IADC COMMITTEE NEWSLETTER

TRANSPORTATION

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IN THIS ISSUE

This article discusses the misclassification of employees as independent contractors, and how this trend has impacted the class-action landscape in Canada. It also provides private motor carriers with useful tips and guidelines to protect them as Canadian courts continue to address employee misclassification.

The Stakes Just Got Higher!
With the $150 million Pizza Hut Class Action – Do Independent Contractors Fit Your Business Model?

ABOUT THE AUTHORS

Johann Annisette is an Associate in Alexander Holburn's Toronto office and is a member of the firm's Insurance and Business Disputes practice groups. He has experience conducting complex legal research on a variety of matters related to product liability, the duties of officers and directors, and class action certifications. He has negotiated successful settlements for several clients in the transportation industry, including settling a contentious matter for a client with Transport Canada. Johann has also successfully represented clients across a number of industries before the Ontario Superior Court of Justice. He can be reached at jannisette@ahbl.ca.

Heather C. Devine is one of Canada's leading transportation lawyers. From 2014-2020, she has been recognized as one of the *Best Lawyers*® in Canada for Transportation Law, and is the current President of the Canadian Transport Lawyers Association. Heather was admitted to the Ontario bar in 1999 and the Nova Scotia Bar in 1998, and has a J.D. law degree from Queens University. Heather worked as a commercial litigator until learning to fly single engine planes in 2009, which led her to focus in transportation law. Since then, her focus has included combining technology, transportation, and intellectual property to advise clients such as brokers, freight forwarders, carriers, and other clients who move goods locally and internationally. She can be reached at hdevine@ahbl.ca.

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This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. Learn more about the Committee at www.iadclaw.org.

Adam Rust
Vice Chair of Newsletters
Lewis, Thomason, King, Krieg and Waldrop, P.C.
arust@LewisThomason.com

Some Private Motor Carriers still utilize independent contractor drivers in their business model. However, we ask: will that model continue, or will it be conquered by successful lawsuits brought by misclassified employees who demand damages for unpaid employee benefits, minimum wage, and employment insurance and pension contributions?

As lawyers who track these legal developments, we predict that without legislative change, the role of independent contractors is being narrowed to the point that very few can ever meet the qualifications truly required to be recognized as an independent contractor. If so, then the stakes are very high for companies if their independent contractors be found to be misclassified employees.

Given this trend – we advocate dealing with these issues directly in the Independent Contractor Agreement, by implementing terms and conditions which limit potential awards of damages in the event of misclassification.

Let me explain why.

What's New?

Mr. Liubomir Marinov, a driver for Pizza Hut, is the representative plaintiff in a $150m lawsuit where he alleges, on behalf of many delivery drivers, that he is a misclassified employee. Simply put – despite being hired to be an independent contractor, Mr. Marinov's statement of claim alleges that he was in fact an employee, and entitled to the rights and privileges of an employee.

Mr. Marinov claims he worked for a Toronto-area Pizza Hut since 2005, initially being paid $4.50 per delivery, plus tips. At the onset of the COVID-19 pandemic in Spring 2020, he was paid an hourly rate of $8.00 per hour, which was then increased to $10.00 per hour later in the year. These hourly rates are below minimum wage in Ontario, which is $15.00 per hour.

As an employee, the rights and privileges to which he would be entitled include: Ontario's minimum wage, the expenses of the deliveries (i.e. gas and car expenses), and the expense of being a licencee or user of Pizza Hut's in-house app called Dragon Drive. He also claims employment insurance benefits and pension contributions that Pizza Hut would have been required to pay under the law, had he been classified as an employee.

This class action claim is at its early stages. It is not yet certified, nor have the allegations been proven in Court. We set out the claims, however, because it enables the reader to consider the facts as presented by a person claiming to be a misclassified employee.

Why Are the Damages Claimed so High?

The damages claimed are high: $150 million. The damages include not only the value of the rights and privileges we set out above,

but they reflect the size of the Pizza Hut enterprise. It is the second largest chain in Canada, and is alleged to have around 18,000 restaurants, in 100 countries.

This means that there could be an extremely large number of workers who have been misclassified and would have to be appropriately compensated if a decision is made in their favor.

Other Similar Cases for Comparison

Mr. Marinov is not alone in initiating such a high value claim. In Ontario, proposed class actions have proliferated in recent years, where plaintiffs have alleged systemic misclassification of employees as independent contractors.

- On June 12, 2020, Amazon delivery drivers commenced a proposed class action for $200 million.
- In October 2021, a similar proposed class action seeking $200 million was commenced against Instacart on behalf of full-service shoppers.
- Notably, in August 2021, the Ontario Superior Court of Justice certified a landmark $400 million class action lawsuit against Uber. The action was originally filed in 2017 and alleges that UberEATS drivers are employees, not independent contractors, and therefore owed various entitlements under provincial and federal employment laws.

What is the difference between an Independent Contractor and an Employee?

To assess the difference, one starts with considering the following factors:

- the level of control exerted by the company over the worker's activities;
- the ownership over the tools and equipment;
- whether the worker hires their own helpers;
- the degree of financial risk undertaken by the worker;
- the degree of responsibility for investment and management the worker holds; and
- the worker's opportunity for profit.

This is a highly fact-specific exercise and the relative weight of each factor will depend on the particular circumstances of the case.

