The Employment Relationship: Independent Contractor or Employee? Defining the Scope of the Relationship and its Consequences

Jamie Flanagan
Rachel Ravary
Maureen Boyd
McCarthy Tétrault LLP

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mccarthy.ca

Introduction

The scope of the employment relationship is sometimes surprisingly wide. For example, it is possible for more than one entity to be the "employer", and a person who is an independent contractor for tax purposes may be considered an "employee" for the purposes of a complaint under the *Employment Standards Act*. This paper discusses the following issues of employment law:

- What are the differences between an employee and an independent contractor?
- What are the consequences if an employer treats someone who is really an employee as an independent contractor?
- Is notice required to terminate a relationship with a contractor, and if so, how much?
- How do you determine who is the employer? In what circumstances may there be more than one employer?

Employment Status : Employee Versus Independent Contractor

It has become popular to "recast" individuals who would formerly have been characterized as employees as independent contractors. This popularity arises from both market conditions and the perception that the individual benefits by being able to claim certain deductions from taxable income not available to employees and the company benefits by being relieved of the obligation to pay CPP and EI contributions and to provide reasonable notice of termination. However, these perceived benefits are often illusory, either because the contractor is legally determined to be an employee or because regardless of the contractor status the company is required to give reasonable notice of termination.

The issue of whether an individual is an employee or independent contractor is important because status as an employee will trigger the application of certain statutory rights and obligations. Specific obligations arise under the following legislation if the individual is an employee: the *Income Tax Act*, the *Employment Insurance Act*, the *Canada Pension Plan Act*, the *Employment Standards Act*, the *Workers Compensation Act* and the *Labour Relations Code* (or the *Canada Labour Code* if the employer is federally regulated). In addition, employees are protected by the common law entitlement to "reasonable notice" of termination of employment unless there is an express and enforceable provision regarding termination in the contract of employment.

As a result, the determination of whether an individual is an employee or contractor has significant legal ramifications. The starting point for making this determination is the "classic four-fold" test[1], which looks at whether the individual is "in business for himself", by examining:

- The degree of control exercised by the individual over the timing and manner of performance of the work;
- Whether the individual owns the tools, supplies or equipment required to perform the work;
- Whether the individual has a chance of profit; and
- Whether the individual runs risk of loss.

[1] *Montreal v. Montreal Locomotive Works Limited*, [1947] 1 D.L.R. 161 (P.C.)

In the *Montreal Locomotive* case , Lord Wright outlined the purpose behind this four fold test when he stated:

> "In this way it is in some cases possible to decide the issue by raising as the crucial question *whose business is it*? In other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

This inquiry into "*whose business is it*" is also often referred to as the "integration test" or "business organization test" in subsequent decisions. The theme behind this test is whether the person is employed as part of a business and his work is done as an integral part of that business, compared with an independent contractor, whose work is done for business but is not integrated into it, but rather is only an accessory to it. It must be remembered that the tests are not rigid tests, but rather are tests which look at the overall nature of the relationship between the person doing the work or performing the services and the person or organization for whom the worker services are performed.

In applying this test a wide variety of factors are considered. Generally, the presence of some or all of the following factors indicate the individual is an employee if he or she:

- occupies a permanent position with the organization;
- works full-time for the organization;
- does not provide services for any other entity;
- performs a key role or works in the "core" areas of the business;
- works at times as directed by the organization;
- works at the premises of the organization or at a location determined by the organization;
- uses the organization's tools or equipment to perform the work;
- attends "in-house" meetings with employees of the organization;
- receives a fixed and regular amount of remuneration;
- receives group insurance benefits, pension or other benefits from or through the organization;
- does not have the authority to hire or retain other people to perform the work for him;
- takes vacation, particularly if the individual is paid while away from work;
- assumes no financial risk in performing the services;
- may make changes or innovation in the way the work is performed which do not affect the amount of remuneration received by the individual;
- receives training from the organization;
- performs the same kind of work as others who are employed by the organization;
- is not required to arrange his or her own substitute to perform the work when the individual is unable to work; or

- is not permitted to work for or be involved with any competitive entities.

