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Employment Notes

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EMPLOYEE OR INDEPENDENT CONTRACTOR - HOW CAN YOU TELL?

The question often comes up as to whether a person is engaged in a contract of service as opposed to a contract for services, i.e.: whether the person is an employee or an independent contractor. This question goes to a number of issues from the perspective of both the payor and the payee. From the payor's perspective, the question relates primarily to the obligations the payor has vis-a-vis the payee including remittances under the Income Tax Act, Employment Insurance Act and Canada Pension Plan as well as certain obligations under provincial employment standards legislation. On the payee's side, there are certain tax deductions and deferral opportunities available to an independent contractor, but he must forego certain statutory protections including on the termination of the arrangement.

The following therefore is intended to be of some guidance in helping to make this determination. It should be noted that the following list compares factors that courts will look at, but is not conclusive in determining which relationship exists

Independent Contractor

• no exclusivity, the worker may provide services to more than one business;
• remuneration not based on an hourly rate and payable on submission of an invoice including GST;
• payment by worker of expenses incurred in the performance of the work which may be reimbursed on some basis by the payor;
• no payment to the worker if no services performed;
• ownership of tools and equipment by the worker;
• no restrictions on the hours of work and vacation time; hirer does not supervise worker's activities;
• no vacation pay or bonuses;
• worker is generally not provided with benefits such as health and pension;
• worker is not required to report to the hirer's premises or to perform the services personally; and
• contract is for a limited period of time or a specific project.

Employee

• worker works exclusively for a particular hirer;
• payment of a salary or hourly wage, no invoices;
• hirer pays expenses and does not require the worker to pay any expenses in relation to the work done;
• payment to the worker without reference to work done;
• hirer provides worker with all tools and equipment;
• hirer sets working hours and controls and supervises the worker's duties;
• worker is eligible for bonuses based on performance and for vacation pay;
• hirer generally provides health and pension benefits;
• services must be performed personally and generally the worker is required to report to the hirer's premises on a regular basis; and
• contract is for an indefinite period.

While the courts have emphasized different factors in different circumstances, and often the factors that are typical of one form of relationship are not found to be present in the other, this list should provide some guidance in terms of the significant factors that are taken into account.

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DIVISIONAL COURT HOLDS SEXUAL HARASSMENT DOES NOT AMOUNT TO WILFUL MISCONDUCT

The Divisional Court, in *Xerox Canada v. Ontario*, released December 13, 1999, held that the sexual harassment of a subordinate manager by a Director did not amount to wilful disobedience and thus relieve the employer from providing termination and severance pay to the Director, as required under the *Employment Standards Act*.

EMPLOYMENT NOTES

"The Divisional Court held that the sexual harassment of a subordinate manager by a Director did not amount to wilful disobedience..."

The Director had been employed by Xerox for 22 years with six managers reporting to him, and another 104 employees under his supervision. The manager, who reported to him, had been employed by Xerox for 19 years. In May 1994, approximately five months after the Director became her supervisor, she made a complaint of sexual harassment against him pursuant to Xerox's workplace harassment policy. Xerox investigated, concluded that sexual harassment was established and terminated his employment for cause.

Xerox had a sexual harassment policy which defined sexual harassment as "any form of unwelcome sexual behaviour or innuendo". Moreover, the Director admitted in evidence that one of his duties as Director was to ensure that the employees who reported to him were free from sexual harassment, and that another of his duties was to understand what constituted sexual harassment.

Nevertheless, while the manager was under his supervision the Director made comments to her such as "she had a figure that most 18 year olds would give their right arm for". When they were away on a business trip and eating a meal together, he stated that it looked like they were on a date and he said he was extremely attracted to her. Finally, in March 1994 the Director told the manager that he "loved her".

At this time Xerox was in the midst of a downsizing and it was the testimony of the manager that she believed the Director could affect her future in the company. Because of this belief, she testified that she initially did not directly tell the Director that his comments were inappropriate. Instead, in an effort to ensure that she maintained her job she adopted a strategy which, while she felt would make it clear she was not interested, would avoid making him feel rejected, upset or uncomfortable.

Afterwards the manager sought advice from certain other managers within the company, all of whom advised her to tell the Director she was not interested in him. This led to a lunch meeting at the end of March, 1994 where the manager told the Director that she "could not have an affair with him, that it simply wasn't right". Notwithstanding this, throughout April and May the Director continued to engage in behaviour which was agreed by all to be completely inappropriate including, while away on business telephoning the manager on three successive nights at home late in the evening and mentioning that he was alone "in a great big bed". Further, he later insisted that the manager drive him home from a company function, and during the drive home touched the manager's arm and knee.

The adjudicator's decision, in essence, was that the Director was not guilty of wilful misconduct because he did not realize that his conduct was harmful and unwelcome to the manager. This was based on the conclusion that the manager failed to state in clear and unambiguous terms that she did not welcome the Director's attention. The Divisional Court upheld the adjudicator's decision, finding that it was not "unreasonable".

