



## THE EMPLOYEE VS. INDEPENDENT CONTRACTOR DEBATE

### BACKGROUND

Approximately 16 years ago, CA4IT member, Wall & Associates, Chartered Accountants, began advising IT contractors that they may be able to take the position that they were independent contractors and that they could incorporate their business to realize significant tax advantages. Today CA4IT member firms in Vancouver, Calgary, Edmonton, Winnipeg, Toronto, Ottawa and Montreal serve approximately 3,000 IT contractors and are recognized nationally as a leader in the employee vs. independent contractor issue. Sixteen years ago the possibility that an IT software developer could be an independent contractor was considered an aggressive tax strategy. The majority of professional accountants took the position that such individuals would be considered to have set up a “personal service corporation” and, consequently, would gain no tax advantages from incorporation, as they would be deemed to be employees.

### THE WIEBE DOOR CASE

In 1986 the Wiebe Door Case decision set the precedent for the criteria to be used for deciding the employee vs. independent contractor debate. The Wiebe Door Case established the following criteria to be used:

1. The extent to which the employer controls how the work is done
2. The risk of profit or loss
3. The ownership of tools
4. The extent to which the work performed is an integral part of the process in the employer’s business

In 15 years of experience in representing IT software developers, the CA4IT member firm of Wall & Associates, Chartered Accountants has represented thousands of IT contractors regarding the independent contractor issue and has never lost a case to Canada Customs & Revenue Agency on this issue. The main considerations and arguments can be summarized as follows:

The primary measurement is the extent to which the employer controls what work is to be done and how the work is to be done. If, under the terms of a contract, the employer could say to the IT software developer, “Mary, we are extremely busy in the shipping department today. Go over there, report to Bill and help them out,” then it would be reasonable to infer that the individual would be an employee. In the case of IT software developers, they are hired to develop software based on their background and expertise and are not counselled as to how they should do their job.

The second criteria identified in the Wiebe Door Case was the potential for profit or loss. The courts have found IT software developers liable for damages as a result of negligence and, for this reason alone, there is a risk of profit and loss. Generally this risk can be underwritten through payment of a comprehensive general liability insurance premium of about \$300.00/year.

The third criteria is the ownership of tools. The tools of the IT software developer are generally considered to be the education, background and experience of the individual coupled with personal computers and offices in their homes.



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The fourth and final criteria is the extent to which the work performed is an integral part of the business of the employer. In the Wiebe Door Case, the installation of the doors was not considered an integral part of the door manufacturing process, just as the development of new software to improve the business processes of the employer has not been considered an integral part of the employer's business.

### CANADA CUSTOMS & REVENUE AGENCY'S POSITION ON THE ISSUE

Canada Customs & Revenue Agency has been successful in the courts in substantiating a degree of control in a situation where a placement agency places an unincorporated contractor at a client site. In these situations, the IT worker is generally directly remunerated by the placement agency as opposed to the client of the placement agency who may have some degree of control over the individual. The precedent that has been set in the courts for these situations is that the IT worker is to be considered an employee for the purposes of Canada Pension, Employment Insurance and, in Ontario, perhaps even the Employee Health Tax, but they are to be considered self-employed for tax purposes. If the IT individual is working through an incorporated entity, Canada Customs & Revenue Agency has not been able to establish any degree of control and the workers have been ruled to be independent contractors.

### THE BENEFITS OF INCORPORATING

The tax benefits of incorporating are substantial. IT clients of CA4IT Associate firms average over \$125,000.00 of gross revenue from consulting and pay an average of 18% of gross revenue for all personal and corporate taxes. Clients of IT staffing receive a complimentary one hour, no obligation consultation to discuss a tax strategy suitable for their personal circumstances. To make an appointment for a free consultation, please contact [CustomerService@ca4it.com](mailto:CustomerService@ca4it.com)



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