

In the business world, your daily activities require that you deal with customers, suppliers, employees and a number of other people. Your work is full of all sorts of agreements, but are you always aware of them? Do you prefer to agree verbally through fear of the other party's reaction? Do you think you're incapable of drafting a contract? Do you believe it would be impossible for you to draft valid contracts?

In the following pages, the *Quebec Bar Foundation* describes the main contracts you are likely to come across when you start your career as an entrepreneur. This booklet will give you an overview of the broad principles you have to comply with. It will also make you aware of the importance of signing contracts and negotiating them to meet your needs. Advice about drafting contracts is also given. ■

You and Your Contracts

Before learning how to write a contract, you have to know one when you see it and be aware of its validity requirements.

Firstly, a contract is formed when one or more people freely agree with each other to do or not do something. When the law does not require that a contract be in writing, as is the case for certain contracts governed by the *Consumer Protection Act*, a contract may be made verbally or in writing, as the parties wish. A corporation or partnership can enter into contracts just as an individual entrepreneur or self-employed worker can. However, the impacts of a contract are different depending on the legal form of the business. On this topic, see *Booklet 1 "The Legal Form of Your Business"*.

For a contract to be considered valid, three conditions must be met:

- **There is an exchange of consent by the parties**

When Marissa, a computer graphics designer, agrees to work for Jane on a particular file, they must clearly and freely indicate their acceptance of the contract through a handshake, a signature or otherwise. If Marissa realizes that Jane misled her, or if Jane made her agree by using threats, she could likely have the contract declared invalid by a court.

- **The parties are capable of contracting**

The parties to the contract must be persons in full possession of



SHEDDING LIGHT on contracts

their mental abilities; in order words, "capable" and "able" within the meaning of the law when the agreement is formed. If Luke is placed under a protective regime (tutorship or curatorship), he may be considered incapable depending on the seriousness of his illness and therefore unable to validly enter into a contract. Here again, the contract could be held invalid by a judge, for all the parties to the contract.

- **The contract has a particular object**

The object of the contract you sign is the very nature of the legal transaction which has been entered into. To be valid, the object must not be prohibited by law or contrary to public order. The transaction is identi-

cal for you and the other party to the contract i.e. the person with whom you have made an agreement. It could involve the sale of a building, a donation of money, a loan, the lease of a commercial building, etc. For example, Gerry and Lisa decide to purchase a page of advertising in their local newspaper to announce the opening of their business of selling CDs and new and used books. The object of the contract here is the purchase of advertising space.

As an entrepreneur, you will have many opportunities and many reasons to enter into a contract: the purchase of office supplies, a bank loan, lease of a work space, hiring of a secretary, exchange of services, shareholders' agreement or part-

nership contract, etc. You don't need to have thousands of dollars at stake for there to be a contract or agreement—even the smallest transaction is considered a contract.

Forms of contracts

Do you think that a contract is only valid if it is prepared by a legal adviser? Well, think again! In fact, only certain contracts such as mortgages, marriage contracts and certain types of wills must be notarized, i.e. prepared by a legal adviser. Most contracts can be prepared at home. But be careful! There are situations where what is involved in a contract can be very significant. Sometimes it is better to consult a lawyer to avoid problems.

Many people believe that a contract is only valid if it is in writing. Let's be clear, unless the law provides otherwise, there is a "contract" even if there is nothing in writing to prove it. A good handshake is enough to seal the deal of the century! However, be aware that if a problem comes up during the term of your contract, it's your word against the other party's

word in proving the content of your agreement! Note also that the law greatly limits the proof of a contract by testimony when the dispute involves more than \$1,500.

It is much more sensible and highly recommended that you and the other party set out in writing your intentions, rights, obligations and duties. Even though you are busy with your daily activities, set aside some time to prepare written contracts relating to your business activities. This will give you several benefits:

- ✦ you will show that you are very professional;
- ✦ you will clearly determine with the other parties the rules of conduct and each person's obligations;
- ✦ you will avoid conflicts and differing interpretations about the details of your agreements;
- ✦ you will facilitate proof of the content of your agreements in the case of a dispute.



