
The Role of Intention in Distinguishing Employees from Independent Contractors

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PRÉCIS

Dans un revirement plutôt soudain par rapport à la jurisprudence, la Cour d'appel fédérale a indiqué que l'intention commune des parties devait jouer un rôle pour distinguer les employés des entrepreneurs indépendants dans les causes fiscales. Un examen de la jurisprudence indique qu'il y a de nombreuses questions sans réponse au sujet du rôle approprié de l'intention, et que l'intention ne joue pas nécessairement un rôle important dans les décisions sur la qualification. L'auteur soutient qu'il n'y a aucune justification pour tenir compte de l'intention et qu'il y a de nombreuses raisons pour lesquelles l'intention ne devrait pas être prise en considération. Cependant, si les tribunaux continuent de considérer l'intention comme pertinente pour faire la distinction entre employés et entrepreneurs indépendants, l'auteur maintient qu'ils devraient clarifier leurs raisons pour légitimer l'intention comme considération pertinente et fournir une orientation pour les causes subséquentes.

ABSTRACT

In a rather sudden shift in the case law, the Federal Court of Appeal has directed that the common intention of the parties should play a role in distinguishing employees from independent contractors in tax cases. A review of the case law shows that there are many unanswered questions about the appropriate role of intention, and that intention may not play a major role in characterization decisions. The author argues that there is no justification for considering intention and that there are many reasons why intention should not be considered. However, if the courts continue to consider intention to be relevant to the distinction between employees and independent contractors, the author maintains that they should make their reasons clear to legitimize intention as a relevant consideration and provide direction for subsequent cases.

KEYWORDS: EMPLOYEE ■ INDEPENDENT CONTRACTORS

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INTRODUCTION

The 2001 Supreme Court of Canada ruling in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*¹ appeared to settle many of the unresolved issues relating to the legal test for distinguishing between employees and independent contractors. However, the reprieve was short-lived. The following year, the Federal Court of Appeal's decision in *Wolf v. Canada*² introduced a new element: the intention of parties with respect to the legal character of their relationship. The Federal Court of Appeal has continued to insist that intention is relevant, but has generally failed to give adequate direction about how this factor should affect the established legal test. In this article, I consider the role of intention in the employee-independent contractor test in relation to three pieces of legislation: the Income Tax Act (ITA),³ the Employment Insurance Act (EIA),⁴ and the Canada Pension Plan (CPP),⁵ all of which are similar

1 2001 SCC 59.

2 2002 FCA 96.

3 Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the ITA").

4 Employment Insurance Act, SC 1996, c. 23, as amended (herein referred to as "the EIA").

5 Canada Pension Plan, RSC 1985, c. C-8, as amended (herein referred to as "the CPP").

because they impose taxes (the latter two imposing payroll taxes) and are within the jurisdiction of the Tax Court of Canada and the Federal Court of Appeal.

A number of articles have considered the test for distinguishing between employees and independent contractors. Several older articles have surveyed the case law,⁶ but, because of their vintage, these articles did not address the role of intention. More recent surveys of the jurisprudence have recognized the expanding importance of intention.⁷ Timothy Clarke praised the change because it would “enable parties to govern their affairs more easily . . . without interference by the Courts or the Minister.”⁸ In his 2008 paper, Kurt Wintermute concluded that intention played a significant role, although there was a great deal of uncertainty at that time with respect to how intention was used.⁹ Therefore, while there have been fairly comprehensive surveys of the case law before 2007, the literature has not yet addressed the appropriate role of intention. In this article, I endeavour to fill in this gap and to provide a review of the more recent cases.

I begin with an examination of the case law, which reveals that most, if not all, courts now mention intention as a factor. However, uncertainty still surrounds how intention is established and how it is used. I then argue that the intention of the parties with respect to the legal characterization of their relationship should not play a role in the legal test for distinguishing between employees and independent contractors. All of the reasons for considering intention are flawed, and there are countervailing arguments against considering intention.

6 See, for example, Alain Gaucher, “A Worker’s Status as Employee or Independent Contractor,” in *Report of Proceedings of the Fifty-First Tax Conference*, 1999 Conference Report (Toronto: Canadian Tax Foundation, 2000), 33:1-98; Brian J. Wilson, “Employment Status Under the Income Tax Act,” in *Income Tax and Goods and Services Tax Planning for Executive and Employee Compensation and Retirement*, 1991 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1992), 2:1-61; Lara Friedlander, “What Has Tort Law Got To Do with It? Distinguishing Between Employees and Independent Contractors in the Federal Income Tax, Employment Insurance, and Canada Pension Plan Contexts” (2003) 51:4 *Canadian Tax Journal* 1467-1519; and Joanne E. Magee, “Whose Business Is It? Employees Versus Independent Contractors” (1997) 45:3 *Canadian Tax Journal* 584-603.

7 See, for example, Elizabeth J. Johnson and Jeffrey C. Johns, “Decisions Involving Legal Relationships: Partnership, Employee Versus Independent Contractor, and Agency (2010) 58, special supp. *Canadian Tax Journal* 149-73; Geoffrey A. Garland and Paul K. Grower, “Employee and Independent Contractor—Where Are We Now?” in *2004 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2004), 7:1-55; and Stuart Rudner, “Employee or Independent Contractor? Tax and Civil Courts Adopt Different Approaches in the Debate,” Focus on Labour and Employment Law, *Lawyers Weekly*, September 10, 2010.

8 Timothy W. Clarke, “The Employee/Independent Contractor Conundrum,” in *2004 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 2004), 10:1-33, at 10:17.

9 Kurt G. Wintermute, “A Worker’s Status as Employee or Independent Contractor: Recent Case Law, Trends, and Planning,” in *Report of Proceedings of the Fifty-Ninth Tax Conference*, 2007 Conference Report (Toronto: Canadian Tax Foundation, 2008), 34:1-35, at 34:21.

THE CASE LAW

In this section, I review the case law to establish the framework in which the courts (particularly the lower courts) must operate with respect to the role of intention in distinguishing between employees and independent contractors. The section begins with a brief explanation of the relevance of the employee-independent contractor distinction. I then examine how intention has been established in the cases and explore the role of intention. Although developments in the law have made intention a factor, the role of intention is still uncertain.

The Relevance of the Employee-Independent Contractor Distinction

The employee-independent contractor distinction is relevant to a number of legal areas, all of which in large part depend on provincial common or civil law. The distinction is relevant under the ITA primarily because different provisions apply to employees, who earn employment income, and contractors, who earn business income.¹⁰ If a worker is earning employment income rather than business income, fewer deductions are available, the employer must withhold and remit income tax, and the worker is not required to make instalment payments.¹¹ In addition, tax treaties may afford different treatment on the basis of the distinction.¹² Disputes often arise when the Canada Revenue Agency (CRA) disagrees with a worker with respect to his or her taxable income or the requirement that he or she make instalment payments, or when it argues that the recipient of the worker's services must withhold and remit tax.

The distinction is also relevant under the EIA because persons "employed in insurable employment"¹³ and their employers are required to make contributions to the employment insurance system, and employees are able to obtain employment insurance benefits (as long as the other requirements are met).¹⁴ Independent contractors are generally not required to make contributions and are not able to obtain employment insurance benefits. Disputes often arise because the government claims that the parties are in an employment relationship and have wrongfully neglected to make contributions. In these cases, the CRA usually makes a similar claim with respect to the CPP. Arguments also arise when workers become unemployed and the CRA disputes that they are employees entitled to employment insurance benefits.

Both employees and independent contractors must contribute to the CPP, but, as Lara Friedlander points out, the treatment of employees and independent contractors

10 Subdivision a of division B of part I of the ITA applies to employment income, while subdivision b of division B of part I applies to business income.

11 See Friedlander, *supra* note 6, at 1472-73 for a more detailed description of these distinctions.

12 This was the case in *Wolf*, *supra* note 2.

13 *Supra* note 4, section 67.

14 See Friedlander, *supra* note 6, at 1474-76 for a more detailed description.

is different.¹⁵ There are different rules for calculating their respective contributions.¹⁶ If an employment relationship exists, both the employee and the employer must make contributions, and the employer is required to withhold and remit the employee contributions along with its own.¹⁷ Independent contractors, however, are responsible for remitting their own contributions directly to the government,¹⁸ and these contributions are the equivalent of both the employer and the employee contributions.¹⁹ Workers can receive retirement benefits from the CPP irrespective of whether they were employees or independent contractors.²⁰

Although the recommendations in this article are limited to three areas of law, the courts have seldom distinguished cases on the basis of the area of law applied in a particular case. To a great extent, the courts draw on a single body of law concerning the employee and independent contractor distinction, regardless of the particular legal context (although the wisdom of this practice is not without question).²¹

Case Law on Establishing Intention

The courts have most often used the term “intention” in this context to mean the parties’ intention concerning the legal characterization of their relationship as either employee-employer or independent contractors. It is also possible to consider the intention of the parties with respect to the terms of their agreement or other characteristics of their relationship; while this may be relevant to the employee-independent contractor distinction, the term “intention” is not generally used in this sense in the case law. In this article, I generally use the term “intention” to mean intention with respect to legal characterization, although there are a few noted exceptions.

The courts consider only mutual intention;²² if mutual intention cannot be established, the courts have generally found intention to be irrelevant. In several instances, the courts have suggested that there must be a “clearly-expressed mutual intent”²³ for the intention to be relevant. However, in some cases the courts have examined

15 Ibid., at 1477-79.

16 Ibid., at 1478-79.

17 Ibid., at 1478-79.

18 CPP, section 10.

19 CPP, schedule.

20 Friedlander, *supra* note 6, at 1479.

21 Ibid.

22 See, for example, *Thompson v. MNR*, 2011 TCC 81; *Copper Creek Homes Inc. v. MNR*, 2011 TCC 570; *Heineke (Creative Staging Saskatchewan) v. MNR*, 2011 TCC 475; *Therrien v. MNR*, 2013 TCC 116 (cannot unilaterally change one’s mind); *Bansal v. MNR*, 2010 TCC 340; and *Harold Isaac OP Sunrise Electrical v. MNR*, 2010 TCC 225.

23 *Copper Creek Homes*, *supra* note 22, at paragraph 24. See also *Twilley v. MNR*, 2009 TCC 524, at paragraph 10; and *Laperrière v. MNR*, 2007 TCC 252.

oral testimony,²⁴ and even conflicting evidence, to determine the mutual intention²⁵ before considering it in deciding the proper characterization of the relationship.

The term “common intention” (alternatively referred to as “mutual intention” by the courts) is used here to mean the common or mutual intention of the parties as determined by the courts through the examination of their relationship. This term can be contrasted with the term “asserted intention,” which is used to describe the intention asserted by one or both of the parties, either in written or oral statements. “Shared asserted intention” is the term used when the parties assert the same intention. Asserted intention can be used by the courts to determine mutual intention, but it is common intention that is legally significant in determining employee or independent contractor status.

Shared asserted intention as expressed in written agreements has been an important factor in determining common intention, although in numerous recent cases the Tax Court has found a lack of common intention, despite the existence of a written agreement indicating an independent contractor relationship.²⁶ In a 2014 case, *Mallon v. MNR*, Miller J stated, “When determining the status of a working arrangement the message must be that the courts will look foremost to the actions and behaviour that define the relationship and determine whose business it is. Indeed, action and behaviour will determine intention, not the other way round.”²⁷ It is likely that Miller J meant that objective evidence is necessary to prove common intention, not that intention itself is objective. In any event, Miller J clearly places little value on asserted intention.

Power imbalances and lack of knowledge have played a role in determining common intention. For example, in *Coloniale Maid Service Ltd. v. MNR*, an EIA case, the Tax Court judge pointed out that the workers showed “merely acquiescence—or grudging acceptance”²⁸ of the company’s declaration of independent contractor status, and the workers acquiesced to this status in order to receive payment. The court appeared to proceed with its analysis, apparently without a finding of common intention, despite a signed statement that the workers were self-employed. Similarly, in *Powertrend Electric Ltd. v. MNR*, another EIA case, the Tax Court found no common intention because the worker agreed to be an independent contractor only to keep his job.²⁹ In a third EIA case, *1772887 Ontario Ltd. v. MNR*, the Tax Court made

24 See *Pichugin v. MNR*, 2011 TCC 16.

25 See, for example, *Smith v. MNR*, 2011 TCC 20; and *Persuader Court Agents Inc. v. MNR*, 2010 TCC 335.

26 *La Scala Conservatory of Music II v. MNR*, 2013 TCC 122; *Peterborough Youth Services v. MNR*, 2013 TCC 291; *Acanac Inc. v. MNR*, 2013 TCC 163; and *177398 Canada Ltd. v. MNR*, 2011 TCC 300.

27 *Mallon v. MNR*, 2014 TCC 14, at paragraph 15.

28 2010 TCC 115, at paragraph 31.

