

Case In Point

Ontario Labour Relations Board Issues its First “Gig Economy” Decision

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In its first “gig economy” decision, the Ontario Labour Relations Board (Board) has concluded that Foodora couriers are dependent contractors and therefore may unionize.

Foodora is a web services company that provides an online marketplace platform connecting consumers to restaurants, through the use of couriers.

Board’s Test for Dependent Contractor Status

In [Canadian Union of Postal Workers v. Foodora Inc.](#), the Board considered whether Foodora couriers are dependent contractors within the meaning of the Ontario *Labour Relations Act, 1995* (Act) and reaffirmed the essential question to address: do these individuals more closely resemble the relationship of an employee or that of an independent contractor?

The Board set out its analysis in accordance with the framework established in the seminal case of [Algonquin Tavern](#). In *Algonquin Tavern*, the Board identified the following factors which it regularly considers in order to analyze whether individuals are dependent contractors:

- the use of, or right to use substitutes
- ownership of instrumentalities, tools, equipment, appliances, or the supply of materials
- evidence of entrepreneurial activity
- the selling of one’s services to the market generally
- economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes
- evidence of some variation in the fees charged for the services rendered
- the extent, if any, of integration
- the degree of specialization, skill, expertise or creativity involved
- control of the manner and means of performing the work
- the magnitude of the contract amount, terms and manner of payment, and
- whether the individual renders services or works under conditions which are similar to persons who are clearly employees.

Application of the *Algonquin Tavern* Factors

After reviewing the agreed statement of facts and the evidence of four representative witnesses, the Board determined that each factor was either neutral or favoured the conclusion that the couriers were dependent contractors. Some of the key factors favouring dependent contractor status were:

1. Foodora couriers do not use substitutes (e.g. they do not fulfil their work obligations with someone else's labour or skill), nor are they permitted to do so.
2. While Foodora couriers provide most of the tools required to perform the work, the Board determined that the Foodora App was the single most important part of the delivery process and was a tool that was owned and controlled by Foodora.
3. The terms and conditions of the relationship between the couriers and Foodora limited the couriers' economic mobility and independence.
4. Couriers were found to be heavily, if not entirely, integrated, into Foodora's business. Foodora's revenue is entirely dependent on the reliable and timely delivery service of the couriers.
5. Foodora implemented numerous controls over the manner and means of performing the work. Foodora controls the scheduling of shifts, issues various levels of "strikes" for performance issues which resemble progressive discipline in an employment relationship, and requires couriers to maintain an ongoing relationship with the company.

Conclusion

After reviewing the *Algonquin Tavern* factors, the Board concluded that "the couriers are selected by Foodora and required to deliver food on the terms and conditions determined by Foodora in accordance with Foodora's standards. In a very real sense, the couriers work for Foodora, and not themselves."

Ultimately, the Board found that Foodora couriers more closely resemble employees than independent contractors, and are therefore properly characterized as dependent contractors for the purposes of the Act.

The Board has not yet issued a certificate to the union as there are outstanding voter list issues between the parties.

This decision is the first Board decision dealing with "app workers" in the gig economy and there are certainly issues raised in the decision that may be adjudicated further.

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