

# MINDING YOUR BUSINESS

## Employer or Independent Contractor: What is the Test, and Does it Matter?

By Bernard C. LeBlanc - This article first appeared in the April 2007 Issue of *Professional Practice and Liability on the Net* and is reprinted with permission.

The August 2004 issue of this newsletter (<http://www.sml-law.com>) reviewed what was considered, at that time, the basic test for distinguishing between whether someone can be characterized as an employee or an independent contractor. This distinction is important in both sides of the employment relationship for income tax and vicarious liability purposes, as well as termination notice provisions, employer health taxes and for other reasons. Recent judicial developments have altered the test somewhat, although it may be too early to tell whether the changes will be significant or not.

Traditionally, courts have looked to a four-part test that was set out by the Judicial Committee of the Privy Council in *Montreal (City) v. Montreal Locomotive Works Ltd.* In that case, Lord Wright indicated that the court should examine the extent of the employer's control over the person, who owns the "tools" of the particular trade, whether the employee has a chance to profit or whether he or she is paid regularly, and whether the employee has a risk of loss.

More recently, courts have been applying different, although related tests. For example, in one case, the


court held that the test really was one of control. In other words, the court should ask whether the person alleged to be an employee is subject to the control and direction of the employer in terms of how the work was to be done, when it was to be completed and how the person must perform the work. The more control, the more likely it would be that the person would be regarded as an employee as opposed to an independent contractor.

Another test that has been developed is the "organization test", which considers the question of whether the person is an integral part of the busi-

ness operation or only accessory to it. The more integral the employee is to the employer's business, the more likely it is that that person would be classified as an employee.

Finally, in still another case, the court identified four similar but somewhat different factors that the court identified in *Montreal Locomotive*. In *Talbot v. Pan Ocean Oil Corp.*, the court suggested that the issue should be determined by the extent to which the employer had power to select employees, how wages were paid, whether the employer had a right to control how the work was performed and the extent and means by which the employer had the right to discharge the person.

While all of these tests are somewhat different, they generally have a common theme of the importance of the person to an employer's business and the extent to which the employer controls the means by which the work is performed. The one area where all of the courts agree is that any agreement as between the employer and the person as to how the person should be characterized, an employee or an independent contractor, is not determinative. Therefore, if the parties enter into a written agreement and they agree as between themselves that the person will be characterized as "an independent contractor", a court will not make that finding if, on the basis of its own

analysis of the factors described above, it is of the view that the person is really an employee. To use an analogy, if it looks like a rose, it feels like a rose, and it smells like a rose, then it probably is a rose. 

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## Sites to See

### Hudson's Bay Company Archives

<http://www.gov.mb.ca/chc/archives/hbca>

The Hudson's Bay Company has made another major donation of archival records to the province of Manitoba. The archives, which are housed in Winnipeg, trace the Hudson's Bay Company from its inception in 1670 through the development of the fur trade, North American exploration and settlement and the growth of the company's Canadian retail, wholesale, property and natural resources business into the 20th century. The records, which are accessible to the public, will be of interest to academics, students, genealogists and other researchers from around the world.