# Keenan v. Canac Kitchens, 2015 ONSC 1055 (CanLII)



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**CITATION:** Keenan v. Canac Kitchens, 2015 ONSC 1055
**COURT FILE NO.:** CV-11-420147

**DATE:** 20150121

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| | ) | |
| MARILYN KEENAN and LAWRENCE KEENAN c.o.b. as KEENAN CABINETRY | ) | *Bram Lecker, Matthew A. Fisher and Maria Esmatyar*, for the Plaintiffs |
| Plaintiffs | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |
| CANAC KITCHENS LTD., A DIVISION OF KOHLER LTD. and KOHLER CANADA CO. | ) | *Dave McKechnie*, for the Defendants |
| Defendants | ) | |
| | ) | |
| | ) | **HEARD:** 19 and 20 January 2015 |

**REASONS FOR JUDGMENT**

**MEW J.**

[1] Lawrence Keenan worked for the defendant, *Canac*, from 1976 to 2009. For the first six or seven years, he worked as an installer of kitchen cabinets. In 1983, he became a

foreman, supervising the work of other installers. Although, the job title subsequently changed to Delivery and Installer Leader, Mr. Keenan continued to supervise the delivery, installation, and service of the defendant's kitchen cabinets, until his relationship with the defendant ended.

[2] Marilyn Keenan, Lawrence Keenan's wife began working for *Canac Kitchens* as a foreman in 1983. Prior to that, she had helped out her husband on an informal basis. She, too, continued to work with the defendant until 2009.

[3] The trial of this action addresses the issue of whether the plaintiffs were employees, dependant contractors, or independent contractors of the defendant. As the case progressed, and by the time of closing submissions, the two options put forward for determination were those of dependant contractors or independent contractor.

[4] Only the plaintiffs gave evidence at trial. In addition, there was a short statement of agreed facts. The parties had agreed on the figures that would be used for the purpose of any damages calculation, in the event that the court's finding on the relationship between the parties gave rise to an award of damages.

[5] There is no doubt that until October 1987, the plaintiffs were employees of *Canac*. Then, in mid-October 1987, they were summoned to a meeting with *Canac* management, at which they were told that they would no longer be employees, but instead, would carry on their work for *Canac* as independent contractors. The plaintiffs were also told that they should incorporate.

[6] The plaintiffs were informed that under the new arrangement, they would be responsible for paying installers. The installers would provide their own trucks and would pick up kitchen from *Canac* and deliver them to job sites, where they would be installed. *Canac* would set the rates to be paid to the installers and pay the plaintiffs, who, in turn, would pay the installers. The plaintiffs, as Delivery and Installation Leaders, would, as before, also be paid on a piece work basis for each box or unit installed. But, the amount paid would be increased to reflect the fact that the Delivery and Installation Leaders were being paid gross, without deductions for *Unemployment Insurance*, *Canada Pension Plan*, or *Income Tax*. Delivery and Installation Leaders would now be responsible for damage to cabinets while in transit, and were expected to obtain insurance to cover such liability.

[7] Shortly after this meeting, the plaintiffs were given a four page draft agreement addressed to "*Keenan Installations"* and dated 19th October 1987. This document purported to confirm the terms of the agreement between the plaintiffs, as a subcontractor of *Canac*, engaged in the delivery, installation, and service of kitchen cabinets, vanities, and countertops. Two of the provisions on the first page of this document, included the following:

"You understand, that as a subcontractor of *Canac*, you will devote full-time and attention to the business of *Canac* and shall report to *Canac*'s Installation Manager."

…

"As much time as is necessary to fulfill the terms and conditions of the contract in attending to the business of *Canac* and shall report to *Canac*'s Installation Manager."

