

TRANSPORTATION

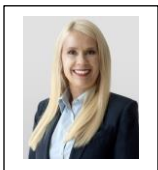
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IN THIS ISSUE

Uber drivers win employment rights in Canada under the Employment Standards Act! This article addresses the recent opinion from the Supreme Court of Canada granting Uber drivers employment rights and discusses five tips for practitioners to fortify the independent contractor model in Canada.

Is the Role of Independent Contractors Being Extinguished?

ABOUT THE AUTHOR



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. In her spare time, Heather flies airplanes and works as an instructor to perform simple aerobatics in the Pitts Special S-2A. She also rides motorcycles, including her Kawasaki Ninja. She can be reached at hdevine@ahbl.ca.

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Companies Must Not Require Drivers to Contract out of the *Employment Standards Act*

The Supreme Court of Canada has just ruled that Uber drivers can sue for wages and vacation pay under the *Employment Standards Act (2000)* which means that companies which contract with independent contractor drivers may face misclassification claims by drivers for up to two years of wages and benefits.

The SCC's decision in *Uber Technologies v Heller*¹ continues a trend to extinguish the role of independent contractors in Canada. In response, companies should effect clear, updated independent contractor agreements and tailor business operations to ensure that the independent operator model is fair, equitable, and well-implemented.

Heller v. Uber Technologies, recap

Mr. Heller, the representative plaintiff in the class action, who was engaged as an UberEATS delivery driver filed a class action lawsuit in Ontario alleging that Uber and UberEATS drivers are employees for the purposes of the *Employment Standards Act, 2000* (the ESA). Mr. Heller argued drivers are entitled to the benefits afforded to *employees* under the ESA. He argued that Uber had breached the provisions of the ESA (as an employer) and he sought to strike arbitration provisions in the driver agreement with Uber.

The Driver Services Agreement and UberEATS Services Agreement required all drivers to review and click “yes, I agree” prior to being allowed to provide services to Uber. The agreements stipulated that any dispute between the parties, which could not be resolved between them, would be decided by an Arbitrator appointed in accordance with International Chamber of Commerce (ICC) Rules and would be arbitrated in the Netherlands, applying the law of the Netherlands.

The SCC applied the doctrine of unconscionability and found the agreements to be “unconscionable”: essentially, the agreement itself was unfair and resulted from an inequality of bargaining power between the driver and the company. The arbitration clause was part of an un-negotiated standard-form contract, and the cost of the arbitration would equal the approximate annual income of the driver.

In striking down the arbitration clause, and establishing that the clause constituted an illegal contracting out of the ESA, the SCC has now provided drivers with a choice to proceed with a class action, an individual action in the Courts, or to make an employment standards complaint to determine their status under the ESA.

Since the drivers have the ability to seek determination of their status under the ESA, I predict that it is likely that the ESA could rule the drivers are ‘dependent contractors’.

¹ *Uber Technologies v Heller*, 2020 SCC 16,

The Repercussions When Drivers are Misclassified

Since an Uber driver can now make an employment standards complaint, companies which retain drivers should be aware of rulings in this context, such as the Ontario Ministry of Labour's 2018 conclusion that a Dominos Pizza delivery driver, Mr. Juan Jose Lira Cervantes, was improperly classified as an independent contractor, and was found to be an employee.

Mr. Cervantes was awarded \$28,144.50: \$17,539.60 was allocated for wages found to be below minimum wage, and the rest was for vacation, over-time, holiday payments, and benefits. These payments were calculated over two years, the time limit for a claim.

Further, the Franchisee was ordered to pay monies for reprisal: the Ministry of Labour concluded the refusal to assign further delivery work to Mr. Cervantes after learning he had complained to the Ministry of Labour was actually a decision to fire the driver for making a complaint.

Calculate this amount for a two-year period for a driver who provides independent contractor services to your company and the peril to your company becomes quite real. Further, this decision, which is specific to the powers of the Ministry of Labour, does not address the additional consequences that a company in a similar position may suffer: there can be consequences for unremitted taxes, CPP, EI, health taxes or government health insurance, and workers insurance

premiums. Employees also have common law rights upon termination which can be onerous.

What Can a Company Do to Assess the Propriety of its Workers' Classification?

There is no one single factor in Canada for determining whether a worker is an employee or independent contractor. An adjudicator will consider the relationship between the company and the worker as a whole to determine whether the worker is properly classified as an independent contractor.

The following are tips which might assist with improving the probability of defending an employee misclassification case. However, given the current trend, it may be inevitable that even with following these tips an adjudicator will conclude that an independent contractor driver is misclassified.

1. Ensure All Independent Contractors are Incorporated Companies

First, only contract with drivers that are in turn contracted with or employed by another corporation. (Here, I refer to the independent contractor's company as the 'corporation'). The corporation that contracts with your company must be properly incorporated in a province of Canada, or federally incorporated and should be in good standing.

