

## ARE YOU HIRING INDEPENDENT CONTRACTORS OR EMPLOYEES?

✍ Ronald Smith



For many employers, hiring staff as independent contractors can seem like a logical way to meet resourcing requirements without the costs and expectations of a long-term commitment that are associated with permanent employees. However, although you may think you've hired a contractor, the CRA may not agree. You may also run afoul of the Alberta Employment Standards Code should the Courts deem your staff to be employees, not contractors. Unfortunately, there can be a heavy financial cost to employers in these circumstances.

In the Alberta Employment Standards Code, an employee is defined as:

“an individual employed to do work who receives or is entitled to wages.”

Often, employers hire contractors but the work they are hired to do falls under this definition of employee. There are several key factors that are considered by the Courts to determine if the worker is an employee or contractor. These include:

- Does the company dictate how, where and when the work should be done?
- Does the company control promotions & discipline?

- Does the company own the tools or equipment used by the worker?
- Does the worker submit an invoice after completing a project or get paid a regular amount at consistent intervals?
- Is the worker in business for himself/herself?
- Does the worker have a chance at profit or a risk of loss?
- Can the worker accept work from other companies or decline work that is assigned?

Why does it matter? Because employees are entitled to vacation pay, overtime and termination notice or pay in lieu of notice. And, as an employer, you must pay income tax, Employment Insurance and CPP. If CRA determines that your contractor should have been hired as an employee, you may find yourself liable for income tax, Employment Insurance and CPP arrears, interest and penalties. Employers can face further sanctions under the Employment Standards Code if the contractor should have been receiving benefits such as vacation pay and overtime.

Unfortunately there is no simple test that can be used to let employers determine how

the relationship will be classified before work begins. All the factors that can determine if the worker is an employee or independent contractor are taken into consideration to determine how the relationship will be labeled.

Employers looking to hire independent contractors can take the precaution of signing a proper contract. Although this isn't a guarantee, it may reduce the chance of receiving an unwelcome visit from CRA. A proper contract should:

- include a 'hold harmless' clause that requires the contractor to take responsibility for all risks associated with performing the tasks described in the contract;
- include a termination clause if the contractor does not satisfactorily fulfill his/her duties. No notice period or pay in lieu of notice should be paid;
- if possible, be made with a contractor who is incorporated.

If you are employing, or are considering hiring independent contractors, the employment lawyers at Duncan Craig LLP can help you assess their status and prevent a future unwelcome ruling and the associated costs.

# THE LINK

CONNECTING YOUR BUSINESS AND PERSONAL LEGAL NEEDS



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## USING CONFIDENTIALITY AGREEMENTS TO HELP SELL YOUR BUSINESS

✍ Ross Swanson

Opening up your business to the scrutiny of potential buyers can be a stressful and potentially risky experience for many owners. After all, to get the best price possible, you are going to have to show prospective purchasers all the intimate details, business processes and trade secrets that have made the business a success. The fact that so many potential purchasers may be current competitors adds to the fear that the information you disclose could be used against you if the sales negotiations break down.

In business sale negotiations it is very common to have the purchaser sign a confidentiality agreement before disclosing sensitive or proprietary information. We believe that a well-crafted confidentiality agreement can not only be used to protect the seller if the deal falls through, it can also be used to weed out semi-serious candidates and help bring about the completion of the sale.

In most transactions, purchasers are asked to sign the confidentiality agreement after the initial discussions have taken place and the Letter of Intent (LoI) is signed. With the right provisions in place, we often encourage sellers to request that the other party sign the agreement earlier in the process so that the two parties can discuss the business openly. Too often, initial purchase agreements have to be revisited or deals fall through after the LoI is signed

because new information becomes available to the purchaser after signing the confidentiality agreement.

There are several key components to a good confidentiality agreement that will protect the seller. The first is a clause that specifies the damages the potential purchaser will have to pay for each breach of the agreement. A potential payout of \$100,000 per breach is a pretty strong incentive for potential buyers to keep all confidential information safe and their lips sealed. Specifying the damages per breach saves the seller the often difficult challenge of trying to quantify the cost of a breach by the buyer.

Another key component of a strong confidentiality agreement is an injunction clause. This clause allows the seller to seek orders from the Courts for the buyer to immediately stop a specific action. Injunctive relief can be attained quickly from the Courts, especially compared to the far more lengthy process of suing for damages.

We have also advised many clients to request a deposit from potential buyers who want access to a company's confidential information. This deposit can be non-refundable at any time or forfeited after waivers. Agreements should also include a non-solicitation provision that prevents a prospective buyer from approaching employees or customers.



There are many other considerations that go into a confidentiality agreement and the disclosure of information. These include:

- Who can see the information
- Where the information can be reviewed
- If the information can be copied in any way
- How the information provided to the purchaser should be returned or destroyed if the deal falls through
- What private information is specifically covered by the agreement. This typically includes material not available publicly or already known to the buyer such as trade secrets, propriety information, know-how & processes, business plans, finances, customer lists and marketing strategies
- The length of time the agreements is in place

With an effective confidentiality agreement in place, business owners looking to sell their business can not only minimize the risks that come from disclosing confidential information, they can use it as a tool to help bring about a successful sale.

If you are contemplating selling your business and would like more information on how to use confidentiality agreements to effectively reduce your risk, please contact us.



