UPDATE

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Independent Contractor or Employee? The Risk of Getting it Wrong

Sometimes an employer and an employee mischaracterize the working relationship as one of independent contractor rather than employment. This might be done for a variety of reasons, including tax planning and liability concerns. However, it is not so simple as to just declare the relationship to be one of independent contractor. Further, the risks of getting it wrong can be significant.

For example, in *Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464, the Ontario Court of Appeal held that an individual who had been labelled an "independent contractor" by the company was actually an employee, and thus, was entitled to reasonable notice of termination.

The plaintiff, Braiden, began working for La-Z-Boy as a customer service manager in 1981. In 1986, he became a "sales representative trainee". In this role, Braiden worked from a home office, reported to and was reviewed by the company's national sales and marketing manager, sold La-Z-Boy products at prices set by the company in an attempt to meet sales targets set by the company, worked in a geographical area established by the company, paid for his own expenses, attending meetings and furniture shows at the direction of the company, and was provided with training, tools, catalogues, advertising materials and fabric samples by La-Z-Boy. Braiden was compensated by way of salary and commission.

One year later, La-Z-Boy informed Braiden that his training period was complete, and thus, his employment was at an end. It stated that Braiden would transition to a "commissioned sales representative" who would be compensated solely based on commission. All other aspects of Braiden's employment remained the same.

In 1995, La-Z-Boy required Braiden to sign an "Independent Sales & Marketing Consultant's Agreement". The Agreement stated that Braiden was not the agent or employee of La-Z-Boy and that either party could terminate the Agreement without cause on sixty days notice in writing to the other party. Beginning in 1997, the company required Braiden to incorporate his own company, and have the company sign the Agreement with La-Z-Boy. Braiden was also asked to share office space with other sales agents, and to pay a proportionate share of the expenses of that office.

In 2003, Braiden's employment was terminated by the La-Z-Boy on sixty days notice. The Company relied on the notice provision in its agreement with Braiden's company.

At the Ontario Court of Appeal, La-Z-Boy argued that it had an independent contractor relationship with Braiden's company, and that the terms of the Agreement governed the notice required to be given at termination. The Court held that the mere fact that Braiden was providing his services through a corporation or was labelled as an independent contractor in the Agreement were not determinative of his status; the Supreme Court test of whether the person is performing services as "a person in business on his own account" from *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 still had to be applied.

The factors to be considered in *Sagaz* include the level of control the company has over the worker's activities, whether the worker provides his own tools or hires his own helpers, the degree of financial risk and opportunity for profit of the worker, and the degree of responsibility for investment and management held by the worker. The Court held that in the case at hand, Braiden was carrying on the business of La-Z-Boy, not his own business. The factors relied upon were the fact that Braiden worked exclusively and on a full-time basis for La-Z-Boy, that he was compensated and financially dependent on La-Z-Boy for commissions, and that La-Z-Boy had control over the territory in which Braiden worked, the products he sold, and the prices of those products. La-Z-Boy monitored and reviewed Braiden's sales. The Court also considered the fact that Braiden was part of a group of sales agents who

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were the primary distributors of La-Z-Boy products, and thus "was a crucial element in La-Z-Boy's business". The fact that Braiden supplied his own car and office was held to be insignificant in comparison to the other factors indicating that Braiden was in an employment relationship. As a result, the Court held that Braiden was an employee of La-Z-Boy.

On the issue of the notice period in the Agreement, the Court held that the sixty-day notice period was a change to the terms of the parties' contract since prior to the signing of the Agreement, Braiden would have been entitled to a longer notice period at common law. The Court held that this change to the contract required fresh consideration, and that there was no evidence of such consideration since Braiden provided the same services and received the same level of compensation as prior to the signing of the Agreement. Furthermore, the Court held that the mere offer of continued employment or forbearance from termination was not good consideration. The Court held that to enter into a fresh agreement containing a shorter notice period than provided for at common law, "La-Z-Boy would have to point to evidence that it clearly communicated the changes in the agreement that governed its relationship with Mr. Braiden, Mr. Braiden appreciated that he was giving up legal rights and consideration flowed for the forfeiture of those rights".