29 2011 TCC 361, at paragraph 20.

it clear that independent contractor status could not be imposed on the temporary and junior workers because they were “put in the position” of having to accept independent contractor status.³⁰ Therefore, it appears, at least in the EIA context, that when a worker is in a relatively weak position, a common intention may not be found, despite documentation that suggests otherwise.

In at least two EIA and CPP cases, the courts have used a worker’s lack of knowledge to refute evidence of a common intention. In *Dean (Ana’s Care & Home Support) v. Canada (National Revenue)*,³¹ the Tax Court noted that the workers may not have understood the significance of a lack of source deductions, which led to a finding of no common intent. In *Oldham Robinson Integrated Technologies Inc. v. MNR*,³² the Tax Court based its decision that there was no common intention on the worker’s lack of understanding of the meaning of self-employment when entering into a verbal agreement. The power imbalance also played a role because the court noted that the worker did not argue about the status as a result of her fear of losing her job.³³ In at least one case, however, a party’s failure to read the contract was not sufficient to dissuade the court from finding common intention.³⁴

The courts assess the common intention that exists at the time that an agreement is made.³⁵ They have indicated that intention is not the same as aspiration or desire. Common intention of independent contractor status was found in one case despite a party’s desire to become an employee in the future.³⁶ The Tax Court similarly rejected an argument of employee status on the basis of remorse and regret relating to independent contractor status where employee status would have meant compliance with goods and services tax (GST) legislation.³⁷

A number of other factors have influenced findings of common intention. In *Butt v. MNR*, the court found that a worker entering into the contract through a personal company indicated an intention to form an independent contractor relationship.³⁸ Applying for a GST number³⁹ and reporting earnings as business income⁴⁰ have both supported an intention to be classified as an independent contractor. A failure to

30 2011 TCC 204, at paragraphs 146, 155, and 163.

31 2012 TCC 370.

32 2010 TCC 596.

33 *Ibid.*, at paragraph 10.

34 *Integrantuity Marketing Ltd. v. MNR*, 2012 TCC 4.

35 *Cavalier Land Ltd. v. MNR*, 2011 TCC 490; and *MAP v. MNR*, 2012 TCC 70.

36 *Prue v. MNR*, 2011 TCC 9.

37 *Wellbuilt General Contracting Ltd. v. MNR*, 2010 TCC 541. Similarly, see *Cavalier Land Ltd.*, *supra* note 35.

38 2013 TCC 284, at paragraph 16.

39 See, for example, *Maple Elect Zoltan v. MNR*, 2012 TCC 286.

40 See, for example, *Nightingale v. MNR*, 2012 TCC 218.

question a lack of source deductions,⁴¹ the issuance of T5 slips,⁴² the negotiation of a rate of pay that was higher than that of an employee,⁴³ and accepting responsibility for worker's compensation premiums⁴⁴ have supported findings of intention to be an independent contractor in various cases. However, in *SB Towing Inc. v. MNR*⁴⁵ the court found that the lack of GST registration could be attributed as much to inattention or negligence as to intention. Further, a worker's income tax return may not reflect an agreement reached one year earlier, according to the finding in *SIP Distribution Inc. v. MNR*.⁴⁶ While a number of factors have been used as objective evidence of subjective intention, their use is dependent on the facts.

Several factors have influenced courts in other cases to find a lack of common intention. A subsequent unilateral amendment to a contract to label the parties as independent contractors was viewed as an indication that intention was not clear at the time of the original contract.⁴⁷ In another case, where the worker did not turn her mind to the character of the relationship, no intention was found.⁴⁸ Despite an agreement that both parties would pay their own taxes, the court found a lack of common intention in *Young Tile Inc. v. MNR*.⁴⁹

In *Poulin v. Canada*,⁵⁰ the Federal Court of Appeal suggested that a physical disability may result in an inability to form an intention:

Given the applicant's physical condition and the consequences that result from employer status, I do not think it is reasonable to infer that the applicant intended to enter into a contract of employment with the three workers that would make him their employer.⁵¹

The court appears to suggest that the applicant could not reasonably have been considered to be an employer, presumably because he was a quadriplegic, with physical limitations described as "pathetic and heart-breaking."⁵² This is particularly infuriating because the court does not seem to recognize the abilities of the

41 *Watzke v. MNR*, 2011 TCC 351.

42 *Kowalchuk v. MNR*, 2011 TCC 265.

43 *Ibid.*

44 *Ibid.*

45 2013 TCC 358.

46 2011 TCC 423, at paragraph 10.

47 *Marilake Education Centre Inc. v. MNR*, 2013 TCC 82.

48 *875527 Ontario Ltd. v. MNR*, 2012 TCC 214, at paragraph 11.

49 2012 TCC 383, at paragraphs 7, 10, and 15.

50 2003 FCA 50.

51 *Ibid.*, at paragraph 30.

52 *Ibid.*, at paragraph 2. For a critique of such language, see Tamara Larre, "Pity the Taxpayer: The Tax Exemption for Personal Injury Damages as a Disability Policy" (2007) 33:1 *Queen's Law Journal* 217-47.

applicant, even though it noted that after his accident he was employed half-time by the Canadian Museum of Civilization as a tourist guide or information officer. Courts would be sensible to eschew this line of reasoning in the future.

In a recent case, *177398 Canada Ltd v. MNR*, the Tax Court used other factors to at least partially justify a finding that there was no common intention, despite a written agreement indicating a shared intention of an independent contractor relationship.⁵³ The court decided that the contract's terms, including a full-time commitment with the company, an agreement not to compete, and the provision of a vehicle by the company, were more in keeping with employment, and this contributed to a finding of no common intention.⁵⁴ As is discussed below, one problem with this approach is that it does not coincide with the current two-step test for determining employee or independent contractor status, which establishes intention before applying judicially specified factors.

Case Law on the Role of Intention

In the past decade or so, there have been a large number of cases touching on the role of intention in distinguishing between employees and independent contractors. To make sense of these cases, it is necessary to examine the development of the law. In the survey below, I concentrate on the landmark decisions of *Wolf*,⁵⁵ *Royal Winnipeg Ballet v. MNR*,⁵⁶ and *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*⁵⁷ but also consider the intervening cases. The review of cases since *Royal Winnipeg Ballet* is more comprehensive because these cases have not yet been reviewed extensively in the literature.

Cases Preceding *Wolf v. Canada*

The history of the test that distinguishes employees from independent contractors has been recounted on several occasions.⁵⁸ For the purposes of this article, it is sufficient to say that the four-in-one test, originating from Lord Wright's decision in *City of Montreal v. Montreal Locomotive Works Limited and Another*⁵⁹ and adopted in *Wiebe Door Services Ltd. v. MNR*,⁶⁰ was endorsed by the Supreme Court of Canada in the 2001 case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, and this became the predominant test. It emphasized whether a service provider was performing

53 2013 TCC 177, at paragraph 86. Bowman J also interprets the comments in *Gagnon*, infra note 119, to suggest a similar approach: see *Lang v. MNR*, 2007 TCC 547, at paragraph 32.

54 *177398 Canada Ltd.*, supra note 53, at paragraph 86.

55 Supra note 2.

56 2006 FCA 87.

57 2013 FCA 85.

58 See, for example, Clarke, supra note 8; Friedlander, supra note 6; and Magee, supra note 6.

59 [1946] UKPC 44, at paragraph 17.

60 87 DTC 5025 (FCA).

services “as a person in business on his own account”⁶¹ and considered four factors as especially relevant, although the list was non-exhaustive.⁶² The four factors were control, ownership of equipment, degree of financial risk, and opportunity for profit.⁶³

Before *Wolf v. Canada*, intention was not recognized as a factor in the employee-independent contractor distinction.⁶⁴ Courts focused primarily on the factors set out in *Wiebe Door*. In fact, in *Minister of National Revenue v. Standing* the Federal Court of Appeal stated, “There is no foundation in the case law for the proposition that such a relationship may exist merely because the parties choose to describe it to be so regardless of the surrounding circumstances when weighed in the light of the *Wiebe Door* test.”⁶⁵

Wolf v. Canada

The history of the role of intention begins with the Federal Court of Appeal’s 2002 decision in *Wolf v. Canada*. The appellant had entered into an agreement with a Canadian corporation, Kirk-Mayer of Canada Ltd., agreeing to provide services to Canadair Limited as an “independent contractor.” The case involved the question whether the appellant, a mechanical engineer resident in the United States but working in Canada, could be taxed by Canada. According to article XIV of the Canada-US income tax convention,⁶⁶ the state in which a taxpayer is not resident (in this case, Canada) can tax an independent contractor only if the individual has a fixed base in that state.⁶⁷ The taxpayer argued that he was an independent contractor and did not have a fixed base in Canada.

The Tax Court held that the appellant was an employee of Kirk-Mayer.⁶⁸ The three judges of the Federal Court of Appeal agreed with one another in result that the appellant was an independent contractor, but each authored a separate set of reasons. All of the judges appeared to consider the Civil Code of Québec⁶⁹ to be relevant in determining the status of the worker.

61 *Sagaz*, supra note 1, at paragraph 47.

62 *Ibid.*, at paragraphs 47-48.

63 *Wiebe Door*, supra note 60.

64 The courts have mentioned intention in several cases: *Bradford v. MNR*, 88 DTC 1661 (TCC); and *SARA Consulting & Promotions Inc. v. MNR*, [2001] TCJ no. 773. See *Mayne Nickless Transport Inc. v. MNR*, [1999] TCJ no. 132, at paragraph 20.

65 *Minister of National Revenue v. Standing* (1992), 147 NR 238, at 239-40 (FCA).

66 The Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, signed at Washington, DC on September 26, 1980, as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, July 29, 1997, and September 21, 2007.

67 *Wolf*, supra note 2, at paragraph 37. The article was deleted in 2007.

68 *Ibid.*, at paragraph 32.

69 SQ 1991, c. 64.

Desjardins JA's decision did not promote an increased role for intention. After reviewing the decision in *Sagaz*, she applied the legal test. The first subheading considered was "the written contract." After discussing the duration of the contract, she noted that "[t]he terms of the written contract between Kirk-Mayer and the appellant will only be given weight if they properly reflect the relationship between the parties."⁷⁰ It seems from the discussion preceding the quotation, that Desjardins JA was examining the terms in the contract, rather than the parties' characterization of their relationship, to determine if these terms were consistent with the actual relationship. However, she then went on to quote a reference from *Standing v. Canada (MNR)*, which stated that the parties' characterization of their relationship lacked sufficient foundation.⁷¹ She then examined the factors in *Wiebe Door*, concluding that they pointed to independent contractor status. Thus, the only reference in the decision to the intention of the parties in characterizing their relationship is contained in a (perhaps misplaced) quotation dismissing the relevance of the characterization in the contract.

The decisions of the two other Federal Court of Appeal judges in *Wolf* are viewed as endorsing the importance of the intention of the parties, although the comments on intention differ greatly. Décarý JA made a bold statement: "I say, with great respect, that the courts, in their propensity to create artificial legal categories, have sometimes overlooked the very factor which is the essence of a contractual relationship, i.e. the intention of the parties."⁷² These words, and the rest of the paragraph, appear to indicate that intention is significant when interpreting the contract.

Décarý JA's judgment veered away from the longstanding jurisprudence by focusing on intention and failing to systematically consider the *Wiebe Door* factors (although control and autonomy were discussed), apparently because of freedom to contract and to determine one's own tax consequences. For example, Décarý JA states that "[t]axpayers may arrange their affairs in such a lawful way as they wish. . . . When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search."⁷³

However, there is some question whether his comments with respect to intention pertain to the terms or to the legal characterization.⁷⁴ Further, the reference to intention in the relevant Civil Code provisions⁷⁵ could be taken to limit the decision's

70 *Wolf*, supra note 2, at paragraph 71.

71 *Ibid.*

72 *Ibid.*, at paragraph 117.

73 *Ibid.*, at paragraph 119. See also paragraphs 118 and 120.

74 Décarý JA's discussion appears to focus on intention with respect to the terms of the agreement that relate to control and subordination (*ibid.*, at paragraphs 118 and 120). However, he does make reference to the stated intention of the parties with respect to characterization on at least one occasion in the judgment, when at paragraph 119 he refers to "what they say they are."

75 *Ibid.*, at paragraph 117.

scope to the Code. It is also notable that he still supports as central the question whether a person is carrying on business on his or her own account.⁷⁶ Therefore, it seems that the focus on intention had not completely ousted the test endorsed by the Supreme Court in *Sagaz*.