These factors are all weighed, which means that all of the factors are considered together and there is not a requisite number of factors which must be present. A person may be an employee even if only a few of these factors are met. Also remember that using the term "independent contractor" in a written consulting agreement is not determinative of the legal relationship between the parties. Just saying it is does not make it so. Courts and administrative tribunals will look at what is actually done by the person, rather than the terms of the written consulting agreement. For example, a commissioned sales representative who is required to attend at a sales centre at certain times, works only for the company and who uses the company's equipment to perform work is probably an employee, regardless of the fact that she is paid commissions and therefore does not earn a fixed amount. The bottom line is that if a person does not assume any financial risk in performing the work, that person will still earn the same amount of money regardless of how he or she organizes himself or herself, and the work is performed under the direction and control of the organization purchasing the individual's services, then he or she is likely an employee.

This test is applied by various decision-makers in a purposive way, which means that the decision-maker who applies the test will do so in a way which is most consistent with the purpose of the legislation at issue. As a result, an individual who the Canada Revenue Agency has found to be an independent contractor under the *Income Tax Act* may still be found to be an employee for the purpose of the *Employment Standards Act* or the *Workers Compensation Act*. Legislation which has as its purpose the protection of employees is interpreted broadly in order to ensure maximum coverage consistent with that purpose. Therefore, individuals are more likely to be found to be employees under the *Employment Standards Act*, *Workers Compensation Act* or *Labour Relations Code* than under the *Income Tax Act*.

Finally, the fact that the contract for services is with an incorporated entity rather than an individual is not enough to preclude a finding that the individual is really an employee. There have been a number of cases in which the courts have found that the fact that the individual provided services through a corporation which was paid for the individual's services did not affect that individual's status as an employee for the purposes of suing for wrongful dismissal[2].

Legal Consequences if a Contractor is Really an Employee

There can be serious legal consequences and liability for an organization where an individual who is in fact an employee is treated as an independent contractor. The majority of the legal consequences and liabilities arise under various statutes which impose obligations on employers in respect of employees and the remuneration to be paid to employees. The failure of an organization to fulfill these obligations and the consequent liability will often not come to light until circumstances arise where the individual who has been happy to be treated as an independent contractor in the past has decided that it is now in his or her best interest to be treated as an employee or, alternately where there is an audit or other inquiry by a statutory body. Such circumstances may arise after an involuntary termination by the organization of the contractual relationship with the individual, a dispute between the individual and the organization over remuneration, a statutory claim by the individual, or by a third party where the status of the individual is put in issue, or by an audit from the Canada Revenue Agency or Employment Standards. There are also common law implications and liabilities. Some examples of the consequences which may result if an individual is regarded as a contractor when the relationship is properly characterized as one of employment are as follows.

[2] *Mann v. Northern B.C. Enterprises Ltd.* (2003) 35 C.C.E.L. (3d) 19 (B.C.S.C.), *MacPhail v. Tackama Forest Products Ltd.* (1993), 50 C.C.E.L. 136 (B.C.S.C.) and *Bird v. Warnock Hersey Professional Services Ltd.* (1980), 25 B.C.L.R., 95 (S.C.)

1. The *Income Tax Act*

If the individual is an employee, the *Income Tax Act* will apply, which means that the employer has (and had) an obligation to withhold income tax remittances from the individual's salary or wages. An employer who has failed to withhold taxes is liable to pay the taxes which should have been remitted and pay a penalty of 10% of the amount which should have been withheld. The penalty can be as much as 20%, if the failure to deduct was made "knowingly" or under circumstances amounting to gross negligence. There are also fines that can be imposed and imprisonment if the conduct amounts to a criminal offence. The employer is also liable to pay interest on the unpaid taxes, and directors of the employer corporation can be held jointly and severally liable for the source withholdings, penalty and interest.