In the dissenting opinion of Justice MacDonald it was held that the adjudicator was unreasonable in his definition of wilful misconduct and it was held that "if the adjudicator had interpreted the phrase 'wilful misconduct' properly, so that he considered whether the Director's conduct was a very marked departure from the standards by which responsible and competent supervisors, bound to the Xerox workplace policy, habitually govern themselves, various of his findings and conclusions would have become significant to the result."

EMPLOYMENT NOTES

"This decision has potentially troubling aspects for employers who could face a human rights complaint from affected employees..."

Given the fact that the Director was in a power dependency relationship with the manager, it was held that the misconduct was an abuse of the Director's power and, as a result, that it was unreasonable for the adjudicator to hold that the manager bore the burden of communicating to the Director clearly and unambiguously that she did not welcome his attention.

This decision has potentially troubling aspects for employers who could face a human rights complaint from affected employees if they do not promptly and properly respond to complaints of sexual harassment. In my view the dissenting decision of the Divisional Court is preferable and I would submit that the reasoning of Justice MacDonald is more compelling and should be followed by courts and adjudicators going forward.

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EI ACT AMENDED TO EXTEND PARENTAL LEAVE

The Federal Government is in the process of amending the *Employment Insurance Act* to extend parental leave benefits for people who are caring for newborn children or adopted children. Under the proposed amendment, the benefit period will be extended from 10 weeks to 37 weeks. This period is in addition to the benefit period of 15 weeks for pregnancy leave. The total benefit period for pregnancy and parental leave will be 52 weeks.

These amendments to the *Employment Insurance Act* do not extend the period of time that employers must give employees for parental leave or pregnancy leave. The Ontario *Employment Standards Act* still provides that an employer must grant an employee a pregnancy leave of up to 17 weeks and parental leave of up to 18 weeks. Employees who wish to extend their parental leave beyond the period set out in the *Employment Standards Act* in order to receive their employment insurance benefits for the extended period should make such arrangements with their employer prior to the leave to ensure that job will be made available on their return.

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POTENTIAL EMPLOYER LIABILITY FOR BRIBERY OF FOREIGN PUBLIC OFFICIALS

The recently federally enacted *Corruption of Foreign Public Officials Act* creates new offences with criminal sanctions for the attempted or actual bribery of a foreign public official in certain circumstances. The Act essentially creates three new offences. It is now an offence to:

- Bribe a foreign public official;
- Possess property that was obtained or derived as a result of the bribing of a foreign public official; and,
- Transfer the possession of any property or proceeds that were obtained or derived from the bribing of a public official (the "laundering" offence).

To date, there have not been any prosecutions under the Act and it is difficult to predict the manner in which this Act will be enforced.

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EMPLOYMENT NOTES

"The provinces (Ontario and Quebec) have agreed to work together in increasing construction labour mobility between the two provinces..."

FAIRNESS IS A TWO WAY STREET ACT: UPDATE

In our last issue of Employment Notes, we described some of the provisions of the *Fairness is a Two-way Street Act, 1999* enacted by the Ontario Government in May, 1999.

In November, 1999, each of Ontario and Québec appointed a negotiator to discuss construction labour mobility and, on November 11, 1999, a series of recommendations were agreed to between the provinces. The provinces have agreed to work together in increasing construction labour mobility between the two provinces and to try to move forward to a comprehensive bilateral agreement. The incentive and instigation to these negotiations appears to have arisen from the Act itself, and Quebec's response as shown by the awarding of construction contracts at the Hull Casino.

As a result, the Ontario Government has agreed to remove Québec as a designated jurisdiction for the purposes of the Act and the Act, therefore, has no current application. The provinces have agreed to a minimum of a one-year "monitoring period" during which the provisions of the *Fairness is a Two-way Street Act, 1999* will not apply. The provinces will revisit this issue before November, 2000.

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RIGHTS OF SAME SEX COUPLES EXPANDED

Both the Provincial and Federal governments have responded to the recent decision of the Supreme Court of Canada in *M. v. H.* by enacting legislation which gives "same-sex couples" the same rights as heterosexual common law couples. In the *M v. H.* decision, the Supreme Court of Canada held that a provision in the *Family Law Act* of Ontario which limited spousal support to spouses of the opposite sex violated the guaranteed equality rights provision of the *Canadian Charter of Rights and Freedoms.* A declaration was issued that the definition of spouse was of no force and effect. However, the Court ordered that this declaration be suspended for a period of six months in order to give the government time to amend the legislation.

In October 1999, the Ontario government amended all legislation to give the same rights to a "same-sex partner" that exist for common-law spouses. The following employment related statutes have been amended:

- *Ontario Human Rights Code.*
- *Employment Standards Act.*
- *Pension Benefits Act.*
- *Workplace Safety and Insurance Act.*

The Federal Government has given first reading to Bill C-23 which will also give same- sex partners the same rights as common law heterosexual partners. The following Acts to be amended are of particular note:

- *Canada Pension Plan Act.*
- *Employment Insurance Act.*
- *The Pension Act.*

For a complete list of the legislation which has been amended, please call Elizabeth Forster.

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EXPECT THE BEST

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