

CONTRACTS



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What is a Contract?

- A Contract is:
 - A “deal” two or more parties have agreed to, are expected to abide by and be bound by their promises.
- Contracts may be formed orally or in writing.
- There is no single form of contract that can be used in every situation.

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Creating and Interpreting Contracts

Contracts requires an understanding between two distinct parameters:

- ✓ *The legal principles* required to form a valid contract, and
- ✓ The unique *fact situations* that form the context of the contract.

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The Principles of Contract Offer and Acceptance – *Legal Principles*

- A valid contract requires:
 - A definite offer made,
 - A definite acceptance of that offer communicated, and
 - Consideration.
 - Contracts are valid only if the parties mutually promise to perform some act or undertake to perform some obligation for the other's benefit.
- It is important to remember:
 - A counter-offer is not an acceptance, and
 - Any change in an offer's terms on receipt of the offer is not an acceptance.

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The Substantive Content of a Contract

- Contracts mean precisely what they say — not what the parties later say they might have intended.
- If the parties do not express their arrangement accurately in the contract, it is the contract wording that will likely be enforced—not what the parties later claim they wished to have happen.

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Employment



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EMPLOYMENT RELATIONSHIP

✓ Employment Standards Legislation



(absolute minimums)

✓ Personnel policy of organization



(beyond the minimums)

✓ Individual employment contracts

(beyond the personnel policies)

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EMPLOYMENT STANDARDS ACT

Hours of Work

- 8 Hours per day based on a regular work day or more than 8 hours if regular work day is more than 8 hours. (Maximum of 48 Hours in a work week.)

Overtime and Overtime Pay

- Hours worked in excess of 44 per week must be totaled and the number of hours worked in excess of 44 per week are deemed overtime hours.
- An employer must pay an employee overtime pay at least 1.5 times the wage.

Averaging Agreements

- Employees and employers may enter into a written agreement to average overtime over a greater period of time, rather than 1 week.
- Time off may be taken if agreed by the Parties.
- If the time off is not taken, the employer may pay the overtime.

Vacation

- At least two Weeks Vacation

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Termination of Employment - Employee

Employees wishing to terminate must provide written notice:

- 1 week, if employed less than 2 years
- 2 weeks, if employed 2 years or more.

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Termination of Employment – Employer (Without Cause)

Employers wishing to terminate to provide written notice or pay in lieu of notice:

- 1 week, if employed more than 3 months but less than 2 years
- 2 weeks, if employed 1 - 3 years
- 3 weeks, if employed 3 - 4 years
- 4 weeks, if employed 4 - 5 years
- 5 weeks, if employed 5 - 6 years
- 6 weeks, if employed 6 - 7 years
- 7 weeks, if employed 7 - 8 years
- 8 weeks, if employed 8 or more years.

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TERMINATION WITHOUT CAUSE

- ✓ Can terminate at any time provided that notice, or pay in lieu of notice is given
- ✓ Legislation states minimum (one pay period)
- ✓ May be modified by personnel policy
- ✓ May be modified by employment contract
- ✓ Common law (Availability of alternate employment, length of service, position with employer, age, salary, lack of good faith and fair dealing by the employer)

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REASONABLE NOTICE

Bardal v. The Globe and Mail LTD., (fifty-one years ago)

Reasonable notice must be decided by considering:

- The character of the employment
- The length of service of the employee
- The age of the employee; and
- The availability of similar employment.

Love v. Acuity Investment Management Inc. (Feb. 2011)

Employee's length of service was 2.5 years. The Court ordered a longer period of notice than had been provided originally based solely on length of service. (Results 5 months notice)

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TERMINATION WITH CAUSE

- ✓ Defined as “*willful misconduct or disobedience, or willful neglect of duty that is not condoned by the employer*”
- ✓ No notice is required
- ✓ Must issue warnings specific to termination
- ✓ Must show progressive discipline and a paper trail
- ✓ What is sufficient depends on circumstances of each case

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CONSTRUCTIVE DISMISSAL

- ✓ Unilateral and fundamental change to the employment relationship (it must be “substantially altered”)
- ✓ Examples: less responsibility, significant change in duties, change in policy, new location of work, loss of status
- ✓ Notice is required if constructive dismissal is proven

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ADVANTAGES FOR EMPLOYEE

- ✓ Stable pay with no risk of loss
- ✓ Paid holidays, lieu days and sick pay
- ✓ Statutory protection (Employment Standards Act)
- ✓ Vicarious liability of employer
- ✓ Skills training
- ✓ Reasonable notice to terminate
- ✓ Tax deducted at source and submitted for you
- ✓ Pay into Employment Insurance scheme
- ✓ Employer contributes to EI, CPP
- ✓ Other employment benefits provided

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DISADVANTAGES FOR EMPLOYER

- ✓ Expensive (about 20 percent higher due to statutory obligations)
- ✓ Less flexibility in staffing
- ✓ Vicarious liability
- ✓ Employer liability (termination, severance, other statutory requirements, administrative burden)
- ✓ Need to supervise/direct

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CONTRACTOR RELATIONSHIP:

