

**Employment: Arts and the Law**  
**A Guide to Human Resources for Artists and Arts Organizations**

**A Project of the Fredericton Arts Alliance**

**This Project was made possible by the Pro Bono Students Canada Program.**

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**PBSC and the Faculty of Law, University of New Brunswick regrets that it cannot provide legal advice. This document contains general discussion of certain legal and related issues only. Please consult with a lawyer for assistance with specific legal problems.**

## **How to use this guide**

Skim the Table of Contents to familiarize yourself with the overall contents and flow of the guide. Though this guide cannot possibly address everything that will be relevant to contracting artists, or speak fully to the multitude of possibilities that can arise in business situations, it is our hope that it will serve as a useful starting point for artists.

Please be aware that some of the information in this booklet comes from Canadian case law, and may be subject to change at any time. If you have concerns, please consult a lawyer.

This booklet acts as a guide to various human resource and associated legal issues relating to contract workers, employees and their employers.

## **What is an Employee?**

*It is very important to determine whether or not you are classified as an employee or a contract worker. If you are not an employee then you do not have the same rights and do not have the same contractual duties.*

In an employee contract, or contract *of* service, a person carries out the work, according to the direction and control of the employer and gets paid for the work as the work is carried out.

In a contract *for* service a person, a contractor or service provider makes a commitment to the client to carry out material or intellectual work or to provide a service for a price or fee. In a contract for service the one doing the work is free to choose how they will perform the contract.

From New Brunswick *Standards Employment Act*:

“employee” means a person who performs work for or supplies services to an employer for wages, but *does not include an independent contractor*;

“employer” means a person, firm, corporation, agent, manager, representative, contractor or sub-contractor having control or direction of or being responsible, directly or indirectly, for the employment of one or more persons and includes employer as defined in the [NB] *Public Service Labour Relations Act*, but does not include a person having control or direction of or being responsible, directly or indirectly, for the employment of persons in or about his private home.

It is often difficult for people to determine whether they are employees or contractors, but the following will help you figure out under which category you fall.

### **Difference between employee and “self-employed”**

Whether or not you are an employee is based on the nature of the relationship that you have with the potential employer. As such, even if it is explicitly written into your contract that you are an ‘employee’, the courts or government decision-makers (such as CRA officers, employment insurance officers, CPP officers, workmen’s compensation officers) can decide that the relationship you have is not that of an employee/employer but that of a contractor/client. These decisions also have implications towards your obligations to government, your entitlement to benefits, rights as an employee, and union eligibility.

When determining whether or not an employee-employer relationship exists, the courts or government decision-makers will look to various factors about the relationship. When certain elements are present, they are more likely to find an employment relationship. Some elements are more important than others, but the existence of one alone does not mean that you are or are not in an employee relationship; they consider them all together and balance them accordingly.

Three common elements that courts and government decision makers will consider when determining if you are an employee:

- 1) The employer must exercise a relatively high degree of control over the *where and when* of your employment
  - The employer controls, directly or indirectly, what work is to be done, how, when and where it is to be done.
  - The employer has the right to hire or fire.
  - It does not matter if the employer uses the control, only that they have the ability to do so.
  - The employer has a higher degree of control over the worker's daily activities and greater influence over the worker.
  - Working part-time, casually, at home or for an employment agency *does not* necessarily mean you are not an employee.
  
- 2) The worker must be economically dependent on the employer
  - The employer usually provides the tools and equipment. However, small investments for your own tools do not take you out of employee status (e.g. a photographer who owns his or her own camera can still be an employee, so can a carpenter who owns his or her own tools, or a graphic designer's computer).
  - The employer covers cost of use and repair of equipment, insurance, transport, rental etc.
  - The employer alone assumes the risk of loss.
  
- 3) The worker must not be an entrepreneur operating a business, but must form part of the employer's business
  - The worker is performing an integral part of the business.
  - The worker's work is exclusively for the employer.
  - Working for more than one employer does not necessarily mean you are an independent contractor.