As a result, the Ontario Court of Appeal held that Braiden was an employee who was entitled to reasonable notice of termination at common law.

As can be seen in the La-Z-Boy decision, categorizing an individual as an independent contractor will not necessarily be successful to avoid common law severance. In addition to that concern, incorrectly characterizing someone as an independent contractor can also create significant risks and liabilities with statutory withholdings, such as income tax, CPP and EI, as well as issues over failure to comply with employment standards legislation.

As such, employers should be very cautious about creating an independent contractor relationship. They should seek legal advice before doing so and ensure that the relationship is properly documented. On many occasions, even where the underlying relationship is truly one of an independent contractor, the parties incorrectly document it, creating unnecessary liabilities.

Arbitrator Recognizes Seriousness of Employee's Failure to Adhere to Lockout Procedure

In *Communications, Energy & Paperworkers Union of Canada, Local 922 v. Potash Corporation of Saskatchewan Inc., Lanigan Division* a Saskatchewan arbitrator recently considered a grievance involving the dismissal of a thirty-year employee who had failed to follow his employer's lockout procedure. A lockout procedure is a safety protocol used to ensure that potentially dangerous equipment is isolated from a power source before performing maintenance or repair work on the equipment. It requires the responsible employee to disable all sources of power to the equipment and to verify this prior to commencing work on the equipment.

On May 10, 2010, the Grievor had been assigned to repair a cleaner cell in the Employer's mill. The cleaner cell to be repaired was "the lead cell" in a specified bank of cleaner cells. Prior to undertaking any repairs, the Grievor was responsible for locking out the lead cleaner cell, which had a mechanical number of 826. However, the Grievor instead locked out cleaner cell 828 and then commenced work on the lead cell with the help of another millwright.

The Grievor's supervisor discovered the problem and notified the Grievor that he had not locked out the correct cell. Following a visual inspection, some discussion with management and arrangements for a union steward to be present, the Grievor was asked to write a statement about what happened. In his written statement, the Grievor's explanation was that he had run some field tests (as required by the lockout procedure) but misread the cell number as 828 when in fact, in better light, it later became clear that it was actually 826.

The Employer did not accept the Grievor's explanation and concluded that he had clearly violated the lockout procedure. Had he followed the lockout procedure as he said he did, he would have realized his error prior to commencing work on the cell. The Employer, having recently made significant efforts in a mission to enhance its safety record, treated this as an extremely serious incident and dismissed the Grievor from his employment.

The Union grieved the Grievor's dismissal and the matter proceeded to an arbitration hearing, where the Union raised a number of arguments in support of its

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request for the dismissal be set aside. At the outset, the Union took the position that the Grievor's violation of the lockout procedure resulted from an innocent error or mistake. It then argued that the Employer's investigation and disciplinary process was wrong or unfair because the Employer did not give the Grievor an opportunity to explain his written statement prior to terminating his employment and it did not prepare an investigation report. The Arbitrator rejected these arguments, holding that the Grievor had ample opportunity to explain his conduct in writing and to have a union steward assist him. Based on the evidence, there was nothing unfair, wrong or deficient in the investigation conducted by the Employer.

The Arbitrator went on to determine that the Grievor's written statement – and his more detailed explanation given at the hearing – were untruthful. Had the Grievor run the tests he said he did, he would have properly identified the equipment before proceeding to lock it out.

The Union also argued that the penalty of dismissal was excessive in the circumstances. A dismissal was considered to be a Step Four disciplinary incident under the progressive discipline procedure set out in the collective agreement. However, the Union argued that the Employer's usual penalty for a lockout violation was a Step Three disciplinary incident.

In reviewing the relevant circumstances, the Arbitrator noted that the Grievor was fully versed in the lockout procedure. As a result, she concluded that the Grievor had totally disregarded the lockout procedure and that this conduct, followed by a clearly untrue statement to the Employer, did not render the penalty of dismissal outside the appropriate or reasonable range of penalties.