The third set of reasons, written by Noël JA, limited the importance of intention, although it still had great potential to change the course of the law. In his four-paragraph judgment, Noël JA opined that in this particular case the characterization by the parties of their relationship “ought to be given great weight.”⁷⁷ He acknowledged that the description of the relationship is “not usually determinative” but stated that “in a close case such as the present one, where the relevant factors point in both directions with equal force, the parties’ contractual intent, and in particular their mutual understanding of the relationship cannot be disregarded.”⁷⁸ It appears then that Noël JA viewed intention as a tie-breaker. However, later statements might suggest another test: “the manner in which the parties viewed their agreement must prevail unless they can be shown to have been mistaken as to the true nature of their relationship.”⁷⁹ The latter half of Noël JA’s reasons might therefore support a test that uses intention as a presumption, which can be rebutted if the parties’ labelling of their relationship was mistaken. Here, the evidence was neutral at best, and therefore the Tax Court was wrong to disregard the understanding of the parties.⁸⁰

The lack of congruency among the three sets of reasons (and even within them) has made the case particularly difficult to apply. Since two of the three judgments can be read to emphasize the intention of the parties with respect to the legal characterization of their relationship, it is not surprising that the courts subsequently adopted this idea and increasingly referred to intention.

Cases Following Wolf and Preceding Royal Winnipeg Ballet

Several points are interesting about the first few appellate cases that considered intention following *Wolf*. The court in *Poulin v. MNR* and *Le Livreur Plus Inc. v. Canada (Minister of National Revenue)*⁸¹ considered only the points of Décaré JA, and not those of his colleagues. The court in *Le Livreur Plus* also considered intention in addition to all of the *Wiebe Door* factors, even though Décaré JA had not considered these factors. The court’s decision in *D & J Driveway Inc. v. Canada (Minister of National Revenue)*⁸² mentioned intention, but not the *Wolf* case, and intention did not appear to play an important role in the decision.

76 *Ibid.*, at paragraph 119.

77 *Ibid.*, at paragraph 122.

78 *Ibid.*

79 *Ibid.*, at paragraph 124.

80 *Ibid.*

81 *Poulin*, supra note 50; *Le Livreur Plus*, 2004 FCA 68.

82 2003 FCA 453.

Royal Winnipeg Ballet v. MNR

After *Wolf*, the first case to discuss the role of intention in detail was the 2006 case of *Royal Winnipeg Ballet v. MNR*. The Tax Court had upheld the minister's ruling that three dancers were employees of the Royal Winnipeg Ballet, and thus the ballet company must make CPP and employment insurance contributions. The Tax Court judge stated that intention should serve as a tie-breaker in the event that the legal tests do not produce a result.⁸³ Two of the Federal Court of Appeal justices, Sharlow JA and Desjardins JA, overturned the Tax Court's decision, while Evans JA dissented.

Sharlow JA's review of the jurisprudence contained a summary of the *Wiebe Door* and *Sagaz* decisions, as well as the reasons of all three judges in *Wolf*.⁸⁴ She then considered the intention of the parties and pointed out that there was a common understanding among the parties that the dancers were not employees.⁸⁵ Sharlow JA was unsympathetic with the Tax Court judge's concern that giving intention great weight could allow employment insurance to become an optional program. She explained, "There is ample authority for the proposition that parties to a contract cannot change the legal nature of that contract merely by asserting that it is something else."⁸⁶ In one sense, this explanation was less than satisfactory because the Tax Court's concern was that paying heed to intention would change this proposition and allow an assertion to determine the legal nature of the contract. Sharlow JA may have meant to reaffirm the precedent that intention is not determinative. She points out that both in *Wiebe Door* and in *Wolf*, the courts examined the parties' relationship to determine if it was, in fact, the one that they intended to create.⁸⁷

Sharlow JA disagreed with the Tax Court judge's reading of Noël JA's decision in *Wolf* as creating a tie-breaker role for intention.⁸⁸ To make her point, she did not consider Noël JA's judgment (which in my view does appear to incorporate a tie-breaker role at one point). Instead, she justified her position on the basis of *Montreal Locomotive*, which was cited at the end of Noël JA's judgment.⁸⁹ Since *Montreal Locomotive* does not mention intention, but looks to the terms of the agreement in determining the legal character of the parties' relationship, one may conclude that here, Sharlow JA is referring to intention in relation to the terms of the agreement. This approach could also be consistent with Décaré JA's remarks in *Wolf*, which, as noted earlier, are ambiguous with respect to the meaning of intention. However, Sharlow JA was interpreting Noël JA's judgment, in which he clearly meant intention in the sense of legal characterization. Later in the judgment, Sharlow JA states that

83 Supra note 56, at paragraph 55, citing *Royal Winnipeg Ballet v. MNR*, 2004 TCC 390.

84 Supra note 56.

85 Ibid., at paragraph 64.

86 Ibid., at paragraph 56.

87 Ibid.

88 Ibid., at paragraph 57.

89 Ibid.

the label given by the parties to their relationship is not necessarily determinative.⁹⁰ However, she also later refers to “common intention as to most of the *terms* of their contract.”⁹¹ There is certainly some confusion about whether Sharlow JA’s discussion of intention is referring to intention with respect to terms or intention with respect to legal characterization.

Sharlow JA appeared to rely on the principles of contract interpretation:

One principle is that in interpreting a contract, what is sought is the common intention of the parties *rather than the adherence to the literal meaning of the words*. Another principle is that in interpreting a contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account. The inescapable conclusion is that the evidence of the parties’ understanding of their contract must always be examined and given appropriate weight.⁹²

With respect, relying on contract interpretation to explain the process of determining the legal character of the relationship is problematic because these are two different exercises.

Sharlow JA concluded that the trial court judge should have considered the factors from *Wiebe Door* “in the light of”⁹³ the common intention that the dancers were independent contractors. As discussed later, this idea is repeated in subsequent cases, although its implications are still not clear.

Desjardins JA’s concurring set of reasons in *Royal Winnipeg Ballet* did not say much about intention, although she did state that she “would not deprive the common law judge of the possibility of being made apprised of the intention of the parties so as to test such intention against objective factors and the surrounding circumstances of the case when he makes the final determination.”⁹⁴ Later, she pointed out that judges must make sure that the circumstances in fact coincide with the label given by the parties.⁹⁵ She also commented that this exercise is similar to determining whether a relationship is one of partnership: it is necessary to look to objective evidence, not just to subjective intention.⁹⁶ As when determining whether a partnership relationship exists, it is not the interpretation of the contract, but the nature of the relationship, that must be determined.⁹⁷ Thus, unlike Sharlow JA’s reasons, the reasons of Desjardins JA make the distinction between the two exercises clear.

90 Ibid., at paragraphs 60–62.

91 Ibid., at paragraph 62 (emphasis added).

92 Ibid., at paragraph 60 (emphasis in original).

93 Ibid., at paragraph 64.

94 Ibid., at paragraph 71.

95 Ibid., at paragraph 72.

96 Ibid., at paragraphs 74–75.

97 Ibid., at paragraphs 78 and 79.

Desjardins JA saw value in allowing the common-law judge to look to numerous criteria in determining the legal nature of the relationship, and she agreed with Sharlow JA that intention should not be used only as a tie-breaker. She ends her reasons by leaving open the question whether the concept of the parties' intention is different under the civil law of Quebec.

One uncertainty that arises from the judgments of Sharlow JA and Desjardins JA is how, exactly, intention affects the analysis. While Sharlow JA stated that the other relevant factors should be examined "in the light of" the common intention, is it not clear what this actually means. Beyond citing *Wolf*, there is no commentary in the reasons explaining *why* intention with respect to legal characterization is relevant. In fact, Sharlow JA's reasoning is questionable in that she appears to use authorities that relate to the interpretation of a contract, which cannot be equated with the determination of the legal character of the parties' relationship.

In his dissenting judgment, Evans JA saw little role for intention in determining whether a person is an employee or an independent contractor. He pointed out that in the past courts "have attached little significance to the parties' understanding of the legal nature of their contract, or to their stated intention to enter into a particular kind of contract."⁹⁸ Instead, the legal character of a contract was determined on the basis of terms and conduct.⁹⁹ He observed that it is only recently that courts have weighted intention heavily in a number of employment insurance and CPP cases. He pointed out that the reasoning in these cases has relied, at least in part, on the Quebec Civil Code,¹⁰⁰ while this was the first common-law case that involved the role of intention.¹⁰¹

Evans JA gave several persuasive reasons for minimizing the role of intention. First, he pointed out that legal characterization is an inference of law, which "does not rest on the legal label attached to the agreement by the parties or on their purpose in entering into it."¹⁰² He then distinguished between interpretation of the contract and legal characterization: "The intention of the parties is relevant to determining the terms of the transaction, not to its legal characterization, nor to whether the parties attained their ultimate objective."¹⁰³

Evans JA, like Desjardins JA, used the legal characterization of a partnership as an analogy, though in a very different way. While Desjardins JA used the test for determining whether a partnership exists to make the point that looking to objective

98 Ibid., at paragraph 86.

99 Ibid.

100 Ibid., at paragraph 87.

101 Ibid., at paragraph 88.

102 Ibid., at paragraph 92.

103 Ibid.

evidence was necessary, Evans JA analogized the partnership test to the employee-independent contractor test and identified authorities that showed that declared intention carried little or no weight in determining legal characterization.¹⁰⁴

Evans JA doubted the relevance of the parties' view of the legal characterization of their contract, and questioned how it would fit with the factors from *Wiebe Door*.¹⁰⁵ He also pointed out that the parties' view of the contract is self-serving.¹⁰⁶ Further, he commented that the parties may have differing bargaining powers, and that attributing weight to stated intention may adversely affect the more vulnerable party, who might be denied statutory rights (such as employment insurance benefits) as a result.¹⁰⁷ Finally, he observed that the legal characterization of the parties can have an impact on third parties, such as tort victims and the CRA,¹⁰⁸ stating that this result can "jeopardize"¹⁰⁹ the interests of third parties and "undermine non-voluntary protective statutory programs, such as EI and CPP."¹¹⁰

Evans JA concluded as follows: "In my opinion, the only significant role of the parties' stated intention or understanding about the legal nature of their contract is as part of the interpretative context in which the court views the contract in order to resolve ambiguities and fill in silences in its terms."¹¹¹ It is unfortunate that he does not explain this statement more fully. For example, does it mean that he would support the use of intention as a tie-breaker? Can the parties' label be used to fill in terms on which the agreement is silent, such as the supply of tools, which could affect the *Wiebe Door* analysis? Evans JA's strong statements up to this point in the judgment make it clear that he does not want intention to be given much weight, but this final statement raises the possibility of using intention in some circumstances.

Later arguments in this article against the use of intention incorporate many of Evans JA's points. Unlike the decisions advocating the use of intention, which provide few and weak reasons for introducing such a significant change in the law, the decision of Evans JA provides thoughtful and persuasive ideas.

Cases Following Royal Winnipeg Ballet

Following *Royal Winnipeg Ballet*, it could be expected that the cases would place significant weight on intention. In fact, Kurt Wintermute's study of the jurisprudence, which incorporates cases decided one year after the decision, showed that

104 Ibid., at paragraphs 93-94.

105 Ibid., at paragraph 98.

106 Ibid., at paragraph 99.

107 Ibid., at paragraphs 101-102.

108 Ibid., at paragraph 103.

109 Ibid.

110 Ibid.

111 Ibid., at paragraph 105.

the courts appeared to place increasing reliance on intention.¹¹² However, it remained unclear how intention should temper the analysis. As Bowman J stated in *Lang v. MNR*, “I doubt that it is possible to find one *ratio decidendi* that would apply to all three judgments.”¹¹³

In *City Water International Inc. v. Canada*, the first Federal Court of Appeal case after *Royal Winnipeg Ballet*, the court considered whether the Tax Court judge should have placed greater weight on intention, given the reasons in *Royal Winnipeg Ballet*:

In my analysis, since the relevant factors yield no clear result, greater emphasis should have been placed on the parties’ intention by the Judge in this case. The Judge was required to consider the factors in light of the uncontradicted evidence, and to ask himself whether, on balance, the facts were consistent with the conclusion that the workers were persons in “business on their own account” . . . or were more consistent with the conclusion that the workers were employees.¹¹⁴

This excerpt is interesting in several respects. The first sentence appears to suggest that since the *Wiebe Door* factors did not lead to a conclusion, the judge should have given intention greater consideration. This could be interpreted to mean that intention should be used as a tie-breaker. However, in the second part of the paragraph, the court’s comments are that the factors (presumably the *Wiebe Door* factors) should be considered “in the light of” the “uncontradicted evidence” (presumably of intention). This latter comment coincides with the decisions of Desjardins and Sharlow JJA in *Royal Winnipeg Ballet*. In reality, the court did not seem to perform its *Wiebe Door* analysis “in the light of” the common intention, since common intention was discussed only after the analysis of the other factors. In the end, the court concluded that the Tax Court had erred in not properly considering intention; had it done so, the result would have been a finding of an independent contractor relationship.

