

INDEPENDENT OR DEPENDENT CONTRACTOR? BC COURT FINDS NO SEVERANCE OWING TO LONG TERM SERVICE PROVIDER

Posted on February 10, 2019

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A recent decision of the British Columbia Provincial Court^[1] serves as an important reminder of the factors a court will consider when determining whether an individual is a dependent contractor and of the repercussions dependent contractor status may have on severance obligations upon termination.

In *Thomas v. Vancouver Free Press Publishing Corp.*, the BC Provincial Court considered whether Colin Thomas, a freelance writer, was a dependent contractor of the Vancouver Free Press Publishing Corp. (“**Vancouver Free Press**”). Mr. Thomas conceded that he was never an employee of the Vancouver Free Press, but claimed that he was a dependent contractor and was therefore entitled to reasonable notice or pay in lieu of notice upon his termination. Ultimately, the Court found that Mr. Thomas was not a dependent contractor and was therefore not entitled to notice or pay in lieu.

Background

Mr. Thomas was a freelance writer who started to write theatre reviews for the Vancouver Free Press, who publishes *The Georgia Straight*, on a freelance basis in 1988. At about that time, Mr. Thomas was asked if he would become the theatre critic for *The Georgia Straight*. Mr. Thomas agreed.

Over the years, Mr. Thomas would make pitches to *The Georgia Straight*'s Arts Editor proposing reviews of certain theatre shows. The Arts Editor retained discretion to reject the pitch or ask for a review of a different show. When a pitch was accepted, Mr. Thomas would attend the show, write his review, and then submit it to *The Georgia Straight*. Mr. Thomas was paid a flat rate plus GST for each review.

In 2004, *The Georgia Straight* implemented a policy that limited Mr. Thomas to writing only two theatre reviews in any issue of *The Georgia Straight*. As a result, Mr. Thomas supplemented his income by providing story-editing services that he mostly promoted and offered through his personal website. There was conflicting evidence on whether Mr. Thomas was permitted to write for other publications. Mr. Thomas believed that he was not allowed to write reviews for other publications however, *The Georgia Straight* denied that this was the case. Mr. Thomas continued to write for *The Georgia Straight* until September 2016, when he was told that *The Georgia Straight* would no longer purchase theatre reviews from him.

Mr. Thomas was subsequently offered a job writing theatre reviews for the Westender newspaper, however he turned down the offer. He then entered into a contract with the Vancouver Fringe Festival Society to write a theatre review column. That relationship ended in March 2018. Mr. Thomas also generated income from subscriptions to his website where he published his theatre reviews.

Decision

The Court considered whether Mr. Thomas was a dependent contractor. The factors to consider in making this determination are set out in *Lightstream Telecommunications Inc. v. Telecon Inc.*[2] and include the level of worker control, ownership of equipment and tools, opportunity for profit and loss, and business integration. In determining that Mr. Thomas was not a dependent contractor, the Court noted the following:

- The Georgia Straight did not control the content of Mr. Thomas' writing other than to approve the show to be reviewed;
- The Georgia Straight did not prevent Mr. Thomas from writing reviews and earning additional profits from other publications;
- The Georgia Straight was never obligated to purchase a review from Mr. Thomas; and
- The Georgia Straight used the services of other reviewers and continued to publish theatre reviews after Mr. Thomas stopped writing them, showing that the paper was not reliant on Mr. Thomas.

The strongest factors in favor of a finding of dependent contractor status were the 28-year relationship between The Georgia Straight and Mr. Thomas and Mr. Thomas' reliance on The Georgia Straight as a source of income. However, after taking each factor into consideration, the Court concluded that Mr. Thomas was not a dependent contractor and was therefore not entitled to reasonable notice of termination.

The Court also determined that if Mr. Thomas had been a dependent contractor or an employee, he would have been entitled to 20 months of reasonable notice.

Takeaways

This decision is a timely reminder to employers that an intermediate category exists between employees and independent contractors. If a non-employment work relationship exhibits a certain level of economic dependency, the worker may be found to be dependent contractor and therefore entitled to reasonable notice upon termination. Employers should seek legal advice when hiring independent contractors or workers on a freelance basis to ensure that the relationship is appropriately structured to meet the employer's needs.

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[1] *Thomas v. Vancouver Free Press Publishing Corp.*, 2019 BCPC 9.

[2] *Lightstream Telecommunications Inc. v. Telecon Inc.*, 2018 BCSC 1940.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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