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Briefs

Submission to the WCB on Determining Workplace Status

A pdf of the complete submission can be found here(224 KB).

The BC Federation of Labour (“Federation” “BCFED”) appreciates the opportunity to provide a submission on the current review of the Workers’ Compensation Board’s (“WCB”) policy governing workplace status.

The Federation represents more than 500,000 members of our affiliated unions, from more than 1,100 locals, working in every aspect of the BC economy. The Federation is recognized by the WCB and the government as a major stakeholder in advocating for the health and safety of all workers in BC and full compensation for injured workers and their surviving dependents.

This submission was prepared in consultation with our affiliates.

Background

The current policy on workplace status dates back to 1977 and was a response to the growing contracting-out in the forest and construction industries. To accommodate this practice, the WCB Board of Commissioners issued Decision No. 255 and while this decision was retired in 2003, many of the current policies reflect these principles.

As stated in the discussion paper, the purpose of this review is in to ensure policies are up to date. The nature of work is changing with the introduction of web-based technologies to work and now two years into the COVID-19 pandemic, we are on the cusp of more changes to how work is conducted. The current policies have consequences for workers in some industries to be misclassified and ineligible for employment and workplace protections. As such, the BCFED has significant interest in these proposed amendments to the policy.

The BCFED fully supports the Community Legal Assistance Society's ("CLAS") submission regarding the proposed amendments. In general, we support the proposed amendments, and in particular, the efforts to simplify the criteria and process for determining whether an individual is a worker or an independent contractor.

However, there remains room for improvements and the additional amendments outlined in CLAS's submission offer both clarity and a higher protection for workers.

And we believe there is a way forward in this endeavor via the adoption of the "ABC test" that has been recognized recently in California. As explained in the CLAS submission, it is a modern test to determine that a person will be considered an employee unless the employer shows:

- The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- The worker performs the work that is outside the usual course of the hiring entity's business; and,
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The ABC test is easily adaptable to the changing nature of work, precarious work, app-based gig work, and to those employers who purposefully misclassify workers doing the work of their business as independent from the company.

The BCFED agrees with CLAS's position that the ABC test would best provide the WCB with a way to extend the coverage to workers who are routinely misclassified. And the ridged reliance upon the

Supreme Court of Canada's decision in *671122 Ontario Ltd v. Sagaz Industries Canada Inc., 2001 ACC59 (Sagaz)* is not going to accomplish a more modern approach.

Volunteers and practicum students

The BCFED is very concerned volunteers and practicum students are not considered workers under the proposed amendments and therefore have limited protections under the *Workers Compensation Act* (WCA).

Volunteers and practicum students are often exposed to the same workplace hazards as workers. For example, a student teacher completing a practicum is in the classroom sharing the same workspace as the teacher. Practicum students are provided coverage under Section 6 of the WCA but must rely upon their educational institute to apply for the extension. The WCB has confirmed to the BCFED students at SFU, UBC and UVIC participating in a practicum have been given extended coverage as per Section 6.

The BCFED recommends the WCB proactively provide education to employers, educational institutions, and volunteer agencies to promote the requirements under Sections 6 and 7 of the WCA and conduct a review of programs that should be included.

Provision of major equipment

We agree with CLAS the emphasis on the provision of major equipment in the draft policy is very concerning. In the coastal forest industry, much of the dangerous work of falling trees has been contracted out to single owner-operator companies. The piece of equipment required to do this job is a chain saw, not requiring a "significant investment or expense" and a piece of equipment the worker may already own. Gig economy workers are asked to use equipment they often already own, e.g., a car, a cellphone.

We agree with CLAS if provision of major equipment is relevant, it could be considered as part of a third criterion of the ABC test, whether a worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work being performed. But

listing it as one of only four main criteria provides an opportunity for misclassification.

Conclusion

We appreciate the opportunity to provide our comments on these proposed amendments. The BCFED urges the WCB to seriously consider making further amendments based on the recommendations of CLAS's submission to ensure that workers are no longer misclassified and are afforded their rights to compensation and to health and safety protections under the WCA.