In a later case, *Combined Insurance Company of America v. Canada (National Revenue)*, the Federal Court of Appeal appeared to place great emphasis on the role of intention. The court summarized the case law as follows:

1. The relevant facts, including the parties’ intent regarding the nature of their contractual relationship, must be looked at in the light of the factors in *Wiebe Door* . . . and in the light of any factor which may prove to be relevant in the particular circumstances of the case;

112 *Supra* note 9, at 34:21. Wintermute’s research shows that when the parties’ common intention was to have an independent contractor relationship, judges found there to be an independent contractor 57 percent of the time before *Wolf*, 71 percent of the time after *Wolf* and before *Royal Winnipeg Ballet*, and 89 percent of the time after *Royal Winnipeg Ballet*.

113 *Lang*, *supra* note 53, at paragraph 24.

114 2006 FCA 350, at paragraph 31.

2. There is no predetermined way of applying the relevant factors and their importance will depend on the circumstances and the particular facts of the case.¹¹⁵

The court later commented that the *Wiebe Door* factors were “at the very least useful guidelines.”¹¹⁶ This diminishment of the importance of the four-in-one test¹¹⁷ would represent a major change in the jurisprudence, if it were adopted in later cases. In this case, however, the *Wiebe Door* factors appeared to play a major role, and the court concluded that they supported the intention to create an independent contractor relationship.¹¹⁸

In the next Federal Court of Appeal case, *Gagnon v. MNR*,¹¹⁹ after stating that no evidence was provided with respect to intention, the court made the following statement: “However, the four criteria analyzed by the judge are relevant and helpful in ascertaining the intent of the parties to the contract and the legal nature of their relationship.”¹²⁰ In a later Tax Court case, this was taken to mean that intention was given a prevalent role,¹²¹ although intention was not mentioned in the remainder of *Gagnon*. It was also interpreted to mean that the *Wiebe Door* tests can assist in determining intention.¹²²

In *Kilbride v. Canada*, the Federal Court of Appeal considered whether the taxpayer should have been denied business deductions under the ITA on the basis that he was an employee. What is interesting for the purposes of this discussion is that the Federal Court of Appeal appeared to support the use of intention as a tie-breaker: “This is not a close case where the *Wiebe Door* test is inconclusive, requiring the court to give greater weight to the intention of the parties.”¹²³ This interpretation is inconsistent with the decisions of Desjardins and Sharlow JJA in *Royal Winnipeg Ballet*, although this case was cited later in the same paragraph.¹²⁴

In the CPP and employment insurance case of *National Capital Outaouais Ski Team v. Canada*, the Federal Court of Appeal rejected the argument that it should look first to intention and that there was a presumption in favour of intention. The court observed that setting up a presumption in favour of intention would be contrary to the presumption in favour of the minister’s assumption of facts in the area of the insurability of employment.¹²⁵ Assuming that a common test exists across all

115 2007 FCA 60, at paragraph 35.

116 *Ibid.*, at paragraph 38.

117 See Bowman J in *Lang*, supra note 53, at paragraph 31.

118 *Combined Insurance Company of America*, supra note 115, at paragraph 72.

119 2007 FCA 33.

120 *Ibid.*, at paragraph 5.

121 *Lang*, supra note 53, at paragraph 32.

122 *Ibid.*

123 2008 FCA 335, at paragraph 11.

124 *Ibid.*

125 2008 FCA 132, at paragraph 8.

areas of the law, this reasoning is somewhat problematic because similar presumptions would not exist in tort law, for example.¹²⁶ Another problem with the court's reasoning is that, as the judges acknowledge, there is a presumption in favour of the minister's assumed facts.¹²⁷ Such a presumption exists in income tax law as well.¹²⁸ This is the case no doubt because the person applying for insurance or disputing the CRA's position has better access than the minister to information that could rebut the presumption.¹²⁹ However, the legal characterization of a relationship is not a fact; it is a conclusion in law.¹³⁰ Therefore, there should be no presumption in favour of the minister's assumptions regarding the legal character of a relationship (although this point does not mean that there should instead be a presumption in favour of the parties' intention).

A few years later, the Federal Court of Appeal decided the case of *TBT Personnel Services Inc. v. Canada*. The issue was whether truck drivers working for the appellant (TBT) were employees and whether TBT should therefore have paid premiums under the CPP and EIA. Sharlow JA, for the court, summarized what *Wolf* and *Royal Winnipeg Ballet* held about the role of intention:

[W]here there is evidence that the parties had a common intention as to the legal relationship between them, it is necessary to consider that evidence, but it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention.¹³¹

The court began its analysis with the key question: whether TBT engaged the drivers "as a person in business on his own account."¹³² Thus, the intention of the parties did not appear to displace this central question.

Some of the drivers in *TBT Personnel Services* signed a written agreement, while others did not. The Tax Court judge had decided that only those drivers who had signed the agreement were independent contractors. Sharlow JA began by reviewing aspects of the contract that were relevant to the *Wiebe Door* factors, but then reviewed the intention clause, which indicated that the driver was an independent contractor:

126 This reasoning might give rise to the question whether the test should be the same across all areas of the law. See Friedlander, *supra* note 6.

127 *National Capital Outaouais Ski Team*, *supra* note 125, at paragraph 9.

128 *Canada v. Anchor Pointe Energy*, 2007 FCA 188, at paragraph 28; and Pooja Samtani and Justin Kutyan, "Reverse Onus: Time To Reconsider?" (2012) 2:4 *Canadian Tax Focus* 8-9, at 8.

129 *Anchor Pointe Energy*, *supra* note 128, at paragraph 35, citing *Orly Automobiles Inc. v. Canada*, 2005 FCA 425, at paragraph 20.

130 *Kopstein v. The Queen*, 2010 TCC 448, at paragraph 68; and *Strother v. The Queen*, 2011 TCC 251, at paragraphs 21-22.

131 *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, at paragraph 9.

132 *Ibid.*, at paragraph 10.

[S]uch intention clauses are relevant but not conclusive. The *Wiebe Door* factors must also be considered to determine whether the contractual intention suggested by the intention clauses is consistent with the remaining contractual terms and the manner in which the contractual relationship operated in fact.¹³³

The *Wiebe Door* factors, in this case, supported a conclusion that the drivers who signed the agreements were employees, despite the intention clause. Thus, the intention clause did not affect the result. Sharlow JA upheld the Tax Court's decision that the drivers without a written agreement were employees.

To summarize the appellate-level law following *Royal Winnipeg Ballet*, the Federal Court of Appeal cases left questions about whether intention could still be used as a tie-breaker,¹³⁴ the way in which the *Wiebe Door* factors would be analyzed "in the light of" intention,¹³⁵ whether the principal focus of an inquiry is common intention rather than who runs the business,¹³⁶ and what difference intention makes to the analysis if it does not give rise to a presumption.¹³⁷

In the Tax Court, perhaps the most notable case following *Royal Winnipeg Ballet* is *Lang v. MNR*,¹³⁸ in which Bowman J reviewed the existing case law and pointed out that the Supreme Court of Canada had not yet expressed its opinion about the proper role of intention.¹³⁹ Bowman J also highlighted the reasons of Evans JA in *Royal Winnipeg Ballet* and opined that the Supreme Court, if considering the employee-independent contractor test, would have to address Evans JA's reasons for de-emphasizing the importance of intention.¹⁴⁰ He pointed out that trial judges who ignored intention were often overruled, and therefore, while intention cannot be ignored, the weight to be attached to it had not yet been settled.¹⁴¹ He concluded that there were four possible roles for intention:

- (a) Intent is determinative (*Royal Winnipeg Ballet*).
- (b) *Wiebe Door* is all that is needed and intent need not be considered (*Sagaz*, *Wiebe Door* and *Precision Gutters*).
- (c) The *Wiebe Door* test does not point conclusively in any direction and so intent is a tie-breaker (*Wolf* and *City Water*).
- (d) Common sense, instinct and a consultation with the man on the Clapham omnibus.¹⁴²

133 Ibid., at paragraph 35.

134 *City Water International Inc.*, supra note 114; and *Kilbride*, supra note 123.

135 *Combined Insurance Company of America*, supra note 115.

136 *Gagnon*, supra note 119; and *Combined Insurance Company of America*, supra note 115.

137 *National Capital Outaouais Ski Team*, supra note 125.

138 *Lang*, supra note 53.

139 Ibid., at paragraph 33.

140 Ibid.

141 Ibid., at paragraph 34.

142 Ibid., at paragraph 36.

All four of these approaches led to the same conclusion in *Lang*.

A number of observations can be made about the other Tax Court decisions that arose after *Royal Winnipeg Ballet* and before *Connor Homes*. In at least one case, the court described intention as very important.¹⁴³ However, in more cases the court seemed to downplay the role of common intention.¹⁴⁴ Frequently, the court found that the relationship was not as intended.¹⁴⁵ There were different approaches to the use of intention. Some cases added common intention to the list of *Wiebe Door* and other relevant factors.¹⁴⁶ In other cases, the idea of using common intention as a tie-breaker persisted,¹⁴⁷ similar to the ideas expressed in *City Water* and *Kilbride*. Despite *National Capital Outaouais Ski Team*, in at least one case it was suggested that common intention gives rise to a presumption.¹⁴⁸ While a number of judges reasoned that intention must be consistent with objective factors,¹⁴⁹ no direction was given about how the *Wiebe Door* factors should be examined in the light of intention. There was a need for additional clarity.¹⁵⁰

1392644 Ontario Inc. (c.o.b. Connor Homes) v. MNR

The most recent direction from the Federal Court of Appeal is found in *Connor Homes*,¹⁵¹ in which the court fortunately went some way toward clarifying the role of common intention. In this case, the issue was whether persons retained by Connor Homes to deliver foster and group home services were employees of Connor Homes, and thus engaged in pensionable and insurable employment under the CPP and EIA regimes, respectively. The Tax Court agreed with the minister that the workers were

143 *Wellbuilt General Contracting Ltd.*, supra note 37.

144 *Director of Labour Standards v. Acanac Inc.*, 2013 SKQB 21, at paragraph 54, stating “‘on the ground’ conduct may be more determinative of the true relationship”; *Wilford v. MNR*, 2011 TCC 6, at paragraph 19, stating that characterization “is a matter of law and not of private agreement.”

145 *North Delta Real Hot Yoga Ltd. v. Canada (National Revenue)*, 2012 TCC 369; *A-1 Lumpers Inc. v. MNR*, 2012 TCC 243; *Samqo Transport v. MNR*, 2012 TCC 132; *Canadian Bio Pellet Inc. v. MNR*, 2011 TCC 406; *The Girls Gym of Canada Ltd. v. MNR*, 2011 TCC 312; *Steiner v. MNR*, 2011 TCC 146; *1770200 Ontario Inc. v. MNR*, 2011 TCC 65; *TBT Personnel Services*, supra note 131; and *Kilbride v. The Queen*, 2007 TCC 663; aff’d. 2008 FCA 335.

146 *Malleau v. MNR*, 2013 TCC 47; *Samqo Transport*, supra note 145; and *Seeslam Inc. o/p Truepath Logistics v. MNR*, 2010 TCC 243.

147 *Mehta v. MNR*, 2011 TCC 558; *Heineke*, supra note 22; *Integrated Automotive Group v. MNR*, 2011 TCC 468; *Sadden v. MNR*, 2011 TCC 450; *Southland Livestock Feeders Ltd. v. MNR*, 2011 TCC 209; *1772887 Ontario Ltd.*, supra note 30; *Aquazition 2007 Ltd. v. MNR*, 2011 TCC 77; and *Picbugin*, supra note 24.

148 *Maple Elect Zoltan*, supra note 39.

149 *Pro-Pharma Contract Selling Services Inc. v. MNR*, 2012 TCC 60; *MAP*, supra note 35; and *177398 Canada Ltd.* (2011), supra note 26.

150 This was also observed by Wintermute, supra note 9, at 34:20-21.

151 Supra note 57.

employees. One of the arguments made on appeal to the Federal Court of Appeal was that the Tax Court judge did not give appropriate weight to the contracts signed by the parties, which indicated a shared asserted intention to form an independent contractor relationship.

The judgment, for the court, was delivered by Mainville JA, who observed the difficulty of applying the employee-independent contractor test. After reviewing *Wiebe Door* and *Sagaz*, he observed that a “jurisprudential trend has emerged which affords substantial weight to the stated intention of the parties,”¹⁵² citing *Wolf* and *Royal Winnipeg Ballet* but noting the criticism in *Lang*.