It is important to note that the job title is not necessarily a persuasive factor nor is the existence of an agreement between company and independent.

A different option to consider: Dependent Contractor

Interestingly, as companies and some workers have pushed to delineate the role of independent contractor, the courts and labour boards have pushed back and developed a new category: that of dependent contractor.

In British Columbia, the plaintiff worker in *Pasche v. MDE Enterprises Ltd.,* 2018 BCSC 701 was found to be a *dependent contractor* after the Court concluded that factors supported a finding of *both* independent contractor and employee.

The company in that case was ordered to pay Mr. Pasche common law damages for wrongful dismissal, to which he would not be entitled had he been an independent contractor. Interestingly, the notice period was not as long as would have been awarded to a true employee. In particular, the designation of dependent contractor was based upon the length of his service (18 years) and his economic dependence on his employer.

Here in Ontario, the Ontario Labour Relations Board (the "OLRB") ruled on this question in the context of Foodora delivery drivers in *Canadian Union of Postal Workers v. Foodora Inc*., 2020 CanLII 16750 (ON LRB).

The Foodora couriers sought to unionize, which would only be permissible if they were "dependent contractors" as defined under the *Labour Relations Act*. Ultimately, the OLRB concluded the couriers "more closely resemble employees than independent contractors". In coming to this conclusion, the OLRB found the following factors to be persuasive:

- The couriers were not permitted to engage in substitutes to increase their revenue or profits;
- Couriers owned their own method of transportation and delivery bag, but the most significant tool was the Foodora delivery app;
- Couriers were limited to what Foodora permitted and were not able to rely on 'customary entrepreneurial tools,' such as advertising or promotion, to increase their own profits;
- Foodora imposed a complex system of incentives and restrictions upon couriers and exercised control over pick-up and delivery, ability to decline orders, and hours of work;
- Couriers were almost entirely integrated into Foodora's business and did not develop independent relationships with restaurants or clients; and
- Foodora unilaterally established parameters for couriers, who could be closely monitored via the Foodora app to ensure they were meeting service standards.

Given the emergence of this third category which attracts significant protections, it appears that courts and arbitrators are becoming increasingly willing to find workers entitled to protections as a dependent contractor after undertaking a full contextual analysis.

Important Factors to Consider: Control, Sharing of Profits/Losses, Independent Sources of Work

First, where a worker is using a company owned app to dictate the terms of the company-worker relationship, the first issue

will be how much control is exerted over the worker's pick up, delivery, hours of work, source of work, and importantly ability to decline work. The more control – the higher the probability the worker is a dependent contractor or even an employee.

Second, if the worker does not share in the risk of loss or the benefit of profits, then the claim that worker is independent is weakened beyond redemption.

Third, *can* the worker obtain work other sources? If so, *does* the worker obtain work from other sources? A one-source worker does not appear to be independent, and as such, this is a predictable, final factor.

Where a worker (1) has control over their work selection, hours, and ability to take on work, (2) shares the risk of loss and the benefit of profit with the company, and (3) can *and does* source their work from others, the probability that the worker is independent is strengthened.

In most present-day business models, it is rare for a worker to exert control over their work, to share in the perils and advantages of risk/benefit, and to obtain work from different sources. Consequently, the weighing of these factors for most worker-company relationships would likely lead to the conclusion that the workers are, in fact, dependent contractors or perhaps even employees.

Repercussions for Companies?

Upon a finding that a company has misclassified an employee, the company may be responsible for various statutory and common law liabilities.

This can include retroactive pay to ensure wages already earned meet the relevant employment standards legislation, liability for vacation pay, benefits, or overtime to which an employee is rightly entitled, and vacation and statutory pay.

Under workers' compensation or occupational health and safety legislation, a company can also be held liable for a workplace injury and responsible for retroactive payments on unpaid premiums. A company may also be subject to fines and interest.

Additionally, a company who has misclassified an employee could be responsible for past payments for Canada Pension Plan, Employment Insurance, and income tax not deducted from employee pay-cheques to the Canada Revenue Agency. This liability may also come with penalties between 3-10%, interest on any amounts owing, or even a summary conviction.

Finally, if the misclassified employee is terminated and the contract does not contain termination provisions that satisfy the applicable employment standards legislation, a company may be liable for common law damages for reasonable notice.

Going Forward – Independent Contractor v. Dependent Contractor v. Employee

These high value lawsuits may have significant ramifications for Private Motor Carriers who rely on the designation of their workers as independent contractors, since these classifications may not withstand attack by the workers.

Indeed, recent trends in decisions not only in Canada, but also California, the United Kingdom, and France have similarly found "gig economy" workers like Uber drivers to be employees, contrary to company expectations.

For companies that have business models predicated on the delivery of services through independent contractors, these recent decisions may be a cautionary tale for their reliance on this classification. The upcoming class actions may have a profound and expensive impact on how these businesses operate in the future if employment-type rights are extended to the plaintiff classes.

In particular, Pizza Hut may be holding its breath awaiting the outcome of the aforementioned Ontario Uber case. In both the Pizza Hut and Uber cases, the companies are alleged to exert control over all aspects of the delivery shift, and none of the workers share in the profits nor face the peril of paying expenses.

[1] Thank you to Articling Students Megan Wong and Cory Song for research and writing contributions.

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