One interesting anomaly and perhaps inconsistency is that the obligations on an employer to remit income taxes only relate to income that an individual earns. The *Income Tax Act* provides that salary or wages are obtained from an office or employment, and defines an office or employment as only applicable to individuals. As a result, it may be possible for an employer to reduce the risk of an assessment by the Canada Revenue Agency relating to failure to withhold and remit income tax by requiring the independent contractor to provide its services through a corporation. Although providing services through a corporation is not determinative of the relationship under other statutes and other common law obligations, for the purposes of the *Income Tax Act*, it may be sufficient to eliminate the risk for an employer.

2. The *Excise Tax Act* ("GST")

There are also interesting implications involving the services provided by an independent contractor for the purposes of the obligation to pay GST and the ability of an employer to obtain input tax credit for the GST paid. Under the *Excise Tax Act*, if a "taxable supply" is provided, GST is to be charged on that taxable supply. The Act specifically excludes the supply of a service to an employer by an employee as a taxable supply. So the supply of a service by an employee is not subject to GST. On the other hand, a true independent contractor would be providing a taxable supply that is subject to GST. The employer would be obligated to pay the applicable GST and the independent contractor would be required to collect and to remit the GST imposed. If the employer has paid GST to an independent contractor on the mistaken belief that the individual was an independent contractor when in law the individual was an employee, it has implications.

The first implication relates to the ability of the employer to claim input tax credits for the GST paid to the independent contractor. If the GST was not payable on the service provided by the independent contractor, as a result of that person really being an employee, the employer will not be allowed to claim the input tax credit for the GST paid. So practically, the employer ends up paying an additional 7% to the employee for the services provided and it is unclear whether the employer could recover that from the employee. Normally, any challenge to the status of an independent contractor would result form an audit or assessment by Canada Revenue Agency. If the independent contractor properly remits the GST collected for the services provided to the employer, the likelihood of assessment by the Canada Revenue Agency is probably diminished, however the likelihood is also correspondingly increased if the GST paid to the independent contractor is never remitted by the independent contractor.

The *Excise Tax Act* also contains numerous penalty provisions. The Act can create financial and administrative problems if the independent contractor which has provided the services to the employer is really an employee in law. Also, the corporate veil that can be used as an independent contractor to reduce the potential risk of assessment under the *Income Tax Act* is not a protection under the *Excise Tax Act*.

3. *Canada Pension Plan and Employment Insurance Act*

The employer is required to pay matching contributions for CPP and EI premiums and to deduct and remit the employee's contributions. If not done by the employer, both the unpaid matching contributions and the employee's contribution may be recovered by Canada Revenue Agency from the employer, along with penalties and interest. Directors of employer corporations can be held jointly and severally liable. One of the most common challenges to the characterization of the employment relationship occurs after the independent contractor has ceased working and then makes a claim for EI benefits. If an assessment or audit is performed, the entire payroll of the corporation can be challenged. It is disruptive, costly and a potential significant liability.

4. Employment Standards Legislation

The provisions of the *Employment Standards Act* will apply, with a number of possible ramifications:

- Vacation pay must be paid on the employee's total income for the year (at a rate of 4% if employed less than five years and at 6% if employed five or more years);
- If the employee is paid by commission, minimum wage may be owing for those pay periods in which the employee was paid less than minimum wage;
- The employee may be entitled to overtime wages for hours of work in excess of eight per day or 40 per week;
- The employee will be eligible for unpaid maternity and parental leave, including the right of reinstatement at the end of the leave; and
- The employee may be eligible for notice of termination, or pay in lieu, if the employer has terminated the work relationship.

5. Labour Legislation

If the individual is an employee, the individual may be part of an existing bargaining unit, or eligible to be included in an application for certification under the *Labour Relations Code*. To the extent that independent contractors are excluded from bargaining units, it raises an interesting question as to whether or not it would be an unfair labour practise if an employer consciously attempted to set up its "work force" through the use of independent contractors, rather than employees.

