THE IMPACT OF EMPLOYMENT STATUTES ON INDEPENDENTCONTRACT WORKERS

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INTRODUCTION

Do Alberta's employment statutes have any application to independent contract workers engaged in the petroleum industry?

The *Employment Standards Code*, and the *Human Rights, Citizenship & Multiculturalism Act* regulate the employment relationship and, on their face, apply to employees. Nevertheless, issues relating to independent contract workers have been addressed, to varying degrees, by the administrative bodies which apply and enforce these statutes.

As will be discussed, the *Occupational Health and Safety Act* and the *Workers' Compensation Act* have broader application and can apply to both employment and independent contractor relationships.

EMPLOYMENT STANDARDS CODE

The *Employment Standards Code* establishes minimum statutory entitlements that apply to employees employed in the provincially regulated sectors in Alberta like the petroleum industry.[1] The *Code* is not intended to regulate the supply of services by independent business persons. Rather, it is concerned with situations where the supplier of services is tied to another by an employment relationship. Accordingly, the minimum entitlements imposed under the *Code* are only available to employees.[2]

The terms "employer" and "employee" are defined in section 1 of the *Code*:

1(1)(k) "employee" means an individual employed to do work who receives or is entitled to wages and includes a former employee;

(1)(1) "employer" means a person who employs an employee and includes a former employer.

The tema "wages" is broadly defined:

(x) "wages" includes salary, pay, money paid for time off instead of overtime pay, commission or remuneration for work, however calculated, but does not include

(i) overtime pay, vacation pay, general holiday pay and termination pay,

(ii) a payment made as a gift or bonus that is dependent on the discretion of an employer and that is not related to hours of work, production or efficiency,

1 The minimum statutory entitlements of individuals employed in the federally regulated sector, like banks television and radio stations, airlines, etc., are governed by the Canada Labour Code, R.S.C. 1985, c.L-2.

2 Section 2 of the Employment Standards Code provides that the Act applies to all employers and employees, except as otherwise provided.

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(iii) expenses or an allowance provided instead of expenses, or

(iv) tips or other gratuities;

In light of these definitions, how would issues relating to independent contract workers be raised under the *Code*?

The most obvious scenario arises when a worker who had been treated as an independent contract worker claims one of the statutory entitlements under the *Code*. Such a claim can be made when the individual is still rendering services to the company, but frequently arises after temiination of services. Most likely, the issue is raised when the independent contract worker files an Employment Standards Complaint seeking either unpaid wages[3], overtime pay, vacation pay[4], general holiday pay or termination pay (or all of the above).

At that time, the employer should immediately inform the Employment Standards Officer that the claimant is an independent contract worker, not an employee. Employers should not be surprised to learn that the fact that the claimant had agreed that he or she was an independent contract worker and had acted like one, is not determinative, in Employment Standard's eyes, of whether the claimant was in fact an employee and entitled to protection under the *Code*.

The Employment Standards Officer will apply the criteria used by Employment Standards to determine whether the claimant is truly an independent contract worker or whether he or she had really been engaged in an employment relationship (in other words, an employee). No one particular factor is determinative. Rather, the Officer will examine the totality of the relationship and then make a determination.

The employment standards jurisprudence purports to use the standard common law tests to determine whether an independent contractor relationship exists: the fourfold test (the degree of control, ownership of tools, risk of loss and chance of profit and loss)[5] and the organization test (whether the work performed by the individual in question forms an integral part of the operations of the business).[6] These tests, when applied in the context of employment standards legislation, has given rise "to definitions and interpretations of employer and employee and test of employee and independent contractor status which are consistent with the main purpose and objectives of the Act".[7] It has been stated that the scheme of the Act is both protective and social legislation as it applies to all employers and employees except those statutorily excluded".[8]

In *R v. Pereira*,[9] the Alberta Court of Queen's Bench interpreted the term "employee" under the predecessor to the *Code*, as follows"

> "I am of the view that the word "employee" might have a different meaning in the law of vicarious liability than it has in the context of the *Employment Standards Act*. Since "employee" must be defined, subject to the

3 Re Seketa v. Wacyk (1995), 23 O.R. (3d) 546 (Ont. Gen. Div.); See Castlegar Taxi (1988) Ltd. v. British Columbia (Director of Employment Standards), [1991] B.C.J. No. 2712 (B.C. S.C.) where the percentage of gross receipts paid to taxi drivers were less than the British Columbia minimum wage.

