

A Warning to Refereeing Associations Before It's Game Over

By: Ronald A. Petersen

Although the difference between an employee and an independent contractor may seem readily appreciated by anyone who has ever held a job, some employment relationships are truly difficult to categorize. Such is the case with amateur sports officials who have considerable claim to being independent contractors even though they appear to have some employee-like attributes.

The classification is not trivial for either the refereeing associations or amateur sports officials, as the legal implications of falling within the boundaries of either category are considerable. Indeed, determining whether amateur sports officials are employees or independent contractors poses significant liability, tax and labour ramifications.

The Implications

A finding that sports officials are employees will inevitably place all refereeing associations within the framework of labour legislation such as the [Employment Standards Act, 2000, S.O. 2000, c. 41](#). This will place an enormous burden on, and probably cripple most, if not all, refereeing associations that generally operate as not-for-profit organizations since they already have limited resources and finances. Associations' managers would suddenly be on the hook for worker's compensation, leave compensation, unemployment taxes, CPP payments, vacation pay, termination notice requirements and severance pay, to name but a few. Associations would also have to be concerned about claims of vicarious liability for the actions of an official while on the job.

From a legal and financial perspective, there seem to be few benefits that flow to refereeing associations if amateur sports officials are deemed employees.

The Law

Supreme Court of Canada in *Sagaz*

The common law is rife with employment cases that distinguish between an independent contractor and employee. In [671122 Ontario Ltd. v. Sagaz Industries Canada Inc., \[2001\] 2 S.C.R. 983](#) the Supreme Court of Canada outlined a number of factors to consider when assessing the relationship. The court placed considerable emphasis on the degree of control exerted by the employer over the worker, and decided that the intention of the parties in an employment contract should not be the focal point of the inquiry, since what is contracted on paper does not necessarily reflect the true relationship between the employer and the worker.

Federal Court of Appeal in *Royal Winnipeg Ballet*

The most recent appellate decision on this issue arose in the context of taxation law, and comes from the Federal Court of Appeal (“FCA”) in [*Royal Winnipeg Ballet v. M.N.R. \(F.C.A.\)*, \[2007\] 1 F.C.R. 35, 2006](#). In this case, the FCA considered the factors outlined in *Sagaz* as a means of deciphering the nature of the work relationship; however, in contrast to *Sagaz*, it placed more emphasis on the intention of the parties. The FCA held that even though the ballet company exhibited a significant degree of control over the dancers, by choosing the works to be performed, assigning the roles, providing the choreography, directing the performances and establishing the time and location of the performances, the understanding amongst the company and the dancers was that they were independent contractors.

Interestingly, in dispelling the control factors that worked against a finding of ballet dancers as independent contractors, as mentioned above, the FCA reasoned that the level of control exerted over the dancers was no more extensive than what would be required if the company were to retain “guest dancers”, who are indisputably held out to be independent contractors.

Some of the other factors examined by the FCA that are in line with an independent contractor relationship include:

- a dancer is free to accept an assignment for live performances with another company if such is permitted in the individual contract;
- a dancer retains ownership of his or her image;
- a dancer bears certain costs such as maintaining his or her fitness, physical conditioning, rehearsal wear, makeup, orthopedic devices, and other health items; and
- a dancer is a GST registrant, and charges the company GST for his or her services.

The Referees as Independent Contractors

In Canada, neither a court nor an administrative board has yet to adjudicate on the issue of whether amateur sports officials qualify as independent contractors. There have been several claims by referees for vacation pay, but these were settled outside of court.

Accordingly, it may be useful to consider some of the principles enunciated in *Sagaz* and *Royal Winnipeg Ballet* as they might apply to amateur sports officials. Most of these, if true, suggest that amateur sports officials are independent contractors, at least within the context of employment law.

Degree of Control

- Refereeing associations do not exert much control over referees; they simply allocate game assignments.
- Referees are free to accept or reject game assignments.
- Referees are responsible for their transportation to and from the games.

- Associations do not control referees' hours, other than by offering a date and time, nor do they place pressure on referees to accept more assignments.
- Referees do not have to report to the association on a regular or defined basis.
- Although referees' behaviour is governed by a code of conduct, they are not under the direct supervision of the association.
- Referees are responsible for maintaining their own physical fitness.

Ownership of Tools and Equipment

- Referees purchase their own protective equipment and uniform.

Method of Payment

- Referees are usually paid per game assignment.

Regularity of Employment

- Referees are permitted to join more than one officiating association.

Integration

- Officiating is a contract for service, which means that although a referee's work is for the business, it is ancillary to it.

On the other hand, there are at least two factors that suggest that amateur officials are employees. One of these is the financial risk or economic gain associated with the respective work. In sports officiating, there is no risk of financial loss because an official's livelihood is not usually dependant on income from refereeing. That is, money made from refereeing is, at most, viewed as a bonus, and certainly not as the main source of income. Second, as is often the case, an official's uniform displays the logo of the association so as to advertise that the official belongs to or works for a specific employer.

The American Viewpoint

In the United States, this issue surfaced in the labour context before the National Labor Relations Board in 1986. In that case, the NLRB denied officials the ability to collectively bargain because they were independent contractors, not employees.

There are also several states that have passed legislation in various contexts, which stipulate that amateur sports officials are independent contractors.

Some Concluding Thoughts

It is difficult to assess what the courts or legislature will decide on the issue. In the meantime, it is important for managers of refereeing associations to avoid placing undue emphasis on what is stipulated in the “employment” contract, and to consider adopting some of the following suggestions:

- Obtain a written acknowledgement of independent contractor status from the referees yearly.
- Hold separate trust accounts for income purposes.
- Permit referees to accept game assignments from other organizations, subject to warnings that they may not have proper insurance coverage.
- Require referees to purchase their own equipment, including uniforms, even if their choice is limited to one that has a specific logo on it.
- Minimize pressure on referees to accept more game assignments.
- Minimize supervision of referees, other than enforcing standards.
- Avoid employing your own league organization referees, since referees who work exclusively for a league are more likely to be seen as employees.

These suggestions, if implemented, may help characterize the work relationship as one that will relieve refereeing associations of onerous legal and financial requirements of an employer-employee relationship.

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