6. *Workers' Compensation Act*

With respect to Workers' Compensation assessments, the obligation of the "employer" to pay assessments is not substantially different, because the "employer" will be liable for any unpaid assessments of a "contractor" (regardless of whether the contractor is an employee) either as the employer or pursuant to section 51 of the *Workers Compensation Act*. However, if the worker was an employee, the employer may be liable to pay back assessments and penalties for failure to include the employee in assessable payroll.

7. Common Law Claims for Wrongful Dismissal

If an organization terminates its contractual relationship with an independent contractor, the independent contractor normally has no claim for wrongful dismissal. There are some recent exceptions to this, which are discussed below. However, if the independent contractor is determined to be an employee, there is no doubt that the employee has the ability to claim damages for wrongful dismissal. The claim for damages for wrongful dismissal is made based on an implied term in the contractual relationship between the employer and the

employee that the employer will provide the employee with reasonable notice of termination of employment, or pay in lieu of such notice. The length of the reasonable notice period could be anywhere up to what is generally accepted as the upper limit of 24 months, depending on the age, length of service, position and availability of alternate employment for the employee.

8. Vicarious Liability of Employers

Generally speaking, an employer is vicariously liable for the acts of its employees, provided such acts are committed by the employee in the course of employment. This is distinguished from the relationship of an employer and an independent contractor, which typically does not give rise to any claims for vicarious liability. Obviously, regardless of the characterising of an individual as an independent contractor, if they are in law an employee, the employer will be liable for the acts and omissions of the individual committed in the course of employment. This could be a significant issue if an employer has no insurance coverage for such claims, or has to bear the cost of deductibles and increased premiums for an individual that it believed was responsible for its own actions. The Supreme Court of Canada in *671122 Ontario Ltd.* v. *Sagas Industries Canada Inc.* (2001) 2 SCR 983 discussed the vicarious liability of employers for the acts of employees and independent contractors. The Supreme Court of Canada focussed on the control that the employer has over the work performed as one of the crucial factors in determining whether the person is an employee and the vicarious liability of the employer for the acts of the employee.

9. Priority on Insolvency

If an employer becomes insolvent, the status of the worker as an employee or an independent contractor can impact the priority for amounts unpaid to the worker as well as the liability of directors. Employees take statutory priority over other creditors, up to certain amounts, under the *Bankruptcy and Insolvency Act* and various provincial legislation, such as the *Builders' Lien Act*. Independent contractors have no such priority. In addition, provincial and federal business corporation legislation provides that directors are jointly and severally liable for the wages of employees, normally up to a maximum of six months wages. Although directors may have a due diligence defence, the fact that an employee was treated as an independent contractor in circumstances which are not justified, may render directors liable.

10. Other Contractual Claims

There can be no more telling example of the consequences than that experienced by Microsoft in 1997 in the U.S. In that case, approximately 1,000 individuals had been hired as independent contractors by Microsoft. The Internal Revenue Service challenged that characterisation and held that the independent contractors were in fact employees for tax purposes. Once their status as employees was determined by the IRS, these individuals then launched a class action against Microsoft for the employment benefits which they should have received as employees, particularly their participation in Microsoft's employees stock plan. After significant litigation, the United States Court of Appeal ruled that the individuals were employees and were entitled to the benefits which they should have received as employees during the period in which they were classified as independent contractors. This represented a significant liability for Microsoft.

It is certainly feasible for those who have been classified as independent contractors to make claim for the provision of employment benefits that they would have received had they been treated as employees, rather than independent contractors. This could be particularly devastating to employers if claim for long term disability benefits was allowed for someone who was classified as an independent contractor in circumstances where the employer cannot pass that obligation onto the LTD carrier.

Recommendations

- Prior to the commencement of services, negotiate the terms under which services will be provided and if the party providing services is to be an independent contractor, make sure that the terms properly reflect this status;
- Set out the terms under which services are to be provided in a written agreement and ensure that the agreement expressly stipulates that the service-provider is an independent contractor and not employee;
- Because the way in which services are provided may change over time, conduct a "due diligence" audit from time to time to ensure that the basis upon which the individual provides services continues to be properly characterized as an independent contractor relationship; and
- Include a termination provision which provides advance notice of termination which is fair in the circumstances (see next heading).