*It is important to note that one factor alone is not conclusive.*

Indicators that someone is self-employed:

- Worker may work for other payers
- Worker provides tools
- Worker decides how task is completed
- Worker sets own working hours
- Worker may hire someone to complete the job
- Worker does not participate in payer's benefit plans
- Worker does not have vacation pay, and has no restrictions on hours of work or time off
- Worker pays own expenses
- Worker is paid by the job on predetermined basis
- Worker submits invoice to payer for payment
- Worker may accept or reject work

Indicators that someone is an employee:

- Worker works exclusively for payer
- Payer provides or pays for tools
- Payer can control how work is done
- Payer sets working hours
- Worker must perform services himself or herself
- Payer provides pension and benefits
- Worker is paid for vacation time
- Payer pays expenses
- Worker is paid a salary or hourly wage
- Worker reports to payer's workplace regularly

## **What are the Obligations of Independent Contractors?**

### **Are there legal obligations the client has to its contract workers?**

- It is important to note that the *New Brunswick Employee Standards Act* does not apply to independent contractors. Thus the protection that employees are afforded under that Act does not apply to you if you fall into the independent contractor category.
- Your Client must allow you time to review the contract and to present it to your own lawyer or legal advisor.

### **Are there legal obligations a contract worker has to his or her client?**

- An independent contractor is bound by the terms of the contract.
- An independent contractor has a duty to act in good faith with his client.
- Acting in good faith means:
  - Complying to the terms of the contract.
  - Using your best efforts to meet all your requirements.
  - Not acting in any way that is irreconcilable with the duties and obligations of the contract.

### **Are there any labour laws or standards that are different for artists of any discipline? If not, what are the key things I should know as an employee?**

If you are an independent contractor you are not entitled to protection under the laws regulating employment. However as an employee, the minimum employment standards remain the same no matter the discipline. Industry standards may meet or exceed minimum employment standards.

## **What are Employee Obligations?**

Employee obligations arise from the Law of Contracts. Independent contractors are not employees and so do not have an “employment” contract, as such they aren’t held to the same common law rules.

These rules apply whether or not you are a Federal employee or one that falls under the *Employments Standards Act* for New Brunswick.

Employees will have obligations under their express and implied contractual terms.

Express terms are those explicitly written into the contract. It is very important to read everything in your contract and ask for clarification if you do not understand. Make sure you do the same with your collective agreement, as you may be under obligations to your union for specific contractual clauses.

For example the *Canadian Theatre Agreement for 2009-2012* section 7 calls for Artists Obligations to Equity

7:01 CTA Engagement Contract

Nothing contained in any CTA Engagement Contract signed by any member of Equity shall be construed so as to interfere with the carrying out of any obligation which a member owes to Equity by reason of his/her membership therein. The Theatre shall not request or require any member to do anything forbidden by the Constitution and By-Laws of Equity or by such rules made by the Equity Council or its authorized representatives which are not in conflict with this Agreement.

Implied terms are those the courts have decided exist in all employment contracts even when they aren't explicitly written. These are obligations that employees are held to, and if not followed, could be held as grounds for dismissal.

### **Express**

Most express obligations will be straightforward and easy to understand and often linked to the job you've been hired to do. The courts will read these terms literally and if anything is ambiguous, it will be read in the employee's favour, but you shouldn't count on that. One form of clause to look out for is a restrictive covenant.

### Restrictive Covenant

A restrictive covenant seeks to prevent an employee from exploiting an employer's trade secrets, confidential information, or general business goodwill, *or from competing with the employer after their employment relationship has ended.*

The general expertise and skills that the employee has learned on the job cannot be restricted, but using specific confidential information that you learned on the job can be.

For example: A photographer had an employment contract with a photography company. In the contract there was a restrictive covenant which prevented him, once the contract was over, from soliciting business with schools he had worked with through the company. When the company found out that he had solicited from those former schools they sued and the final court order prevented him from working for those schools.

*When a contract contains a restrictive covenant, it is important to address it with your employer and have it fully explained. If it is complicated you may want to discuss it with a lawyer. The restrictive covenant must be reasonable and cannot prevent you from working after leaving employment. A lawyer can help negotiate an appropriate clause.*

## **Implied**

The following are implied terms, which means they do not have to be written in the contract, but employees must abide by these rules.