[8] Ms. Keenan read through this document and discussed it with her husband. Their understanding was that that there would be no material change to their income as a result of this new arrangement. The agreement they received was already signed on behalf of *Canac*. The plaintiffs felt that the document was consistent with what they had been told at the meeting. They did not seek any legal or other advice before signing the document, nor was it suggested by *Canac* that they should. They did not make any changes to it. They felt that they could trust *Canac*. Furthermore, if they wanted to keep their jobs, they had no other choice but to agree to *Canac*'s terms. Accordingly, Marilyn Keenan signed the agreement.

[9] At around the same time, each of the plaintiffs received a Record of Employment (R.O.E.), from *Canac*. Both of these documents reflected a first day of work of 6th January 1986 and last day of 16th October 1987. The reason for the issuance was stated as "quit".

[10] Neither of the plaintiffs paid attention to the R.O.E.s which they received. As their relationship with *Canac* was continuing, they had no concerns about, for example, entitlement to employment insurance. Both were surprised when, as a result of this litigation, it was called to their attention that they had allegedly quit, and that the start dates recorded on the R.O.E.s were clearly incorrect.

[11] The Keenans never, in fact, incorporated. They did register the business name "*Keenan Cabinetry"*. They obtained the insurance required by their agreement with *Canac*, and they registered with what was then known as The Workers' Compensation Board. Although they were responsible for cutting cheques to the installers they supervised, the installers were not their employees. And *Keenan Cabinetry* never registered as an employer with the Canada Revenue Agency for the purposes of withholding taxes and other source deductions.

[12] With the exception of a few jobs on weekends, helping out with the installation of windows and doors, which were not invoiced through *Keenan Cabinetry*, the plaintiffs worked exclusively for *Canac* until 2007. In that year, the flow of work from *Canac* slowed down. According to Mr. Keenan, who took the view that the plaintiffs' agreement with *Canac* precluded them from doing work for any other kitchen cabinet companies. *Canac* turned a blind eye to the plaintiffs' undertaking some work for *Cartier Kitchens*, a competitor of *Canac* between 2007 and 2009.

[13] Despite taking on work for *Cartier*, a substantial majority of the plaintiffs' work continued to be done for *Canac*. In 2007, the plaintiffs' revenues attributable to *Canac* and *Cartier* were 80% and 20% respectively. In 2008, the split was 66.4% from *Canac* and 33.6% from *Cartier*. In 2009, up to the 15th of March, the split was 72.6% from *Canac* and 27.4% from *Cartier*.

[14] So far as the plaintiffs were concerned, the 1987 agreement, notwithstanding, they continued to consider themselves as loyal employees of *Canac*. They enjoyed employee discounts. They wore shirts with company logos. They had *Canac* business cards. Mr. Keenan received a signet ring for 20 years of loyal service. To the outside world, and in particular, to *Canac*'s customers, the plaintiffs were *Canac*'s representatives.

[15] In March 2009, the plaintiffs were called to a meeting and were told that *Canac* was going to close its operations and their services would no longer be required. The *Canac* work quickly dried up.

[16] The defendant takes the position that it was not required to give the plaintiffs any, let alone reasonable, notice that their services were being terminated.

[17] The common law in Ontario, relating to dependent contractors, is now well established. Employment relationships exist on a continuum; with the employer/employee relationship, at one end of the continuum, and independent contractors at the other end. Between those two points, lies a third intermediate category of relationship, now termed dependant contractors: *McKee v. Reid's Heritage Home Limited,* 2009 ONCA 916 (CanLII), at paragraph 30.

[18] Like employees, dependant contractors are owed reasonable notice on termination. In *Belton v. Liberty Insurance Company of Canada* (2004), 70 O.R. (3$^{d)}$ 81, at paragraph 11, the following principles were articulated to distinguish independent contractors from employees, when considering the status of a commissioned agent:

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?

[19] These principles have been adapted to cases involving dependent contractors: *McKee*, at paragraphs 33 to 35.