Mainville JA reviewed only the decision of Décary JA in *Wolf*, noting the substantial weight he afforded to intention and his comments that without unambiguous evidence to the contrary, the express intention of the parties should prevail, apparently on the basis of freedom to contract.¹⁵³ Mainville JA then summarized Sharlow JA’s reasons in *Royal Winnipeg Ballet*, in which she directed that the *Wiebe Door* factors should be addressed, in light of the common intention, to see whether they are more consistent with an employment or an independent contractor relationship.¹⁵⁴ Mainville JA was careful to reiterate what Sharlow JA had also observed: the parties’ declaration is not determinative.¹⁵⁵

Mainville JA noted the difficulty in applying the decision in *Royal Winnipeg Ballet*,¹⁵⁶ and singled out two cases where a Tax Court judge had interpreted *Wolf* to mean that intention should prevail.¹⁵⁷ To counter these cases, Mainville JA used the dissenting judgment in *Royal Winnipeg Ballet*, in which Evans JA pointed out that, in the words of Mainville JA, “the parties’ view of the legal nature of their contract is inevitably self-serving, the parties to the contract are often not in equal bargaining positions, and the legal characterization of a contract by the parties should not impact on third-parties relying on vicarious liability theories.”¹⁵⁸ Mainville JA used Evans JA’s dissent to limit the role of intention slightly, but not nearly to the extent advocated by Evans JA.

Mainville JA then justified the consideration of the common intention of the parties with freedom-to-contract principles:

However, properly understood, the approach set out in *Royal Winnipeg Ballet* simply emphasises the well-know[n] principle that persons are entitled to organize their affairs and relationships as they best deem fit. The relationship of parties who enter into

152 Ibid., at paragraph 30.

153 Ibid., at paragraph 31.

154 Ibid., at paragraph 33.

155 Ibid.

156 Ibid., at paragraph 34.

157 Ibid., at paragraph 35.

158 Ibid.

a contract is generally governed by that contract. Thus the parties may set out in a contract their respective duties and responsibilities, the financial terms of the services provided, and a large variety of other matters governing their relationship.¹⁵⁹

Mainville JA then limited the impact of intention:

However, the legal effect that results from that relationship, *i.e.* the legal effect of the contract, as creating an employer-employee or an independent contractor relationship, is not a matter which the parties can simply stipulate in the contract. In other words, it is insufficient to simply state in a contract that the services are provided as an independent contractor to make it so.¹⁶⁰

While freedom to contract appeared to justify a consideration of common intention, the legal nature of the exercise reduced its weight. In further support of not permitting parties to determine their status, Mainville JA cited the “far reaching legal and practical ramifications”¹⁶¹ in other areas of the law, and concluded that the legal status must “be grounded in a verifiable objective reality.”¹⁶² Concerns about the ability to manipulate the relationship, the legal nature of the question, and the far-reaching legal consequences dampened the effect of intention. These arguments are addressed later in the article. For now, it is sufficient to comment that a compromise appears to have been reached.

A novel, albeit minor, contribution of *Connor Homes* is its formulation of a two-stage approach. The first stage required a determination of the common intention of the parties.¹⁶³ The court did not state that intention must be mutual to be considered relevant, although it is likely that the courts will continue to consider mutuality to be a necessity. (Indeed, if freedom to contract was the impetus behind the increased focus on intention, it would make sense only to consider the *mutual* intention of the parties.) The decision also noted that the parties’ behaviour could determine common intention, including behaviour with respect to invoices, GST registration status, and income tax filings.¹⁶⁴ The courts have not consistently given great weight to these factors,¹⁶⁵ and it will be interesting to see if the court’s obiter comments will be seen as an endorsement for the placement of greater weight.

The second stage required the court “to ascertain whether an objective reality sustains the subjective intent of the parties.”¹⁶⁶ In the words of Mainville JA,

159 *Ibid.*, at paragraph 36.

160 *Ibid.*

161 *Ibid.*, at paragraph 37.

162 *Ibid.*

163 *Ibid.*, at paragraph 39.

164 *Ibid.*

165 See, for example, *SB Towing*, *supra* note 45; and *SIP Distribution*, *supra* note 46.

166 *Connor Homes*, *supra* note 57, at paragraph 40.

the parties' intent as well as the terms of the contract may also be taken into account since they colors [sic] the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent.¹⁶⁷

This is really nothing new—simply a restatement of Sharlow JA's judgment in *Royal Winnipeg Ballet*. Unfortunately, no examples are given concerning how intention may colour the relationship.

The language used in the next part of the paragraph does not support a presumption in favour of intention, but rather indicates that the *Wiebe Door* test must be used to determine whether a worker is an employee or independent contractor.¹⁶⁸ The court maintained that the "central question at issue remains whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account."¹⁶⁹ Depending on how the decision is interpreted in other cases, intention, as the consideration that colours the rest of the analysis, could displace control and the other factors as the most important consideration. Still, the court stated that "no particular factor is dominant and there is no set formula. The factors to consider will thus vary with the circumstances."¹⁷⁰

The remainder of the judgment in *Connor Homes* may reflect a minor role for intention in practice. In applying its test, the court did not believe that the Tax Court's error in looking to intention last necessarily vitiated its decision.¹⁷¹ The court noted a common intention that the parties were independent contractors, which characterization was contradicted by the evidence. There is nothing in the remainder of the court's analysis of control or other *Wiebe Door* factors to indicate that intention coloured the analysis and differentiated it from that of the lower court. One must therefore wonder whether intention will ever play a meaningful role if it does not lead to a presumption and the courts have not discovered a way to view the *Wiebe Door* factors in the light of the intention.

Cases Following Connor Homes

The Federal Court of Appeal has not ruled on the issue of employee-independent contractor status since *Connor Homes*, although it has heard nearly three dozen cases from lower courts. A review of these decisions reveals how *Connor Homes* has been interpreted and applied. The vast majority of the decisions have involved determining whether workers were engaged in insurable and pensionable income-earning activities under the EIA and CPP. Generally speaking, intention has not played as great a role as one might have expected.

167 Ibid., at paragraph 40.

168 Ibid.

169 Ibid., at paragraph 41.

170 Ibid.

171 Ibid., at paragraph 42.

While most of the signals indicating a minor role for intention after *Connor Homes* have been subtle, in two cases Miller J overtly disagreed with the increased focus on intention. In *Acanac Inc. v. MNR*, the workers argued that they were employees, while the company argued that the workers were independent contractors. Miller J was skeptical about placing emphasis on intention:

Acanac clearly went so far as to have an Independent Contractor Agreement drawn up with independent contractor-like terms. Some might say this illustrates an intention to enter an independent contractor relationship: the more cynical may suggest the true intention does not necessarily go to the legal relationship, but to the result flowing from that: that is, no requirement to make source deductions. Frankly, this has always troubled me about putting any emphasis on the role of intention. Reliance on intention presumes those concerned have some intimate legal knowledge of the distinction between employment and independent contractor. With respect, in many cases, this is an unrealistic presumption.¹⁷²

In *Mallon v. MNR*, the contract indicated that the worker was an independent contractor, but Miller J was again wary of placing undue weight on intention:

This case highlights what is often at the root of these employee versus independent contractor cases, and that is that the involved parties believe they can choose to opt in or out of Employment Insurance. . . . If a worker wants independent contractor status, then with a stroke of a pen the worker has it. . . .

This case also highlights the danger in placing too much reliance on intention in determining the appropriate relationship.¹⁷³

Later in the same case, Miller J interpreted *Royal Winnipeg Ballet* to mean that “stated intention can be ‘disregarded’”¹⁷⁴ and moved on to a detailed criticism of *Connor Homes*:

With respect, turning what was, prior to the *Royal Winnipeg Ballet* case, a one-step approach into a two-step approach, requiring the second step to be an analysis through the “prism” of intention appears to place too great an emphasis on the factor of intention, that can so readily be manipulated with no regard for the true status of the working relationship, but more to the effect of avoiding source deductions.¹⁷⁵

Miller J considered himself bound by the Federal Court of Appeal’s approach, but found that the actions of the parties did not support the intentions expressed in the contract, and therefore found no common intention under the first stage. He then launched into a further criticism of the two-stage test:

172 *Acanac Inc.*, supra note 26, at paragraph 22.

173 *Mallon*, supra note 27, at paragraphs 11-12.

174 *Ibid.*, at paragraph 14.

175 *Ibid.*

I would suggest, with respect, the two step approach is backwards. First, determine the true nature of the working arrangement, through the traditional analysis, and as Justice Noël acknowledged in *Wolf v. The Queen*, if the answer is not definitive, consider the mutual intention. Or perhaps look to intention as just one of the traditional factors such as control, ownership of tools, chance of profit and risk of loss, limiting the analysis to one step. It has always troubled me that this factor received no mention in the Supreme Court of Canada leading case on this issue (*1671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*) yet we now must analyze through the intention prism. As judges we attempt to set tests not just to provide useful guidance for our own analysis, but to provide a helpful roadmap to taxpayers or, in this case, employers and workers. When determining the status of a working arrangement the message must be that the courts will look foremost to the actions and behaviour that define the relationship and determine whose business it is. Indeed, action and behaviour will determine intention, not the other way round. . . . I proceed with caution when factoring intention into the analysis.¹⁷⁶

It is therefore clear that at least one Tax Court judge is dissatisfied with the direction that the Federal Court of Appeal has taken and has advocated for a lesser role for intention.

A review of the cases seems to indicate that the focus has remained on whose business it is (the approach promoted in *Sagaz*), rather than intention.¹⁷⁷ Generally, the Tax Court has also recognized the two-stage approach in *Connor Homes*, with a few exceptions.¹⁷⁸ A surprisingly prevalent problem is a failure in many cases to clearly identify whether there was common intention.¹⁷⁹

Two comments can be made about the recent cases that involve establishing common intention. First, the factors traditionally relevant under the *Wiebe Door* analysis have been viewed in at least one case after *Connor Homes* as being relevant to establishing intention.¹⁸⁰ This is not consistent with the two-stage approach in *Connor Homes*, under which the *Wiebe Door* factors should be considered in the second stage, following a determination of common intention. While the *Connor Homes* approach seems tidier, the reality is that other objective factors, such as the

176 Ibid., at paragraph 15.

177 See, for example, *Marilake*, supra note 47; and *York Region Sleep Disorders Centre Incorporated v. MNR*, 2013 TCC 108.

178 One notable exception is *3142774 Nova Scotia Ltd. v. MNR*, 2013 TCC 129, in which the court suggested that the *Wiebe Door* test is to be applied before looking to intention (if necessary), and then at paragraph 17 the court quoted *Connor Homes*, which promoted the inverse order of analysis. In another case, *Butt v. MNR*, supra note 38, the court appeared to deviate from *Connor Homes* by suggesting that since intention was clear, there was no need to examine the four-in-one test, though on a closer reading of the case, this may have been the result of a finding of a lack of direct contractual relationship.

179 *Guevera v. MNR*, 2013 TCC 193; *York Region Sleep Disorders Centre*, supra note 177; *Marilake*, supra note 47; and *Hann v. MNR*, 2013 TCC 359.

180 *177398 Canada Ltd.* (2013), supra note 53.

status claimed in income tax filings and GST registration, have often been considered to be evidence of common intention (although they have not always proved conclusive).¹⁸¹ However, these factors tend to affect credibility because they can represent a verifiable expression of how a party views the relationship. The *Wiebe Door* factors, by comparison, are less likely to be an expression of subjective intent since even if the party has knowledge of the four-in-one test, the test does not set out a formula for determining legal status. For example, a high level of control in the relationship does not necessarily indicate that the parties intended to create an employment relationship. Using *Wiebe Door* factors to affect the finding of common intention is therefore problematic under the existing two-stage approach advocated in *Connor Homes*.

Second, the courts have found no common intention in many cases.¹⁸² As shown in table 1, of the 29 instances in which the Tax Court has considered the legal character of a person or group since *Connor Homes*, either the court failed to find common intention or failed to make its finding on intention clear in over half of the cases.¹⁸³ In general, when the courts noted shared asserted intention, in writing or otherwise, that the parties acted as independent contractors, they have found a common intention to form such a relationship in 55 percent of the cases. Even when a signed agreement indicated a certain characterization, intention was often not a factor because no common intention was found in at least 8 instances.¹⁸⁴ To support a lack of common intention, the courts have referenced power imbalances (as a result of which one party had no choice but to sign the agreement),¹⁸⁵ lack of attention or knowledge,¹⁸⁶ and the *Wiebe Door* factors.¹⁸⁷ It seems that written expressions of intention may generally be of limited value because power imbalances and a lack of attention or knowledge are quite common.¹⁸⁸ However, in other cases the Tax Court stated that a lack of knowledge of the meaning of independent contractor did not matter¹⁸⁹ and viewed a worker's assertion as an illegitimate attempt to unilaterally change the

181 See *Connor Homes*, supra note 57, at paragraph 39.

182 *Parvaio v. MNR*, 2013 TCC 305; *2177936 Ontario Ltd. v. MNR*, 2013 TCC 317; *La Scala, Peterborough Youth Services*, and *Acanac Inc.*, all supra note 26; and *177398 Canada Ltd.*, supra note 53.

183 The 29 instances are found in 22 cases, up to May 1, 2014. In two cases, multiple groups or individuals were assessed separately. The cases do not include two cases involving personal services businesses, in which intention was not found to be relevant.