Is drafting contracts for you?

Although you have already entered into an untold number of contracts in your life, that does not necessarily make you an expert on the subject. No matter, you are still very capable of drafting valid contracts. It's simple: avoid using terms if you don't know what they mean, such as "subrogation", "prescription" and "pledge". Instead, get in the habit of explaining your thoughts in your own words. The result will be the same and this way, you will quickly gain more confidence in yourself.

Remember, a contract is a unique document. It simply has to reflect the content of your agreement. Its wording should remain simple, clear and precise, so that you and the other party will understand it.

If in doubt, it is recommended to ask a lawyer to help you out. A lawyer is a specialist in contracts; he can complete your work, validate it and answer your questions. A word of advice: don't overestimate your skills and never dismiss the possibility of consulting a specialist.

An agreement, a contract

In theory, all contracts are based on the same rules. Although there are specific rules for certain contracts such as the lease or sale of a building, we can nonetheless identify certain general elements applicable to all contracts.

Each transaction is unique and should give rise to a contract specific to it. Don't hesitate to add to, change or remove clauses so the final document meets your needs.

Beware of standard contracts sold as forms. If you decide to use one, take it as a model, because it almost certainly won't be exactly what you need. Delete and change what does not exactly correspond to your agreement and adapt the content of the contract to your needs.

Remember that a contract prepared in the proper form becomes the "law" of the parties who entered into it.

Some aspects of a contract are more important than others. Before signing an agreement with a client, a supplier or a business partner, check the points found in the table "The Elements of a Contract" in this booklet.



