

## Dependent contractor with 'unconscionable' contract gets \$10,000 after dismissal

**Nova Scotia property manager worked exclusively for owner in relationship with power imbalance**

<https://www.hrreporter.com/employment-law/news/dependent-contractor-with-unconscionable-contract-gets-10000-after-dismissal/363034>

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“There are pros and cons to both [contractor and employment relationships] and one size does not fit all.”

So says Luiza Vikhnovich, an employment lawyer with Sherrard Kuzz in Toronto, in discussing a decision from the Nova Scotia Small Claims Court which ruled a property manager was an independent contractor entitled to reasonable notice of dismissal.

### Background

Darlene Boutilier worked as a superintendent property manager at several residential properties owned by Peter Rouvalis through a numbered corporation. According to Boutilier, she was hired in 2011 and started out cleaning apartments on a part-time basis but in 2016, she started working close to full-time hours. She initially did some homecare work for another employer, but by 2018, she only worked for Rouvalis, although she continued to advertise her services.

Boutilier’s job duties included cleaning, helping tenants move out, removing rodents, inspecting fire extinguishers, snowplowing, painting, purchasing supplies, and dealing with tenant issues on an on-call basis. Another employee handled renting out the units.

Boutilier occasionally hired other people to help her but had to consult with Rouvalis first. She drove a truck owned by Rouvalis' corporation. While performing her job duties, she brought her own housekeeping supplies and used her own lawn tractor to mow lawns. Rouvalis reimbursed her for larger purchases such as lumber, sinks, and toilets, and Boutilier managed the company's cash accounts at retail suppliers.

Often, Rouvalis found something that wasn't done right, but Boutilier was never given any warnings about a need to improve.

On June 23, 2020, Rouvalis asked Boutilier to come to a meeting. Another individual who was involved in the management of the company was present, but this made Boutilier uncomfortable because she had a history with him — Rouvalis claimed not to be aware of this. Rouvalis asked her to sign a contract and Boutilier said she wanted to have it reviewed by a lawyer. However, Rouvalis refused and said she could show it to her lawyer afterwards.

The agreement included an article that permitted Boutilier to live in a particular apartment with free parking that "cancels and supersedes the tenancy agreement between the owner and the contractor."

Boutilier said she felt intimidated. She refused to sign and the meeting ended with the other individual yelling at her and insulting her. Rouvalis testified that he brought a copy of the contract by her apartment the next day, but she wasn't there and she didn't show up for work. Two days later, Rouvalis gave her a termination letter stating, "As discussed, this letter confirms the termination of your superintendent agreement dated June 1, 2020."

Boutilier found employment in a homecare position about two-and-a-half months later and filed a claim for wrongful dismissal and breach of contract. Rouvalis countered that she was an independent contractor and could be terminated at any time. He also alleged that he had just cause to terminate her employment, as he inspected several vacant apartments and they were in disarray, which cost him over \$15,000 per month in lost rent, which he mentioned at the June 23 meeting.

Rouvalis added that the article in the agreement referring to free accommodation in the apartment was an error and Boutilier was still expected to pay \$1,000 per month, as she had been doing up to that point.

The court found that the character of the relationship was that of a contractor. Boutilier's work wasn't limited exclusively to Rouvalis' company and she had a certain amount of independence. While she had the authority to hire new employees, she needed approval first, said the court.

The court also found that Boutilier provided some of her own tools, while Rouvalis paid for bigger-ticket items and provided the truck she used to get around. In addition, there was no financial risk or expectation of profit for Boutilier.

Exclusivity is a key factor in determining the [contractual relationship](#), according to a legal expert.

### **Worker was exclusive and economically dependent**

However, the court also determined that the exclusivity of the relationship — plus the fact that tenants, vendors, and subcontractors with whom Boutilier dealt “would see her objectively as representing and working as part of [Rouvalis’] business” — made it a dependent contractor relationship that entitled Boutilier to reasonable notice of termination.

“The court concluded Boutilier was a dependent contractor because Boutilier was economically dependent on (and working exclusively with) the defendant,” says Luiza Vikhnovich, an employment lawyer with Sherrard Kuzz in Toronto. “Although Boutilier was free to work for others and advertised her services as such, the evidence showed she had not actually worked for anyone other than the defendant in two years prior to termination.”

The agreement itself will not determine the nature of the contractual relationship and decisionmakers will look at the surrounding facts, regardless of how the worker and the employer describe the relationship, she says.

In 2019, an Ontario court further clarified what makes a contractor [dependent rather than independent](#).

The court also found that the contractor agreement that Rouvalis required Boutilier to sign was unenforceable due to unconscionability. It was “a classic scenario of inequality of bargaining power,” plus the contract was sprung on Boutilier without notice, she was pressured to sign it, and she wasn’t allowed to have her lawyer review it. In addition, there was no evidence that Boutilier consented to the contract afterwards, since she was terminated within two days — which the court noted was suspicious timing.

“While it may seem like a good idea at the time, limiting the opportunity of the other party to review the agreement or receive independent legal advice is rarely a winning strategy. Providing time to seek advice can strengthen an employer’s position if the other party later seeks to overturn a negotiated agreement,” says Vikhnovich.

Since there was no evidence of any warnings or other progressive discipline elements, the court determined there was no cause for dismissal. Taking into consideration that Boutilier was middle-aged, she had worked full-time for two years, and the likelihood of finding replacement employment was fairly positive, the court found three months' notice was appropriate.

Rouvalis' company was ordered to pay Boutilier \$10,000 as compensation for lost wages during the reasonable notice period. In order to avoid such liability, employers should carefully consider the type of arrangement they want without assuming that one type is automatically better, says Vikhnovich.

"There are pros and cons to both [contractor and employment relationships] and one size does not fit all," she says. "Most important is that the employer understand the risks and benefits of either approach and enters into the arrangement with eyes wide open."

See *Boutilier v. Rouvalis*, 2021 NSSM 54 (N.S. Sm. Cl. Ct.).

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