- 1) Advance Employer's Business Interests
  - Employees have a duty to act in the business' best interest as determined by the employer
- 2) Obedience to Orders and Insolence
  - Employees have a duty to obey the lawful and reasonable orders of the employer as long as they are within the scope of the employment
  - Insolence (for example, profanity directed at employer) is a breach of the implied duty of loyalty. A single act of insolence will usually not be grounds for dismissal, especially when it is provoked, but may be if followed by actual or threatened physical assault.
- 3) Absenteeism and Lateness
  - Employees are bound to show up for work in a timely manner.
  - Employees have a right to assert their religious beliefs, so the employee has a right to time off for their religious holidays and in that case cannot be dismissed for absenteeism.
  - Employers must accommodate an employee with a disability, such as arriving late or requiring more time, or absenteeism for medical reasons.
- 4) Dishonesty
  - Employees are bound not to act in a deceitful, fraudulent or otherwise dishonest manner
- 5) Drunkenness and Impropriety
  - Employee is bound to show up for work in a sufficiently sober condition to perform the job effectively and without endangering the safety of other persons in the workplace
- 6) Incompetent or Negligent Performance of the Job
  - Employees guarantee that they have the expertise to perform their contractual duties
  - Employees cannot misrepresent (lie about) their qualifications, skills, or experience
  - Employers are required to provide training when employees need to use new technologies
- 7) Not to Wrongfully Exploit or Abuse the Employer's Business interests
  - Employees cannot engage in conduct which is damaging to an employer's business interests

## Copyright

The traditional rule is that the employer is presumptively entitled to the exclusive copyright in any works produced by the employee in the course of employment, unless the parties agree otherwise.

For a more detailed account, see Copyright booklet (*Demystifying Copyright*) provided by Fredericton Arts Alliance.

## Conflict of Interest

Employees are to avoid conflicts of interest. Conflicts of interest arise when a reasonably well informed person would conclude that an interest might influence the exercise of the individual employee's duty. Personal, financial, or political interest can be at issue, or conflicts may arise during the course of work through accepting gifts, hospitality and benefits.

For example, when an employee invests, or engages in an enterprise that is in competition with his or her employer, that presents a conflict of interest.

## Notice of Termination

An employee is bound to give the employer reasonable notice when quitting. When deciding to quit your job, you must ensure that your employer is given enough time to replace you. The reasonableness of the notice is decided by looking at the circumstances of each particular case. The courts look to the character of the employment, the length of service of the employee, the age of the employee and the availability of finding a similar employee, having regard to the experience, training and qualifications of the servant.

## Fiduciary Duty

*Since employment obligations stem from an employment contract, employees do not necessarily have a greater duty to an organization. However special duties arise when employees are in what is known as a special fiduciary relationship with their employer.*

Some employees have a special "fiduciary duty" which they owe to their employers.

### When does it arise?

- 1) A fiduciary must exercise a relatively broad and independent discretion in handling the critical aspects of an employer's business
- 2) The employer's business interest must be especially vulnerable to the actions of the fiduciary

This duty is usually reserved for top executives and managers.

### Obligations

- Employees cannot leave to exploit business opportunities discovered in the course of employment
- Employees cannot compete with a former employer for a reasonable time

## **What are the duties of a board of directors?**

In a very general way, the duty of members of a board of directors are to manage the affairs of the organization in question, this duty is set out in the organizations' governance documents (i.e. By-laws, constitution, incorporation documents if incorporated, etc.). However, they are generally not employees.

Very often when discussing the duty of a director in legal terms, there will be discussion of the "standard of care" that a director must attain. In the case of an unincorporated association, there is no clear legal directive showing what the exact standard of care that a director must follow. Generally, the assumption is that such associations will be expected to fall under the same standard as a corporation without share capital.

In Canada there are two different standards of care that may be applied to a director. One standard is the subjective standard, which means that a persons' experience and skill will influence the standard to which they are held. A person with a great deal of knowledge or skill will be held to a higher standard than someone who has very little.

The second standard that may be applied to directors is the legislative standard of care, where the standard is that of a reasonable person. This is defined in s.122(1)(b) of the Canadian Business Corporations Act and in s.79(1)(b) of the Business Corporations Act (New Brunswick). The question of defining what makes a reasonable person is a little more difficult to define. The reasonable person standard means that the question that must be answered is: what would a regular person, without having received specialized training, do in any particular situation.

## **What is a trust?**

A trust is some form of property, be it money, stocks and bonds, land etc. that is set aside for the purposes of benefiting a person, persons, or a specific group or organization, who are known as the beneficiary or beneficiaries. A trust is administered and run by trustees. Trustees are required by law to manage the trust property for the benefit of the person/group designated in the trust document. ( This is the document that sets out the terms of the trust, as in how it is to be run, who benefits, what is the nature of the trust property, etc.)

