

## Terminating Independent Contractor Agreements

In today’s fast paced and ever-changing business world, employers have begun to rely more and more on independent contractors. Aside from the obvious advantages of the employer not having to remit taxes and various premiums, one benefit of this arrangement is the ease with which it can be ended - maybe!

Employers generally associate reasonable notice and severance with the termination of an employee’s services, rather than those of an independent contractor. However, this distinction is becoming less obvious as employment law principles and remedies, such as reasonable notice, are being applied to independent contractor relationships.

The following cases demonstrate this evolution.

### The Reebok Case

Marbry entered into an oral agreement with Reebok, whereby the latter granted the former the exclusive right to sell Reebok athletic footwear and clothing in British Columbia. As part of the agreement, Marbry was required to maintain a showroom containing an inventory of demonstration products, conduct product knowledge sessions for Reebok customers’ retail sales staff, and assist Reebok in tracking down counterfeit Reebok products.

In part because of the efforts of Marbry, the Reebok product line greatly increased its market share in British Columbia. Eleven years after the original agreement, Marbry, at the request of Reebok, agreed not to take on non-Reebok product

lines. Even before this request, the sale of Reebok products amounted to approximately 75% of Marbry’s total sales. A month after the request, Reebok terminated the parties’ agreement on one month’s notice.

Marbury sued. The court concluded that the relationship between Marbry and Reebok was more akin to employee/employer than that of independent contractor or strict agency. As a result, Marbry was entitled to nine months notice of the termination.

The factors the court considered significant included the duration and permanency of the relationship, the degree of reliance and closeness of the relationship between the parties, the high degree of exclusivity of the relationship and the degree of control that Reebok had over Marbry’s actions.

### The Centennial Case

Aqwa and Centennial Home Renovations entered into an agreement whereby Aqwa agreed to work as a commissioned salesperson for Centennial. The agreement included a provision that either party could terminate the agreement at any time without notice or penalty.

Despite this clear termination clause and Aqwa’s understanding of what he had signed, the trial judge concluded that Aqwa was entitled to reasonable notice when he was terminated by Centennial. The conclusion was based on the unequal bargaining positions of the parties at the time the agreement was made, and the lack of what the judge referred to as “mutuality” in the effect of the termination provision.

The Ontario Court of Appeal disagreed with the trial judge. The appellate court found that the parties’ agreement was not unconscionable or unfair and therefore it should be upheld. In other words, Centennial had been within its rights to terminate the agreement with no notice.

Two somewhat similar cases, two very different results. However, both cases offer some important lessons.

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# Suing on Contingency

One of the most commonly-asked questions of personal injury lawyers is whether they will work on a contingency fee basis. While clients may not have a great familiarity with the legal process, one concept they are familiar with is contingency fees.

A contingency fee arrangement is an agreement whereby the lawyer agrees to accept a percentage of the final monetary award obtained by the client. In addition, the lawyer agrees to accept the risk of receiving nothing if the lawsuit is unsuccessful.

This fall marks 10 years since the Law Society of Upper Canada approved changes to the *Rules of Professional Conduct* permitting contingency fees. Under the rules, a lawyer and client may enter into a contingency fee arrangement provided it:

- is in writing;
- is signed by the lawyer and client;
- contains a statement of the method by which the fee is to be determined, including the percentage that may accrue to the lawyer in the event of settlement, trial or appeal; and
- includes a statement that the client may appeal to a Superior Court Judge for a determination of whether the fee is fair and reasonable.

In including these conditions the Law Society has attempted

to structure a contingency fee system that is fair for both the lawyer and the client. They have also included other requirements which further protect the client, specifically:

- that the fee arrangement does not require the lawyer's consent to discontinue or settle the claim;
- that the client is free to change lawyers or end the lawyer/client relationship at any time; and
- a specific reference that contingency fees shall not apply to family or criminal matters.

The Rules also suggest that a contingency fee agreement should take into account a number of factors and that the written fee arrangement should specifically refer to factors such as:

- the likelihood of success;
- the nature and complexity of the claim;
- the expense and risk of pursuing the claim; and
- who is to receive an award of costs.

If you have questions about contingency fees, or would like to discuss a contingency fee arrangement please feel free to contact one of our lawyers. 

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- Do not assume that because you have entered into an independent contractor relationship that it can automatically be terminated without notice.
- While oral agreements are legally binding, written agreements are better and more certain.
- It is important to include a clear and unambiguous termination provision in your independent contractor agreements. The provision should set out the grounds for terminating the agreement, or state that none are needed, as well as the amount of notice that must be given.
- Get the assistance of an experienced business lawyer to draft your independent contractor agreements and to work to validate the classification through advanced rulings from the CRA and the WSIB.
- Independent contractors should review the agreement with a lawyer.

- The more an independent contractor is treated like an employee, the more likely that he or she will be entitled to reasonable notice if the relationship is terminated.
- Ideally, independent contractor agreements should have clear start and end dates. Encourage the independent contractor to seek out other sources of work, since then they are more likely to be determined to be "independent."

While most situations involving independent contractors will be obvious, there will be times where it will not. In those situations, you are best to seek professional legal advice. 

### Summer Movie Tip: The Rainmaker

The Rainmaker is based on a novel of the same name by John Grisham. Matt Damon plays Rudy Baylor, a young lawyer who goes to work for an ambulance chaser played by Danny DeVito. Rudy brings with him a case of a woman wanting to sue an insurance company that stalled on paying her son's medical bills. 

# What are Probate Fees? How Can (Should) I Avoid Them?

When planning your estate, one factor to consider is the estate administration tax, commonly referred to as probate fees, that your estate may have to pay out.