184 *La Scala* (three groups of workers), *Peterborough Youth Services*, and *Acanac Inc.*, all supra note 26; *177398 Canada Ltd.*, supra note 53; and *SB Towing*, supra note 45 (two groups of workers).

185 *La Scala*, supra note 26, at paragraph 31.

186 *Peterborough Youth Services*, supra note 26.

187 See, for example, *177398 Canada Ltd.*, supra note 53; and *Gagnon*, supra note 119.

188 *Therrien*, supra note 22.

189 *Sandberg v. MNR*, 2013 TCC 301; and *Robertson Human Asset Management Inc. v. MNR*, 2014 TCC 23.

TABLE 1 Shared Asserted Intention Versus Common Intention

	Common intention						
	Independent contractor		Employee		None/unclear		
	No.	%	No.	%	No.	%	
Shared asserted intention							
Independent contractor . . .	22	12	55	0	0	10	45
Employee	0	0	0	0	0	0	0
None/unclear	7	2	29	0	0	5	71
Total	29	14	48	0	0	15	52

parties' common intention. In *Acanac Inc.*, Miller J did not specify which evidence he relied on in reaching the conclusion that there was no common intention, despite the presence of a signed statement of intention.

The role of intention was reduced in yet another way in the recent case of *Loving Home Care Services Ltd. v. MNR*.¹⁹⁰ Boyle J held that despite a shared asserted intention that the workers were independent contractors, common intention was of little importance because one party did not know what an independent contractor was:

As a general principle, workers who are not informed and do not actually know or understand the differing possible characterizations of their work relationship can not make a very helpful self-characterization of the nature of the legal relationship they have taken on, and certainly not one that can much enlighten or inform the Court's objective consideration of the traditional *Sagaz/Wiebe Door* factors.

In the circumstances of this case, the Court places little weight on the subjective intentions of the workers to characterize their work relationship as independent contractors.¹⁹¹

Boyle J takes a novel approach in considering a lack of knowledge. Rather than using a lack of knowledge to influence the finding of common intention, as had been done in the past, Boyle J used the factor to affect the weight of common intention. This approach is particularly persuasive where, as he suggests, the reason for considering common intention is that the parties have special insight into the legal characterization of their relationship. In this case, a lack of knowledge indicated that their intention was of little or no value. As is discussed later in this article, it is unclear whether special insight of the parties is in fact the reason that the courts have decided to consider intention.

To a great extent, the reasons in the most recent Tax Court decisions do not assign common intention a major role in the decision-making process. As noted above, in *Mallon* Miller J refers to the requirement set out by the Federal Court of Appeal

190 2014 TCC 71.

191 *Ibid.*, at paragraphs 27-28.

that the *Wiebe Door* factors be assessed “through the intention prism.”¹⁹² In the vast majority of cases,¹⁹³ intention was initially discussed, but it was ignored during the *Wiebe Door* analysis; as a result, common intention does not appear to affect the characterization of the parties’ relationship.¹⁹⁴ Either the courts did not think that it is important to the analysis or they did not know how to apply it. Unless the Federal Court of Appeal or the Supreme Court of Canada steps in to clarify the role of common intention at the second stage of the *Connor Homes* approach, the Tax Court may continue to be content to simply ignore intention at the second stage and essentially rely on *Wiebe Door*, as was the case before *Wolf*. I argue later in this article that this is not an unfortunate result.

The fact that a court’s reasons do not reflect a major role for common intention does not necessarily mean that common intention does not affect its decision making. In his study of cases up to 2007, Kurt Wintermute observed that intention appeared to play an increasing role. While a robust comparison of his study to more recent cases is impossible because of a relatively small number of cases and a lack of appellate court decisions, a study of the 29 instances¹⁹⁵ in which the courts have considered the legal character of a person or group since *Connor Homes* does not appear to paint a similar picture. As shown in table 2, of the 24 instances in which either the parties had a shared asserted intention or the court found a common intention of an independent contractor relationship, only 7, or 29 percent, resulted in a finding of an independent contractor relationship.

Finally, a cursory review of non-tax cases, most of which involve wrongful dismissal, shows that intention is often not considered to be a factor, and *Connor Homes* has not been considered to be a leading case.¹⁹⁶ This raises the question whether there will be further divergence among areas of the law with respect to the employee-intendant contractor test.

192 *Mallon*, supra note 27, at paragraph 15.

193 The two exceptions are the thinly reasoned *Vertzagias v. MNR*, 2013 TCC 219; and *Butt*, supra note 38.

194 See *Guevera*, supra note 179; *Therrien*, supra note 22; 3142774 *Nova Scotia Ltd.*, supra note 178; *La Scala*, supra note 26; *Murray v. MNR*, 2013 TCC 220; *Niagara Gorge Jet Boating Ltd. v. MNR*, 2013 TCC 261; *Kouper-FKS Industries Inc. (Modes For Kids Sakes Ltée) v. MNR*, 2013 TCC 315; *Hann*, supra note 179; *SB Towing Inc.*, supra note 45; *Mallon*, supra note 27; and *Robertson Human Asset Management*, supra note 189.

195 See supra note 183.

196 See, for example, *R v. Chilliwack Cattle Sales Ltd.*, 2013 BCSC 1059 (the accused was charged under animal health legislation and regulations in relation to loading ill cattle); *Farmers of North America Inc. v. Bushell*, 2013 SKCA 108 (a wrongful dismissal case); *Hazel v. Rainy River First Nations*, 2013 OJ no. 4990 (ONSC) (a wrongful dismissal case); *Jacobs v. PHAT Training Inc.*, 2014 ABQB 100 (a case involving, among other things, wrongful dismissal); and *Ho v. WFG Securities of Canada Inc.*, 2014 ONSC 1791 (a wrongful dismissal case in which neither *Connor Homes* nor intention was mentioned as a relevant factor, although the parties’ characterization appears to have been a factor).

**TABLE 2 Shared Asserted Intention and Common Intention
Versus Court's Characterization**

		Result			
		Independent contractor		Employee	
		No.	%	No.	%
Shared asserted intention					
Independent contractor	22	5	23	17	77
Employee	0	0	0	0	0
None/unclear	7	4	57	3	43
Common intention					
Independent contractor	14	5	36	9	64
Employee	0	0	0	0	0
None/unclear	15	4	27	11	73
Shared asserted or common intention, independent contractor					
	24	7	29	17	71
All cases	29	9	31	20	69

A review of the cases therefore uncovers three unresolved questions that should be addressed by the Federal Court of Appeal:

1. Should the determination of common intention be affected by power imbalance, lack of knowledge, and the factors normally considered under *Wiebe Door*?
2. Should common intention be given more or less weight in some circumstances?
3. What does it mean to say that the second stage of analysis should be considered “in the light of” common intention?

Since *Connor Homes*, the Supreme Court of Canada denied leave to appeal in the case of *Pluri Vox Media Corp., et al. v. Her Majesty the Queen, et al.*¹⁹⁷ on May 16, 2013, which is unfortunate because granting leave would have given the highest court an opportunity to clarify the role of intention. There are two reasons that the Supreme Court should consider granting leave in such a case. First, the court has yet to endorse the now prevailing, though sometimes criticized, view that common intention is an important aspect of the test. Second, even if common intention should play a role, the Supreme Court should address the previously identified unresolved issues. In the remainder of the article, I consider the ideal way for the Supreme Court to decide the issue, should it grant leave.

THE WAY FORWARD: HOW SHOULD THE COURTS DETERMINE AND USE INTENTION?

This section of the article is aimed at the Supreme Court and the Federal Court of Appeal, which have the power to refine and change the jurisprudence, although admittedly major changes are much more likely to come from the Supreme Court because the Federal Court of Appeal is less likely to overrule its own precedent. In this section, I consider how and whether the issue of intention should influence whether a worker is characterized as an employee or an independent contractor under the CPP, EIA, and ITA. I conclude that intention should play no role. However, given the trajectory of the case law, appellate courts (and the Federal Court of Appeal in particular) may decide that intention should play a role. Therefore, later in this section I explore the ways in which intention could fit into the employee-independent contractor test. Assuming that intention has any relevance, its appropriate role depends on the justification for its consideration.

The Argument Against the Relevance of Intention

Intention should not play a role in determining whether a worker is an employee or an independent contractor for two sets of reasons. The first set discredits any possible justifications for considering intention. The second set examines countervailing factors that favour either no role or a reduced role for intention. Together, these reasons create a strong case against any consideration of intention.

Discrediting the Justifications for Considering Intention

A review of the case law has revealed little explanation of the reasons for considering the intention of the parties. This is somewhat surprising, since the introduction of intention in *Wolf* represented a clear shift in the case law and also since the leading Supreme Court decision in *Sagaz* did not mention intention as a relevant consideration. Nonetheless, it is possible to extract some justifications for considering intention from the cases and to imagine other possible arguments in favour of this position. These arguments are each considered below.

While the Civil Code language was originally referenced in support of considering intention (and is perhaps the most persuasive justification for considering intention in *Wolf*), the test for determining whether a worker is an employee or an independent contractor within the jurisdiction of the Civil Code has essentially merged with the test for common-law jurisdictions after *Royal Winnipeg Ballet*.

RESOLVING UNCERTAINTY

If common intention conclusively determines whether a relationship was one of employee and employer or independent contractor, much of the uncertainty surrounding the legal classification would be eradicated. There are legitimate concerns with the uncertainty created by the existing law, including the financial consequences

of misclassification.¹⁹⁸ In general, courts have often been concerned with creating uncertainty in the area of tax law.¹⁹⁹

If common intention were conclusive, uncertainty would be resolved only if common intention were easily determinable. However, case law has demonstrated that the parties often disagree about intention. Even if written agreements exist, the courts have favoured evidence that leads to a finding of a lack of common intention. Therefore, unless the courts are willing to recognize a written agreement as conclusive, the written agreement would not resolve uncertainty.

Further, to resolve uncertainty completely, the courts would have to agree that intention governs, which is something that they have not been prepared to do. No court has yet held that when common intention is clear, it dictates the legal result, and it is extremely unlikely that a court will ever make such a statement, given the countervailing considerations.

An increased role for intention does decrease uncertainty to some extent. However, the reasons against considering intention, set out below, present more important arguments than the reduction in uncertainty. In addition, there are other options for reducing uncertainty: parties can ask the CRA for rulings,²⁰⁰ laws can be amended to eliminate the distinction between employees and independent contractors²⁰¹ or to introduce bright-line tests,²⁰² and settlement programs can be considered (as have been proposed in the United States).²⁰³

PROMOTING FREEDOM TO CONTRACT AND TAX PLANNING

Décary JA's reasons in *Wolf* could be read to suggest that allowing people to choose to become independent contractors is desirable because they have given up benefits in return:²⁰⁴ the worker "deliberately sacrifices security for freedom,"²⁰⁵ and there is "better pay with less job security."²⁰⁶ While this passage in *Wolf* may focus on control,

198 Clarke, *supra* note 8, at 10:5.

199 *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54; and *Mathew v. Canada*, 2005 SCC 55.

200 Clarke, *supra* note 8.

201 Friedlander, *supra* note 6, at 1514-16.

202 *Ibid.*, at 1517-18.

203 Judson D. Stelter, "The IRS' Classification Settlement Program: Is It an Adequate Tool To Relieve Taxpayer Burden for Small Businesses that Have Misclassified Workers as Independent Contractors?" (2008) 56:2 *Cleveland State Law Review* 451-81, at 468. Stelter describes and critiques the Internal Revenue Service's classification settlement program, which, among other things, allows a "safe harbor" for certain employers who have had a reasonable basis for misclassifying employees as independent contractors (see page 461) and an early settlement program for partial relief when complete relief is unavailable (see page 469).

204 *Supra* note 2, at paragraph 118 and accompanying text.

205 *Ibid.*

206 *Ibid.*

rather than intention, it is nonetheless possible to advance an argument that it is fair for workers to be able to gain some of the advantages of independent contractor status because they have given up some of the important advantages of employment. However, it is inappropriate to view the consequences under the ITA, CPP, and EIA as part of a give-and-take negotiation because the government and members of society in general are not a part of the negotiation.

Décary JA's reasons include other passages connecting freedom to contract with the idea that intention should be considered.²⁰⁷ Another case emphasising freedom-to-contract principles is *Capri Interiors Ltd. v. MNR*, in which the Tax Court, after quoting Décary JA's reasons for judgment in *Wolf*, stated:

Thus, it seems to this Court that the pendulum has started to swing, so as to enable parties to govern their affairs more easily in relation to consulting work and so that they may more readily be able to categorize themselves, without interference by the Courts or the Minister, as independent contractors rather than employees working under contracts of service.²⁰⁸

Mainville JA's reasons in *Connor Homes* viewed the decision in *Royal Winnipeg Ballet* as being based on the freedom to contract,²⁰⁹ although he recognized that the weight of intention needed to be limited.