The Arbitrator went on to consider whether it would be appropriate to substitute a lesser penalty pursuant to section 25(3) of the *Trade Union Act*, even though dismissal was within the reasonable range of penalties. She found that, although no other employee had been dismissed as a result of a lockout violation, a review of the evidence regarding past discipline demonstrated that the Grievor's dismissal was generally consistent with the Employer's policies and its approach to discipline. Furthermore, although the Grievor was a long service employee with a relatively clear disciplinary record (one incident of insubordination in May 2009 which she found was part of his admissible disciplinary record), his misconduct was a breach of a key safety procedure and was therefore a serious matter. This breach was deliberate and intentional and was not a momentary or emotional aberration.

Based on these and other factors, the Arbitrator found that it would not seem reasonable and just to reduce the penalty of dismissal to some lesser penalty. Accordingly, she upheld the Grievor's dismissal and dismissed the grievance.

In Saskatchewan, specific statutory requirements for lockout procedures are found in *The Occupational Health and Safety Regulations, 1996* under *The Occupational Health and Safety Act, 1993*. It is important for employers to note that not every lockout or other safety violation will constitute grounds for dismissal. While employers have an obligation to maintain a safe workplace and to ensure that employees understand and follow safety procedures, each case must be considered in light of its particular facts and circumstances when it comes to imposing discipline. A well-drafted and implemented safety policy and periodic safety audits can be instrumental in demonstrating that the employer takes safety matters very seriously and will take appropriate disciplinary measures in the event that safety procedures are not followed.

Dealing with Lingering Wrongful Dismissal Claims

In his novel *Bleak House*, Charles Dickens described the litigation involving Jarndyce and Jarndyce as follows:

> Jarndyce and Jarndyce drones on. … Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. … The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length

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before the court, perennially hopeless.

While most wrongful dismissal actions do not truly resemble the fictional Jarndyce and Jarndyce case, some of them feel like it. Many employers are named in claims that have languished for years, with the plaintiff having done nothing to advance the claim.

It is not surprising that a dismissed employee's enthusiasm for litigation is at its highest in the months after the termination: the fire in the belly of most litigants is cooled by the passage of time as well as by the receipt of bills from their lawyer along the way.

Many wrongful dismissal actions stall shortly after getting started, with nothing more than the exchange of pleadings and perhaps a mandatory mediation completed. Eventually, in such cases, enough time passes that the defendant employer begins to wonder whether it is fair that they should still be expected to defend themselves. A recent decision from the Court of Appeal for Saskatchewan, *International Capital Corporation v. Robinson Twigg & Ketilson* ("*ICC v. Twigg*"), decided in April of 2010, makes it more likely that employers will be relieved of the obligation to defend themselves from such "historic" claims.

The Saskatchewan *Rules of the Court of Queen's Bench* do not contain a requirement that plaintiffs advance their claims within a specified time, or risk dismissal by the Court. The *Rules* are currently under revision, and some have suggested that Saskatchewan should follow the lead of other provinces and stipulate such a "drop dead" time period. However, it does not appear likely at this time that this revision will be implemented.

As the law stands, then, old claims remain alive until defendants apply to have them dismissed for "want of prosecution" by the plaintiff. Under this process, defendants have the onus to prove that the claim should be dismissed. Until *ICC v. Twigg,* this onus was difficult to meet, as defendants had to establish that:

> There was inordinate delay;
>
> The reasons for the delay did not excuse the delay;
>
> There would be "serious prejudice" to the defendant in the conduct of its case; and
>
> The interests of justice favoured dismissal of the action.