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## ESTATE FREEZES FOR BUSINESS OWNERS

 Robert Dunseith, QC

For the owners of privately-held companies, an estate freeze can serve as a highly valuable estate planning and business succession tool. When an estate freeze occurs, the current owners are transferring the future growth of the company to new recipients, most commonly children of the owners or a family trust. This action freezes the value of the current owners' estate to the day the estate freeze takes place and therefore limits the owner's exposure to future capital gains. This type of reorganization can also allow the company to access other family members' lifetime capital gains exemption eligibility - \$813,600 in 2015, but indexed to rise with the rate of inflation in future years.

In a typical estate freeze, the owners exchange their common shares for preferred shares that have a fixed (or frozen) value equal to the common shares exchanged. The new beneficiaries, typically the children, subscribe to a new common share for a nominal value. If properly structured, the parent will not have made a taxable disposition and no taxable benefit will have been conferred on the child, since the full present value of the corporation is represented in the preferred shares issued to the parent in the exchange.

There are several different types of estate freezes that can be used depending on the family and financial circumstance of the current owners. For example, in circumstances where there is not sufficient

value in the company to provide for the owner's full retirement needs there is the option of conducting only a partial estate freeze. This allows the current owners to still benefit from some of the future growth. There are a number of factors that need to be considered before deciding on the ideal structure of an estate freeze including:

- the parents' life expectancy;
- lifestyle and income needs;
- the impact of expected inflation;
- the ability of the children to responsibly manage and preserve directly controlled wealth;
- whether the parents have identified which of their children are suited for taking over ownership and eventually control of the family business;
- how even-handedness in estate planning can be achieved if only one of several children is identified as the beneficiary of the freeze; and
- the ability of the company to fund orderly redemptions to finance the parents' retirement when the time comes.

In many circumstances, the estate freeze is accompanied by the creation of a family trust. The key feature of a family trust is the power of the trustees (usually the parents, who control the family company) to appoint the capital and income of the trust to one or more beneficiaries specified by name or class. This will include an express and unfettered

discretion to exclude other beneficiaries. Where the trust is constituted for the purpose of holding shares of a family corporation, it will allow the trustees to decide who among their children will receive the shares, once the children have grown up and demonstrated their interest and ability with regard to the family business. It can also be used to distribute the proceeds of the shares, should the parent decide that the shares will be sold or the corporation wound up.

Estate freezes are particularly useful for family business and aid in transferring the company to the next generation in a tax efficient manner. However, estate freezes can also be used in other circumstances such as to ease entry of key employees into partial ownership of a business, to promote loyalty and dedication, and possible succession to more full ownership in future.

In addition to the potential significant tax savings that come about from an estate freeze, the process can provide a strong incentive for the new generation to promote the success of the family corporation.

It should be noted that there are numerous technical legal and tax considerations to be weighed in the development and implementation of an estate freeze plan. These must be addressed carefully in conjunction with your lawyer and accountant.



## ARE YOU COVERED?

 Patrick Feehan

Being involved in a car accident is a terrible experience that can be made worse if you discover that your auto insurance is insufficient. As personal injury lawyers, it's a difficult situation that we come across all too often. The good news is that you can take steps in advance to protect yourself quite easily, and for a relatively small amount of money. Here's what you need to know:

If you are to cause an accident, Section A of your auto insurance policy covers the damages you cause to others, but only to the limits you have chosen. The typical Alberta policy includes \$1million of coverage under Section A. It seems like a lot of money, but it may not be enough. Imagine if you injure a professional or someone with a lucrative job in the oil sands. If the victim can no longer work, their loss of income claim alone could exceed the one million dollar limit of your policy. Many serious and catastrophic injuries can also require life-long care at considerable expense.

If your insurance doesn't cover the full costs of the injured party, you are responsible for the difference. Your pay can be garnished, you can be forced to sell your house, and your assets can be seized. Fortunately, this is something you can help avoid by increasing the amount of coverage included in Section A of your policy. An additional \$1,000,000 in coverage, increasing your protection to \$2,000,000, can be purchased at minimal extra cost.

You should also be aware that the current (and badly out of date) Alberta law requires Section A coverage of only \$200,000, so there are drivers on the road who are really underinsured. If you are injured in an accident that's caused by someone who is underinsured or even uninsured, there is something in place to help you. The SEF 44 (Standard Endorsement Form) portion of your own auto insurance policy requires your own insurance company to make up for the shortfall in coverage available. So, if you are injured in an accident and the driver at fault lacks adequate insurance to cover

your claim including any loss of income or treatment costs you require, your insurance company will make up the difference, up to the limits of your own Section A policy.

We suggest you consider speaking to your insurance broker about increasing your coverage to \$2 million. The resulting increase in premium for doubling your coverage is usually very small, especially when you view it as part of the overall cost of owning and operating your vehicle. This amount is more likely to be sufficient in the event of an accident, regardless of who is at fault. Alternatively, you can discuss an umbrella policy that increases your liability coverage across all your personal insurance lines.

If you haven't reviewed your insurance policy recently, now may be a good time to take a look and ensure you are protected. Please feel free to contact our personal injury team if you have any questions.



## RECENT DEAL HIGHLIGHTS | January - September

**In the first nine months of 2015 Duncan Craig's M&A Team advised clients on dozens of successful transactions with a total value of \$372M. Recent deal highlights from 2015 include:**

- Acted for a client in the auto industry partnership on the disposition of \$22M of assets to competitor.
- Represented the US guarantor on \$15M debt restructuring related to the Canadian assets of international food & beverage company.
- Represented the owner of retail business on the disposition of \$35M in business assets to a public company.
- Acted for a real estate developer on a \$55M construction financing.

Contact us today for a no obligation chat about your next business purchase, sale or merger to find out how our team can help make the transaction a success.