## The Basics

Probating a will is the act of judicially certifying a will's validity and confirming the executor's authority. Although a will is a legally binding document and the executor derives his or her authority from the will, probate may still be necessary. Often, it is a third party, such as a bank or trust company, who will require that the Will be probated, before they will take instructions from the executor.

When a will is probated, an estate administration tax must be paid. This tax is calculated based on the fair market value of all the assets covered by the will submitted to probate, less any encumbrances on real property. The rate is \$5 per \$1,000 up to \$50,000 and \$15 per \$1,000 on the balance of the estate. So an estate worth \$257,000 would be required to pay \$3,355 in estate administration tax.

In order to pay less in probate fees, many people have begun to look at ways of reducing the size of their estates. Naming a beneficiary, other than your estate, on your RRSPs and life insurance allows these assets to pass outside your Will, thus avoiding probate fees. If only one third party requires the Will to be probated, your executor may be able to work out another solution such as a security arrangement or a letter of indemnity.

## Joint Tenancy

Another common way to reduce probate fees, is to transfer valuable assets, such as a home, a cottage or a mutual fund portfolio, into joint ownership.

Joint tenants each own the whole of the property. On the death of one of the joint tenants, the property passes automatically to the survivor(s). The property does not become part of the estate and therefore is not subject to probate fees.

For many, the most valuable asset is their home. Therefore one mechanism that at first seems ideal, because of its simplicity, is to transfer title to your home into a joint tenancy with one or more of your children. However, before you rush down to the registry office, there are a few things to consider.

### 1. Possible Tax Consequences

When a principal residence is sold, the tax payer is exempted

from paying taxes on any capital gain. However, you risk losing this valuable principal residence designation if you make your children joint tenants of your home. In fact, if the children do not live in the home, you will lose half of the principal residence exemption. In addition, if there are any outstanding mortgages on the property, land transfer tax will have to be paid.

This type of arrangement could also jeopardize your children's access to the principal residence exemption or their eligibility to participate in government programs for first-time home buyers.

The transfer of other capital assets, such as shares, into joint ownership may trigger immediate capital gains taxation that would otherwise have been deferred until sale or death.

### 2. Exposure to Creditors

As joint tenants, your children become full legal owners of your home. As a result, the property is exposed to any outstanding or future debts of your children.

### 3. Family Law Considerations

In the event your child's marriage breaks down, the value of his or her interest in your home may be exposed to an equalization claim.

### 4. Family Relations

Unless you make all your children joint owners of your home, conflicts could arise following your death since the provisions of a will cannot defeat the rights of the joint owners.

### 5. Loss of Control

All joint tenants have an equal say in what should be done with the property and none can act independently. Therefore, the possibility of an eventual conflict between the various owners should be carefully considered.

### 6. Psychological Element

Most people have worked hard for their home and may be reluctant to make their children equal owners while they are still active and healthy.

Before taking any measures to avoid probate taxes, speak to an experienced professional. A person with the expertise can spell out the advantages and disadvantages as well as help you work through the math. 

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## Corporations - Separate Legal Persons

There are a number of ways to legally set up a business, including incorporation, sole proprietorship and partnership. One of the key distinctions that sets a corporation apart from the other two formats is limited liability. Unlike a sole proprietorship or a partnership, a corporation is a legal entity that is separate from its owner.

### Separate Entity

In the eyes of the law, a corporation is a separate personality, whose acts, rights, duties and liabilities belong to it and not to its shareholders. This means that the owner/shareholder of the corporation will not be liable for the business's debts, obligations or liabilities.

There is nothing improper about taking advantage of the limited liability offered by a corporation, so long as third parties are made aware that they are conducting business with the corporation and not with the individual(s).

### Corporate Veil

Over the years, the courts have been extremely reluctant to pierce this corporate veil. To this day that remains the general rule and it is only in extremely limited circumstances, such as fraud, dishonesty or avoidance of legal obligations, that a court will lift the corporate veil. Directors and officers of a corporation can also be personally liable for unpaid sales taxes (such as HST) and

certain other statutory exceptions to the general rule.

### Shareholders of Private Corporations

Despite a corporation being a separate entity and the court's reluctance to look behind a corporation, an individual shareholder must be diligent when entering into a transaction to ensure that he is not inadvertently doing so in his personal capacity. To preserve the advantage of limited liability, it is essential, when corporate documents are being signed, that it is clear that the individual signing does so on behalf of the corporation and not on his/her own behalf.

We recommend that the following method of signing be used whenever any corporate document is executed:

*XYZ Limited*

*Per:*

*John Smith (signature)*

*John Smith (name of individual)*

*President (office held by individual)*

Any departure from this protocol could result in the individual signing the document becoming personally liable for the obligations set out in the document.

Our firm works in all areas of corporate and commercial law, including incorporation. We would be pleased to discuss your needs with you. 

## Liability of Social Hosts

During the warm summer months, many people will be entertaining with family and friends around the pool and in their backyard. While it is important to not let your guests drive when they have had too much to drink, a social host is generally not legally liable if this does occur. The Supreme Court of Canada made this clear in a 2006 decision wherein the high court held that a social host does not owe a duty of care to a person injured by a guest who has consumed alcohol

at their party. The court stated in its reasons, that individuals who attend a party do not "check their individual responsibility at the door" meaning, of course, that the individual who attends a party is responsible for the amount of alcohol that he or she consumes.

Nevertheless it is conceivable that a court may decide this differently if the host is actively encouraging irresponsible behaviour. 

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