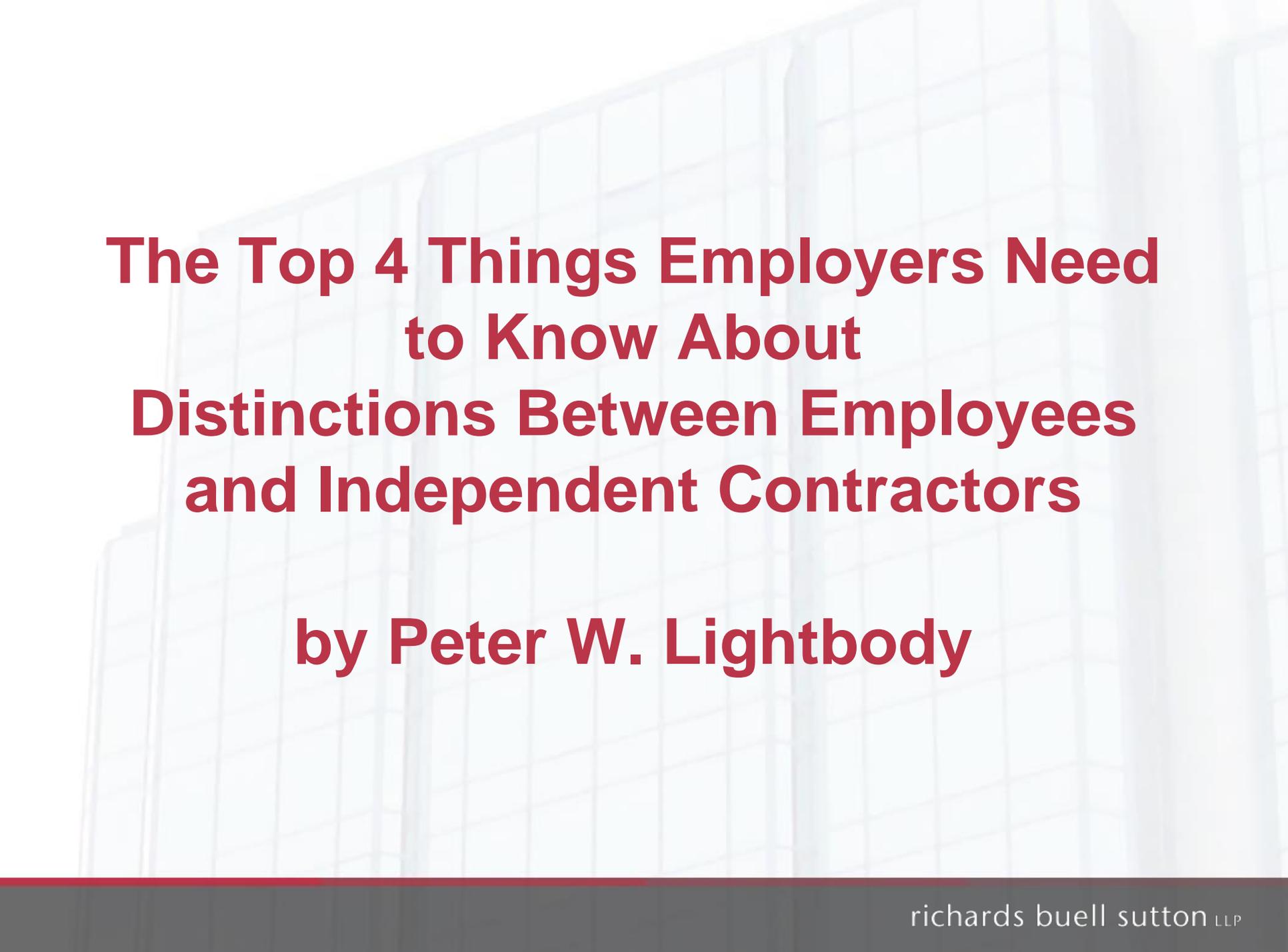




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**The Top 4 Things Employers Need
to Know About
Distinctions Between Employees
and Independent Contractors**

by Peter W. Lightbody

1. Employee vs. Independent Contractor: How to Make the Distinction

- The Supreme Court of Canada (SCC) ruled in 2001 that "there is no one conclusive test" to determine employee vs. independent contractor - see *67112 Ontario Ltd. v. Sagaz*.
- The SCC also said the central question is whether the worker is "performing services as a person in business on his own account". In other words, "whose business is it"?

1. Employee vs. Independent Contractor: How to Make the Distinction (cont'd)

- The SCC also said the degree of "control" over the person performing the services will always be a factor in making the distinction.
- Terms in a written agreement between the parties will be only one factor, sometimes a very minor factor.
- In practice, the courts typically look to many different factors, none of which is determinative:
 - Level of control over worker's activities?

1. Employee vs. Independent Contractor: How to Make the Distinction (cont'd)

- Whether worker provides her own tools?
- Can the worker sub-contract?
- Does the worker have financial risk, opportunity to profit?
- Does employer provide work premises?
- Does employee work for others? Is this permitted?
- Method of remuneration?
- Written agreement?
- Etc.??

