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## SOMEWHERE IN THE MIDDLE: THE NATURE OF DEPENDENT CONTRACTORS

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### Overview

The British Columbia Supreme Court recently reiterated the importance of recognizing “dependent contractors” in Canadian employment law, as providing “protection to economically vulnerable and dependent workers” who fall somewhere on the continuum between employees and independent contractors.

In [Ursic v Country Lumber Ltd.](#), Country Lumber entered into an oral agreement (the “Contract”) with Borly Holdings Ltd., a trucking services corporation solely owned and operated by Mr. Ursic. Almost fifteen years later, Country Lumber terminated the Contract without cause and without notice. The issue before the court was whether Borly was a dependent rather than independent contractor of Country Lumber, and if so, what notice was required.

### Holding

The BCSC applied the traditional, non-exhaustive list of factors from the jurisprudence to determine the “true nature” of the relationship between Borly and Country Lumber. Despite certain indications of independence, such as Borly’s investment in purchasing and maintaining its own trucks and equipment and being paid hourly rather than on salary, the Court concluded that Borly was a dependent contractor, and entitled to reasonable notice (or pay *in lieu* of notice).

In particular, the BCSC emphasized that the high degree of economic reliance and exclusivity on the part of Borly strongly militated in favour of a dependent contractor relationship. Borly earned 100% of its revenue through its services to Country Lumber, had a full-time work schedule for Country Lumber, and its trucks sported Country Lumber decals, making it unrealistic for Borly to provide its trucking services to other companies. Therefore, even though there was no express requirement to work exclusively for Country Lumber, “... the volume and demands of the work itself create[d] exclusivity”.

In addition:

- 1) *Control*. While Borly hired and employed its own drivers to operate the trucks, Country Lumber dictated significant aspects of Borly's work, including setting working hours and providing some training to, and disciplining, Borly drivers. The court held that the degree of Country Lumber's control weighed in favour of a dependent contractor relationship.
- 2) *Risk*. Borly was not paid a salary and, due to the nature of the work, Borly was exposed to potential loss; however, because Borly was paid a set hourly rate and was guaranteed some amount of work, the Court held this weighed in favour of a dependent contractor relationship.
- 3) *Ownership of Business*. Borly's trucks and drivers represented Country Lumber's business to third parties, and the delivery services were an integral part of Country Lumber's operation. Notably, the court held that the plaintiff's replaceability was irrelevant. Rather, the importance of Borly's specific function to the business militated in favour of a dependent contractor relationship.
- 4) *Permanence*. The business relationship lasted approximately 14 years, during which time, Borly increased its trucking services to Country Lumber. The substantial coordination between the parties in operations weighed in favour of a dependent contractor relationship.
- 5) *Reliance*. The parties had to coordinate delivery times, shipments, and staffing, and relied on each other for efficient operation. The court held that Borly's work was "fairly routine", and while not the strongest finding, Country Lumber's reliance on Borly also weighed in favour of a dependent contractor relationship.

In assessing what notice period was reasonable in the circumstances, the Court held that notice periods for dependent contractors should not automatically be reduced from what an employee would be entitled to. Rather, the requisite notice should reflect where "the relationship falls on the continuum between employee and independent contractor". Here, considering the *Bardal* factors, the character of the relationship was "intermediate" – somewhere between an employee and an independent contractor. In awarding a notice period of 10 months (rather than the 16 months sought by the plaintiffs) the Court weighed the lengthy, exclusive working relationship against the fact that Borly had obtained the benefits of a contractor relationship for tax purposes and was a corporate entity that hired its own employees. In determining the quantum of damages, the BCSC extrapolated the average after-tax income/revenue ratio from the six months prior to termination, and accounting for mitigation, awarded \$82,953.91 *in lieu* of notice.

## **Key Takeaways**

- 1) Even where some evidence of independence exists, courts will assess the relationship as a whole to determine the status of the relationship. Economic dependence, control, and exclusivity are important indications of a dependent contractor relationship.
- 2) Dependent contractors fall somewhere on the continuum between employees and independent contractors. Courts will look at the level of dependence in that relationship when determining reasonable notice periods and/or damages.
- 3) The absence of a written contract can make subsequent conduct more influential in determining the meaning of the terms of the contract and the nature of the relationship. Still, how the parties refer to the relationship (including for tax purposes) is not determinative.