✓ The 'Contract'



✓ Contract law and language

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Descriptors of a Contractor

- ✓ No deductions
- ✓ No statutory holidays
- ✓ No mention hours of work
- ✓ Chance of profit and some risk of a loss
- ✓ Works away from the employer's business.
- ✓ Incorporation
- ✓ No minimum notice of termination
- ✓ No job description
- ✓ Pay a "rental" for use of any employer's equipment
- ✓ Submit an invoice for payment each month
- ✓ Charge HST
- ✓ No job title or a business card

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EMPLOYEE or CONTRACTOR

- ✓ **Control test** (the worker's independence)
- ✓ **Integration test** (are worker's tasks integral to organization's day-to-day business)
- ✓ **Economic reality test** (control over work, ownership of tools, financial risk)
- ✓ **Specific result test** (is work time-specific or ongoing)

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EMPLOYEE or CONTRACTOR

No single test determines employment status, rather the tests are used in combination and are applied to the circumstances of each individual case. The purpose of the tests is to draw attention to the true nature of the relationship.

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**Moose Jaw Kinsmen Flying
Fins v. Minister of National
Revenue**

Federal Court of Canada, 1988

FLYING FINS ...

- ✓ Swimming instruction and training is integral to the business and the sole reason for the existence of the business
- ✓ Coach required to comply with bylaws and all rules
- ✓ Required to be available during the hours set by the Club
- ✓ Could be dismissed for misconduct
- ✓ Coach incurred no expenses, supplied no facilities, took no business risks

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FLYING FINS ...

- ✓ Any financial gain or loss resulting from the Club's operations fell to the Club, not coach
- ✓ Certain degree of control was exercised by the Club
- ✓ Coach required to supply personal services to the Club – could not substitute the services of others for his own
- ✓ Canada Revenue Agency determined that the coach was an employee and not a contractor

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EMPLOYEE v. CONTRACTOR DIFFERENCES

- ✓ **Liability**
 - ✓ Employer is vicariously liable for employees and volunteers, while contractor is personally liable
- ✓ **Taxes, benefits, pensions**
 - ✓ Employer deducts taxes and contributes to employment benefits, paid holidays, sick days, income security
- ✓ **Termination**
 - ✓ Employer must give notice unless for cause, contractor typically requires no notice

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THE PERILS OF GETTING IT WRONG

- ✓ Taxes have to be paid retroactively
- ✓ Employer and employee have to pay out EI and CPP contributions
- ✓ Employee must pay more taxes because of improperly-claimed expenses
- ✓ Directors may be personally liable
- ✓ Fines and penalties may be imposed on both employer and employee

RECENT CASE LAW

***McKee v Reids Heritage Homes Ltd (RHH)* (Ontario Court of Appeal)**

This case confirmed that a sub-category of a contractor called a dependent contractor exists.

McKee began her work as a salesperson in 1987 and was paid on every home she sold and paid her own employees.

McKee terminated and was awarded 18 months pay.

Appeal court ruled that McKee was a dependent contractor and created an economic dependency and exclusivity of service.

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CASE LAW CONTINUED....

If deemed a contractor, court will now determine whether exclusive contractor or not. (Independent or dependent)

Therefore, contractor terminations may require adherence to Employment Legislation and/or the common law requirements for termination.

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WHICH DO YOU WANT

1. Employer perspective
2. Employee/contractor perspective

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EMPLOYMENT CONTRACT

- ✓ Description of job duties
- ✓ Term of agreement
- ✓ Compensation, benefits, holidays
- ✓ Supervisory relationship
- ✓ Performance appraisal
- ✓ Termination and severance
- ✓ Confidentiality
- ✓ Link to personnel policies (if applicable)
- ✓ Proprietary Rights

CONTRACTOR AGREEMENT

- ✓ Deliverables
- ✓ Term of agreement
- ✓ Compensation
- ✓ Reporting relationship
- ✓ Termination
- ✓ Risk, indemnification, insurance
- ✓ Confidentiality
- ✓ Proprietary Rights

PROPERTY RIGHTS

- ✓ Intellectual property created by an employee belongs to the employer
- ✓ Intellectual property created by a contractor belongs to the contractor
- ✓ Contracts need to include provisions to deal with ownership of intellectual property

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Covenants

- A “covenant” is a promise.
- “Restrictive covenants” limit, or restrict, the rights of a party.
 - Non-competition agreements / Exclusivity
 - Non-solicitation agreements
 - Confidentiality agreements.
- A restrictive covenant that has an excessively broad scope, imposing unreasonable restrictions or prohibitions, will likely be struck down by the courts.

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JOB DESCRIPTION

- ✓ Identify the position (title, level)
- ✓ Summarize the job functions and activities
- ✓ Define the reporting relationship
- ✓ Describe the responsibilities and duties
- ✓ Forms the basis for the performance appraisal

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MANAGING THIS RISK

For the business:

- ✓ Structure the relationship to be one of true contractor
- ✓ Ask contractor to provide an indemnity
- ✓ Or, play it safe and establish employment relationship

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Check it out!

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