Newsletter

IN THIS ISSUE

USE OF "WITHOUT PREJUDICE" COMMUNICATIONS

The use of the statement "Without Prejudice" in communications appears to be on the rise and, in many situations, it is used incorrectly.

"Without Prejudice" is a statement set onto a written document such as a letter or an email, which qualifies the signatory as exempt from the content to the extent that it may be interpreted as containing admissions or other interpretations that could later be used against the signatory and which could affect the legal rights of the principal of, or the person signing or sending the document.

Without prejudice communication has its origins in settlement negotiations. The courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system. (*1)

Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible. The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. (*2)

As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:

> . . . parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** has been listed in **Who's Who Legal Canada** as one of the six most highly regarded lawyers in Shipping & Maritime law in Canada.

- The **CBMU** Fall Conference will be in Toronto on December 1. The **Transportation Club of Toronto** dinner will be on December 3 in Toronto and the **Grunt Club** dinner will be on December 4th in Montreal.

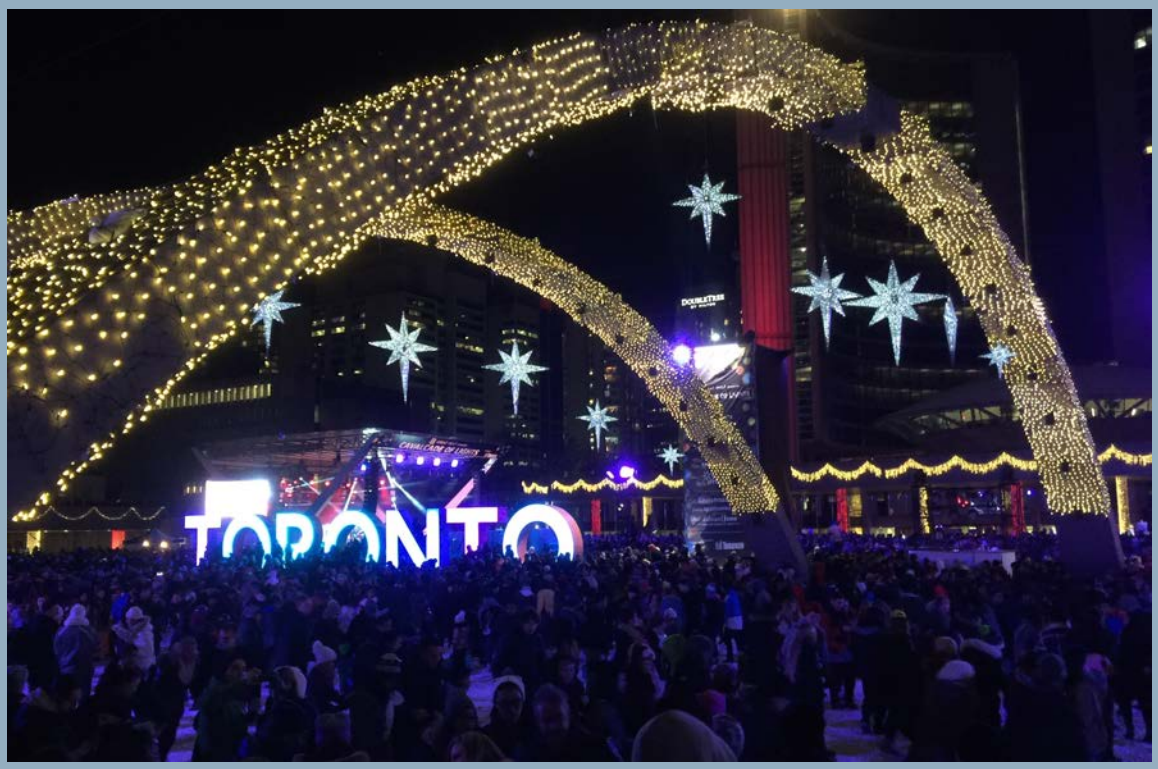
- **Gordon Hearn** will be representing the Firm at the meeting of the **Conference of Freight Counsel** in Nashville, Tennessee on January 10-11, 2016

- **Louis Amato-Gauci** and **Gordon Hearn** will be representing the Firm at the Chicago Regional Meeting of the **Transportation Lawyers Association** being held on January 14 and 15, 2016

- The **Fernandes Hearn Annual Seminar** will take place on January 14th, 2016 at the Advocates Society Education Centre in Toronto.

