

Ontario Court Approves Employment Class Proceeding Involving Franchise System Delivery Drivers

Derek Ronde, Stefanie Di Francesco

February 4, 2025

In *Cervantes v Pizza Nova Take Out Ltd.*, the Ontario Superior Court of Justice granted certification of a proposed class proceeding against both a franchisor and its franchisees in respect of employment law claims made by independent contractor pizza delivery drivers. Although the decision is procedural, it outlines the potential risk of litigation against franchise parties from franchisee employee claims.

The decision involved Pizza Nova, a franchisor with a network of over 140 franchised locations in Ontario. Pizza Nova's business model depends on delivery services. Delivery constitutes more than two-thirds of Pizza Nova's sales; many customers never enter brick-and-mortar stores. Pizza Nova franchisees hired hundreds of drivers to deliver pizza as independent contractors. The proposed class action brought against Pizza Nova and its franchisees claimed the drivers were misclassified employees.

Employees Versus Independent Contractors

Determining whether a worker is an independent contractor or an employee is a fact-dependent analysis. The underlying question is whether the person engaged to perform services is performing them as a person in business for themselves. The analysis is complex and considers factors including (a) the level of control the employer holds over the worker's activities; (b) the level of integration the worker has into the business; (c) whether the worker can provide services to other companies; (d) whether the worker can hire helpers or substitute their services for the services of another worker; and (e) whether the worker has an opportunity to profit in the performance of the tasks.

As this decision demonstrates, if a company treats a worker as an independent contractor when the worker is actually an employee in law, there could be significant legal consequences, including the potential for liability for non-compliance with minimum standards under applicable legislation.

The Class Action Certification Decision

On December 17, 2024, a certification hearing was held to determine whether the representative plaintiff could bring a class action on behalf of all drivers against Pizza Nova, as a franchisor, and Pizza Nova's 141 franchisees. The claim involves the allegation that, by misclassifying the drivers as independent contractors,

the franchisor and franchisees deprived the delivery drivers of statutory entitlements under Ontario's *Employment Standards Act, 2000* (ESA), such as vacation, overtime, and public holiday pay, minimum wage, and to employment insurance, *Canada Pension Plan*, and Workplace Safety and Insurance Board remittances.¹

In this case, the Honourable Mr. Justice Glustein of the Ontario Superior Court of Justice certified the claims against the four franchisees that hired the representative plaintiff.² The Court also certified the same common issues against the franchisor via the claim that the franchisor is a common employer of all delivery drivers. However, the court did not certify the majority of claims against the remaining 137 franchisees in respect of the plaintiff's common employer allegations. Instead, only conspiracy claims were certified against the franchisor and all of the franchisees. Class counsel was granted leave to locate additional drivers to act as representative plaintiffs against the remaining 137 franchisees in respect of the non-conspiracy claims.

Common Employer Considerations and Findings

In certifying the claims against the franchisor, the Court noted that Pizza Nova exercised a significant degree of control over the hiring, training, conduct, operation, and firing of delivery drivers. Through policy or procedure, the Court found that the franchisor had developed and required franchisees to (among other things) adopt and enforce:

1. mandatory standard policies and procedures that regulated drivers' delivery procedure, delivery times, salutations and greetings, use of branded equipment, form of compensation, choice of apparel and presentation, work allocation, and workplace conduct;
2. a mandatory requirement that delivery drivers were to acknowledge that: (a) they were self-employed independent contractors and not employees, (b) were required to report taxes as self-employed persons, and (c) were not entitled to statutory benefits or protections (the Mandatory Acknowledgement);
3. a centralized system that received orders, allocated orders to franchisees, assisted drivers in performing deliveries, and tracked deliveries to completion;
4. independent contractor contracts that franchisees were obligated to use and delivery drivers were obligated to sign; and
5. instructions on how franchisees are to address complaints or concerns from delivery drivers.

The franchisor also imposed a policy on franchisees regarding grounds for driver termination, including the use of foul language, consumption of alcohol on duty, and the failure to offer cash change to customers. Further, the franchisor also had direct communication with delivery drivers over breaches or misconduct.