The Elements of a Contract

Elements	Explanation	Examples
<p><i>The title</i> The title</p> <p>• • •</p>	<p>The beginning of a contract normally includes a title indicating the type of contract you are signing. This allows you to clarify the content of the agreement and make sure you're on the same wavelength as the other party.</p>	<p>“Loan Agreement”, “Shareholders’ Agreement”, “Service Contract”, “Commercial Lease”, “Confidentiality Agreement”, “Distribution Contract”</p>
<p><i>Date and place</i> Date and place</p> <p>• • •</p>	<p>Indicating the date the contract is signed can be important to determine when the contract starts. The place should be indicated so it will be known where the contract was signed.</p>	<p>“Service Agreement entered into in Victoriaville, July 8, 2008”</p>
<p><i>Identification of the parties</i> Identification of the parties</p> <p>• • •</p>	<p>It is essential to specify who the parties to the contract are. Make sure you indicate your last and first names, the names of the businesses, your addresses and in what capacity you are acting under the agreement. This can be very useful when you negotiate with a representative of the company such as the superintendent of a rental property, the sales clerk of your supplier or the purchasing representative for your client.</p>	<p>“Between: <i>Good Buildings Leasing Inc.</i> 999 Violet St., Chevrefeuille, QC J9J 9J9 represented by: Sandra Cronin, President (hereinafter referred to as the Lessor)</p> <p>And: <i>William Leclair</i> 888 Plateau St., Chevrefeuille, QC J8J 8J8 (hereinafter referred to as the Lessee)”</p>
<p><i>The rights and obligations of the parties</i> The rights and obligations of the parties</p> <p>• • •</p>	<p>This section must clearly set out the rights and obligations of each named party. This is the heart of the agreement. It allows your undertakings and those of the other party to be established precisely. In the case of a service contract, the rights and obligations may include the duties to be performed, the time given to do them, the terms of payment, the evaluation of the quality of the work and liability in the case of breakage or errors committed while the work is being performed.</p>	<p>“The borrower agrees to only use the loan for the purposes indicated in the contract” “Upon signing the lease, the lessee agrees to give the lessor proof of insurance of the premises in question” “Emmanuel Smith agrees that his partner, Lena Beecher, will be the sole signatory of cheques of the partnership”</p>
<p><i>The effective date of the contract</i> The effective date of the contract</p> <p>• • •</p>	<p>It is important to indicate when the parties intend the contract to take effect. It may be the date the contract is signed or any other date or circumstance indicated.</p>	<p>“The contract will come into effect on September 18, 2008” “The contract will take effect on the date it is signed by the parties”</p>
<p><i>The term of the contract</i> The term of the contract</p> <p>• • •</p>	<p>A contract may be for a fixed or indefinite term. Regardless of its term, it may be advisable to set out the terms for renewing it. Don't forget: in theory, the rights and obligations relating to a contract are only valid during the term of the contract.</p>	<p>“The term of the lease is 12 months” “The lease shall be renewable on the terms set out in Schedule 2” “The contract shall be in effect until one of the parties informs the other in writing of his intention to terminate it”</p>
<p><i>The end of the contract</i> The end of the contract</p> <p>• • •</p>	<p>The contract ends on the date indicated. It may also be useful to describe the circumstances which could put an end to the contract and within what time period.</p>	<p>“The death of a partner shall terminate the partnership contract” “The party wishing to terminate the contract must give 20 days’ notice of termination”</p>
<p><i>How disputes will be settled</i> How disputes will be settled</p> <p>• • •</p>	<p>The preparation of a contract does not shelter you from possible conflicts regarding its interpretation or the failure to comply with it. It is useful to agree how they will be resolved before they arise. This precaution may prevent you from having to become involved in a legal battle that costs you time and money. You can choose to go to arbitration, mediation or conciliation.</p>	<p>“In the case of a disagreement or dispute with respect to the interpretation or application of this contract, the parties agree to use arbitration, to the exclusion of the courts, and they name as sole arbitrator Jack Goodman or, failing him, another attorney designated by the firm Jolicoeur & Goodman.” “The quantity of wood cut by the forester shall be calculated by an independent appraiser chosen by the parties. Such appraiser shall use Department of the Environment appraisal standards”</p>
<p><i>The signature and initials of the parties</i> The signature and initials of the parties</p> <p>• • •</p>	<p>The signing of a contract is not essential for it to come into effect, but it is highly recommended. It plays a major role, because it is confirmation that the parties expressed their consent. In addition to the signature, it is useful to initial each page of the contract. This small detail shows that all the pages have been read and that their content has been accepted by the parties. The initials also facilitate proof that no page has been added or substituted to the agreement after it is signed. Be sure to keep a signed copy.</p>	

You got burned!

Have you ever realized after the fact that signing a contract wasn't such a good idea? Like many people, you may have felt that you were burned by the requirements of an agreement. For example, Myra thinks that the interest rate on a loan she signed several years ago is way too high, and George would like to move his business but he still has ten years to go before the end of his commercial lease.

It is important to understand that, even if the effects of a contract are very advantageous for one person and a bad deal for another, the contract cannot be invalidated for that reason alone. However, there are certain situations which could lead to the cancellation of a contract or the reduction of its effects.

One such situation is when there is a so-called "contract of adhesion". Such a contract is imposed on you without

your being able to negotiate its essential terms, such as some loan or insurance contracts. If a contract of adhesion is excessively disadvantageous to you, the courts may invalidate it or reduce its effects. Another situation is when you signed a contract when you were a minor or incapable of fully exercising your rights and you suffered harm as a result. The same applies to a consumer, who can demand the nullity of a contract or the reduction of his

obligations thereunder where the consumer's obligation is excessive, harsh or unconscionable or the respective obligations of the parties amounts to exploitation of the consumer. ■



The COMMERCIAL LEASE

COMMERCIAL OR RESIDENTIAL—ONE AND THE SAME?