Parties clearly should be able to negotiate consequences between themselves, which is an important aspect of the freedom to contract. However, this reasoning is incompatible with the situation at hand, in which third parties are involved. Ignoring intention with respect to legal characterization does not interfere with freedom to contract; ignoring intention does, justifiably, interfere with the freedom to determine legal results. One cannot “contract out” of the law. It is conceded, however, that this counterargument does not apply to some areas of the law, such as wrongful dismissal, where third-party interests are not relevant.

Similarly, it is possible to discredit the contention that ascertaining the common intention of the parties is the object of the exercise.²¹⁰ As noted by Desjardins JA²¹¹ and Evans JA²¹² in *Royal Winnipeg Ballet*, there is a distinction between contract interpretation and legal characterization. The focus of contract interpretation is the common intention of the parties, but this is not necessarily the focus of legal characterization.

207 See *ibid.*, at paragraph 119 and accompanying text.

208 2004 TCC 23, at paragraph 20.

209 *Connor Homes*, *supra* note 57, at paragraph 36.

210 See Sharlow JA's decision in *Royal Winnipeg Ballet*, *supra* note 56, at paragraph 59, citing Décary JA in *Wolf*, *supra* note 2, at paragraph 117.

211 *Ibid.*, at paragraphs 78-79.

212 *Ibid.*, at paragraph 92.

Another argument put forward by Déary JA is that recognizing the intention of the parties is consistent with the idea that there is a legitimate right to arrange one's affairs to minimize taxes.²¹³ This idea supports a position that parties can choose to form an independent contractor relationship to gain a tax advantage. However, it does not mean that the legal test for an independent contractor relationship does not need to be met. By analogy, parties can choose the legal form that they use (for example, a lease rather than a sale), but this does not mean that merely calling the transaction a lease is sufficient to make it a lease; the legal requirements of a lease must still be met. The question whether intention *should* play a role in the legal test will be explored further below. Assuming a consistent application of the test across different areas of the law, the other problem with the tax-planning argument is that it would change the law in other legal areas on the basis of tax law principles.

RECOGNIZING SPECIAL INSIGHT OF THE PARTIES

The intention of the parties might be considered relevant if the parties have special insight into the legal characterization of their relationship. If one or either of the parties has expertise that would allow the parties to determine the legal characterization of their relationship better than a judge, it is valid to consider the parties' characterization. However, it seems unlikely that this would often be the case. As Miller J pointed out, it is "an unrealistic presumption."²¹⁴ The courts have struggled to apply the test, and therefore it is difficult to conceive of circumstances in which the parties would be better suited to perform an appropriate legal analysis. Even if the parties seek legal advice, at most it could be said that their expertise is equal to that of judges.

Additional Reasons To Reduce or Eliminate the Role of Intention

To the extent that any of the justifications for considering intention are persuasive, I argue here that they are outweighed by a number of factors.

THE CHARACTERIZATION OF THE WORKER IS A QUESTION OF LAW

In *Wilford v. MNR*, Weisman J stated that "a worker's status in a working relationship is a matter of law and not of private agreement."²¹⁵ Other judges, including Evans JA in *Royal Winnipeg Ballet*, have made similar statements:²¹⁶ "Whether a contract falls

213 Ibid., at paragraph 119. See also paragraphs 118 and 120.

214 *Acanac Inc.*, supra note 26, at paragraph 22.

215 *Wilford v. MNR*, supra note 144, at paragraph 19.

216 *Aquazition 2007 Ltd.*, supra note 147, at paragraph 16; *Canada Post Corp. v. Carroll and Workplace Health, Safety and Compensation Commission of New Brunswick*, 2012 NBCA 18, at paragraph 45, citing *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2001 NBCA 17; and *Wilford v. MNR*, supra note 144, at paragraph 19.

into a particular legal category is an inference of law, drawn from the terms of the agreement and the conduct of the parties. It does not rest on the legal label attached to the agreement.²¹⁷

The statements above are interpretations of existing law in which the courts limited the role of intention. However, whether intention *should* play a role in a legal test cannot depend solely on the matter being a question of law. The legal test could incorporate intention as a factor. In fact, subjective intention is a factor in many areas of law, such as criminal law and intentional torts. What is different about these situations is that intention most often pertains to taking an action or producing a non-legal result. In other words, the law is most often concerned about the intention to deceive or harm someone, not the intention to commit a crime or tort. In the case of contract law, however, the intention to create a binding legal obligation is a prerequisite to the formation of a contract, and therefore intention with respect to legal consequences is relevant.²¹⁸ It is therefore possible that intention with respect to legal characterization (and thus legal consequences) could be a factor in the test for determining the legal character of a worker. The question is whether it makes sense to permit the parties to play a role in dictating these legal effects. The closest parallels exist in relation to other situations in which a contractual relationship has to be characterized. In these cases, as explained in *Joey's Delivery Service*,

the law is concerned with what people actually do and not what they agreed to do. More importantly, the law will not blindly accept the classification label the parties have placed on their relationship. This follows from the equitable doctrine that form does not prevail over substance. For example, one cannot label a document a “lease” that in law is regarded a “licence.” The nature of a working relationship is a legal problem that is to be resolved by legal analysis, not agreement.²¹⁹

Intention, as reflected in the label placed on the relationship in the agreement, has little or no relevance to the categorization of a number of contractual legal relationships, such as the existence of a partnership²²⁰ or the existence of a lease as opposed to a sale.²²¹ In these cases, the courts are concerned with the substance or true nature of the relationship. This raises the question whether there are special circumstances that justify permitting the parties to dictate or influence the characterization as an employee or independent contractor. On the basis of this discussion, the short answer is no. The justifications for considering intention are weak, and the reasons for not considering it are many.

217 *Royal Winnipeg Ballet*, supra note 56, at paragraph 92.

218 Guenter Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003), at 162.

219 *Joey's Delivery Service*, supra note 216, at paragraph 79.

220 *Rezek v. Canada*, 2005 FCA 227, at paragraph 80.

221 *W-5 Pins Ltd. v. Andrejcin*, 2005 SKCA 68, at paragraph 17.

CONTRARY TO THE PURPOSE OF THE DISTINCTION IN THE LEGISLATION

An important question is whether granting parties the opportunity to choose, or even influence, the legal characterization of their relationship is contrary to the purpose of the employee-independent contractor distinction in the legislation and the purpose of the regime as a whole. Lara Friedlander has examined the purposes of the legislation studied in this article,²²² and I rely on her work in the following analysis.

In the case of the ITA, Friedlander observes that the policy reason for distinguishing between employees and independent contractors is not entirely clear²²³ but appears to be “largely one of administrative efficiency.”²²⁴ In fact, the Royal Commission on Taxation recommended abolishing the distinction because of the resulting unfairness.²²⁵ The government’s response to the report confirmed that the distinction would remain in place for administrative reasons; the record keeping by employees and the administrative work by the government to process the returns would be too onerous if employees were permitted to deduct expenses to the same extent that businesses are entitled to do so.²²⁶ An employment credit has been introduced to recognize employment-related expenses,²²⁷ although this only partially addresses fairness concerns.

While there certainly are equity grounds for arguing against the distinction in tax law, employees are generally less likely than independent contractors to incur large expenses relating to their work. According to the *Wiebe Door* factors, employees are less likely to control how work is done, own their own tools, or bear the risk of loss or profit personally, and these factors indicate that most employees incur relatively fewer expenses. In any event, the rules exist for an administrative reason. Such an administrative rule will have no effect if taxpayers can easily manipulate it. To permit such manipulation through subjective intention would be contrary to the purpose of the distinction because it would increase the administrative costs that the rule attempts to curtail. Further, if one looks to equity grounds, there is nothing to suggest that taxpayers with a common intention to be independent contractors are more likely to incur large work-related expenses. Therefore, considering intention does not support the purpose underlying the employee-independent contractor distinction under the ITA.

222 Friedlander, *supra* note 6.

223 *Ibid.*, at 1481.

224 *Ibid.*, at 1482.

225 Canada, *Report of the Royal Commission on Taxation*, vol. 3 (Ottawa: Queen’s Printer, 1966), at 284-85 and 290, cited in Friedlander, *supra* note 6, at 1482.

226 E.J. Benson, *Proposals for Tax Reform* (Ottawa: Queen’s Printer, 1969), at 16, cited in Friedlander, *supra* note 6, at 1483.

227 ITA subsection 118(10).

An even stronger argument can be made against using common intention in the case of the EIA. Friedlander points out that the purpose of the legislation is to “protect people at risk of becoming unemployed.”²²⁸ She reports that there was perceived to be a risk (or moral hazard) that independent contractors could “create the conditions which permit collection of benefits.”²²⁹ Once the line was drawn between employees and independent contractors for benefits purposes, presumably it was concluded that the group that could benefit should fund the scheme, along with their employers, who would control the loss of employment.

A number of judges have commented on the problems with permitting people to opt in or out of employment insurance. For example, in *Royal Winnipeg Ballet*, the Tax Court stated the following:

If “intention” was given the prominence the Supreme Court of Canada appears to have reserved for the control factor, there would be a risk that payors, employers, employees and independent contractors might view it as some endorsement of a right to opt in or out of the employment insurance scheme. It should be borne in mind this is not a voluntary program.²³⁰

If employment insurance were a voluntary program, it would not protect the most vulnerable. For example, the Tax Court has stated in an employment insurance and CPP case that giving too much weight to labels “would give true employers the ability to unjustly deprive their true employees of many benefits that have been legislated by Parliament and its provincial counterparts.”²³¹

There are two principal aspects of being an employee under the employment insurance scheme: the benefits if unemployed and the unavoidable premiums. Workers might see short-term advantages to being classified as independent contractors when they sign a contract, but may then change their minds and wish to be employees later on when the contract is terminated. Because of the subjective nature of intention, there is scope for manipulation, and courts have recently found a lack of common intention despite a written agreement indicating independent contractor status in situations where the worker was seeking employment insurance benefits.²³² If part of the reason for excluding independent contractors from benefits is the moral hazard or potential for manipulation, then allowing this type of manipulation seems to contradict the purpose of the distinction.

228 *Supra* note 6, at 1484.

229 Canada, Commission of Inquiry on Unemployment Insurance, *Report* (Ottawa: Minister of Supply and Services, 1986), at 239, quoted in Friedlander, *supra* note 6, at 1484.

230 *Royal Winnipeg Ballet*, *supra* note 83, at paragraph 31. See also Miller J in *Mallon*, *supra* note 27, at paragraphs 11-12.

231 *Dynamex Canada Corp. v. MNR*, 2010 TCC 17, at paragraph 34.

232 *Peterborough Youth Services and Acanac Inc.*, both *supra* note 26; and *177398 Canada Ltd.*, *supra* note 53.

For employers, there is only a negative side to employment status: premiums. Therefore, there is a strong incentive to classify the relationship as something other than employment. Given the power and knowledge advantage of employers in most cases, permitting common intention to play a role in determining legal status is contrary to the purpose of the scheme because it will deny protection to those most vulnerable to unemployment.

Friedlander reports that the distinction between employees and independent contractors in relation to CPP is not great because they both must pay premiums, although the calculation and collection method varies.²³³ The fact that employers must contribute to premiums is tied to the “general understanding that CPP contributions ought to be paid by both employers and employees.”²³⁴ Moreover, there is a “perception that employers ought to take some responsibility for financing the CPP.”²³⁵ This public perception is inconsistent with an opt-out regime.

Under the ITA, EIA, and CPP, considering intention appears to be contrary to the reasons for the distinctions that are based on working status. Although the test will be most at odds with these regimes if intention is given great weight, even assigning a lesser tie-breaking role to intention can influence outcomes and thus create conflict with the legislative purpose of the distinction.

NEGATIVE IMPLICATIONS FOR THIRD PARTIES

Judges have pointed out that third-party interests are at stake, and several distinct ideas are embedded in this language.²³⁶ In some cases, third-party interests refer to government interests that lie at the heart of the legislation. For example, the Federal Court of Appeal has commented that “the State may have an interest in ensuring that laws establishing payroll taxes for employers and employees are complied with.”²³⁷ In other cases, third parties are tort victims.²³⁸ Since third parties are, by definition, not part of the agreement, this argument can be used to defeat a freedom-to-contract justification for considering the intention of the parties.

Since the distinction between employees and independent contractors has, to a large extent, been consistent across many areas of the law, Mainville JA in *Connor Homes* points out that the ramifications of permitting parties to dictate their characterization is far-reaching:

Because the employee-employer relationship has important and far reaching legal and practical ramifications extending to tort law (vicarious liability), to social programs (eligibility and financial contributions thereto), to labour relations (union status) and

233 Friedlander, *supra* note 6, at 1485.

234 *Ibid.*

235 *Ibid.*

236 Evans JA uses the term in both senses in *Royal Winnipeg Ballet*, *supra* note 56, at paragraph 102.

237 *Grimard v. Canada*, 2009 FCA 47, at paragraph 34.