[20] The first of these principles involves consideration of the exclusivity of the relationship between the parties. In the development of the jurisprudence on the existence of an intermediate category between employee, on the one hand, and independent contractor, on the other hand, a finding that the work was economically dependent on the defendant due to complete exclusivity or a high level of exclusivity weighs heavily in favour of the conclusion that the intermediate category should apply: *McKee*, paragraphs 25 to 26; *Braiden v. La-Z-Boy*, 2008 ONCA 464 (CanLII).

[21] For reasons that I will elaborate on, the application of this fact does strongly favour the plaintiffs' position that they were dependant contractors from 1987 until their termination, having been employees of the defendant prior to that.

[22] The remaining four principles also favour the plaintiffs to a lesser or greater degree. The terms of the 1987 agreement could reasonably be interpreted as requiring exclusivity. The defendant argues that the words, "You will devote full-time attention to the business of *Canac"*, relates only to times when the plaintiffs were actually working for *Canac* and did not preclude the plaintiffs from working for other companies.

[23] Mr. Keenan's evidence, which I accept, is that he did not consider himself at liberty

to work for other kitchen cabinet companies. While, he did not base his belief on the language of the agreement - and I say that because despite both parties having undertaken to produce a copy of the agreement, the defendant could not find a copy at all and the plaintiffs only found a copy a few days before trial –it cannot be said that the text of the agreement, which they had not reviewed for many years, informed the plaintiffs' understanding of their rights and responsibilities. But, the plaintiffs' actions between 1987 and 2007 are consistent with Mr. Keenan's belief.

[24] Other than some occasional, and in my view, inconsequential, weekend work and work for friends and family, the plaintiffs, in fact, worked exclusively for the defendant for 20 years, from 1987 to 2007. Even, when out of economic necessity, because of a downturn in the defendant's business, the plaintiffs started to do some work for *Cartier*, they did so because *Canac* turned, to use Mr. Keenan's phrase, "a blind eye", the clear implication being that *Canac* knew and acquiesced.

[25] On the issue of control, the evidence strongly suggests that *Canac* maintained effective control of the business. *Canac* set the rates for both the installers and the Delivery and Installation Leaders. They established the service standards. They received all deficiency notices and complaints. They dictated the work flow. They set deadlines. When issues arose, in respect of workers' compensation obligations of the plaintiffs and the installers, *Canac* provided, not only instruction on how to fill out forms, but on at least one occasion, a lawyer to advocate at a tribunal hearing for an outcome favouring *Canac*'s interests.

[26] As argued by Mr. Lecker on behalf of the plaintiffs, *Canac* set the plaintiffs' up as a "buffer" (his term) between *Canac* and its installers, with the objective of avoiding as many as possible of the responsibilities, such as workers' compensation, paid vacation, employee benefits, et cetera, as would normally devolve on an employer. However, part of *Canac's* approach also meant that it stepped in and took charge whenever it perceived a threat to its efforts to distance itself from the people that it engaged to carry out its business.

[27] With respect to the tools principle, much was made by the defendant of the fact that the plaintiffs supplied their own tools. In fact, even when they were employees, the plaintiffs had supplied their own tools. But, the tools used by the plaintiffs were not confined to screwdrivers, saws, hammers, and the like. The tools also included the pager, car phone, and mobile phone supplied by *Canac*. The plaintiffs' office at *Canac*'s business premises, the phone, the filing cabinet, were also tools that enabled the plaintiffs to carry out their services to the defendant.

[28] On the question of risk and profit, after 1987, it was possible for the plaintiffs to find themselves in a position where they had to pay an installer without first having been paid by the defendant. According to the defendant, this represented a tangible risk assumed by the plaintiffs which would be indicative of independent contractor status. The defendant also argued that the plaintiffs could have increased their profits by doing more work. Such submissions do not, in my view, accurately capture the true position. Because of the piece work arrangement for payment, which existed both before and after 1987, and the fact that at all material times between 1987 and 2007, the plaintiffs were as fully engaged as they could be in working for the defendant, there was no genuine opportunity to generate additional profits, in a sense consistent with the phrase: "Profit associated with the delivery of his service as distinct from a fixed commission", described and discussed in *Belton* and in the cases which have followed it. Nor, is there any correlation between the degree of risk assume by the plaintiffs and the expectation of profit. Accordingly, the application of the risk and

profit principle to the facts favours the plaintiffs, somewhat.

