



MISCLASSIFICATION OF EMPLOYEES

PITFALLS AND PREDICTIONS FOR THE MODERN EMPLOYER

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AGENDA

- 1 Misclassification in the News
- 2 Worker Classification
- 3 Dependent Contractors
- 4 Significance of Misclassification
- 5 Predictions
- 6 Tips for Employers
- 7 Questions



MISCLASSIFICATION IN THE NEWS

PIZZA HUT PROPOSED CLASS ACTION

Statement of Claim filed January 21, 2022

FILED BY: Liubomir Marinov, on behalf of all Pizza Hut delivery drivers from April 1, 2019

AGAINST: Pizza Hut Canada Company and its franchisees operating over 400 locations across Canada

FACTS

- Mr. Marinov has worked for a Toronto area Pizza Hut since 2005
 - Originally paid \$4.50 + tips per delivery
 - Pandemic declared spring 2020 → making \$8/hour
 - Currently: \$10/hour
 - Current Ontario minimum wage: \$15/hour
- Drivers pay for gas, car costs, phones, data plans necessary to use in-house app (Dragon Drive)
- Dragon Drive dictates orders, tracks delivery times
- Drivers cannot refuse trips

PIZZA HUT PROPOSED CLASS ACTION

ALLEGING: Pizza Hut has misclassified drivers as independent contractors

- Denying workers statutory protections granted to employees

SEEKING: \$150 million in damages



CLASSIFICATION OF EMPLOYEES

CONTEXT IS KEY

- Why is the question being asked?
 - Lawsuit (BC Provincial and Supreme Courts)
 - Employment Standards Branch complaint
 - Human Rights Tribunal complaint
 - Workers Compensation/Occupational Health and Safety
 - CRA
- Different tests, contexts, and risks in each forum



1: COURTS

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59:

BACKGROUND

- The plaintiff company (“Design”) suffered substantial losses after being replaced as Canadian Tire’s supplier of synthetic sheepskin car seat covers
 - The head of Canadian Tire’s automotive division, Robert Summers, made the decision to instead contract with the defendant company (“Sagaz”) following a bribery scheme
 - Mr. Summers’s wrongdoing was discovered and he was terminated
 - However, Canadian Tire preferred Sagaz’s products and retained Sagaz as their supplier

**671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59:
AT TRIAL**

- Design, having lost its major customer, went into steep decline
 - Design brought an action against Sagaz, its president, its marketing company, and the president of the marketing company
 - The lawsuit alleged these parties had improperly bribed Mr. Summers and, but for their actions, Design would have remained Canadian Tire's supplier
 - At trial: the action was dismissed as against Sagaz and Sagaz's president as the bribery had been undertaken by the marketing company and its president

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59:

THE APPEALS

- The Ontario Court of Appeal found Sagaz was vicariously liable for the actions of the marketing company and therefore jointly and severally liable for the trial award
- The Supreme Court of Canada allowed the appeal and restored the trial judge's order, finding the marketing company was an independent contractor
 - In doing so, the Court canvassed the historical tests for the identification of an employer versus an independent contractor and established a set of relevant factors

TEST: THE COURTS

- The level of control exerted by the employer
- The ownership of tools and equipment
- Whether the worker hires their own helpers
- The degree of financial risk undertaken by the worker
- The worker's degree of responsibility for the investment and management
- The worker's opportunity for profit

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59

TEST: THE COURTS

- 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.
- 48 According to the agreement between Sagaz and AIM dated January 29, 1985, AIM was hired to “provide assistance to Sagaz in retaining the goodwill of [Canadian Tire]”. Although the contract designated AIM as an “independent contractor”, this classification is not always determinative for the purposes of vicarious liability. The starting point for this analysis is whether AIM, while engaged to perform such services for Sagaz, was in business on its own account. If so, AIM is an independent contractor as opposed to an employee of Sagaz and vicarious liability likely will not follow.



2: COMPLAINTS UNDER EMPLOYMENT STANDARDS LEGISLATION

EMPLOYMENT STANDARDS ACT: BRITISH COLUMBIA

- *Employment Standards Act*: definition of "employee" includes:
 - a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
 - b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
 - c) a person being trained by an employer for the employer's business,
 - d) a person on leave from an employer, and
 - e) a person who has a right of recall;

Re: Chahal (cob Zip Cartage) – 2014 BC Employment Standards Tribunal

Branch test “casts a wider net” than courts:

- Language of the contract
- Control over the “what and how” of work
- Ownership of tools and equipment
- Chance for profit/risk of loss
- Remuneration of staff
- Right to delegate
- Control over discipline/dismissal/hiring
- Right to work for more than one employer
- Perception of the relationship (external parties)
- Integration into the business
- Intention of the parties
- Is work for specific task or term?