4 Regina v. Mac's Milk Ltd. (1973), 40 D.L.R. (3d) 714 (Alta. C.A.)

5 Montreal v. Montreal Locomotive Works Ltd., [1947] 1 D.L.R. 161 (P.C.); Weibe Door Services v M.N.R. 87 DTC 5025 (Fed. C.A.) where the four-fold test was described as a four-in-one test.

6 Mayer v. J. Conrad Lavigne Ltd. (1979), 27 O.R. (2d) 129 (Ont. C.A.); Weibe Door Services v M.N.R., ibid.

7 Re Ridgeland Developments Ltd. (1991), ESB 013706 (Referee Eaton, Ontario) at 4, See also: R v. Pereira (1988), 20 C.C.E.L. 187 (Alta. Q.B.)

8 R v. Pereira ibid. at 200

9 R v. Pereira ibid. at 200

> statutory provisions that "an employee' is an individual employed to do work "who is in receipt of or entitled to wages" in the context of the entire statute, it appears to be that its sole meaning is the broad meaning describing any situation in which an individual is employed to do work for a person and who is in receipt of or entitle to wages. This meaning is not limited by the criteria of control that the law of vicarious liability imposes."

Consequently, it has been held that a determination by Revenue Canada that a person is an independent contractor is not necessarily binding in the employment standards context and there have been cases where employment standards found an employment relationship, notwithstanding that Revenue Canada had concluded that an independent contractor relationship existed.[10] Ultimately, the Employment Standards Officer will determine whether the relationship under review was one of employment from the perspective of the *Code*, rather than another statute or regulatory regime.

It is possible that the relationship can change over time from an independent contractor to an employment relationship. In *Lamerton & Associates Professional Surveyors v. Yukon Territory (Director of Employment Standards)*[11] it was determined that the relationship was one of independent contractor between May 11, 1995 to August 31, 1995, but one of employer-employee during the period September 1, 1995 to October 17, 1995 during which period no payment had been received by the worker.

If the Employment Standards Officer determines that the individual was in fact an employee (the relationship was one of employer and employee, rather than an independent contractor relationship) and determines that entitlements under the *Code* remain unsatisfied, the Officer will make a determination of the amounts owing. If the Officer is unable to mediate or settle the issue, the Officer will issue an Order of Officer directing the employer to forthwith pay the amount stated in the Order. Issuance of an Order will result in an additional fee of $100.00 or 10% of the assessment amount, whichever is greater, which is also assessed against the employer and is payable to the Provincial Treasurer.

In order to appeal, the employer must within 21 days serve the Director of Employment Standards with the Notice of Appeal, describing the grounds for appeal, and enclosing the amount assessed under the Order and the assessed fee. If the Order is not paid or appealed within the time limit, the Order can be filed with the Court of Queen's Bench and enforced as a Court order.

One of the key obligations imposed by the *Code* on employers is the obligation to maintain certain information for all employees.[12] An employer may not maintain those same records for its independent contract workers. As a result, the employer may find it difficult to defend itself against an Employment Standards Complaint should it be subsequently determined that the independent contract worker was really an employee. Where the Employment Standards Officer is unable to determine the amount of earnings because the employer had not made or kept complete records, section 87(2) provides that "the officer may determine the amount in any manner the officer considers appropriate".