Notice of Termination for Contractors

Even if the individual is an independent contractor, notice of termination of the relationship may still be required. Many companies assume that if the individual is a contractor for tax purposes, no notice of termination must be given to the contractor. However, a number of recent court decisions have undermined the validity of this assumption.

Courts are now likely to imply that an independent contractor is entitled to "reasonable notice" of termination of the relationship, unless there is an enforceable agreement with the company which contains an express provision regarding the terms under which the contract may be terminated. Such reasonable notice of termination may be implied where the contractual relationship is one of "mutual dependency" and there is a significant element of permanence in the relationship. Courts refer to these relationships as "intermediate" – meaning between the employment relationship and the "pure" agency relationship – and will imply a term that the contractor is entitled to reasonable notice of termination.

The key factors in determining whether a relationship is an "intermediate" one, entitling the contractor to notice of termination are:

- the degree of exclusivity in the relationship between the parties;
- the degree of control exercised by the company over the contractor with regard to how, when and to whom services or products are provided;
- the degree of investment the contractor has made to provide the services specifically to the company;
- the length of the relationship; and
- the degree of reliance on the relationship by the contractor (the "vulnerability" aspect).

For example, in 2001 the Ontario Superior Court awarded an independent sales agent damages equal to five times his average monthly commission and bonus earned during his two year relationship with the company[3]. In that case, the parties had entered into a written agreement in May of 1995, which the company terminated without

[3] *Aqwa v. Centennial Home Renovations Ltd. (c.o.b. Centennial Windows)* [2001] O.I. No. 3699 (Ont. Sup. Ct.)

notice some 18 months later, relying on the following term of the agreement: "It is agreed that either party may terminate this agreement at any time without notice or penalty". The court found that this provision was unreasonable and therefore unenforceable. In doing so, it relied upon the decision of the Supreme Court of Canada in *Wallace*[4] in which it was concluded that "the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal". The court relied on the following factors to find that the contractor was in an intermediate relationship:

- the company provided training to the contractor;
- the company controlled what and to whom he could sell;
- the company approved sales before they became final;
- the contractor was limited to a specific territory;
- he attended regular sales meetings;
- he was described as a "branch manager"; and
- he worked primarily for the company and upon termination was "instantly cut-off from the prospect of earning an income".

In light of all these factors, the relationship more closely resembled an employment relationship and therefore reasonable notice of termination was required.

A relationship may be an "intermediate" one even if the contract in question is between two companies. In 1999, the British Columbia Court of Appeal awarded a distributor of Reebok products damages in the amount of nine months after the distributorship arrangement was terminated without sufficient notice[5]. The contractor was an incorporated company which had served for ten years as the exclusive distributor in British Columbia when the company terminated the relationship with one month of notice. Looking at the length and permanency of the relationship, the heavy financial dependence of the contractor upon this distributorship arrangement for his financial security, and the element of exclusivity between the contractor and the company, the court found the relationship fell into the "intermediate" category.

Similarly, the Alberta Queen's Bench awarded damages for failure to give reasonable notice of termination of a contract for services between a trucking company and the company to which it provided services[6]. In that case, the relationship had been in place pursuant to an oral contract for 16 years, when it was terminated without notice and the trucking company had to shut down its business as a result. The period of reasonable notice was fixed at nine months.

The notice periods awarded by courts in these cases are generally shorter than the notice which would be required in a similar employment relationship. Some judges have fixed the notice period by determining the appropriate notice period in an employment relationship, and then discounting it by up to half. However, this approach is not consistent, and the key factors are the length of the relationship and the length of time which the contractor will require to re-establish a viable business.