Not surprisingly, applications to dismiss claims for want of prosecution under this test were met with limited success in all but the most extreme cases, with many applications foundering on the rock of "serious prejudice". For instance, in *ICC v. Twigg,* the Court of Appeal, applying the old test, overturned a lower Court ruling that dismissed a claim that had been initiated by the plaintiffs 15 years previously. Although the Court found that there was undue delay, the defendant had not established that it would be seriously prejudiced in the conduct of its case. Indeed, unless a key witness has died, or the evidence necessary for the defence is otherwise compromised by the delay, it is difficult for defendants to establish "serious prejudice".

Even though the Court of Appeal allowed the claim to proceed in *ICC v. Twigg*, it also re-wrote the law on a "go forward" basis, in a way that should make it easier for defendants to succeed in applications to dismiss in the future. The new test is the same as the old test, with the exception that defendants do not need to establish "serious prejudice" as a prerequisite to succeeding on an application to dismiss for want of prosecution. The issue of prejudice, while still relevant, is to be considered along with other factors in the Courts' assessment of whether it is in the interests of justice that a given case proceed to trial notwithstanding undue delay by the plaintiff.

The Courts will consider the following non-exhaustive list of factors in identifying the "interests of justice":

> *The prejudice the defendant will suffer in mounting its case if the matter goes to trial*
>
> *The length of the inexcusable delay*
>
> *The stage of the litigation*
>
> *The impact of the inexcusable delay on the defendant*
>
> *The context in which the delay occurred*
>
> *The reasons offered for the delay*
>
> *The role of counsel in causing the delay*
>
> *The public interest*

One of the comments made by the Court of Appeal in *ICC v. Twigg* is that a long delay during which the defendant has raised no objection is more likely to be tolerated by the Courts than a delay that has occurred despite the defendant's efforts to move the matter forward. Perhaps not surprisingly, a diligent defendant is more likely to succeed in an application to strike for want of prosecution than a defendant which has been content to sit on its hands.

Employers faced with old wrongful dismissal claims should therefore consider taking reasonable steps to move the case forward, even if the plaintiff's motivation appears to have diminished. Doing so

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carries with it the risk that the plaintiff will be prodded into pursuing their claim. However, the Court has indicated that long delays tolerated by a defendant will also be tolerated by the Courts – and so inactive defendants may not be able to satisfy the "interests of justice" test, so as to succeed in having stale claims dismissed. By contrast, employers that have proactively defended wrongful dismissal claims against them, and have been met by inaction on the part of the plaintiff, will be in a better position to have old claims dismissed.

Court to Consider *Charter* Challenge to *The Public Service Essential Services Act*

The vast majority of provinces have some type of essential services legislation. On May 14, 2008, the Government of Saskatchewan enacted essential services legislation. *The Public Service Essential Services Act* (the "*Act*") affects various public employers including regional health authorities, health care affiliates, the Government of Saskatchewan (as an employer) and Crown corporations, among others. The *Act* requires that trade unions which represent employees employed by public employers negotiate essential services agreements with those employers to ensure essential services are provided in the event of a work stoppage.

"Essential Services" are defined by the *Act* as "services that are necessary to enable a public employer to prevent: danger to life, health and safety, the destruction or serious deterioration of machinery, equipment or premises, serious environmental damage, or disruption to the courts of Saskatchewan". Certain prescribed services with respect to services provided by the Government of Saskatchewan are also defined as "essential" for the purpose of the legislation. In the event that the negotiation of an essential services agreement is not achieved, employers covered by the *Act* have the right to designate certain employees as essential and serve notice on the employees affected and their respective unions.

On July 29, 2008, the Saskatchewan Federation of Labour (the "SFL"), in its own capacity, and together with various trade unions, commenced an action against the Government of Saskatchewan, alleging that the *Act* or certain provisions of it were in breach of sections 2(b), (c) and (d) and sections 7 and 15 of *The Canadian Charter of Rights and Freedoms* (the "*Charter*").

Section 2 (b) of the *Charter* guarantees freedom of thought, belief, opinion and expression. Section 2(c) guarantees freedom of peaceful assembly and section 2(d) guarantees freedom of association. Section 7 of the *Charter* protects the right to life, liberty and security of the person and section 15 guarantees the right to be equal before and under the law.