- The **Marine Club Annual Dinner** will take place on January 15th, 2016 at the Royal York Hotel in Toronto.

- **Kim Stoll** will be representing the firm at the **Admiralty and Claims Litigation Conference** in Houston, Texas being held on January 26-28, 2016.



FIRM SEMINAR

Fernandes Hearn LLP 16th Annual Maritime and Transportation Conference

Date: **Thursday January 14th, 2016**
Location: The Advocates' Society Education Centre
250 Yonge Street, Suite 2700 Toronto
Cost: $65.00 - Includes light lunch and materials on USB Drive
Registration: Sharifa Green, Fernandes Hearn LLP 416-203-9500
Send cheques to: Fernandes Hearn LLP,
155 University Ave. Suite 700, ON M5H 3B7
Limited to 110 attendees 5.5 RIBO Credits (Technical Category)

Topics and Speakers:

8:00-8:30	**Registration & Coffee**	**Sponsor: RIO Insurance Brokers**
8:30-8:45	Welcome	Rui Fernandes
8:45-9:15	Contracts 201 – How are Courts Now Interpreting & Applying Agreements	Gordon Hearn
9:15-9:45	Insurance Coverage Issues – Misrepresentations, Non Disclosures, Warranties and the New UK *Insurance Act* 12 Aug 2016	Rui Fernandes
9:45 – 10:15	Trends in Security - Reducing Your Risk	Stephen Moore, Presidia
10:15 – 10:30	**Coffee Break**	**Sponsor: AON**
10:30-11:15	The Impact of Port Strikes on Importers, Carriers and Insurers	Kim Stoll
11:15-11:45	Safety Plans and Due Diligence	Louis Amato-Gauci
11:45-12:30	Road Accident Reconstructions	Paul Ferrara, HRYCAY Consulting Engineers
12:30-1:00	**Lunch**	**Conference Centre** **Sponsor: /Fernandes Hearn LLP**
1:00-1:45	The Impact of Criminal and Regulatory Breaches on Civil Actions	Melissa Azevedo / Martin Abadi
1:45 – 2:30	Impact of Poor Packing and Inherent Vice on Claims and Insurance	David Huard
2:30 – 3:15	Administrative Monetary Penalties (AMPS) – Can be Revolting	James Manson / Kim Campbell / Tracy McLean

> course of such negotiations . . . may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, that parties be encouraged to freely and frankly to put their cards on the table.

Rush & Tompkins (*3) confirmed that settlement privilege extends beyond documents and communications expressly designated to be "without prejudice". In that case, a contractor settled its action against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible. (*4)

Lord Griffiths' second relevant conclusion was that, although most cases considering the "without prejudice" rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in Rush & Tompkins' situation would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other. (*5)

The Supreme Court of Canada has set out the rule in a number of cases, the most recent of which is *Union Carbide Canada Inc. v. Bombardier Inc.* (*6) The Court stated (*7):

> Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in* (3rd ed. 2009), at para. 14.315).

In the *Union Carbide* decision, the Supreme Court had to look at a confidentiality clause in a mediation agreement. The parties in this case were entangled in a decades long, multi-million dollar civil suit about defective gas tanks used on Sea-Doo personal watercraft. The parties agreed to a private mediation and a standard mediation agreement was signed. It contained a clause regarding the confidentiality of the process. An offer was accepted at the mediation. Two days after acceptance, one of the parties stated that his client considered the settlement to be a "global" settlement. The other party replied that the settlement amount was for the Montreal litigation only. An application was made to the court for homologation (akin to certification or approval) of the transaction. The opposing party sought to strike the allegations contained in some of the paragraphs in the application on the ground that they referred to events that had taken place in the course of the mediation. The application judge held that the mediation proceedings were covered by the *Code of Civil Procedure* and struck the paragraphs. On appeal, the Court of Appeal found that the *Code* did not apply and observed that when mediation results in an agreement, communications made in the

course of the mediation process cease to be privileged and held that settlement privilege does not prevent a party from producing evidence of confidential communications in order to prove the existence of a disputed settlement agreement arising from mediation or to assist in the interpretation of such an agreement. In dismissing the appeal, the Supreme Court of Canada held that (*8):