A commercial lease and a residential lease are different in several respects. Although these two types of contracts involve the lease of a site by a lessor for the benefit of a lessee, they are worlds apart. Contrary to a residential lease, there are no specific rules governing commercial leases. Since only the general rules on contracts and leasing govern the relationship between lessees and lessors of commercial premises, the *Régie du logement* does not have jurisdiction over these types of leases. As a result, you cannot complain to the Régie and ask it to intervene if you have problems after you sign a commercial lease, as only the courts have authority to hear you (Court of Québec, Superior Court).

As the law provides little protection for lessees of commercial premises, entrepreneurs, who are often in a hurry to take possession of their new premises, are sometimes at a disadvantage when the time comes to sign an offer to lease or a lease.

BE CAREFUL!

Pay particular attention to the term of the lease you are preparing to sign: a very long term, such as five or ten years, can hinder the possibilities of expanding your business. Sometimes it is better to sign a commercial lease with a shorter term and negotiate a good renewal clause.

For example, Ian and Paul have been in business for one year. They personally signed a five-year lease with the owners of the building. Despite all their work, the business is not doing well. After a year and a half, they decide to close up shop. However, their lease has not ended. Ian and Paul will have to honour their obligations toward the lessor until they are able to sub-lease or transfer their lease.

Along the same lines, a renewal clause which depends only on what the lessor wants can also be very costly for the lessee.

Nothing prevents the lessor from showing the lessee the door or unreasonably increasing the amount of rent. As you are no doubt aware, moving a business involves substantial costs such as the renewal of certain office supplies, installation fees and leasehold improvements, to name a few.

WATCH OUT FOR PROLIFERATING COSTS

There are different types of leases in business lingo: gross lease, net lease, net net lease, etc. Net of what, anyway? The difference stems from the inclusion of additional fees you may be charged. When signing a lease, take the time to find out what your basic rent includes. Check what other charges the lessor could ask you to pay during the year in addition to the monthly cheque you have already given him for the premises relating to your business. Ask him the question. That way, you will find out if your lessor can charge you a variety of costs, such as heating, electricity, insurance, maintenance, air conditioning, taxes and even expenses for major repairs such as the roof or the structure of the building itself! Also find out whether you will have to give him a percentage of your sales as additional rent. By taking all these costs into account, you will have a better idea of the actual amount of your rent.

NEGOTIATE, NEGOTIATE, NEGOTIATE

Remember, there are no specific rules for commercial leases, because only the basic rules of contracts apply to the signing of such a contract. It is therefore essential that you negotiate its terms. Although that may seem difficult, it is your absolute right – exercise it! Lessors who claim not to be able to change the clauses of contracts are only trying to keep you quiet. Don't be afraid to make yourself heard.

CONSENT – at the heart of the validity of a contract

For a contract to be considered valid, the parties must agree to it freely and be well informed. No one should be forced or misled in the contracting process. You must have freely chosen to enter into a contract. On the other hand, you have the obligation to become well informed before entering into an agreement. You can never plead ignorance, other than in the case of a defect of consent due to error, as described below.

How is consent manifested?

Your consent consists of the manifestation of your acceptance of the contract and its terms. Signing something in writing is not the only way to demonstrate acceptance; it can be expressed in several different ways.

Your acceptance is expressed when you sign an undertaking

or say words announcing your intention to be bound, such as “I accept this agreement” or “I’m going to give you a \$7,000 cheque for your equipment”.

To enter into an agreement, there may also be tacit consent, i.e. which is inferred from what you do. This type of consent is manifested through a person’s actions. For example, when Mike, an entrepreneur, begins renovation work on a customer’s house, he gives a very good sign that there was an agreement between him and his customer and that he agreed to it.

What is a defect of consent?

Where consent was not obtained freely, the validity of the contract can be in doubt. This is called a defect of consent. Error, fear and lesion are defects of consent which can lead to the nullity of a contract.

✿ Error

An error may involve the nature of the contract, the object of the goods or service or an element essential to consent. For example, Roger, who is a farmer, thought he was buying several thousand dollars worth of wheat seed whereas it was in fact an agreement to harvest wheat. Error may also be caused by the silence of a party or his reticence, i.e. when a party is misled through the other party’s bad faith. Note, however, that an inexcusable error does not constitute a defect of consent.