[4] *Wallace v. United Grain Growers Ltd.* (1997), 36 C.C.E.L. (2d) 1 at p. 34
[5] *Marbry Distributors Ltd. v. American International Inc.* [1999] B.C.J. No. 635 (BCCA)
[6] *JKC Enterprises Ltd. v. Woolworth Canada Inc.* [2001] A.J. No. 1220 (Alta Court of Queen's Bench).

Recommendations

- At the outset of the relationship, and prior to the contractor providing any services, enter into a written contract with contractor which contains an express provision setting out the basis upon which the relationship can be terminated; and
- Make sure this termination provision provides to the contractor advance notice of termination which is fair and reasonable in the circumstances, particularly with respect to the degree to which the contractor is dependent upon this contract for its income and the financial investment which the contractor may make (in terms of purchase of inventory or specialized equipment) to perform the services.

When There are Two or More "Employers"

As a result of the growing complexity of inter-corporate relationships – such as subsidiaries or related companies or the use of temporary services or labour brokers – it is often difficult to identify which party is the employer. As a result, statutory provisions have been enacted to protect employees from situations in which their employment entitlements may be jeopardized or defeated by the involvement of two or more companies in the employment relationships.

Related Companies: Two or More Entities Treated as One Employer

More than one company may be held liable for employment-related obligations if they carry on business together or if employees provide services to those companies. This liability can be imposed both at common law (judge-made law) or by statute.

At common law, the basis of liability of a related company is generally based on the fact that the employee provided services to both of the related entities, and under the control and direction of both, or where it is not clear which entity was the employer. For example, a car salesman who worked at various times for two dealerships and a leasing company owned by the same person who exercised control over all three entities was held entitled to recover damages for wrongful dismissal from all three entities, rather than just the entity which last employed him[7]. However, the parent company will not be liable simply because the employee is employed by a subsidiary[8]. To avoid liability of more than one company, the same entity which hires the employee should continue to provide all compensation, and the employee should report to and receive direction from a manager in that entity.

As well, both the *Employment Standards Act*[9] and the *Labour Relations Code*[10] provide a statutory authority by which two or more related entities may be treated as one for the purposes of that legislation. For employment standards purposes, the primary effect is that a determination made against one company may be enforced against associated or related companies which are carried on under common control or direction.

The "common employer" provisions of the L*abour Relations Code* are intended to prevent "double-breasting" where a unionized entity sets up a competitive or complimentary non-union business to avoid the effects of having to operate unionized. It was aimed primarily at the construction industry, but has since been applied in a wide variety of circumstances. The effect of a common employer declaration is far-reaching, because it extends the

[7] *Carlysle-Smith v. Dennison Dodge Chrysler Ltd.* (1997), 33 C.C.E.L. (2d) 280 (B.C.S.C.) at p. 290, where the court also observed that the defendants had entered a common defence.
[8] *Campbell v. Wellfund Audio-Visual Ltd. et. Al.* (1995), 14 C.C.E.L. (2d) 240 (B.C.S.C.)
[9] Section 95 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113
[10] s. 38 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244

application of a collective agreement to the employees of a related company. The declaration can be made where two or more companies carry on associated or related businesses and do so under "common control or direction", and where a labour relations purpose exists. A labour relations purpose is essentially the intent of avoiding or evading a collective agreement, or where the existence of the non-union entity creates a significant, real and immediate threat to the jobs or security of the employees of the unionized entity. Accordingly, where two or more companies work in the same industry or provide complimentary services and they have common owners or management, steps should be taken to eliminate or reduce the common control or direction in order to minimize the risk of a common employer declaration.

Successor Companies

A company which acquires another business by purchase or some other type of transaction may also "inherit" that entity's employment-related liabilities, both by common law or legislation.

Under common law, the successor company will be held liable to provide notice of termination based on the length of the employee's service with both the predecessor and successor companies, unless the successor clearly and unequivocally advised the employee at the time of the acquisition that past service would not be recognized.[11] However, subject to the legislative restrictions set out below, a company which is acquiring a business can change terms and conditions of employment at the time of offering employment, including imposing a termination provision which limits the employee's entitlement to notice of termination. Accordingly, it is important when such a transaction occurs to carefully consider the obligations which the successor company is willing to assume and to obtain legal advice with respect to the terms of the written offer of employment.