As a result, an employer should maintain records on independent contract workers. However, it is not

10 Re Ridgeland Developments Ltd. (1991), ESB 013706 (Referee Eaton, Ontario); Re Sooters Studios Ltd. (1991), ESB 037727 (Referee Gray, Ontario)

11 Lamerton & Associates Professional Surveyors v. Yukon Territory (Director of Employment Standards), [1996] Y.J. No. 127 (Y.T. S.C.)

12 Section 14

prudent to keep exactly the same records relating to independent contract workers that are kept for employees (otherwise, how are they different?). A written contract setting out the key terms between the parties (eg, services to be provided, daily or hourly rate, etc.) is an effective way of recording the arrangement between the parties.[13] It is also useful to require the independent contract worker to issue an invoice for services provided. The invoice makes the transaction look more like one between two businesses and provides evidence of payment and terms in the future should a complaint be filed.

OCCUPATIONAL HEALTH AND SAFETY ACT

The *Occupational Health and Safety Act* imposes obligations on employers, contractors, suppliers and workers. These terms are defined as follows:

1. In this Act,

(a.0001) "contractor" means a person, partnership or group of persons who, through a contract, an agreement or ownership, directs the activities of one or more employers involved in work at a work site;

(e) "employer" means

(i) a person who is self-employed in an occupation,

(ii) a person who employs 1 or more workers,

(iii) a person designated by an employer as his representative, or

(iv) a director or officer of a corporation who oversees the occupational health and safety of the workers employed by the corporation;

(1) "supplier" means a person who rents, leases, erects, installs or provides any tools, appliances or equipment or who sells or otherwise provides any designated substance or hazardous material to be used by a worker in respect of any occupation, project or work site;

(m) "worker" means a person engaged in an occupation;

The Act defines "occupation" as follows:

1(g) "occupation" means every occupation, employment, business, calling or pursuit over which the Legislature has jurisdiction, except

(i) farming or ranching operations specified in the regulations, and

(ii) work in, to or around a private dwelling or any land used in connection with the dwelling or any land used in connection with the dwelling that is performed by an occupant or owner who lives in the private dwelling or household servant of the occupant or owner;

The Act imposes the following safety requirements:

2(1) Every employer shall ensure, as far as it is reasonably practicable for him to do so,

13 A common mistake made by employers in independent contractor agreements is to "over regulate" the relationship. If the level of control exerted by the employer over the contract worker is too great, there is significant risk that an employment relationship will be found.

(a) the health and safety of

(i) workers engaged in the work of that employer, and

(ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and

(b) that the workers engaged in the work of that employer are aware of their responsibilities and duties under this Act and the regulations

(2) Every worker shall, while engaged in an occupation,

(a) take reasonable care to protect the health and safety of himself and of other workers present while he is working, and

(b) co-operate with his employer for the purposes of protecting the health and safety of

(i) himself,

(i.1) other workers engaged in the work of the employer, and

(ii) other workers not engaged in the work of that employer but present at the work site at which that work is being carried out.

(3) Every supplier shall ensure, as far as it is reasonably practicable for him to do so, that any tool, appliance or equipment that he supplies is in safe operating condition.

(4) Every supplier shall ensure that any tool, appliance, equipment, designated substance or hazardous material that he supplies complies with this Act or the regulations.

(5) Every contractor who directs the activities of an employer involved in work at a work site shall ensure, as far as it is reasonably practicable to do so, that the employer complies with this act and the regulations in respect of that work site.

Section 2.1 provides that where there are two or more employers involved at work at the work site at the same time, the work site must have a prime contractor. The Act also places key obligations on prime contractors, contractors and employers in the event of serious injuries and accidents at the work site.[14]

The definition of the term “worker” is sufficiently broad to apply equally to employment and independent contractor relationships. An independent contractor could also conceivably fall within the definitions of “employer”, “supplier” or “contractor”.