> A form of confidentiality is inherent in mediation in that the parties are typically discussing a settlement, which means that their communications are protected by the common law settlement privilege … But mediation is also a "creature of contract" … which means that parties can tailor their confidentiality requirements to exceed the scope of that privilege and, in the case of breach, avail themselves of a remedy in contract … settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same … On the other hand, there are recognized exceptions to settlement privilege at common law that limit the scope of its protection, but such exceptions may be lacking in the case of a confidentiality clause. The question is whether an absolute confidentiality clause in a mediation agreement displaces the common law exception, thereby preventing parties from producing evidence of communications made in the mediation process in order to prove the terms of a settlement.

The Court further added (*9):

> There is indeed a delicate balance to be struck. The concerns articulated by commentators about the uncertainty of confidentiality clauses in mediation contracts are legitimate … In my view, the inquiry in each case will begin with an interpretation of the contract. It must be asked whether the confidentiality clause actually conflicts with settlement privilege or with the recognized exceptions to that privilege. Where parties contract for greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld absent such concerns as fraud or illegality.

The Court recognized the importance of both freedom of contract and the public purpose of furthering settlements. The Court looked at the mediation contract in trying to interpret the intention of the parties. The Court found, "It is my opinion that the parties entered into this mediation process with the intention of settling their dispute and that they had no reason to assume that they were signing away their ability to prove a settlement if necessary." (*10) The Court held that the parties had not renounced the common law rule that communications made in the course of negotiations can be used to prove the terms of a settlement.

Misuse of the "without prejudice" statement can lead to unexpected results. A party may want to use the document in court to prove a point. For example, a letter stating "We accept your contract for building this vessel in accordance with your specifications set out in Document A123" may be the proof needed to show that a contract exists. Putting the statement "without prejudice" on such a document would be a misuse and foolish. You want the document to be "with prejudice."

Very recently the British Columbia Supreme Court in *Reum Holdings Ltd. v. 0893178* (*11) affirmed the principles set out by the Supreme Court of Canada in *Sable Offshore Energy Inc.* that the use or non-use of the words "without prejudice" in any settlement negotiation is not necessarily determinative of whether privilege is invoked. What is important is whether the intent

of the negotiations was to work towards a settlement of the action.

In another recent decision of the British Columbia Supreme Court (*12), an employee brought an action for wrongful dismissal and for aggravated damages and punitive damages against her employer for the manner in which she was fired. The employee had been given two letters on the date of her termination. The first letter set out her immediate termination. It did not set out any reasons for the termination. The second letter, marked "without prejudice", outlined the reasons for the termination and contained an offer. The court held that an employer has an obligation of good faith and fair dealing in the manner of dismissal. The employee claimed she was deeply hurt by the "cold, callous" behaviour of the dismissal. The court found that the employee had not been dealt with fairly and accepted that the dismissal had a negative impact on her emotional well-being. However, the court found that "her evidence does not permit me to find that she suffered mental distress markedly beyond what she would have experienced from being dismissed. I conclude therefore that the plaintiff's claim for aggravated damages must be dismissed" (*13). The court did not comment on whether the failure to set out the reasons for termination in the letter that was "with prejudice" influenced its decision. The case, however, illustrates the danger of placing information in a "without prejudice" letter that should likely have been in a "with prejudice" letter, leaving only the offer in the "without prejudice" letter.

The question to always ask when determining whether to use the words "without prejudice" is why are we using it? If it is to admit to a customer or client that you were wrong and you are apologizing and let's resolve the matter, then such use is appropriate and furthers the attempt at resolution of the matter. If the purpose of the document is to summarize what has taken place (for posterity) or to set out the events or course of action or the contract, the use of "without prejudice" would be a misuse.