EMPLOYMENT STANDARDS ACT: ONTARIO

- *Employment Standards Act*: definition of "employee" includes:
 - a) a person, including an officer of a corporation, who performs work for an employer for wages,
 - b) a person who supplies services to an employer for wages,
 - c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees,
or
 - d) a person who is a homeworker,

EMPLOYMENT STANDARDS ACT: ONTARIO

An individual may be considered an employee under the *ESA* when some of the following apply to the relationship:

- the work the individual performs is an important part of the business
- the business decides:
 - what the individual is to do
 - how much the individual will be paid
 - where and when the work is performed
- the business provides the individual with tools, equipment or materials to perform the work
- the individual cannot subcontract their work to someone else
- the business has the right to suspend, dismiss or otherwise discipline the individual

Ministry of Labour, Training and Skills Development



3: COMPLAINTS UNDER HUMAN RIGHTS LEGISLATION

HUMAN RIGHTS CODE: BRITISH COLUMBIA

- Context: complaint to the Tribunal
- *Human Rights Code*: definition of “employment”:
 - "employment" includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and "employ" has a corresponding meaning;

Crane v. British Columbia (Ministry of Health Services)

– 2005 BC Human Rights Tribunal

- a) "Utilization" — this ... looks to the question of whether the alleged employer "utilized" or gained some benefit from the employee in question;
- b) Control — did the alleged employer exercise control over the employee, whether in relation to the determination of his or her wages or other terms and conditions of employment, or in relation to their work more generally, such as the nature of the work to be performed or questions of discipline and discharge?
- c) Financial burden — did the alleged employer bear the burden of remuneration of the employee? and
- d) Remedial purpose — does the ability to remedy any discrimination lie with the alleged employer?

HUMAN RIGHTS CODE: ONTARIO

- The *Code* does not define “employee.”
- However, because the *Code* is to be interpreted broadly, the Commission takes the position that the *Code*’s protection extends to employees, temporary, casual and contract staff, and other persons in a work context, such as people who work to gain experience or for benefits.
- This broad interpretation is consistent with a number of Tribunal decisions from across Canada.
- The protections in the *Code* also apply to employees after hours and when they are not at their workplace.

HUMAN RIGHTS CODE: ONTARIO

- The *Code* protects temporary and casual staff no matter how long the person has worked for the organization or the nature of the employment.
- The definition of “employee” in the *Code* is interpreted broadly enough to include contractors, even if they would not be considered “employees” for the purposes of other legislation. A human rights tribunal may be skeptical of claims by an employer that a person doing work for them is not protected by the *Code* because he or she is a “contractor” rather than an “employee.”



DEPENDENT CONTRACTORS

WHAT IS A DEPENDENT CONTRACTOR?

- Intermediate position between employees and independent contractors
- Formally “contractors”, but entitled to reasonable notice upon termination
- Determining whether a person is a dependent contractor requires two steps:

1

Determine whether the worker is a “contractor”;

2

If yes, and they are exclusively contracting for one party, then they may be a dependent contractor.

Pasche v. MDE Enterprises Ltd., 2018 BCSC 710:
BACKGROUND

- At social gathering, plaintiff indicated he needed work
- Verbal agreement that the plaintiff would work for the defendant as a sheet metal estimator
 - no written contract
- Worked for defendant from 1997 – 2015
- Plaintiff terminated with 2 weeks' notice

Pasche v. MDE Enterprises Ltd., 2018 BCSC 710:
FACTORS

- Worked from employer's office
- Owned computer and software
- Issued clothing and hats with employer's logo; attended events
- Business cards indicated employee
- Christmas bonus
- Claimed earnings as business income and claimed business expenses on tax return
- No performance reviews or discipline

Pasche v. MDE Enterprises Ltd., 2018 BCSC 710:
DECISION

- Contractor factors: mutual intention of parties, no statutory deductions, claimed expenses, day-to-day control
- Employee factors: long-term relationship, exclusivity, on-premises workspace, uniform, representations to others
- Conclusion: not an employee, not an independent contractor
 - Instead: dependent contractor due to economic dependence and length of service

Pasche v. MDE Enterprises Ltd., 2018 BCSC 710:
ORDER

- 13 months' notice (less than an employee would have been awarded)
- \$71,500 less notice provided and amounts earned during notice period = **\$46, 012.88**

Cormier v. 1772887 Ontario Limited, 2019 ONCA 965:
BACKGROUND

- Plaintiff worked as a wardrobe stylist and fashion studio manager and claimed she had been an employee for 23 years
 - Employer claimed she had been an employee for 13 years and an independent contractor for 10 years
- **ISSUE:** what was the Plaintiff's status for her 23 year working relationship with the Defendant?