## **What is a fiduciary duty, and why does a trustee owe one to the trust organization?**

A fiduciary duty is a duty owed by a trustee towards the beneficiary of the trust being managed. In the case of a charitable or non-profit organization that is run by a board of trustees, the duty in question is owed to the organization itself. It is important to note that not all directors are trustees and not all trustees are directors. The term trustee refers specifically to those who have been appointed to manage a trust fund on behalf of the people or organization who benefit from the trust. The concept of a fiduciary duty is something that can apply to trustees, directors and employees alike.

The fiduciary obligation is usually defined as taking the same care in managing the affairs of the trust as a reasonable person would take in managing his or her own affairs. It should be noted that there are some indications that Canadian courts can differentiate between a sophisticated and

an unsophisticated trustee, and will occasionally determine that an unsophisticated party may not be as responsible as a sophisticated party when there is fault in interpreting the terms of a trust. The law suggests that while a particular judge might distinguish between a sophisticated and unsophisticated party, they are under no obligation to do so; therefore, for the purposes of trustees looking at this booklet, both sophisticated and unsophisticated trustees are considered equal in Canadian law, which is to say that everyone will be treated equally in terms of their responsibility to the beneficiaries of the trust.

Trustees must also be careful not to breach their fiduciary duties by profiting from their positions as trustees, or by allowing themselves to be placed in a position where they may have a conflict of interest. Simply put, a trustee cannot use their position as a means to enrich themselves, or suggest the trust invest in a business that the trustee in question owns or benefits from, as this will create a conflict of interest.

## **What are charities and non-profit organization?**

A charitable organization is defined under the income tax act as an organization that provides the following services:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community as a whole that the courts have identified as charitable.

An organization must fall into one of those four categories, and have applied for charitable status and be accepted by the Charity Directorate to be considered a charitable organization in Canada.

A non-profit organization is an organization that does not distribute surplus funds to shareholders or to the owners of the organization. Instead extra funds are used to pursue the organization's goals. A non-profit organization may also be referred to as a corporation without share capital (This means that it does not sell shares that produce dividends for shareholders). It is important to understand that a non-profit organization (NPO) *is not necessarily* the same thing as a charitable organization.

An NPO or a Charity may be created as a trust or a corporation, or may be unincorporated. All of these different forms of organisations have different governing rules in the eyes of the law. A trust is governed by the trust deed, which lays out what a trustee can and cannot do. Incorporated organizations have the Canadian Business Corporations Act or in New Brunswick, the Business Corporations Act (SNB 1981, c B-9.1) which provide a list of the obligations of a director. NPOs can be incorporated either at the provincial or federal level, and the obligations differ between the two. At the federal level, the corporation bylaws must be filed with Industry Canada and approved by the Minister. A list of directors and their mailing addresses must also be filed.

## **What are the minimum requirements for a board of directors?**

A board of directors is required to govern the organization. Governance is defined as “the overall processes and structures used to direct and manage an organization’s operations and activities”. The Alliance for Non-Profit Management states that the role of a board of directors is to stand outside the organization and hold it accountable to the public interest. Public interest includes the client base, the workers, the volunteers, the donors and the general public. While there is often a great deal of overlap between directorship and management, generally the board of directors is not meant to interfere with the day to day operations of the organization.

In general, a board of directors is intended to help develop the policy that will guide the organization in question. In many cases, the management aspect of directorship involves making sure that the organization has enough resources to function properly.

In terms of minimum requirements, one can look to something like a publication from the CUPE National Research Branch which lists the following:

- Developing a mission statement that provides vision and direction
- The agency’s financial health including annual budget approval
- Proper human resources
- Ensuring legal requirements are followed
- Bylaws
- Ensuring Board effectiveness
- Administration
- Establishment of committees to undertake financial, personnel, fundraising and planning functions
- Effective community relations and communications
- Hiring the executive director; and
- Working conditions

Not all of these duties are legally binding on a director, but are examples of things that are assigned to a board of directors. Duties such as: the passing of bylaws and ensuring that everyone (board members and employees) obeys them, and seeing to the financial health of the organization are almost certain to be a part of a director’s duties. This may vary depending on the organization in question.

A board of directors cannot be expected to be expert in every area, such as accounting, law, or other specialized areas like taxation. It is normal and acceptable to rely on outside advisors and their expertise when making board decisions.