Rui M. Fernandes

Follow Rui M. Fernandes on Twitter @RuiMFernandes and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

Endnotes

(*1) *Sparling v. Southam Inc.* (1988),1988 CnaLii 4694, 66 O.R. (2d) 225.
(*2) *Sable Offshore Energy Inc. v. Ameron International Corp.,* [2013] 2 SCR 623, at para. 13.
(*3) *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740
(*4) (*2) *Sable Offshore Energy Inc. v. Ameron International Corp.,* [2013] 2 SCR 623, at para. 14.
(*5) *Ibid,* at para. 15.
(*6) [2014] 1 SCR 800.
(*7) *Ibid,* at para. 31.
(*8) *Ibid*, at paras. 39, 45
(*9) *Ibid*, at paras. 48, 49
(*10) *Ibid*, at para. 65.
(*11) 2015 BCSC 2022.
(*12) *TeBaerts v. Penta Builders Group Inc.,* 2015 BCSC 2008
(*13) *Ibid*, para. 112.

2. Class Actions and Plaintiffs From Across the Globe: *Is There Protection for the Defendant in Ontario Class Action Litigation?*

The recent decision in *Airia Brands Inc. et al v. Air Canada et al* (*1) provides an interesting and informative example of how our courts can maintain a handle on a complex "class action" proceeding involving numerous parties from multiple jurisdictions. This decision illustrates how and when the practical benefits and efficiencies that come with a certified class proceeding may be outweighed by the concern of fundamental fairness for the parties.

The Facts

Certain "representative plaintiffs" brought a proposed class action lawsuit against various airlines, including Air Canada, alleging that the airlines conspired in Canada and throughout the world to fix prices of airfreight shipping services. The representative plaintiffs sought to "certify" a worldwide class of plaintiffs for the purposes of the class action giving rise to this reported decision.

Pursuant to s. 27(3) of Ontario's *Class Proceedings Act, 1992* (*2) a judgment on "common issues" of a class binds every class member who has not opted out of the class proceeding.

The practical effect of a class proceeding is stated in section 27 of the *Class Proceedings Act, 1992* and is as follows:

(1) A judgment on common issues of a class or subclass shall,
a) set out the common issues;
b) name or describe the class or subclass members;
c) state the nature of the claims or defences asserted on behalf of the class or subclass, and
d) specify the relief granted.

(2) A judgment on common issues of a class or subclass does not bind,
a) a person who has opted out of the class proceeding …

Under the provisions of the *Class Proceedings Act, 1992* a court shall certify a class proceeding if:

a) the pleadings or the notice of application discloses a cause of action (i.e. a type of claim recognized by the courts);
b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
c) the claims or defences of the class members raise common issues;
d) a class proceeding would be the preferable procedure for the resolution of the common issues, and
e) there is a representative plaintiff or defendant, who:
- would fairly and adequately represent the interests of the class
- has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding, and
- does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Under the above legislation, an order certifying a lawsuit as a class proceeding shall also specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out.

A consideration of what would constitute the "worldwide class" for the purposes of certification is important in understanding the issues addressed by the court in this case.

The Potential "Worldwide Class"

In this context of this case, "airfreight shipping services" refers to the carriage of shipments by

air to or from Canada. This class action alleged a global price fixing conspiracy between the defendant airlines. The services in question related in particular to the shipment of high-value, time-sensitive and compact goods, the cost of which is made up of the base rate and surcharges or extra fees imposed above and beyond the base rate, and, in particular, surcharges for fuel and security. The majority of such airfreight shipping services is sold to freight forwarders who are retained by shippers. These freight forwarders act as intermediaries for the shipment of the cargoes in question.

This intermediary dynamic gives rise to the issue presented in this action: when air cargo services are purchased by a shipper through a freight forwarder, the airline will not necessarily come to know the identity of the shipper – it might, but not necessarily. In this regard, one of the defendants initially involved in the claim (but subsequently released from the same), Lufthansa Airlines, itself identified *60,000* such "indirect purchaser customers". Airlines also sell airfreight shipping services directly to shipper customers. In the case of Air Canada, the court record revealed it had thousands of "direct purchaser shipper customers" located throughout the world.