Do the obligations imposed by the Act apply where an independent contractor contracts with another independent contractor? This was found to be the case in Ontario

in *R v. Wyssenis*[15], where Wyssen, a window cleaner, had been contracted to clean the windows of four buildings. Since one of the buildings had overhanging balconies and was beyond his expertise, Wyssen contracted with another experienced window cleaner to clean that building. The second window cleaner used his own equipment and was not supervised by Wyssen. While working on the building, the window cleaner fell to his death and Wyssen was charged under Ontario’s *Occupational Health and Safety Act*. The

14 Section 13 and 14
15 R v. Wyssen (1992), 10 O.R. (3d) 193 (Ont. C.A.)

definition of "employer" in the Ontario Act includes "a person who...contracts for the services of one or more workers". The Ontario Court of Appeal held that Wyssen fell within the definition of "employer" and directed that he be tried under the charges made pursuant to the Act.

One author has commented that Alberta's definition of "employer" "also extends to that of an independent contractor relationship as is contemplated by the definition of employer in the Province of Ontario, as interpreted in the *Wyssen* case".[16] The definition of "employer" in Alberta, while not as broad as Ontario's definition, may be sufficiently broad to capture some independent contractor relationships. There are no reported Alberta cases applying the *Wyssen* decision. Accordingly, I am not aware of any Alberta case that has taken the Alberta definition of "employer" as far as the Ontario definition.[17]

Section 27 provides workers with the right to refuse any work if, on reasonable and probable grounds, the worker believes there exists or it will cause to exist an imminent danger. Section 28 protects workers from disciplinary action where the worker has acted in compliance with the Act. Section 28 reads as follows:

> 28 No person shall dismiss or take any other disciplinary action against a worker by reason or that worker acting in compliance with this Act, the regulations or an order given under this Act.

In *PanCanadian Petroleum Ltd. v. Holthe*, the worker, Ms. Holthe, was engaged as a scale house operator in a facility owned and operated by PanCanadian, but her wages were paid by E-Can Oilfield Services, which had a contract to supply labour to PanCanadian. Ms. Holthe suffered from headaches, which her doctor attributed to the inhalation of fumes at the scale house. PanCanadian terminated Ms. Holthe's employment because it believed that her job in the scale house was prejudicial to her health and there were no other positions available for her. Ms. Holthe filed a complaint under section 28. The Occupational Health and Safety Officer found that PanCanadian had unfairly dismissed Ms. Holthe because of her health and safety concerns. PanCanadian appealed unsuccessfully to the Occupational Health and Safety Council on the basis that it had not been the employer. The Council directed reinstatement to her former position and payment of her lost wages to the date of reinstatement. PanCanadian appealed further to the Alberta Court of Queen's Bench.

The Court held that section 28 did not require that it find an employment relationship. Rather, all that was required was a finding of dismissal by PanCanadian contrary to the Act. The court stated that this case demonstrated that "there can be circumstances where someone other than (sic) party with whom the worker has a formal contract of employment can effect the worker's dismissal from employment". PanCanadian also argued that since it was not the employer, it was impossible to reinstate her to the employment she had, since reinstatement only rested with E-Can and, further, that the position no longer existed. The court held that the reinstatement order could be practically effected by PanCanadian employing Ms. Holthe at the same wage she had received prior to dismissal. The court also added that if it were necessary to determine whether an employment relationship existed between PanCanadian and Ms. Holthe, it would have found one, on the basis that PanCanadian directed Ms. Holthe's work.

16 N. Keith, Canadian Health and Safety Law at 3-12.1

17 In R v. Carmacks Construction Ltd., [1993] A.J. No. 444 (Alta. Q.B.) a project manager, who was a "principal contractor", under an earlier version of the Act, was found to have no duty to ensure that a company, another principal contractor, complied with the Act. In other words, the Act was found not to create any offence regarding the relationship between two principal contractors.

Because of the potentially broad application of the Act, employers need to be equally vigilant concerning health and safety issues as they relate to independent contract workers, as they are for their own employees. This is graphically illustrated by the *PanCanadian* case.