2. BC Statutes Requiring the Distinction

(a) *Employment Standards Act (ESA)*

- Protection under the ESA applies only to an "employee". A true independent contractor will not be protected.
- This includes protection for overtime, notice on termination, vacation, minimum hours of work, etc.

2. BC Statutes Requiring the Distinction

(a) ESA (cont'd)

- ESA defines "employee" as
 - (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,*
 - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*
 - (c) a person being trained by an employer for the employer's business,*
 - (d) a person on leave from an employer, and*
 - (e) a person who has a right of recall;*

2. BC Statutes Requiring the Distinction

(a) ESA (cont'd)

- The *ESA* is "remedial" - therefore broad interpretation of "employee" is called for when interpreting this statute.
- But generally, analysis under *ESA* follows the standard legal test of "whose work is it", looking at all the factors outlined earlier.

2. BC Statutes Requiring the Distinction

(b) Human Rights Code (HR Code)

- Under section 13 of the *HR Code*, one cannot refuse to "employ" or discriminate regarding "employment", on the grounds of race, sexual orientation, family status, etc.
- "Employment" is broadly defined in the *HR Code*:

"employment" includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and "employ" has a corresponding meaning;

2. BC Statutes Requiring the Distinction

(b) HR Code (cont'd)

- The *HR Code*, like the *ESA*, is "remedial". This means that broad, inclusive interpretations are called for.
- Decisions under the *HR Code* have ruled that:
 - this definition of "employment" is non-exhaustive, and
 - non-traditional employment relationships will be caught by the *HR Code*.
- However, this broad definition still does not capture every relationship where services are provided for remuneration.

2. BC Statutes Requiring the Distinction

(b) HR Code (cont'd)

- A pure "independent contractor" will not be protected by the *HR Code*. For example, in *Steel v Rahn*, 2008 BCHRT 220, a business consultant alleged discrimination on the basis of sexual orientation. The Tribunal noted its remedial mandate, and need for liberal interpretation of "employment". But, the Tribunal engaged in a fairly traditional analysis of the factors noted above, and decided this was not an employment relationship. If the discrimination took place, it did not and could not run afoul of the *HR Code*.

2. BC Statutes Requiring the Distinction

(c) Workers Compensation Act (WCA)

- "Workers", as defined by the *WCA*, are entitled to certain coverage under the *WCA*. The definition of "worker" in the *WCA* is too long to reproduce here.
- Under the *WCA*, a distinction is made between "workers" and "independent firms". According to WorkSafe's Assessment Manual, the analysis for distinguishing between these two entities is generally the same analysis as under the other statutes we have looked at.

2. BC Statutes Requiring the Distinction

(c) WCA (cont'd)

- According to WorkSafe's Assessment Manual, the "major test" is *"whether the individual exists as a business enterprise independently of the person for whom the work is done"*. This is essentially a re-phrasing of the "whose business is it?" test.

3. Federal Statutes Requiring the Distinction - *Income Tax Act, Employment Insurance Act, Canada Pension Plan*

- Businesses are required to hold back and remit source deductions for income tax, EI and CPP, but only for employees, not independent contractors.
- With these federal statutes, the analysis for distinguishing an employee from an independent contractor is consistent with the "whose business is it test" seen above. All of the factors should be considered and no one factor is going to be determinative.

3. Federal Statutes Requiring the Distinction (cont'd)

- Businesses will want to be very careful not to mis-characterize a person working for them as an independent contractor, because certain liabilities can arise:
 - The employer can be ordered to:
 - remit both the employer's and the employee's contributions to EI and CPP,
 - remit unpaid income tax, and
 - pay penalties and interest

And, corporate directors can be personally liable for all of this.

4. Wrongful Dismissal and Notice Requirements Upon Termination

- Employees are entitled to reasonable notice of termination (both statutory minimum under the *Employment Standards Act*, and greater amounts under common law) subject to limits prescribed by written agreements.
- Pure independent contractors have no entitlement to notice of termination.

4. Wrongful Dismissal and Notice Requirements Upon Termination (cont'd)

- However, it is now well established in the law that there exists a "hybrid" relationship, which is neither pure employment nor pure contractor. In such relationships, there can be entitlement to reasonable notice of termination.

4. Wrongful Dismissal and Notice Requirements Upon Termination (cont'd)

- The hybrid concept was addressed by the BC Court of Appeal in *Marbry Distributors Ltd. v. Avreca Int. Inc.* 1999 BCCA 172:

4. Wrongful Dismissal and Notice Requirements Upon Termination (cont'd)

"All relationships in the workplace setting can perhaps be thought of as existing on a continuum. At one end of the continuum lies the employer/employee relationship where reasonable notice is required to terminate. At the other extremity are independent contracting or strict agency relationships where notice is not required. The difficulty obviously lies in determining where upon that continuum one is located."

4. Wrongful Dismissal and Notice Requirements Upon Termination (cont'd)

- The point is that the worker (or business) falling into the intermediate category will likely have some degree of dependence on the other entity, such that it is appropriate to provide some protection by way of notice.
- A factor in assessing the notice entitlement will be where on the continuum the relationship stands. The closer to pure contractor, likely the lesser the notice entitlement.



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