The international dynamic in this case is also enhanced by the fact that the defendants, other than Air Canada, are foreign companies resident and domiciled outside of Canada.

The class proposed by the plaintiffs included claimants from more than 30 different countries in North America, South America, Asia, Australia, Africa and Europe. As characterized by the defendants, this amounted to "countless absent foreign claimants all over the world".

The Concern as to "Absent Worldwide Claimants" and the Certification of a Class as Including them in the Ontario Action

Certain of the defendants brought a motion to "stay" (i.e. freeze in its tracks) the action as it related to "*absent foreign claimants*" defined as those claimants who:

- resided outside of Canada;
- who had suffered any alleged losses in Canada, and
- who had not opted into the action or commenced a related action in Canada.

This stay was sought on the grounds that the courts of Ontario did not have jurisdiction (i.e. "*jurisdiction simpliciter")* over the absent foreign claimants, or alternatively that Ontario was not an appropriate forum – there being another more appropriate place elsewhere – for those particular battles to be waged.

The real concern was that there existed literally thousands of plaintiffs coming within the definition of "absent foreign claimants" (given the description of airfreight services noted above) who had *not* specifically participated in, or 'blessed' the jurisdiction of the Ontario courts. As noted below, this was cited by the defendants as a material distinction (in comparison to those plaintiffs not coming within that definition) making them vulnerable to the risk of attempted "double recovery". The defendants argued that, while the above described binding effect of the *Class Proceedings Act 1992* is not controversial in relation to a plaintiff who has commenced an action in Ontario or any absent foreign claimant who is subject to the court's jurisdiction by virtue of consent or attornment (i.e. having agreed to be bound by the Ontario court's adjudication of a matter), they did have concerns relating to those "absent foreign claimants" who are *not* present in Ontario, or have not in any way consented to Ontario's "jurisdiction".

In this regard, the defendants filed evidence from legal experts from various countries, which established that an Ontario class action judgment involving absent foreign claimants would *not* be "recognized" and "enforced" outside of Canada. This was on the basis that the established general rule for courts in Canada accepting jurisdiction over foreigners - being a

liberal or a "long arm jurisdiction" grant of jurisdiction - is broader than the more conservative, "narrower jurisdiction" model employed in most other countries. In those other countries, the courts tend to accept jurisdiction over a dispute *only* where a plaintiff in a proceeding actually brings the claim himself or joins in an existing claim. In effect, the vulnerability complained of by the defendants in this case was that they could not seek to preclude or "stay" a future action brought elsewhere by an absent foreign claimant on the basis that such claimant had already won an award in Canada. In essence, the expert legal evidence established that the foreign court in such a case would take the position that "*we don't follow the laws of and approaches in Canada, so don't even point to the Canadian judgment as some form of protective mechanism from the action now before us*".

As a result, the defendants complained that they would be exposed to the potential for double recovery by the absent foreign plaintiffs, amounting to a risk running counter to the "good order" and "efficiency" intents and objectives of the *Class Proceedings Act, 1992*.

The plaintiffs in turn lobbied that the defendants were trying to "gut the class". They asserted that the preservation or inclusion of the "absent foreign defendants" in the definition of the class for the purpose of the subject proceeding was proper on the basis that there are practical difficulties in determining the class membership, given that air cargo services are not rendered in a single location but are performed along entire transportation routes, touching both a country of origin and the country of destination. As the determination of where a purchase of airfreight shipping services occurs is a complex issue of mixed fact and law, the plaintiffs complained that without the exhaustive or all-inclusive listing of plaintiffs that the "class" might then lack the requisite clarity of identification of membership being the hallmark of, and condition precedent to, class action proceedings. In effect, the plaintiffs asserted that it is better to "keep all claimants in" rather than sub-dividing "who is in from who is out".