In order to comply with this recommendation, you can ensure that for every independent contractor providing driving services, you demand, obtain and file an up-to-date Corporate Profile Report. The Corporate Profile Report should be updated annually. This Report shows the Ontario Corporation Number; i.e. 1234567 Ontario Limited, and the Corporation Name. It will show the Corporation Type and the Corporation Status which should state: "ACTIVE", and this Report will indicate whether the company (corporation) is in good standing. The corporation's registered address will be reported, and it will also show the identity and address of the officers and directors, but not the shareholders.

In Ontario, this information is within the jurisdiction of the Ministry of Consumer and Business Services. While contracting with a validly registered corporation in good standing is not the only consideration, it is a good first step to enable your company to show that it has contracted with another, different corporation for the provision of driving services, and that the driving services are provided by an independent contractor employed by or retained by that corporation.

You may even request that the corporation show you their agreement between the corporation and driver for your review and keep a file of that agreement along with the Corporate Profile Report and Independent Contractor Agreement, which I discuss below.

2. Invest in obtaining a clear, up-to-date agreement with all independent contractors and follow the terms of that Independent Contractor Agreement

It is important to implement an Independent Contractor Agreement. All agreements with Independent Contractors should be validly executed by both parties, and kept in an accessible file.

The terms of the Agreement are very important: the Independent Contractor Agreement should clearly differentiate between the company using the driving services and the corporation providing the driving services; describe the driving services provided by the independent contractor driver; and include information declaring that the corporation's employees and drivers are not employees of the company. Finally, it is important to recognize that the drivers have the ability to exercise the right to make a complaint under the ESA.

In fact, I recommend you implement the ESA into the agreement as a means to limit payment in the event of termination. In the event that an independent contractor is found to be entitled to pay in lieu of notice for termination, one should include a clause stating what the independent contractor would be entitled to as a payment in the event of termination. Payouts may be limited with the inclusion of the following provision:

“If the company terminates your independent contractor relationship without just cause, you will be entitled to only those payments and benefits required by the Employment Standards Act of Ontario as if you were an employee and will have no other claim at common law or otherwise in relation to your termination. You agree this provision is not an acknowledgement that you are an employee but simply a convenient manner to calculate your termination entitlements in the absence of just cause.”²

The benefit of such a clause is that it provides a contractual agreement of the amount to be paid upon termination, and does not require the adjudicator to devise an amount of their own accord which may be very favourable to the ‘employee’.

Finally, if the independent contractors will wear the company’s uniforms and/or use the company’s registered trademarks, then your company should consider requiring the independent contractors to enter into a licence agreement for the use of the company’s registered trademarks, and that licence agreement can be placed in the company’s Trade-Marks Office file (held by the Canadian Trade-Mark Office) so that it is recorded. This extra step, if available to a company that has registered trademarks, may help the company to show that the

independent contractor is a licensee and not an employee in uniform.³

3. Minimize the Company’s Control Over the Independent Contractor’s Work

Third—it is important to limit the amount of control over the independent contractor’s work. Quite simply: the more control a company has over the independent contractor, the more likely it is that the independent contractor will be found to be an employee.

Ask:

- Does the independent contractor hire their own employee drivers and then contract the services of those employees to your company?
- Can the independent contractor sub-contract the work? Do they:
- Does the independent contractor determine the timing and manner in which services are rendered?
- Do they carry separate and sufficient insurance?
- Does the Independent Contractor have a meaningful ability to profit or suffer a loss?

This latter consideration can be quite influential in favour of finding an

² Why ‘independent contractors may still be entitled to a payout on termination’ by Ed Canning, Hamilton Spectator, September 20, 2015, www.thespec.com

³ Consideration of whether a company has registered trademarks, and the ability to record a licence agreement requires legal advice.

independent contractor relationship, if the answer is yes.

4. Ensure that the Independent Contractor Is Not Wholly Dependent on Your Company

This fourth consideration is closely related to the issue of control – even though all of the above considerations are met – if the independent contractor has only one client – your company, or has been prohibited from taking loads from other customers to hold themselves available for your company, an adjudicator may find the independent contractor to be an employee, or at best a ‘dependent contractor’.

Another factor to consider is that Hours of Service restrictions limit the hours of work a driver can be available and/or drive. If your company, through its operational demands, becomes the single customer of an independent contractor, the actual nature of the operations can influence the adjudicator to conclude the lack of independence means that the driver is actually an employee.

In summary, if a driver has no other source of income and is dependent upon the company for an extended period of time, that driver may be found to be a dependent contractor or an employee.

5. Review the Ownership of the Equipment Required to Perform the Work

The nature of ownership of equipment by drivers can be quite complex. However, the key consideration often will be whether the

independent contractor owns the ‘tools’ and equipment he or she works with.

The independent contractor has the right to use them and must repair, maintain and insure them himself. In our industry, the consideration of whether the Independent Contractor has ownership of the truck can include a consideration whether he or she holds title to the truck, or leases the truck from an unrelated third party, such as PENSKE, or another truck rental company.

In some circumstances, the independent contractor drives a truck upon which the company holds the security interest, or the independent contractor drives a truck which he or she is lease-purchasing from the company. This is a complex legal area and it is best to carefully consider the facts of each scenario carefully, with a knowledgeable lawyer.

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