

## INDEPENDENT, DEPENDENT OR EMPLOYEE — HOW WOULD YOU DESCRIBE YOUR CONTRACTOR?

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In 1999 the British Columbia Court of Appeal released a seminal decision in *Marbry Distributors Ltd. v. Avreca International Inc.* The Court was asked in this case to determine if Gordon Marbry, a small-business owner and a contractor, was entitled to reasonable notice for the termination of his company's long-standing relationship with Avreca, a national distributor of sporting goods.

The Court in *Marbry* was not asked to determine if Mr. Marbry was an employee — there was no question that he was not. It was, however, asked to determine if the nature of the relationship between Marbry and Avreca went beyond that of an "independent contractor situation" and, if so, what that meant. The Court specifically examined the economic ties between Marbry's company and Avreca to determine if those ties imposed a liability on Avreca to provide more than one month's notice of the relationship's conclusion.

Ultimately, the Court held that this relationship was, in certain respects, "more akin to employee/employer than that of independent contractor or strict agency", finding, among other reasons, that the relationship was characterized by a large degree of financial and economic dependence. This ruling opened the door in British Columbia to an intermediate category of relationship between a business and those it pays to work on its behalf. The Court found that, as Mr. Marbry was neither an employee nor an independent contractor, he and his wholly-owned company represented a third category — the dependent contractor.

The importance of the *Marbry* decision, and the identification and definition of this intermediate category, should not be underestimated. In circumstances where a dependent-contractor relationship is found to exist, the contractor, while not entitled to all of the benefits of employment, will at least be entitled to reasonable notice, or pay in lieu thereof, if the relationship is summarily terminated. The Court awarded Mr. Marbry nine months' notice instead of the one month that Avreca had offered.

Such potential liabilities normally fall well outside of those contemplated by the parties at the inception of a contract-type relationship. *Marbry* was decided over ten years ago. How, if at all, has the status of the dependent contractor changed in the intervening years? The answer, as given in December 2009 by the Ontario Court of Appeal in *McKee v. Reid's Heritage Homes Ltd.*, is that *Marbry* is still relevant and, in large part, determinative today. The Ontario Court of Appeal reaffirmed the existence and definition of the dependent-contractor relationship.

### Independent, Dependent or Employee — How Would You Describe Your Contractor?

In *McKee*, the Court was asked to determine whether an individual (and her corporate identity) was a dependent contractor or an employee. Ultimately it held that the plaintiff, Ms. McKee, was an employee but, in the process, it confirmed that there is an intermediate position within the employee to independent contractor spectrum. Mr. Justice MacPherson, in writing for the Court, held:

I conclude that an intermediate category exists, which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known as “dependent contractors” and they are owed reasonable notice on termination.

The facts leading to the Ontario Court of Appeal’s decision in *McKee* are uncomplicated. Elizabeth McKee first began working with Reid Heritage Homes (RHH) in 1987 as a sales-and-marketing agent, a relationship that continued into early 2005. In 1987 at the inception of the relationship, McKee and RHH entered into a written agreement that contained a termination provision requiring 30-days’ notice of termination by either party.

Despite the written agreement, the Court found as a fact that the initial agreement had concluded shortly after the relationship began and that contractual terms between the two parties had evolved over the 18-year relationship to include:

- the effective elimination of the 30-day termination clause initially contemplated by McKee and RHH
- a tacit agreement between McKee and RHH that McKee would work exclusively for RHH
- RHH’s control over key elements of McKee’s work, including the tools of her business.

It should be noted that as a result of the third element, the Court ultimately found that McKee was an employee and not a dependent contractor.

These decisions suggest that the key factor in determining the nature of the relationship will be the degree of exclusivity. Evidence that the contractor is in some way economically dependent on the employer may satisfy a court that a dependent contractor relationship exists. The extent of economic dependency will depend on how complete or near-complete the relationship between the two parties is. How much of a contractor’s income comes from the employer? Does the contractor work for one business exclusively? It is the nature of the relationship that the Court in *McKee* held to be the “hallmark” of the dependent-contractor relationship.

For example, a business may continually hire the same contractor for an extended period of time and enter into a new contract for each new work project. But, depending on the amount of money and time involved as well as any restrictions on the contractor to work for others in the same field, the business may find that it is in an employer/ employee or dependent-contractor relationship. The likelihood of a dependent-contractor relationship existing will increase if the contractor has no option except to work solely (or almost solely) for the business

*McKee* also serves a warning to employers that a worker can still be a dependent contractor (or, in Elizabeth McKee's circumstance, an employee) even when that worker hires, pays and/or manages their own staff. The Ontario Court of Appeal's decision shows that the issue is less about employment than economic ties.

Finally, the *McKee* decision sends another, perhaps more subtle but equally important, warning to employers who create relationships with contractors: reviewing and revising contractor agreements on a regular basis may prevent questions about entitlement or liability on the conclusion of the relationship. With Marbry's definition of the dependent-contractor relationship confirmed, businesses, even when they believe they are contracting with an independent contractor, should take extra care to confirm precisely the sort of relationship they have entered into.