Discussion and the Disposition by the Court

The Ontario Superior Court agreed with the defendant airlines that the class action should be "stayed" as against the absent foreign claimants, ruling that it did not have "*jurisdiction simpliciter*" over any such claims. In effect, the Court would not accept jurisdiction over the absent foreign claimants, accepting that it "cannot reasonably expect that an Ontario class action judgment involving absent foreign claimants will be recognized and enforced abroad". With this finding, the court accepted that there was a risk that absent foreign claimants would be able to bring further litigation against the defendants in their "home" countries, where the preclusive effect of an earlier Ontario judgment (awarding that defendant damages) would be ignored. Accordingly, the defendants would be exposed to the potential for double recovery by absent foreign claimants.

The court ruled accordingly that it would only accept and take jurisdiction over plaintiffs otherwise coming within the class on narrow grounds: *only* and as when it could be established that a plaintiff was present in Ontario or had consented in some way to the jurisdiction of the Ontario court. In adopting this narrow test for jurisdiction, the Ontario court decided to act in concert with the general approach taken by the courts of other countries, who would *then*, citing international "comity" and judicial cooperation / parity principles, be more inclined to "recognize and enforce" an Ontario judgment - thus providing the preclusive protection of preventing a plaintiff from claiming for eventual double recovery on its "home" turf.

The court also ruled that Ontario was not the most just or convenient forum to adjudicate the disputes of the absent foreign claimants, thus leaving it open for them to bring such claims in their "home" jurisdictions.

In the result, in the interest of procedural fairness and justice for the defendants, the Ontario Court of Justice effectively carved out the sub-class of plaintiffs being "absent foreign claimants" from the general class otherwise caught by the Class Proceedings legislation.

Gordon Hearn

Endnotes

(*1) (2015) 126 O.R. (3d) 756 (Ont. Sup. Ct). The reference to "*et al*" in the title of this case is Latin for "and others", reflecting the fact that other plaintiffs and other defendants are involved.

(*2) S.O. 1992, c 6.

3. Dependent or Independent Contractor/ Operator? Termination and WSIB Issues

The determination of whether an individual is a dependent or independent contractor has a number of legal ramifications. Two important aspects are the employment relationship between the parties and its termination, and workers compensation.

Some advantages for use of independent contractors are: (1) overtime compensation is not owed to an independent contractor; (2) employee benefits do not have to be provided, nor do employment taxes have to be paid or withheld; (3) the work relationship is governed by contract and not by laws governing compensation; and (4) skills training is not usually necessary.

Some disadvantages to use of independent contractors include: (1) companies often regret situations where non-employees develop expertise about the company business, only to have the workers move on to a new customer when the contract expires; (2) misclassification of employees as independent contractors can result in severe legal penalties and/or legal liability; (3) independent contractors often charge a premium for their services; and (4) lack of contractor knowledge about the company's specific needs.

Simply using the term "independent contractor" in an agreement may not be sufficient for the determination of the status of the individual. This point was recently illustrated in the decision in the Ontario Superior Court in *Keenan v. Canac Kitchens* 2015 ONSC 1055. In *Canac Kitchens* the claimants, a husband and wife, both worked for Canac for over twenty years. They began their relationship with Canac as employees. Lawrence Keenan worked for Canac from 1979 to 2009. Marilyn Keenan began working for Canac in 1983. In October 1987, both were summoned to a meeting with Canac management at which time they were told they would no longer be employees, but instead would carry out their work for Canac as independent contractors. They were also told that they should incorporate.

The Keenans 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 for installation. Canac would set the rates to be paid to the installers and pay the Keenans, who, in turn, would pay the installers. The Keenans, as Delivery and Installation Leaders, would, as before, also be paid on a piecework basis for each box or unit installed; however, 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.

The Keenans signed a contract with Canac, which described them as independent contractors. They never 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. *Keenan Cabinetry* never registered as an employer with the Canada Revenue Agency for the purposes of withholding taxes and other source deductions.

As 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.

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

The Keenans sued for wrongful dismissal.

Justice Mew commented that the law in Ontario relating to dependent contractors is well established, stating (*1):

> 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 …Like employees, dependant *[sic]* contractors are owed reasonable notice on termination.

Justice Mew then reviewed the case law on the principles used to distinguish independent contractors from employees. He looked at a 2004 decision (*2) involving commissioned agents, setting out the principles:

> 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?

