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**BULLETIN**

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**BC COURT OF APPEAL AFFIRMS DISTINCTION BETWEEN EMPLOYEES  
AND INDEPENDENT CONTRACTORS UNDER THE *EMPLOYMENT STANDARDS ACT***

In the recent decision *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, [2022 BCCA 147](#), the Court of Appeal for British Columbia (the “BCCA”) considered a recurring question in employment law: how to distinguish between an employee and an independent contractor. The BCCA found that three taxi drivers were employees under BC’s *Employment Standards Act* (the “Act”), despite the drivers being characterized as independent contractors under other legislation. In reaching its decision, the BCCA outlined how this analysis varies depending on context, and demonstrated how the determination is made under the Act specifically.

The Background:

The catalyst for this decision was three Black Top taxi drivers filing complaints under the Act in 2016 and 2017. The complainant drivers all either leased or licensed taxis from the taxi owners, and were entitled to keep the fares they earned while operating the taxi, after paying the rent or license fee. The main issue of the complaints was whether the complainant drivers were considered employees of Beach Place Ventures Ltd. and Black Top Cabs Ltd., or independent contractors. A delegate of the Director of Employment Standards (the “Delegate”) found that the complainant drivers were employees. The companies appealed the Delegate’s decision to the Employment Standards Tribunal (the “Tribunal”). As part of their appeal, the companies cited *Beach Place Ventures Ltd.*, [2019 TCC 24](#), a contemporaneous decision involving one of the complainant drivers, in which the Tax Court of Canada found that the driver was an independent contractor, not an employee, under the *Employment Insurance Act* and *Canada Pension Plan*.

The Tribunal upheld the Delegate’s decision that the complainant drivers were employees under the Act. The companies sought reconsideration of the Tribunal’s decision, but were denied. They then sought judicial review of the Tribunal’s decision by the BC Supreme Court, which was likewise dismissed. Finally, the companies appealed to the BCCA.

The Decision:

The BCCA dismissed the appeal, upholding the prior decisions which found that the complainant drivers were properly characterized as employees under the Act. In dismissing the appeal, the BCCA found that neither the BC Supreme Court or the Tribunal were required to follow the decision of the Tax Court, and that attention must be given to the specific characterization of “employee” in the language of the Act.

The BCCA noted that the analytical framework for determining whether a person is an employee or an independent contractor will differ depending on the statutory context at play. It was therefore appropriate that the Tax Court and the Tribunal reached different conclusions as to whether the complainant drivers were employees. The BCCA notes that there is not a universal test to determine whether a person is an employee or independent contractor, and what will be considered in making this determination will be different under the *Employment Standards Act* than under the *Employment Insurance Act* or any other statute.

The BCCA found that the factors used by the Delegate in the initial decision, and the weight given to those factors, was appropriate in light of the specific statutory language and context of the *Employment Standards Act*. The factors the Delegate had considered were:

- control and direction;
- equipment, tools and supplies;
- financial investment and risk;
- GST and WorkSafeBC;
- personal tax filings;
- opportunity for profit;
- permanency of relationship; and
- status of shareholder as employer.

The BCCA also noted that this analysis does not start with a presumption that an employment relationship exists, and that the prior decisions on this matter did not start from this presumption.

#### The Takeaway:

There is no fixed and singular test for determining whether someone is an employee or independent contractor. The nature of the analysis will be determined by the context of the dispute, and what statute governs the dispute. While previous decisions on this issue may be illustrative to a degree, it is important to remember that just because someone has been characterized as an employee in one context does not mean they can't be characterized as an independent contractor in another context, and vice versa.

***Carolyn MacEachern & James Barth***