



Employee, Independent Contractor or Dependent Contractor?

We often are asked to assist our clients in structuring agreements to reflect different kinds of relationships between an organization and its workers. The recent case of *Keenan v. Canac Kitchens* highlights the importance of properly assessing and characterizing the relationship between the parties from the beginning so as to define entitlements such as notice upon termination.

Lawrence Keenan worked for Canac from 1976 to 2009, and his wife, Marilyn Keenan, also worked for Canac from 1983 to 2009. Although both were initially hired as employees, during a meeting in October 1987, they were told they would continue to work as independent contractors. Although there was no change to the income they would receive, the Keenans were provided with an agreement that characterized them as subcontractors of Canac.

The couple worked exclusively for Canac until 2007 when the work at Canac slowed down. At that time, although the majority of their work remained with Canac, they started to also do some work for Cartier Kitchens. The Keenans were terminated in March 2009 because Canac was closing down its operations. Canac argued that the plaintiffs were not entitled to any notice because they were independent contractors. The plaintiffs argued that they were dependent contractors and therefore entitled to reasonable notice.

In arriving at a decision that the plaintiffs were dependent contractors and entitled to 26 months of notice, the court outlined the factors to be considered in determining the appropriate characterization of the relationship:

1. Whether or not the agent was limited exclusively to the service of the principal.
2. Whether or not the agent is subject to the control of the principal not only as to the product sold, but also as to when, where, and how it is sold.
3. Whether or not the agent has an investment or interest in what are characterized as the tools relating to his service.
4. Whether or not the agent has undertaken any risks in the business sense, or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission.
5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

The court reviewed all of the factors above and found that each favoured the conclusion that the plaintiffs were dependent contractors and entitled to reasonable notice.

This case is an important reminder to ensure that the employment relationship is characterized properly from the beginning as, if required, a court will scrutinize the relationship itself and not just the written agreement in determining the nature of the relationship and whether reasonable notice is owing in the circumstances. This decision also highlights the importance of a written employment contract that is signed before work commences, is subject to sufficient consideration, clearly sets out entitlements on termination and complies with all legal requirements, including the applicable employment standards legislation, in order to decrease the chances of a costly damages award such as the one in this case.