The "successorship" provisions[12] of the *Labour Relations Code* provide the "cadillac" of protection for employees who are affected by the transfer of the business. The *Code* requires an employer (the predecessor company) to give 60 days of advance notice to the union of the transaction, and then meet with the union to negotiate any amendments to the collective agreement which may be appropriate by reason of the transaction[13]. The effect of the successorship provisions are that the collective agreement and bargaining rights apply to the successor employer, so the terms and conditions of employment of unionized employees' remains the same (unless altered pursuant to section 54). In addition, the successor employer "steps into the shoes" of the predecessor for all purposes of the *Code*, so any unsatisfied liabilities, such as arbitration awards or pending grievances, may be enforced against the successor.

The *Employment Standards Act* also contains a "successor" provision[14], which is not as strong as the protection provided by the *Labour Relations Code*, but which provides significantly better protection to non-union employees than the common law. This provision stipulates that when all or part of a business or a significant part of its assets are sold or transferred, the employment of employees is "deemed continuous" for the purposes of the Act. In effect, this means that with respect to those employees hired by the successor, they are entitled to recognition of past service with the predecessor for the purposes of vacation entitlement, payment of statutory holidays, entitlement to statutory leaves (and reinstatement) and notice of termination. As well, any liabilities of the

[11] *Rhodes v. Koksilah Nursery* (1997), 29 C.C.E.L. (2d) 303 (B.C.S.C.) and *Sorel v. Tomenson Saunders Whitehead Limited* (1987), 15 B.C.L.R. (2d) 38 (B.C.C.A.)

[12] ss. 35 and 36 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244

[13] Section 54 of the *Labour Relations Code* requires an employer to give 60 days' advance notice to the union of any measure, practice, policy or change which "affects the terms, conditions or security of employment" of a significant number of the employees in the bargaining unit.

[14] Section 97 of the *Employment Standards Act*, R.S.B.C., 1996, c. 113

predecessor employer may be recovered from the successor to the extent that the successor has hired those employees[15]. A purchaser of a business or assets who does not want to inherit any such liabilities should ensure that the vendor terminates all employees at least the day before closing and provides the required pay in lieu of notice pursuant to the Act.

Purchasers of assets of a business, who concurrently offer employment to an employee of the vendor, must also appreciate that if they want to eliminate their obligation to inherit the liability for severance purposes of the prior years of service of the employee with the vendor, they must specifically address such in the employment offers made to these employee. Absent the issue being specifically addressed, the courts will imply that the employee's years of service with the vendor will be credited when the employee begins employment with the purchaser.

Vendors of assets must also appreciate that their liability for claims by a former employee is not eliminated once the employee commences employment with the purchaser. In a recent BC Supreme Court decision *Major v. Phillips Electronics Ltd.* from February 2004, Phillips (the vendor) was held to be responsible for the severance liability for its former employee (Major) who had accepted employment with the purchaser and his employment was subsequently terminated by the purchaser. In the case, the employee had been employed with Phillips for 7 years when Phillips sold off one of its divisions. The employee commenced employment with the purchaser, but two months after his employment started, it was terminated by the purchaser. The employee entered into a settlement with the purchaser and received 17 weeks severance and then subsequently sued Phillips. The BC Supreme Court found that when Phillips sold the assets and terminated the employment of Major, it was in breach of its contractual obligation to Major. The court determined that the reasonable notice period would have been approximately 19 months,. The Court deducted the income earned for the 2 months while he was employed and the severance package he received as mitigation of his damages, and then awarded the balance of 12 months against Phillips. The case certainly indicates that the liabilities that flow from an employment relationship need to be seriously addressed and dealt with properly. Consider the *Prince v. Eaton* nightmare that could have resulted to Phillips in the same scenario.

[15] *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)* (1995), 131 D.L.R. (4th) 336 (B.C.C.A.)