Cormier v. 1772887 Ontario Limited, 2019 ONCA 965:
DECISION

- **HELD:** Plaintiff was a dependent contractor for 10 years and an employee for 13 years
 - Entitled to reasonable notice on the basis of 23 years of service
- **FACTORS:**
 - Economic dependence
 - Permanence of relationship
 - Exclusivity of relationship
- “... the more permanent and exclusive the contractor relationship, then the less it resembles an independent contractor status...”

Canadian Union of Postal Workers v. Foodora Inc. – FACTS

- 2020 Ontario Labour Board decision
- Foodora couriers attempting to unionize
 - Only permitted to do so if they were employees or dependent contractors
- **ISSUE:** were Foodora couriers employees, independent contractors, or dependent contractors?

Canadian Union of Postal Workers v. Foodora Inc. – DECISION

- Foodora couriers are dependent contractors
- Basis for decision?
 - Use of or right to use substitutes/control over performance
 - Ownership of equipment
 - Evidence of entrepreneurial activity
 - Selling of one's services to the market generally
 - Economic independence
 - Ability to vary fees
 - Integration in business

TAKEAWAYS

1

Contracts are important, but what you call someone in a contract doesn't matter as much as **what that person does** and the actual **relationship between parties**.

2

If you hire “independent contractors” for a long period of time, **consider their role** in your business and either the person is **economically dependent**.

3

Courts/tribunals will find someone to be a dependent contractor if they can, and allow claims for reasonable notice



PREDICTIONS FOR PIZZA HUT?

FACTS (again)

- Drivers pay for gas, car costs, phones, data plans necessary to use in-house app (Dragon Drive)
- Dragon Drive dictates orders, tracks delivery times
- Drivers cannot refuse trips
- Contract set out instructions for on-the-job behaviour
 - Drivers:
 - Cannot ask for tips
 - Must report for their shift at a set time
 - Are prohibited from working for other companies during shifts
- Statement of claim: drivers are “integral” to the company’s core business



SIGNIFICANCE OF MISCLASSIFICATION

STATUTORY OBLIGATIONS

- Employment Standards Act
- Human Rights Code
- Workers Compensation Act
- Canada Revenue Agency



**1. EMPLOYMENT STANDARDS
LEGISLATION**

EMPLOYMENT STANDARDS LEGISLATION: BRITISH COLUMBIA and ONTARIO

- Record keeping
- Hours of work
- Rates of pay
- Paydays
- Vacation and Vacation Pay
- Statutory holidays
- Leaves and jury duty
- Deduction from wages
- Termination

*An employer cannot contract out of minimum legislative standards for employees

EMPLOYER PENALTIES: BRITISH COLUMBIA

- Penalties for contraventions of the Act and Regulation*
 - First contravention: \$500
 - Contravention of the same requirement at the same location within three years of the first contravention: \$2,500
 - Contravention of the same requirement at the same location within three years of the second contravention: \$10,000

**Employment Standards Regulation, s 29(1) – Administrative penalties*

EMPLOYER PENALTIES: ONTARIO

- An ESA officer can issue a ticket for less serious ESA violations.
 - A ticket carries a set fine of \$295, with a victim fine surcharge added to each set fine, plus court costs. Alternatively, the fine for a notice of contravention is up to \$1,000.
- For some violations the fine is \$250, \$500, \$1,000 for the first, second, and third violation, respectively, in a three year period for each employee.
- Finally, an employer can be prosecuted and ordered to pay a fine, and/or imprisoned for contravening the *ESA*.
 - An employer can be fined up to \$100,000 for a first conviction.
 - If an employer has already been convicted of an offence under the *ESA*, it can be fined up to \$250,000 for a second conviction.
 - For a third or subsequent conviction, an employer can be fined up to \$500,000.

Since the implementation of its revised prosecution policy in 2004, the Ministry of Labour has initiated over 1,825 *ESA* prosecutions.

EMPLOYER LIABILITY

- Misclassification → retroactive liability
 - Minimum wage
 - Vacation pay
 - Benefits
 - Overtime
 - Severance

CLASS ACTION LIABILITY: BRITISH COLUMBIA

“In this case, the *ESA* provides a complete and effective administrative structure for granting and enforcing rights to employees. There is no intention that such rights could be enforced in a civil action.”

