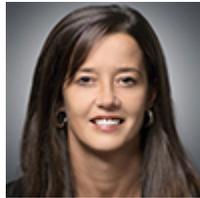


March 21, 2016

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## Dependent Contractors Awarded 26 Months' Reasonable Notice



By [Karen Tereposky](#)

Dependent contractors are becoming an increasing portion of the working population, and an Ontario court recently confirmed that protections available to them are at the top end of the scale.

In the case of *Keenan v. Canac Kitchens*, [2015 ONSC 1055](#), the Ontario Superior Court of Justice considered a case where a married couple (the "Keenans") had worked as installers and foremen with Canac — a manufacturer, distributor, and retailer of kitchen cabinets and accessories — since the mid-1970s. In March of 2009, the Keenans were informed that their services would no longer be required, as Canac was closing its doors. No notice or pay in lieu was given.

The Keenans brought an action for wrongful dismissal, asserting that they were dependant contractors and as such, were owed notice or pay in lieu. Canac argued that the Keenans were independent contractors because they were paid by invoice rather than salary, and also had subcontractors working under them.

The Keenans had begun their relationship with Canac as employees, but in 1987, this changed when Canac notified them that they would be contractors for Canac as "Delivery and Installation Leaders." Under this arrangement, the Keenans were paid (as when they were employees) on a piece-work basis for units installed, but without deduction for income taxes, employment insurance, and the Canada Pension Plan. The Keenans were required to devote "full time and attention" to their Canac duties. Canac would set the rates to be paid to the installers. The Keenans paid the installers with funds provided by Canac. In 2007, the Keenans began working for a competitor due to a slow-down in Canac's work, but still devoted approximately 75 percent of their work hours to Canac.

The Keenans were successful before the Superior Court, and were awarded approximately \$125,000 in lieu of 26 months' notice.

Canac appealed on the basis that the trial judge erred in finding that the Canacs met the requirement of exclusivity, since around the time of the termination,

the Keenans were working for a competitor and, as such, were not dependant contractors.

The Ontario Court of Appeal denied the appeal on this ground, agreeing with the trial judge's observation that, "in the jurisprudence leading to a recognition of the intermediate category of dependent contractors, a finding that the worker was economically dependent on the company due to complete exclusivity or a high level of exclusivity weighed heavily in favour of the conclusion that the worker was a dependent contractor." The Court held that exclusivity could not be determined at one moment in time because it is integrally tied to the question of economic dependency and must involve a consideration of the full history of the relationship.

Canac further argued on appeal that the trial judge had erred in setting an award greater than 24 months, which was previously thought to be the unofficial "cap" on reasonable notice, without finding exceptional circumstances. In the 2006 case of *Lowndes v. Summit Ford Sales Ltd.*, the Ontario Court of Appeal had stated that "generally only exceptional circumstances will support a base notice period in excess of 24 months." Canac requested that pay in lieu of notice be set between 16 and 18 months instead.

The Ontario Court of Appeal affirmed the lower court's decision, finding that the award should not be reduced although there had been no explicit finding of exceptional circumstances. There was also no finding that dependant contractor status automatically leads to a lesser notice entitlement. In the circumstances, the Court found that an award in excess of 24 months was justified and saw "nothing wrong in the trial judge's finding that 26 months' notice was reasonable." This was the first time the Ontario Court of Appeal had endorsed a notice period of 26 months.

As such, although there will still likely be few cases of employees or dependant contractors entitled to reasonable notice periods in excess of 26 months, the "cap" identified in *Lowndes v. Summit Ford Sales* will be surpassed in the right circumstances. For employers, written contracts describing the nature of the relationship and carefully limiting the worker's notice entitlement in the event of termination will help to avoid the imposition of such a large award. With regard to the dependent contractor determination, it is clear that this area of the law continues to evolve. Employers must be diligent in not assuming a particular relationship is one of an independent contractor, particularly where the relationship has an element of exclusivity or near-exclusivity. Field Law can assist with this determination and help to fashion solutions designed to minimize employer risk.

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