Justice Mew concluded that the Keenans were entitled to 26 months of notice after they were found to be dependent, rather than independent, contractors of the employer.

In the trucking area the use of independent operators is common. In fact the Workplace Safety & Insurance Board has indicated that "Hiring subcontractors and/or owner-operators is a common practice in the transportation industry." (*3)

The WSIB informational brochure provides (*4):

> An independent operator is different from a regular employee or worker. An independent operator carries on a business, separate from the employer. Typically, an independent operator in the transportation sector will have the following characteristics:
> • The owner-operator pays for the truck and the majority of the equipment or other related property.
> • The owner-operator has a choice in selecting and operating the vehicle and has market mobility in that he/she has discretion to enter contracts of any duration to transport goods and maximize profits.
>
> The WSIB uses an organizational test to determine if a subcontractor is an independent operator or a worker.

In the trucking industry, the WSIB's organizational test asks specific questions to confirm that the person qualifies as an independent operator for WSIB purposes. If both parties (the owner-operator and the firm using his/her services) agree that the five criteria outlined in the test are reflective of their work relationship, then the WSIB considers the owner-operator to be an independent operator for WSIB purposes. If the person is an independent operator, they will be registered with the WSIB and the WSIB will be able to provide a clearance certificate to confirm that the person is insured with them.

The WSIB questionnaire provides:

> Owner-operators will be treated as independent operators, for workplace safety and insurance purposes only, when the work relationship contains all the following features:
>
> (a) The owner-operator pays for the truck and a majority of the equipment or other related property (such as payments for gas, maintenance of the truck, licence and storage) and is not required to finance the truck and equipment/related property through company sources.
>
> (b) The owner-operator has the right to exercise a choice in selecting and operating the vehicle and has market mobility in that he/she has discretion to enter into contracts of any duration to transport goods and maximize profits.
>
> (c) The principal does not have the right to control where or from whom products/ services are purchased by the owner-operator (however, this does not preclude the owner-operator from exercising his/ her option to purchase products/services from the company). Also, the principal does not have the right to exercise control over the owner-operator's operations except to the extent that loads are offered, and destinations and delivery schedules are established by the principal's contract with the shipper and except for the joint responsibilities set out in federal and provincial licensing and related statutes.
>
> (d) The principal and the owner-operator state that the relationship is one of a contract for service and not that of employer and employee.
>
> (e) The principal does not issue a Canada Revenue Agency T4, T4A or make statutory deductions for E.I. and/or C.P.P.

It should be apparent that simply using the term "independent contractor" in an agreement may not be sufficient for the determination of the actual status of the individual. A fuller analysis of the relationship is needed so that the parties involved are not caught off guard and faced with surprise costs.

Rui M. Fernandes

Follow Rui M. Fernandes on Twitter @RuiMFernandes and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

Endnotes

(*1) 2015 ONSC 1055, para. 17

(*2) *Ibid*, para. 18

(*3) So You're Thinking of Using Independent Operators in Your Transportation Business – Brochure

(*4) *Ibid*, page 2

DISCLAIMER & TERMS

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - January 14th 2016 in Toronto - for the first individual to email us the name of the location depicted in photograph on page 6. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.

And Finally,

A. "The Farmer"

A farmer is sitting in the neighborhood bar getting soused.

A man comes in and asks the farmer, "Hey, why are you sitting here on this beautiful day getting drunk?"

Farmer: Some things you just can't explain.

Man: So what happened that's so horrible?

Farmer: Well, today I was sitting by my cow milking her. Just as I got the bucket 'bout full, she took her left leg and kicked over the bucket.

Man: Ok, but that's not so bad.

Farmer: Some things you just can't explain.

Man: So what happened then?

Farmer: I took her left leg and tied it to the post on the left.

Man: And then?

Farmer: Well, I sat back down and continued to milk her. Just as I got the bucket about full, she took her right leg and kicked over the bucket.

Man: Again?

Farmer: Some things you just can't explain.

Man: So, what did you do then?

Farmer: I took her right leg this time and tied it to the post on the right.

Man: And then?

