

Instructors - Independent Contractor or Employee

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Assessing whether Instructors were Independent Contractors or Employees

Robertson Human Asset Management v MNR, [2014 TCC 23](#)

The TCC was faced with deciding whether Instructors at a college whose program served the retaining of workers injured on the job were employees or independent contractors of the taxpayer. The decision was in the context of the *Employment Insurance Act* (insurable employment) and the *Canadian Pension Plan Act* (pensionable employment).

The Court's statement of the law applicable in classifying the relationship as an employment relationship (contract of service) or an independent contractor relationship (contract for services) is not novel. The TCC relied on the guidance provided by the Supreme Court of Canada in [671122 Ontario Ltd v Sagaz Industries Canada Inc, \[2001\] 2 SCR 983](#), and the Federal Court of Appeal in *Wiebe Door Services Ltd v MNR*, [1986] 3 FC 553(FCA). See also the FCA decision in [Royal Winnipeg Ballet v MNR, 2006 FCA 87](#), and [875527 Ontario Inc v MNR, 2012 TCC 214](#).

For some criticism of the classification of the work relationship using tort law principles, see [Lara Friedlader, "What Has Tort Law Got To Do With It?" \(2003\) 51:4 CTJ 1467](#)).

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What is of interest is the Court's "control" factor analysis (paras 20 - 37). The court appears to have put significant weight on the use of an internally created learning plan that served as a strict guideline for the education of students and the curriculum for each class. This guideline limited the discretion of the instructors and was directed by the Program Coordinator and developed after a detailed learning needs assessment of the student. The learning needs resulted in the creation of a sponsorship agreement with the Client of the taxpayer, and deviation from the sponsorship agreement terms was required for the receipt of funding for each student.

Although the overall determination of the nature of the relationship is likely correct, the Court's comments with regards to the guidelines could be problematic. The TCC distinguished the facts of this case from those in *R.B. Cormier Management Consultants Ltd v Canada (Minister of National Revenue)*, [1989] TCJ No 419. In *Cormier*, the limitation on the freedom of workers was imposed by a government manual which imposed specifications on Cormier. This was seen as being different from the limitations imposed by detailed learning needs analysis, the adherence to which was required for continued funding. One would wonder whether the outcome of this analysis would have been different if the learning needs assessment and the delivery of remedial education was conducted by two different corporations, rather than two divisions of

one corporation. A legitimate and reasonable external limitation on workers freedom in performing services necessary for the appropriate delivery of those services ought to be seen in the same light irrespective of the source of the limitation, so long as it is binding on the service provider when delivering services through employees or contractors.

This and other decisions highlight the problem with making tax distinctions based on tax policy on the basis of tort distinctions for the purpose of tort policy. The *Income Tax Act* is designed in order to achieve certain policy goals, and the distinction between employees and independent contractors (those in business for themselves) is there mainly to increase the ease of administration by imposing withholding and prevent base erosion by limiting deductions. A more functional test for distinguishing between employees or contractors would ask questions that aim at drawing a distinction on the basis of the tax policy behind the distinction. Professor Neil Brooks as suggested such a functional test as consisting of considerations:

(1) For allowing deductions, by looking at:

- whether the payment is substantially for services
- whether the worker provides own equipment
- whether the worker hires own helpers
- the degree of financial risk undertaken by the worker
- the degree of responsibility for investment and management by the worker
- the worker's opportunity for profit or loss in performance of duties

(2) For imposing withholding:

- whether payor is a business person
- whether most of the worker's income is received from a small number of payors

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