[29] Finally, consideration is to be given to the question, "whose business is it?" The answer is: *Canac*'s. Even the installers, who were also set up as independent contractors were required to display *Canac's* logo on vehicles they used to transport *Canac*'s product to the job site. To the outside world, the plaintiffs were *Canac*.

[30] The business arrangement established in 1987, was almost exclusively for *Canac*'s benefit. Other than some business deductions, which the plaintiffs would not have otherwise been entitled to take, there was no evidence of any benefit accruing to the plaintiffs.

[31] The evidence overwhelmingly favours the conclusion that the plaintiffs were dependant contactors, and, as such, entitled to reasonable notice of termination, and I so find.

[32] The defendants argued that if a finding was made that the plaintiffs were dependant contractors, only Mr. Keenan should be compensated. This argument was based on a tribunal finding, which it was acknowledged would not be binding on me, that in the context of certain workers' compensation obligation, Ms. Keenan was an employee of *Keenan Cabinetry*.

[33] I do not accept these submissions that only Mr. Keenan should be compensated. It was clear from the evidence given by both Mr. and Ms. Keenan that they worked very much as a team with a considerable degree of overlap between their respective functions. In this regard, their collaboration as a team went back to 1983, which is when Ms. Keenan first became an employee of the defendant.

[34] As a result of the conclusion that I have come to concerning the plaintiffs' status as dependant contractors, and having regard to their prior status as employees, Mr. and Ms. Keenan, respectively, gave the defendant approximately 32 and 25 years of service.

[35] The defendant submitted that if I were to conclude that the plaintiffs were entitled to reasonable notice, a proper range would be 16 to 18 months.

[36] The plaintiffs, noting that in one of the many recorded employment law cases involving *Canac*, the matter of *Cardenas v Canac Kitchens*, 2009 CanLII 17976 (ON SC), 2009 CanLII, 17976 (ONSC), one of the employees, a 43 year old shift supervisor, who had worked for *Canac* for 27.5 years, was given the notice ceiling of 26 months and that a similar outcome would be appropriate in the present case.

[37] The Agreed Statement of Facts prepared by the parties very helpfully includes a calculation of what the net damages would be on a joint basis, based on the number of months which the court determines to be reasonable notice.

[38] Even if one averages the length of service of Mr. and Ms. Keenan, the result is still 28.5 years. Under the circumstances, I conclude that 26 months' notice is reasonable.

[39] As a result, and based upon the figures contained in the Agreed Statement of Facts, *Kohler Canada Co.* shall pay the plaintiffs damages in lieu of reasonable notice in the sum of $124,484.04. In addition to this, the plaintiffs are entitled to pre-judgment interest in accordance with the *Courts of Justice Act*. And, correct me if I am wrong about this, but my understanding is that the defendant *Kohler Ltd*., was incorrectly named, Mr. McKechnie.

[40] MR. MCKECHNIE: That's correct, Your Honour.

[41] THE COURT: And accordingly, the action against that defendant is dismissed without costs.

Graeme Mew J.

**Released:** 21 January 2015

**CITATION:** Keenan v. Canac Kitchens, 2015 ONSC 1055

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

MARILYN KEENAN and LAWRENCE KEENAN c.o.b. as KEENAN CABINETRY

Plaintiffs

**– and –**

CANAC KITCHENS LTD., A DIVISION OF KOHLER LTD. and KOHLER CANA DA CO.

Defendants

**REASONS FOR JUDGMENT**

Mew J.

**Released:** 21 January 2015