Farmer: Well, I sat back down and began milking her again. Just as I got the bucket about full, the stupid cow knocked over the bucket with her tail.

Man: Hmmm...

Farmer: Some things you just can't explain.

Man: So, what did you do?

Farmer: Well, I didn't have any more rope, so I took off my belt and tied her tail to the rafter. In that moment, my pants fell down and my wife walked in.....
Some things you just can't explain.

B. Famous Airline Quotes . . .

Occasionally, airline attendants make an effort to make the "in-flight safety lecture" and other announcements a bit more entertaining. Here are some real examples that have been heard or reported:

"There may be 50 ways to leave your lover, but there are only 4 ways out of this airplane..."
After landing: "Thank you for flying Delta Business Express. We hope you enjoyed giving us the business as much as we enjoyed taking you for a ride."

As the plane landed and was coming to a stop at Washington Nat'l., a lone voice came over the loudspeaker: "Whoa, big fella. WHOA!"

After a particularly rough landing during thunderstorms in Memphis, a flight attendant on a Northwest flight announced:
"Please take care when opening the overhead compartments because, after a landing like that, sure as shootin' everything has shifted."

From a Southwest Airlines employee...."Welcome aboard Southwest Flight XXX to YYY. To operate your seat belt, insert the metal tab into the buckle, and pull tight. It works just like every other seat belt, and if you don't know how to operate one, you probably shouldn't be out in public unsupervised. In the event of a sudden loss of cabin pressure, margarine cups will descend from the ceiling. Stop screaming, grab the mask, and pull it over your face. If you have a small child traveling with you, secure your mask before assisting with theirs. If you are traveling with more than one small child... pick your favorite.
Weather at our destination is 50 degrees with some broken clouds, but we'll try to have them fixed before we arrive.
Thank you, and remember, nobody loves you, or your money, more than Southwest Airlines."

"Your seat cushions can be used for flotation, and in the event of an emergency water landing, please paddle to shore and take them with our compliments."

Once on a Southwest flight, the pilot said, "We've reached our cruising altitude now, and I'm turning off the seat belt sign. I'm switching to autopilot, too, so I can come back there and visit with all of you for the rest of the flight."

"Should the cabin lose pressure, oxygen masks will drop from the overhead area. Please place the bag over your own mouth and nose before assisting children or other adults acting like children."

"As you exit the plane, make sure to gather all of your belongings. Anything left behind will be distributed evenly among the flight attendants. Please do not leave children or spouses."
"Last one off the plane must clean it."

And from the pilot during his welcome message: "We are pleased to have some of the best flight attendants in the industry... Unfortunately, none of them are on this flight...!"

Heard on Southwest Airlines just after a very hard landing in Salt Lake City: The flight attendant came on the intercom and said, "That was quite a bump and I know what y'all are thinking. I'm here to tell you it wasn't the airline's fault, it wasn't the pilot's fault, it wasn't the flight attendants fault...it was the asphalt!"

Another flight attendant's comment on a less than perfect landing: "We ask you to please remain seated as Captain Kangaroo bounces us to the terminal."

An airline pilot wrote that on this particular flight he had hammered his ship into the runway really hard.

The airline had a policy which required the first officer to stand at the door while the passengers exited, smile, and give them a "Thanks for flying XYZ airline."
He said that in light of his bad landing, he had a hard time looking the passengers in the eye, thinking that someone would have a smart comment. Finally everyone had gotten off except for this little old lady walking with a cane.
She said, "Sonny, mind if I ask you a question?"
"Why no Ma'am," said the pilot, "what is it?"
The little old lady said, "Did we land or were we shot down?"

After a real crusher of a landing in Phoenix, the flight attendant came on with, "Ladies and Gentlemen, please remain in your seats until Capt. Crash and the Crew have brought the aircraft to a screeching halt against the gate. Once the tire smoke has cleared and the warning bells are silenced, we'll open the door and you can pick your way through the wreckage to the terminal."

Part of a flight attendant's arrival announcement:
"We'd like to thank you folks for flying with us today. And, the next time you get the insane urge to go blasting through the skies in a pressurized metal tube, we hope you'll think of us here at US Airways."