A number of other actions were commenced in relation to the *Act*. The Saskatchewan Union of Nurses commenced an action against the Government of Saskatchewan alleging that the *Act* was in breach of section 2(d) of the *Charter*. The Canadian Union of Public Employees brought an application to the Saskatchewan Labour Relations Board against Regina Qu'Appelle Health Region, pursuant to section 10 of the *Act,* requesting that the number of essential services workers designated as essential be decreased, and also asking for a declaration from the Board that the *Act* was in breach of sections 2(b) and 2(d) of the *Charter*. The Board issued a decision refusing to issue a declaration that the *Act* was contrary to the *Charter*. The Union applied for judicial review of the decision. The Saskatchewan Government and General Employees' Union and Service Employees International Union West each initiated separate court applications asking the Court to rule that the legislation violates the *Charter*.

Rather than proceeding with each of these various actions separately, on August 9, 2010 the Court of Queen's Bench held that the SFL action will be the "lead action" and that all other actions are stayed, with the respective parties being granted intervenor status in the lead action. On September 23, 2010, the Court heard twenty-three further applications for intervenor status in this action. The applicants included the Canadian Union of Public Employees, the United Food and Commercial Workers Union, the University of Saskatchewan, the University of Regina, SaskPower, SaskEnergy, two health

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regions, the Saskatchewan Association of Rural Municipalities, the Saskatchewan Urban Municipalities Association, and various urban municipalities. On October 1, 2010, the Court issued a decision granting ten of the applicants intervenor status.

One of the key Supreme Court of Canada decisions dealing with section 2(d) of the *Charter* in the context of labour relations is *Health Services and Support – Facilities Subsector Bargaining Assn.* v. *British Columbia*, 2007 SCC 27 ("*B.C. Health Services*"). This case involved the *Health and Social Services Delivery Improvement Act*, which affected employees covered by certain collective agreements. It was enacted by the B.C. Government in January of 2002 and was designed to reduce costs by permitting a more efficient management of health care. Employers were authorized by the legislation to reorganize their labour force and make other changes they felt necessary. To facilitate this, the legislation overrode collective agreement provisions that were in conflict with it. Specifically, it overrode provisions dealing with employee transfers and reassignments, contracting out, job security, layoffs and bumping rights.

The unions affected by the legislation launched a *Charter* challenge, arguing that the legislation violated their right to bargain collectively under the *Charter*. The Supreme Court of Canada held that the right to freedom of association under section 2(d) of the *Charter* included protection for the right to engage in collective bargaining. In doing so, the Court overruled not only the lower courts but also its own jurisprudence. The Court ruled that the right to collective bargaining was not a modern right, not merely a creature of statute, but rather a fundamental freedom that existed before and apart from the statutory provisions that defined it. The Court went further to note that section 2(d) was a culmination of a historical movement towards the recognition of a procedural right to collective bargaining. It also considered international law as a tool to *Charter* interpretation. Lastly, it took the position that granting *Charter* protection to collective bargaining was consistent with other *Charter* rights and freedoms.

The protection articulated by the Court in the *B.C. Health Services* decision is the protection of the process of collective bargaining. The Court stated that protection of process does not protect or guarantee a particular outcome in collective bargaining, nor does it guarantee a specific type or model of collective bargaining. As with all rights, a balancing of competing interests must be achieved. As a means of obtaining this balance, the right to collective bargaining is only infringed when there is a substantial interference with the freedom of association. In the decision, the Court provided a stricter test for a section 1 justification for substantial interference with collective bargaining rights than for breach of other *Charter* rights. They cited essential services, vital state administration, clear deadlocks and a national crisis as situations where a justification for substantial interference may exist.

There are certainly strong arguments that the principles in *B.C. Health Services* do not lead to the conclusion that Saskatchewan's *Act* is off side the *Charter*. Although a date for the *Charter* challenge of Saskatchewan's *Act* has yet to be finally determined, the Court is currently contemplating the trial will commence in early September of 2011.

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