WORKERS' COMPENSATION ACT

The *Workers' Compensation Act* also applies to "employers" and "workers" in Alberta engaged in industries which are not exempted under Schedule A to the General Regulations.[18] The definitions of "employer" and "worker", under the Act, are not as broad as under the *Occupational Health and Safety Act*.

> 1(1) In this Act,
>
> (h) "employer" means
>
> (i) an individual, firm, association, body or corporation that has, or is deemed by the Board or this Act to have, one or more workers in his or its service and includes a person considered by the Board to be acting on behalf of that individual, firm, association, body or corporation,
>
> (ii) a proprietor whose application is approved under section 10,
>
> (iii) a corporation where the application of a director of the corporation is approved under section 10, and
>
> (iv) a partnership where the application of a partner in the partnership in approved under section 10,
>
> and includes the Crown in right of Alberta and the Crown in right of Canada in so far as the latter, in its capacity as employer, submits to the operation of this Act;
>
> (x) "worker" means a person who enters into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes
>
> (i) a learner,
>
> (ii) a person whose application to the Board under section 10 is approved, and
>
> (iii) any other person who, under this Act or under any direction or order of the Board, is deemed to be a worker,
>
> but does not include a person who ordinarily resides outside Canada and is employed by an employer who is based outside Canada and carries on business in Alberta on a temporary basis;

While these definitions do not cover independent contract workers, the Act provides for contractors or subcontractors working in industries covered by the Act to be deemed as workers of their principals, except when they perform their work as an employer of workers in that industry, a worker of another employer or a director of a corporation acting in the capacity of a director.[19] These terms are defined in Policy 06-01[20]:

> "A principal is a person or a business entity that hires a contractor to perform work or services.

18 Alberta Regulation 427/81, as amended.

19 Section 11

20 Policy 06-01, Part II p.19

> A contractor is a person who contracts to do work for another. A contractor contracts directly with the principal. A subcontractor contracts with a contractor."

It was a common experience in some industries, like construction, for employers to retain individuals as contractors in order to avoid having to pay workers' compensation premiums. The contract worker usually liked the relationship because of the absence of source deductions, until he became injured. When a workers' compensation claim was filed and it became apparent that the relationship was really one of employment, rather than an independent contractor relationship, the Board could find itself being faced with having to pay benefits without being able to hold the true employer accountable. Where the employer was held accountable, it found itself faced with an unexpected liability, which it could not recover from the fowler independent contractor.[21] The deeming provisions in the Act, enable the Board to treat independent contractor relationships like an employment relationship and recover premiums from the employer.

The effect of the Board's "deeming provision" is that it is irrelevant that the independent contract worker desired to provide services as an independent contractor, structure his affairs to be treated as an independent contractor and satisfy Revenue Canada that he is an independent contractor.[22] Under the Act, the contractor is deemed to be a "worker".

Where a principal is engaging a contractor, the principal may obtain workers' compensation coverage for an individual who would not otherwise be considered a worker, by requesting the Workers' Compensation Board to deem the contractor as a worker. The principal is responsible for paying the workers' compensation premiums and is accountable for all claim costs incurred.[23] The statement of wages which the employer is required to provide to the Board each year, also includes persons, other than a director of a corporation, who renders service to the employer, whether or not remuneration is paid or payable. If wages or salary are not being paid or only a nominal amount is being paid, the Board fixes for the purposes of the assessment a sum that in its opinion represents a reasonable wage or salary for the service being rendered.[24]

In addition, the Board, may on its own initiative or on the application of any interested party, deem any individuals or classes of persons to be workers of a principal.[25]

Where the independent contract worker is providing services through a corporation, it is important that it be made clear to the contractor that he is responsible for registering with the Board (if working in an industry covered by the Act) and is responsible for all premiums. An employer can limit its exposure by requiring, as a condition of the contract, that the contractor furnish evidence of workers' compensation coverage (where the employer is in an industry covered by the Act).