Although the Court noted that the ultimate determination of whether a common employment relationship

existed between the franchisor and each franchisee as it related to the delivery drivers would be decided at trial, the Court found that, for the purposes of certification, it was not plain and obvious that the claim of common employment vis-à-vis the franchisor was destined to fail. Justice Glustein specifically noted that:

1. the franchisor's imposition of the Mandatory Acknowledgement and control over delivery drivers' work practices and policies supported a common employer claim at common law;³
2. the franchisor's directions to franchisees on their delivery driver hiring practices could indicate engagement in activities related to or associated with the drivers' employment, supporting a statutory claim that the franchisor was a common employer pursuant to section 4 of the ESA;⁴
3. the franchisor's involvement in contracts, work allocation, uniforms, causes for termination, and workplace conduct could support a claim for common employer under either the common law or section 4 of the ESA;⁵
4. acknowledgement agreements designating hired personnel as independent contractors are often self-serving and attract little weight; and
5. there is case law that supports the proposition that a franchisor can be found to be common employers despite franchisees' operational independence pursuant to the nature of franchise relationships.

Class counsel advanced no common employment claim at common law for the 137 franchisees that did not hire the representative plaintiff. Further, there were no pleadings to support that group of franchisees' engagement in associated or related activities or businesses with the four that did employ the representative plaintiff. Thus, the Court found that those 137 franchisees could not be common employers of the representative plaintiff. However, the Court granted leave to locate additional delivery drivers to act as representative plaintiffs for these franchisees.

The Court found that the following causes of action were established against the franchisor and the four franchisees that hired the representative plaintiff but not the remaining 137 franchisees:

1. breach of their contractual duty of good faith by enriching themselves without regard for the interests of the delivery drivers, who could be found to be vulnerable;
2. negligence because an employment relationship may not preclude a relationship of proximity sufficient to ground a duty of care; and
3. unjust enrichment because they benefited by retaining the entitlements the delivery drivers were deprived of and had no juristic reason to keep that benefit.

The Court also found that the representative plaintiff established a cause of action in conspiracy against the franchisor and all of the franchisees based on the following allegations:

1. by agreeing to follow the franchisor's alleged requirements, the franchisees collaborated to harm the interests of delivery drivers by breaching the *ESA* and failing to provide statutory benefits in respect

- of the Canada Pension Plan, employment insurance, and workers' compensation;
2. the franchisees and franchisor engaged in unlawful acts by colluding to deprive delivery drivers of statutory entitlements;
 3. the impugned conduct was intentionally directed towards each and every delivery driver;
 4. the franchisees and franchisor were aware of their violations and that their conduct was likely to injure the plaintiff; and
 5. the franchisees' and franchisor's conduct did in fact injure the plaintiff.

Notably, the Court certified the claim for punitive damages against the franchisor and all franchisees. Justice Glustein found that the Franchisor's direction to franchisees to hire all delivery drivers as independent contractors, the requirement of franchisee compliance, and the possibility that the delivery drivers could be a vulnerable group could rise to the level of egregious and high-handed conduct that merits punitive damages.

Takeaways for Franchisors and Franchisees

While this decision only involves a procedural certification of a class proceeding, it is a warning to franchisors and franchisees to review and analyze the nature of any purported independent contractor relationships that may be involved in their franchise systems. Importantly, it is also a warning to franchisors to monitor the extent to which they exercise control over franchisee operations, including their workforces. If you have any questions or concerns regarding these issues, please contact the Cassels [Franchise Group](#).

¹ *Cervantes v Pizza Nova Take Out Ltd.*, 2024 ONSC 7019 [*Cervantes*].

² With the exception of an aggregate damages claim.

³ Common employment relationships can be established at common law through conduct that demonstrates effective control over the employee.

⁴ Section 4 of the ESA provides that separate persons are to be treated as "one employer for the purposes of [the] Act" if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons. Where entities are found to be related, they are jointly and severally liable for any entitlements owed to employees under the ESA.

⁵ A number of factors are relevant to the determination of common employment pursuant to Section 4 of the ESA, including: common management or directing mind, common financial control, common premises, common ownership, existence of common trade name or logo, movement of employees between two or more entities, use of the same assets by two or more entities or transfer of assets between them, and common market or customers served.