Macaraeg v. E Care Contact Centers Ltd., 2008 BCCA 182

CLASS ACTION LIABILITY: ONTARIO

Current proposed class actions alleging systemic misclassification as independent contractors

- January 2022: Pizza Hut delivery drivers seeking \$150 million
- October 2021: Instacart full-service shoppers seeking \$200 million
- June 2020: Amazon delivery drivers seeking \$200 million

August 2021: Ontario Courts certify class action seeking \$400 million against Uber on behalf of UberEATS drivers

- Allegation of misclassification and entitlement under provincial and federal employment laws



2. HUMAN RIGHTS LEGISLATION

HUMAN RIGHTS CODE

- Quasi-Constitutional
- Broad protections
 - The Code specifies that employers cannot make any employment decisions based on the protected grounds
 - Hiring decisions, terms or conditions of employment, termination
 - Duty to accommodate

POSSIBLE REMEDIES

- Cease and refrain order
- Programs
- Reimbursement
- Reinstatement
- \$\$\$ for dignity, feelings, and self-respect

Gebresadik v. Black Top Cabs, 2017 BCHRT 278

- Van taxi driver was injured
- Unable to pick-up wheelchair customers, as required as van-driver
- Given few shifts as sedan driver
- Claimed employer failed to accommodate
- Black Top claimed “undue hardship”

Gebresadik v. Black Top Cabs, 2017 **BCHRT 278**

Decision:

- “...[E]mployment relationships represent the kind of vulnerability that is protected by the Code.”
- Generous interpretation to achieve broad public purposes
- Control and dependency, unilateral suspensions, fees for services, income tax forms
- Black Top was in an employment relationship with complainant for purposes of Human Rights Code.

*para 145, citing *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39.

Gebresadik v. Black Top Cabs, 2017 BCHRT 278

Order:

- Advise shareholders of this decision
- \$7,781.03 for wage loss
- \$200.00 for expenses incurred
- \$15,000.00 for injury to dignity, feelings and self-respect
- \$500 for costs



3. WORKERS COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

WORKSAFE BC and OHSA ONTARIO

- Liability where worker injured in workplace and deemed to be employee
- Liable for:
 - Retroactive payments for unpaid premiums
 - Interest
 - Fines



4. CANADA REVENUE AGENCY

EMPLOYER RESPONSIBILITIES

- Employer responsible for deducting, remitting and reporting payroll deductions
- Deduct CPP contributions, EI premiums, and income tax
- Report employee's income and deductions on T4/T4A
- Prepare a Record of Employment

PENALTIES

- Responsible for CPP/EI amounts not deducted
- 10%+ of amount of CPP, EI and income tax not deducted
- 3-10% for failure to remit deductions
- Interest
- Summary conviction



STRATEGIES FOR MANAGING RISK

EMPLOYER TIPS

- Consider contractor relationship – worth it?
- Minimize employer control over contractor work
- Ensure that the independent contractor is not wholly dependent on your company
- Review ownership of the equipment required to perform the work

STRATEGIES FOR CONTRACTS

- Employer exemptions from liability for acts or omissions
- Indemnification from statutory obligations
- Contractor incorporation
- Restrictive Covenants and non-exclusivity
- CRA pre-determination
- Statutory declarations
- End of relationship considerations

EXEMPTIONS FROM LIABILITY and

INDEMNIFICATION for STATUTORY OBLIGATIONS

Contractor to indemnify and save harmless the employer from:

- All acts or omissions arising from contractor performance of work; AND
- Claims, losses, expenses, costs resulting from assessments related to income tax, EI, CPP, GST, HST, or any other statutory obligations arising from payments to the contractor

NON-EXCLUSIVITY

- Contractor free to offer services elsewhere except where conflict of interest or direct/indirect competition with employer
- Restrictive Covenants inadvisable

CONTRACTOR INCOPORATION

- Contract with a holding company that will designate a representative to perform the services

CRA RULING

- Contractor to obtain pre-determination from CRA
- Provision allowing termination following adverse CRA ruling
- Employer may withhold or make contributions on behalf of worker to CRA, EI, CPP, WCB and others
 - Withholdings deducted from fee for services

STATUTORY DECLARATIONS

- Contractor to provide statutory declaration that they have submitted all required remittances to EI, CPP (employer and employee portions), CRA, and WCB

END OF RELATIONSHIP

- Potentially most contentious stage
- Incorporation of Employment Standards Legislation to avoid common law rights
 - Without reference!

QUESTIONS?



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