HUMAN RIGHTS, CITIZENSHIP AND MULTICULTURALISM ACT

The obligation relating to the employment relationship is contained in section 7(1) of the Act.

> 7(1) No employer shall
>
> (a) refuse to employ or refuse to continue

21 Section 133 of the Act prohibits the employer from deducting these amounts from the person's wages.

22 Potsos v PPG Canada Inc., [1987] 6 W.C.A.T.R. 144 (Ont. W.C.A.T.)

23 Policy 06-01, Part II p. 20

24 Section 97(2)

25 Section 11(2)

to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment

because of the race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry, place or origin, family status or source of income of that person or of any other person.

The Act does not define the words "employer", "employ" or "employment". In the absence of a statutory definition, the common law tests for determining whether an employment relationship exists would govern.

In *Re Cormier and Alberta Human Rights Commission*[26], the Alberta Court of Queen's Bench stated that the words "employer", "employ" and "employment" used in the predecessor section 7, contained in the *Individual's Rights Protection Act* were not clear in their meaning. In this case, Mr. Cormier, a truck driver, had filed a complaint alleging that a contractor, Ed Block Trenching Ltd., had failed to hire him and his truck because he is black. The Alberta Human Rights Commission refused to pursue the complaint because it considered the truckers to be dependent contractors rather than employees of Block. The court held that the words "employer", "employ" and "employment" were used ambiguously in the statute and should be interpreted to include "any contract in which one person agrees to execute any work or labour for another".[27] The court stated the following:

"The fact that the person providing the services also furnishes his own tools or his own truck or some other instrumentality, with which he performs the services, does not entail any the less that he has agreed to execute some work or labour for another, or that he is, in common parlance, employed to do it.

Any narrower interpretation would fail to further the purpose of the statute, which, according to the preamble, threats as "fundamental" the principle and public policy that "all persons are equal in dignity and rights without regard to race". At the risk of falling short of capturing the spirit of the preamble, one may say that the purpose of s. 7(1) of the statute is to assure to individuals in our pluralistic society, equality of opportunity in the earning of a livelihood without their being put at a disadvantage on account of some immutable characteristic or religious belief that differentiates them from others.

It does not follow that everyone who contracts to perform work or labour for another can be said to be "employed" for the purpose of this Act. If the essence of the contract is not the provision of some work or labour but a sale of goods to which the work or labour is ancillary, it cannot properly be said to be an "employment".

The *Cormier* decision reflects the concern that employers not be able to evade human rights legislation because of the way they have structured their economic affairs.

DISMISSAL OF INDEPENDENT CONTRACT WORKERS

It is commonly thought that the contract between an employer and an independent contractor may

26 Re Cormier and Alberta Human Rights Commission (1984), 14 D.L.R. (4th) 55 (Alta. Q.B.)
27 Re Cormier and Alberta Human Rights Commission, ibid. at 74

be terminated by either party at will, in the absence of an express term which states otherwise. The conventional wisdom is that an independent contractor relationship can be terminated without notice or without reasonable notice, as that term is applied to the employment relationship.[28] However, there is a line of cases which have held that there are situations when an employer cannot terminate a contract between itself and an independent contractor, in the absence of cause, without providing notice.

It is important to distinguish between situations where the employer is alleging cause (or substantial breach, which may serve to lower the standard required to establish cause), and where the employer is attempting to terminate the contract without cause. Case law would suggest that where the employer terminated the contract for cause, it may do so without providing notice. However, where the employer has not alleged cause, and has terminated the contract without notice, the Court may imply a contractual term requiring that notice be provided, if the issue has not been addressed by the parties.[29]