✿ Fear

Fear or violence comes into play when a party feels obliged to enter into a contract out of fear for his life, his loved ones or his property. For example, Raymond sold his printing equipment at a loss after Arnold threatened to write a newspaper article exposing his questionable business relationships.

✿ Lesion

There is lesion when the benefits the parties receive from the contract are out of proportion. In most cases, only minors and persons of full age under protective supervision can claim they are the victim of lesion. ■

REMINDER

- ✓ As soon as two or more people agree, whether they are individuals or corporations, exchange their consent and come to an agreement on something to be provided, a contract has been reached.
- ✓ Never sign a contract if you don’t understand all the clauses and the implications—you may be in for a surprise. Discuss it first.
- ✓ As a general rule, it is always possible and even desirable to negotiate the clauses of the contracts you sign so they meet your needs and expectations as best as possible.
- ✓ Always keep a copy of the contracts you sign.
- ✓ Each contract is unique and should be adapted to your situation and that of the other party.
- ✓ Other than in a few exceptions, a verbal contract is just as valid as a written contract. The difference lies mainly in how difficult it is to prove its existence and contents.

IF YOU NEED HELP

Agence du Revenu du Québec
Complexe Desjardins, P.O. Box 3000, Succ. Desjardins
Montreal, QC H5B 1A4 Tel.: 514-864-4155
www.revenu.gouv.qc.ca

Canada Customs and Revenue Agency
305 René-Lévesque Blvd. W.
Montreal, QC H2Z 1A6 Tel.: 1-800-959-7775
www.ccrca-adrc.gc.ca

Consumer Protection Bureau
Head office
5199 Sherbrooke St. E., Suite 3671, Hall A
Montreal, QC H1T 3X2
Tel.: 514-873-3701
www.opc.gouv.qc.ca

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Quebec City: www.barreau.qc.ca/quebec
Elsewhere in Quebec: www.barreau.qc.ca/aap



SERVICE CONTRACTS

OFFERING YOUR SERVICES

When Mark, an accountant, agrees with *ReadAll Publishing Inc.* to draft their business plan and prepare their pro forma financial statements for \$2,500, he is entering into a service contract. There is a service contract between an entrepreneur and his client when they agree on the completion of physical work (ex. construction of a building, development of design plans, creation of a website, etc.) or intellectual work (ex. development of a computer program, design of a training program, etc.) or on the providing of services (ex. distribution of a book, cleaning of facilities, etc.), at a price which the customer agrees to pay the entrepreneur.



ELEMENTS OF A SERVICE CONTRACT

When there is a service contract, the customer can tell the entrepreneur he has hired what results he would like to achieve, but he cannot tell him how to do his work. No control over the work schedule or relationship of subordination can be imposed on the entrepreneur. In our example, Mark works from home on his own schedule and with his own materials. *ReadAll Publishing Inc.* therefore can only follow up with Mark and ask him to finish preparing the documents within two months.

NOT TO BE CONFUSED WITH AN EMPLOYMENT CONTRACT

With the proliferation of freelance work and self-employed workers, it is more and more common for people to confuse service contracts with employment contracts. A service contract is a contract which generates the work of an entrepreneur and a self-employed worker, whereas an employment contract is between an employee and an employer.

In the case of a self-employed worker, no deductions at source are taken from his income and he is not automatically entitled to benefits such as compensation for occupational illnesses and work-related accidents and employment insurance. Employees, on the other hand, are entitled to these benefits and tax is deducted from their salary directly. For help distinguishing between the two, read *Booklet 1 "The Legal Form of Your Business"*.

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**The information found in this booklet is general and does not constitute a legal opinion.
If you have specific questions or a legal problem, don't hesitate to consult a lawyer.**

In this text, the masculine form is used to refer to both men and women.

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