238 *Aquazition 2007 Ltd.*, *supra* note 147, at paragraph 17.

to taxation (GST registration and status under the Income Tax Act), etc., the determination of whether a particular relationship is one of employee or of independent contractor cannot simply be left to be decided at the sole subjective discretion of the parties.²³⁹

While this argument was made in favour of limiting the role of intention, it seems that giving any role to intention should be avoided for the same reasons. However, if the courts distinguish the employee-independent contractor test across different areas of the law, the third-party-interest argument will not be relevant in some instances, such as wrongful dismissal cases.

INCENTIVE TO CHARACTERIZE

Judges have made the point that there is often an incentive to characterize a relationship in order to gain certain advantages.²⁴⁰ Granting parties the ability to characterize the relationship raises fairness issues because of the advantages that they may gain. In some cases, these advantages may be tempered by disadvantages. For example, in the case of employment insurance, workers will save premiums if they are characterized as independent contractors, but will not qualify for benefits if they later become unemployed. Nonetheless, there will be a temptation to manipulate the system to align one's position with what is perceived as most advantageous at the time. This manipulation may manifest as a written contractual term or in a subsequent argument that the term did not reflect a common intention when a party later tries to apply for benefits or gain certain tax advantages.

In cases under the ITA involving personal services businesses, the courts have made it clear that intention is not relevant when determining the status of a worker.²⁴¹ Personal services businesses are corporations that are treated as employees to ensure that they are not used to manipulate the tax system by gaining business treatment and favourable corporate tax rates for workers who would normally be employees.²⁴² Since the possibility of manipulation is great with personal services businesses, it makes sense that the courts have not considered intention to be relevant. This possibility also raises the question whether this reasoning should be extended to the employee-independent contractor test more generally: if manipulation of the test through stating intention can give rise to unfair advantage and is contrary to the purpose of the law, then should intention not be eliminated as a factor?

239 Supra note 57, at paragraph 37.

240 Evans JA's dissent in *Royal Winnipeg Ballet*, supra note 56, at paragraph 99, describes it as "inevitably self-serving." See also *Connor Homes*, supra note 57, at paragraph 35; and *Mallon*, supra note 27, at paragraph 14.

241 *G & J Muirhead Holdings Ltd. v. The Queen*, 2014 TCC 49, at paragraph 4; *Gomez Consulting Ltd. v. The Queen*, 2013 TCC 135, at paragraph 10; *609309 Alberta Ltd. v. The Queen*, 2010 TCC 166, at paragraph 23.

242 ITA paragraph 18(1)(p) and subsection 125(7) definition of a "personal services business."

STATED INTENTION DOES NOT NECESSARILY REFLECT THE PARTIES' TRUE INTENTIONS

Even if it could be argued that the parties' true intentions about the character of their relationship are relevant, there are a number of reasons why the stated intention in a contract may not reflect the parties' true desires about the nature of their relationship. First, one or both parties may not know the meaning and consequences of the terms "employee" or "contractor." Without this knowledge, it is difficult to attribute intention. Second, a party with little bargaining power, most often the service provider, may be coerced into signing an agreement with the service recipient to indicate a particular characterization.²⁴³ If intention is given great weight, this might lead to a loss of benefits, including EIA benefits.²⁴⁴ Both lack of knowledge and lack of bargaining power can also be used to rebut the freedom-to-contract and special insight arguments, as discussed above.

The Factors Point to Not Considering Intention

Many of the reasons for not considering intention have been used by the courts to limit the role of intention. However, since the analysis in this section shows that there is no persuasive reason to consider intention and there are many reasons not to do so, I take a stronger position: intention should not be considered relevant in determining whether a worker is an employee or independent contractor in ITA, CPP, and EIA cases. The disadvantages far outweigh any minimal benefit of considering intention.

Exploring the Options for Considering Intention

For the time being, the Tax Court must follow precedent and consider intention. Although it has been argued that intention should not be considered relevant to the employee-independent contractor characterization, I acknowledge that appellate courts may not share this point of view. The Federal Court of Appeal, in particular, may be uncomfortable with discarding intention as a factor now that the court has continued to insist on its relevance in a number of cases. Even the Supreme Court of Canada may be convinced that there is some value in considering intention in light of these cases. If appellate courts continue to consider intention to be relevant, what are the options for incorporating intention into the decision-making process? Most of the options discussed below have been advanced in one or more decisions following *Wolf*.

Tying the Role of Intention to the Reason for Considering Intention

Before considering the various options, it is necessary to explore why intention is relevant because this question may bear on the matter of how intention should be

243 Evans JAs dissent in *Royal Winnipeg Ballet*, supra note 56, at paragraphs 101-2.

244 Ibid.

used. Possible justifications, discussed above, included resolving uncertainty, promoting freedom to contract, and recognizing special insight of the parties. While I have argued that none of the reasons is sufficient to warrant considering intention, the courts may view them as having some merit.

If resolving uncertainty is the reason for considering intention, then intention should automatically govern the relationship, assuming that there are no countervailing factors. Of course, many factors against considering intention have been discussed above, which could justify intention playing a lesser role. At some point, though, the test offers no certainty, and the need to consider intention becomes questionable. If allowing parties to achieve some degree of certainty is the goal, then a clear shared intention should be necessary to show that the parties sought this certainty.

If freedom to contract and plan for taxes are used as justifications, the parties should be shown to have freely and knowingly agreed to a particular characterization. Therefore, power imbalance or lack of knowledge should either result in no common intention or result in common intention being irrelevant. Again, countervailing factors justify tempering the dominant role of intention.

If special insight of the parties into the legal characterization of their relationship is the reason for considering intention, then intention should be assigned differing weight in accordance with the knowledge and expertise of the parties. Since this factor is based on expertise and knowledge, the intention of one party, even if not shared by the other party, could be considered relevant. Special insight exists only when a party has insight that exceeds that of a judge regarding the application of the legal test for classifying the relationship.

If the courts state the justification for considering intention, the consideration of intention will be given legitimacy, and it will be easier for the courts to determine the appropriate role of intention.

Options for the Role of Intention

COMMON INTENTION PREVAILS

In a few cases,²⁴⁵ it has been suggested that common intention is the dominant consideration. The Tax Court speculated that the Supreme Court may make common intention determinative:

Following a review of the aggregate jurisprudence—including *Sagaz*—the Supreme Court of Canada might decide that under certain circumstances—such as the absence of coercion, sham or egregious disparity in bargaining power—the mutual intent of the parties to the working relationship could be determinative of status.²⁴⁶

245 *Kootenay Doukbobor Historical Society v. MNR*, 2010 TCC 256; *Wellbuilt General Contracting Ltd.*, supra note 37; and *Malleau*, supra note 146.

246 *Kootenay Doukbobor Historical Society*, supra note 245, at paragraph 28.

While this approach has the advantage of certainty, particularly when the common intention is clearly expressed by the parties at the time of the contract, it invites all of the criticisms already discussed in this section. Perhaps most importantly, it has the potential to destroy important aspects of the CPP, EIA, and ITA regimes that depend on maintaining the distinction between employees and independent contractors. Most courts seem to recognize the dangers of leaving the characterization in the hands of the parties, and therefore it seems unlikely that they would pursue this option.

AN ADDITIONAL FACTOR

In some cases, intention has been simply added to the factors from *Wiebe Door*.²⁴⁷ This approach does not add certainty, but burdens the courts with considering another factor. If this approach is taken, direction should be given to the lower courts with respect to determining the appropriate weight to assign to intention. If freedom to contract and special insight of the parties are justifications for considering intention, then a lack of knowledge, a lack of special insight, and the existence of a power imbalance should dictate the assignment of lesser weight in the event of a finding of common intention. The danger with this approach is that it is difficult to ensure that intention is not given undue weight, thereby allowing the parties to control the legal result. Courts would be well advised to assert that certain factors (for example, control) are more important than intention.

TIE-BREAKER

The option of using common intention as a tie-breaker, as has been suggested in a number of cases,²⁴⁸ is convenient for courts and gives more clarity to the role of intention than many of the other options do. Unfortunately, it may give rise to the temptation to use intention as a tie-breaker without first undertaking a hard analysis; in fact, lower courts may feel that their judgments are safe from appeal if they use intention as a tie-breaker when the decision is otherwise very difficult. Using common intention as a tie-breaker does not allow courts to give lesser weight to common intention, for example, when knowledge is minimal or when the parties have no special insight. If intention is used only as a tie-breaker, the courts are faced with either finding no common intention or using common intention to determine the result of the case if the other factors are inconclusive.

247 *Seeslam Inc.*, supra note 146; *Samgo Transport*, supra note 145; and *Malleau*, supra note 146.

248 *City Water International Inc.*, supra note 114; *Maliyar v. The Queen*, 2006 TCC 671; *Heineke*, supra note 22; *Integrated Automotive Group v. MNR*, 2011 TCC 468; *Sadden v. MNR*, 2011 TCC 450; *Southland Livestock Feeders Ltd. v. MNR*, 2011 TCC 209; *1772887 Ontario Ltd.*, supra note 30; *Kilbride v. Canada*, supra note 123; *Direct Care In-Home Health Services Inc. v. MNR*, 2005 TCC 173.

PRESUMPTION

If common intention gives rise to a presumption, as some cases suggest,²⁴⁹ the results may be much the same as in the case of a tie-breaker. Common intention would play a role only if the result of the *Wiebe Door* analysis were unclear. However, by setting common intention up as a presumption, it may be even more likely that the courts will forgo a full *Wiebe Door* analysis and that common intention will be granted undue weight.

INTENTION MUST BE SUPPORTED BY FACTS

Many cases declare that intention must be supported by the facts.²⁵⁰ For example, in *Wilford v. MNR*, the court stated, “Such understandings will be given weight only if the terms and conditions of the parties’ working relationship are congruent with their common intention, according to the *Wiebe Door* factors examined above.”²⁵¹ Without a presumption in favour of intention, a tie-breaker role for intention, or even an instruction that intention should colour the objective factors, common intention would play no role in a decision. There would be no point in requiring a court to determine common intention.

CONSIDER OBJECTIVE FACTORS IN LIGHT OF INTENTION

The current prevailing view is that it is necessary to consider objective factors in light of subjective intention.²⁵² In addition, some judges have stated that although intention must be supported by the facts, the facts must be considered in light of or through the prism of intention.²⁵³ In other words, intention should colour the *Wiebe Door* analysis.²⁵⁴ This approach potentially allows intention to play a greater role in decisions, but a review of the recent cases does not suggest that intention has affected the results. This may arise from a lack of comprehension concerning how intention colours the facts. It would be helpful if appellate courts could provide more guidance to lower courts on this matter.

Presumably, the reason behind viewing objective factors in light of common intention is that common intention can help fill in gaps in the evidence. As explained above, this can be rationalized only if both parties understand that certain expectations concerning the obligations of the parties flow from the use of a particular label.

249 *Vida Wellness Corporation (Vida Wellness Spa) v. MNR*, 2006 TCC 534; *Maple Elect Zoltan*, supra note 39.

250 See *TBT Personnel Services*, supra note 131; *York Region Sleep Disorders Centre*, supra note 177; *Thebriën*, supra note 22; *La Scala*, supra note 26; and *Vida Wellness Corporation*, supra note 249.

251 *Wilford*, supra note 144, at paragraph 19.

252 *Connor Homes*, supra note 57, at paragraph 33; *City Water International Inc.*, supra note 114, at paragraph 31; and *Royal Winnipeg Ballet*, supra note 56, at paragraph 64.

253 *Mallon*, supra note 27, at paragraph 14.

254 *Connor Homes*, supra note 57, at paragraph 40.

It is difficult to make this leap since there is no checklist of requirements that must be present in an independent contractor or employment relationship, but merely a set of factors to be weighed.

No Obvious Role for Intention

There is no best approach for considering intention. If intention is to be considered, appellate courts should set out the justification for doing so. In this way, the underlying rationale can help to guide the use of intention.

CONCLUSION

Recently, the case law has evolved to consider the intention of the parties concerning the legal characterization of their relationship, despite a longstanding body of case law that did not take intention into account, concern by judges about the appropriateness of considering intention, and a lack of endorsement by the Supreme Court of Canada. The way in which intention will affect the analysis in practice is still unsettled.

Intention with respect to legal characterization should not play a role in determining whether a worker is an employee or an independent contractor in CPP, EIA, or ITA cases. There are no convincing reasons for considering intention and a number of valid arguments against its use. Should appellate courts continue to find a role for intention, they should make their reasoning clear so that it can be used to resolve issues relating to the determination and the role of intention.

Part of the reason for considering intention may be the difficulty of applying the *Wiebe Door* test, especially when coupled with a lack of understanding of the purpose of the distinction between employees and independent contractors under the ITA, EIA, and CPP (beyond administrative convenience). The bigger question is whether legislation should be amended to set out a new test or perhaps to eliminate the distinction.