In *Dyck v. H.L. Powell Ltd.*[30], the court was faced with a situation where an employer purported to terminate an independent contractor without cause and without notice based on her status as an independent contractor. The court held that she had been engaged as a true independent contractor and she did not fall into that intermediate class of cases which would have entitled her to receive notice. However, in reviewing the cases put forward by the independent contractor, the Court provided the following summary of the circumstances where it can be expected that an employer will be required to provide notice. At page 160, the Court said:

> "The components of a true master-servant relationship have become reasonably well defined. Extracting principles from the "intermediate" category poses much more difficulty. Nevertheless, there is one feature common to each of the foregoing cases. *Each plaintiff was engaged in carrying out the business objectives of the defendant.* Moreover, in each of these cases the plaintiff either acted or was expected to act exclusively for the defendant. [emphasis in original]"

There is a further area of danger for employers which was the subject of the dispute in *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd*.[31] (1986), 25 D.L.R. (4th) 649 (S.C.C.). In that case, the agreement between the parties contained two clauses dealing with how the contract could be terminated. The first clause dealt with issues such as breach, insolvency of one of the parties, and other issues which would make the continuation of the agreement an impossibility. This clause specifically stated that termination could be effected, in writing, without notice. The second clause dealt with the situation where the agreement was to be terminated with or without cause by written notice from one party to the other. It did not specifically address the issue of the length of notice. The contract was terminated under the second clause and the Court held that it was appropriate to imply a term requiring notice into the agreement. The Court took into account that the first clause dealt with notice while the second clause did not and then reasoned that if the provision dealing with notice was absent from the second clause, the parties must have intended that and the consequences its absence, namely that a term requiring reasonable notice would be implied in the absence of cause.

28 Boettcher v. Stremecki (1980), 25 A.R. 372 (Alta. Q.B.) at 386

29 Carter v. Bell & Sons, [1936] 2 D.L.R. 438 (S.C.C.)

30 Dyck V. H.L. Powell Ltd. (1996), 192 A.R.156 (Alta. Prov. Ct.)

31 Hillis Oil v. Wynn's Canada Ltd. (1986), 25 D.L.R. (4th) 649 (S.C.C.)

To summarize, in the absence of cause and an express clause which states otherwise, a true independent contractor relationship can be terminated by either party without notice. However, should the court determine that the contract worker fell within the intermediate category between independent contractor and employee, then a notice requirement will be implied into the relationship.[32] Finally, should the court determine that the contract worker was really an employee, then the court will imply into the contract of employment a requirement that it could only be terminated, in the absence of cause, with reasonable notice at common law.

A written contract with an independent contractor addressing the issue of termination is an effective way for an employer to limit its potential liability. Why take a chance that a court could imply an obligation to provide reasonable notice of termination, when that obligation could be negatived by a written contract or at least defined on terms that are acceptable to the employer. Furthermore, where the contract defines the circumstances where the contract can be terminated without notice for cause, it should also address termination without cause. Where the parties have entered into a term contract, it is essential that the contract provide for termination prior to the expiry of the term.

The lesson to be taken from *Hillis Oil* is the necessity of periodically reviewing the independent contractor agreements that are being used by the employer to ensure that not only are they current, but that they make sense and contain the important provisions that the employer needs to govern the relationship.

Should it be subsequently found that the relationship was truly an employment relationship, the termination clause in the contract may still limit the employer's liability for notice in the absence of cause. However, if the termination clause falls below the minimum notice provision required by the *Employment Standards Code*, the termination clause is void and the employee's common law notice entitlement will prevail.[33]

CONCLUSION

Employers need to be careful not to assume that independent contract workers have absolutely no rights under Alberta's employment statutes. A written agreement with an independent contract worker can be an effective means of limiting liability. As important, employers need to be aware of the potential application of these statutes to its independent contract workers.

32 The question remains whether lesser notice should be awarded than would be awarded had the court found the contractor to be an employee. See: Carter v. Bell & Sons, supra note 26.

33 Matchinger v. HOJ Industries Ltd. (1992), 91 D.L.R. (4th) 491 (S.C.C.)

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