

Case Comment: *Keenan v. Canac Kitchens Ltd* 2016 ONCA 79

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Introduction

The Ontario Court of Appeal (“ONCA”) in the recent decision, *Keenan v. Canac Kitchens Ltd* 2016 ONCA 79 (“*Keenan*”) grappled with a frequent issue facing construction companies that often blur the line between independent contractors and employees.

For tax reasons, and at the risk of over simplification, independent contractors usually have greater control over their own work performance, whereas employees are subject to less control over how and when to perform work, and may be subject to an implied obligations of exclusivity.

Employers (including construction companies) may nonetheless seek to control independent contractors and/or employees through the use of exclusivity provisions in contracts – an employee must work exclusively for the employer. But how does one legally define “exclusivity” and does an independent contractor who is contractually bound to exclusivity get the benefit of employees like notice of termination rights?

The ONCA in *Keenan*, applying the decision laid out in *McKee v Reid’s Heritage Homes Ltd.* 2009 ONCA 916 (“*McKee*”), ruled that exclusivity requires the individual must be economically dependent on the employer. The court also stated that simply providing work to a third party does not mean an exclusive relationship does not exist. This decision can have a serious impact on how construction companies draft employee contracts and downsize their workforce.

Facts

Lawrence and Marilyn Keenan (“the Keenans”) were employees of Canac Kitchens Ltd. (“Canac”). Lawrence started work in 1976; Marilyn started in 1983. Canac manufactured and sold kitchen accessories. Lawrence installed cabinets and became a foreman in 1983. Marilyn was also a foreman. The payment structure was “piece work basis” where the Keenan’s were paid for each box/unit installed.¹

In 1987, the Keenan’s were informed that they were no longer employees but contractors. Canac would provide the materials, locations and the set rates at which the installers would be paid but the Keenan’s would have to use their own truck. They were still paid in the same manner as before but in gross, to reflect the fact that their wage was not deducted to pay income taxes or E.I. They were given a contract to sign that outlined the aforementioned conditions. The Keenan’s did not obtain independent legal advice. Only Marilyn signed. They received “Records of Employment” that stated they had quit.²

¹ *Keenan v. Canac Kitchens Ltd.* 2015 CarswellOnt 2322, 2015 ONSC 1055 at para 6 [*Keenan trial*]

² *Ibid* at para 9

The Keenan's continued working for Canac. They wore company apparel, gave out Canac business cards and even enjoyed employee discounts. In 2007, work from Canac slowed down. The Keenan's took on work from Cartier, a competitor. Nevertheless, the majority of their work still came from Canac.

In 2009 the Keenan's were abruptly told that Canac was ending their relationship with them and that the company was closing down. No notice or termination pay was given. The Keenan's claimed damages for wrongful dismissal. The defendant argued that the plaintiffs were independent contractors and did not have a right to any notice.

Trial Decision

Justice Graeme Mew examined the five factors that were set out in *Belton v Liberty Insurance Co. of Canada* (2004) which outlined how to distinguish employees from contractors. A court must ask:

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 as 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?³

After reviewing the evidence, the justice felt each of the above questions could be answered in favour of the plaintiffs.

Regarding exclusivity, Justice Graeme Mew cited *McKee*. In that decision, the ONCA stated that there existed a continuum. Employees are at one end and independent contractors on the opposite end; dependent contractors are placed in the middle. Dependent contractors, like employees, are "owed reasonable notice on termination."⁴ An individual will be found to be a dependent contractor if the evidence shows that the work was economically dependent on the defendant "due to complete exclusivity or a *high level* of exclusivity."⁵

Prior to 2007, the Keenan's only provided their services to Canac (outside of inconsequential work done for family members). And while the evidence did show that the plaintiffs began

³ *Belton v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81 (Ont. C.A.), at para 11

⁴ *Keenan v. Canac Kitchens Ltd.* 2016 CarswellOnt 965, 2016 ONCA 79 at para 18 [*Keenan appeal*]

⁵ *Ibid* at para 20

to provide services for a competitor in 2007, Canac still received the lion's share of services. In 2007, 80% of the plaintiffs revenue came from the defendant. In 2008, this number was 66.4% and in 2009 it was 72.6%.⁶ Moreover, the court found that the defendant's knew of the Keenan's work for Cartier and turned a "blind eye." This was taken by the court to mean that "Canac knew and acquiesced."⁷

On the subject of control, Mew J held that it was clear that Canac had the control of a principal. Canac set the rates for both installers and the "Delivery and Installation Leaders." Canac dictated work flow and set deadlines.⁸

While the Keenans supplied their own tools, they also used other equipment provided by Canac including a pager, car phone and a filing cabinet. Moreover, they had no genuine opportunity to generate additional profits, which is what question four specifically contemplates that a contractor be able to do.

Finally, the court felt that the answer to the question "whose business is it?" was unequivocally Canac's. The use of Canac business card, apparel, and even vehicles with Canac's logo on them mean that to the outside world, "the plaintiffs were Canac."⁹

Appeal Decision

The defendant's appealed, believing that the trial judge's decision incorrectly defined exclusivity. Justice Gillese, writing for the unanimous court, dismissed the appeal. She stated:

Exclusivity cannot be determined on a "snapshot" approach because it is integrally tied to the question of economic dependency. Therefore, **a determination of exclusivity must involve, as was done in the present case, a consideration of the full history of the relationship.** It is for the trial judge to determine whether, after examining that history, the worker was economically dependent on the company, due to exclusivity or a high level of exclusivity.¹⁰ [emphasis added]

She provided a brief recap of the facts (such as the statistics from 2007-2009) and the case law (like McKee). The ONCA noted that between 1987 and 2007, approximately 97.5% of the Keenan's income came from the defendant. Finally, none of the revenue figures included the time period before 1987 (where the plaintiffs were actual employees).

Justice Gillese found that the plaintiffs had provided 32 and 25 years service and in all but two of those years they had provided strictly exclusive service to the defendant. As a result, the ONCA found no reason to reverse the trial judge's decision.

The Keenan's ultimately were awarded damages of 26 months' notice.

⁶ *Keenan trial* at para 13

⁷ *Ibid* at para 12

⁸ *Ibid* at para 25

⁹ *Ibid* at para 29

¹⁰ *Keenan appeal* at para 25

Analysis and Conclusion

The construction industry is filled with subcontractors and consultants who are paid on piece work basis. The fluidity and the stop-go nature of projects often gives rise to such a work arrangement. This has led to many firms thinking that any individual that provides them services on a piece work basis is an independent contractor. *Keenan v. Canac Kitchens Ltd.* shows that assumption is misguided. Even if a contractor does not have a signed contract, is paid on a piece work basis and even provides services to a competitor they may still be afforded the rights of an employee. The principles of exclusivity and control are flexible in the eyes of the court and will be greatly informed by the work history of the parties involved.

Careful attention must be paid to the full work history that exists between the two parties before a firm decides to downsize and remove an individual from a project. If a company decides to dismiss a longstanding contractor, they should make sure that:

- proper notice is given; or
- that the work history is such that person could not be considered a dependent contractor.

Concurrently, when drafting contractor or employee contracts, individuals should:

- strictly define what exclusivity is; and
- communicate expectations with employees/contractors regarding work done for third parties.

If you do not want them to provide services to competitors then explicitly advise them of this and do not turn a blind eye if this does occur. Otherwise it could be seen as consent. If such precautions are not taken, a wrongful dismissal claim could easily follow.