## **What are obligations of volunteers outside of a board of directors?**

Under the law, volunteers are expected to meet a reasonable standard of care. Volunteers must try to prevent likely injuries and harm, and must do what the average, reasonable person would do in the same situation.

If a volunteer has special skills or knowledge they are expected to do or know more than the average 'reasonable person'. If there is a question of liability, these volunteers will be judged against people with similar skills and knowledge. Volunteers are expected to work to the best of their ability.

Volunteers may include committee members, advisors, volunteer staff for special events, etc.

## **Remedies**

### **If you have any Questions, complaints or issues with your contract, what should you do?**

Before you agree to or sign a contract, make sure you fully understand and are comfortable with the terms of the contract. If you are not, DO NOT sign or agree to any thing.

If you are a part of a union or trade organization see your local representative or ombudsmen counsellor.

Seek the advice of a lawyer or legal professional.

## **Complaints**

Employees who believe that their employer may be in violation of the *New Brunswick Employment Standards Act* are encouraged to contact the Employment Standards office for assistance. You can file a complaint in one of several ways:

1. Contact the Employment Standards Branch by phone toll-free at 1-888-452-2687
2. You can visit the Employment Standards Branch nearest you and speak with an officer.
3. You can write to the Department of Post-Secondary Education, Training and Labour, Employment Standards Branch, P.O. Box 6000, Fredericton NB E3B 5H1.
4. You can print and complete the [complaint form](#) and send it either by fax at 1-(506) 453-3806 or by mail at the above-noted address.

You must file your complaint within 12 months of the date the problem occurred.

For more information look at NB Post-Secondary Education, Training, Labour website under Labour tab. [http://www2.gnb.ca/content/gnb/en/departments/post-secondary\\_education\\_training\\_and\\_labour/labour.html](http://www2.gnb.ca/content/gnb/en/departments/post-secondary_education_training_and_labour/labour.html)

## Resources

### Relevant Statutes

- Status of the Artist Act- <http://laws.justice.gc.ca/en/S-19.6/>
- Canadian Artists and Producers Professional Relations Tribunal- <http://www.capprt-tcrpap.gc.ca/eic/site/capprt-tcrpap.nsf/eng/home>
- New Brunswick Employees Standards Act- <http://www.gnb.ca/0062/acts/acts/e-07-2>

Director's Liability under the Canada Business Corporation Act

<http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0825-e.htm>

A Guide to Non-Profit Governance.

[http://cupe.ca/updir/A\\_Guide\\_to\\_Non-Profit\\_Governance.pdf](http://cupe.ca/updir/A_Guide_to_Non-Profit_Governance.pdf)

Charity Central.

<http://www.charitycentral.ca/>

Guide to Law for Nonprofit Organizations in Atlantic Canada

<http://www.legalinfo.org/images/stories/pdf/guide%20to%20law%20for%20nonprofit%20organizations%20in%20atlantic%20canada.pdf>

## Glossary

1. Common Law - Is the body of law derived from court decisions, rather than statutes/acts.
2. Statutory law - A law passed by a legislative body; Legislation enacted by a lawmaking body. The term *Act* is interchangeable.
3. Fiduciary duty: A duty of utmost good faith, trust, confidence, and candour owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person (or organization) and in the best interests of the other person (such as the duty that one partner owes to another).
4. Express terms: Contract provisions that are explicitly written into the contract
5. Implied terms: Provisions not expressly agreed to by the parties but instead read into the contract by a court as being implicit.

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New Brunswick Canada – Post-Secondary Education, Training and Labour

[http://www2.gnb.ca/content/gnb/en/departments/post-secondary\\_education\\_training\\_and\\_labour/labour.html](http://www2.gnb.ca/content/gnb/en/departments/post-secondary_education_training_and_labour/labour.html)

Human Resources and Skills Development Canada

<http://www.hrsdc.gc.ca/eng/labour/ipg/069/page01.shtml#a1>

Canada Revenue Agency

<http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-e.html>

WorkRights.ca

<http://www.workrights.ca/index.php>

PLEIS-NB – Public Legal Education and Information Service of New Brunswick

[http://www.legal-info-legale.nb.ca/en/index.php?page=welcme\\_aborde\\_volunteer](http://www.legal-info-legale.nb.ca/en/index.php?page=welcme_aborde_volunteer)