



# Guideline for Contract Employees and Independent Contractors

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The Association of Professional Engineers,  
Geologists and Geophysicists of Alberta

## FOREWORD

This document is an update of the document entitled *Contract Employment of Professional Members – A Guideline*, originally issued in 1997. The document was revised to conform to the current style for guidelines and practice standards, to reflect recent case law, and to update references.

An APEGGA guideline presents procedures and practices that are recommended as acceptable practice for *professional members*. Variations may be made to accommodate special circumstances if they do not detract from the intent of the guideline.

Guidelines use the word *should* to indicate that among several possibilities, one is recommended as particularly suitable without necessarily mentioning or excluding others; or that a certain course of action is preferred but not necessarily required; or that (in the negative form) a certain course of action is disapproved of but not prohibited (*should* equals *is recommended that*). The word *shall* is used to indicate requirements that must be followed (*shall* equals *is required to*). The word *may* is used to indicate a course of action permissible within the limits of the guideline (*may* equals *is permitted*).

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## 1 OVERVIEW

In the practice of engineering, geology and geophysics in Alberta, it is becoming increasingly common to hire individual *professional members* as *contract employees* or *independent contractors*. The factors that lead both the *employers/clients* and individuals to explore the options of an *independent contractor* relationship are many. From the *employers'* or *clients'* viewpoint, *independent contractors* may fulfill their short-term human resource requirements (e.g., six month construction season) or varying workload in a dynamic job market. In these situations, they want to have a human resource pool that can be easily recruited or reduced as the workload changes. They may also use *independent contractors* as a means to assess potential *employees* on a trial basis (e.g., those who seem otherwise qualified but lack directly related experience). Some *clients* may realize a slight reduction in staffing costs while retaining *independent contractors*, who are excluded from benefits such as medical coverage, insurance, vacation, and sick leave. However, typically in these situations, the hourly pay rates for *independent contractors* are higher to offset the exclusion of these benefits.

From the perspective of individual *professional members*, they may prefer to be *independent contractors* for several reasons. Some examples are the significantly higher direct pay rate, preservation of relative organizational freedom, the ability to manage their own tax money rather than giving it up to the government at source, and employment flexibility in dynamic markets. Regardless of the reasons, an *independent contractor* relationship is a mutual decision between the *employer/client* and the individual *professional member*.

While all *employees* should have a clear understanding and description of their responsibilities to their *employer*, it is particularly important for an *independent contractor* who represents a separate, although possibly small, business entity. All the business aspects of employment that are normally handled unilaterally by an *employer* now become a matter of negotiation between the *independent contractor* and his or her *client*. Functional issues include the scope of *services*, level of supervision, confidentiality and intellectual property rights, professional liability and organizational integration. In conjunction, compensation and benefit issues may include invoicing and payroll, taxation and GST, Workers Compensation, Employment Insurance, and liability insurance coverage.

This guideline provides a general overview of *professional members* acting as *contract employees* or *independent contractors* with references to appropriate APEGGA documents given throughout. The most essential reading is APEGGA's *Professional Practice - A Guideline*, *Guideline for Ethical Practice*, *Guideline of Considerations for Establishing a Professional Practice*, and *Development of Consulting Rate Structures and Contracts*. Although some considerations are discussed, this guideline is not all encompassing. *Professional members* seriously considering *independent contracting* should review the various documents issued by government departments regarding the definition of '*independent contractor*' employment under provincial and federal taxation systems. It is also recommended that *professional members* seek the advice of a lawyer and an accountant regarding *independent contractor* status.

## 1.1 SCOPE

The guideline is divided into three sections. The first section outlines the criteria to determine the nature of the employment relationship. These factors are structured as a detailed checklist in Appendix A. This checklist has been extracted from government and other sources that are updated periodically. Individuals considering *independent contractor* status should access the most current checklist for themselves. The second section discusses the issues which can impact the *professional member's* ability to provide high quality professional service and should be the focus of discussions with the *employer/client* prior to commencing work. The last section provides an overview of the common terms of engagement for professional *services*, to ensure a sound and responsible *contract for services* or *employment contract*.

## 1.2 PURPOSE

This guideline was created to assist *professional members* and organizations to deal with the issues relating to *contract employees* and *independent contractors*. The guideline has three primary objectives:

1. To clarify the definitions of *employee*, *contract employee*, and *independent contractor*.
2. To provide an overview of the important issues relevant to the APEGGA professional practice in determining the roles and responsibilities of individuals engaged to provide *services* through a *contract for services* rather than the traditional *employment contract*.
3. To introduce *professional members*, who contract their *services*, to the business practices that can have an effect on the legal, liability, and taxation positions of both the individual and the employing organization.

## 1.3 DEFINITIONS

For the purposes of this guideline, the following terms and definitions apply and are italicized throughout.

### **Client**

The individual, corporation, company, association, firm, partnership, society, or other entity/organization who engages a *professional member* as an *independent contractor* to provide services.

### **Code of Ethics**

Scheduled *Code of Ethics* established pursuant to section 19(1)(j) of the *Engineering, Geological and Geophysical Professions Act*, R.S.A. 2003, c. E-11.1.

### **Consultant**

An individual or entity registered with APEGGA to engage in the practice of engineering, geology or geophysics in the Province of Alberta who provides professional *services* directly to a *client*. From a tax, employment standards, and tort/contract law perspective and for the purposes of this guideline, *consultant* equals *independent contractor*.

**Contract for Services**

A private agreement entered into voluntarily between a *client* and an *independent contractor* to provide *services* for a specific project.

**Contract Employee**

A *contract employee* is not an *independent contractor*, but an *employee*. The expression is somewhat misleading, as all *contractors* and *employees* have contracts. However, the term '*contract employee*' is typically used to refer to an *employee* with an *employment contract* for a fixed term. For example, some *employees* have *employment contracts* for one year, which may or may not be renewed at the end of the year. These *employees* are entitled to all minimum employment standards except termination notice, unless employment terminates prior to the end of the *employment contract*.

**Employee**

An individual who works in the service of another (the *employer*) who receives or is entitled to wages under an express or implied *employment contract* for which the *employer* has the right to control the details of work performance.

**Employment Contract**

A private agreement regarding employment entered into voluntarily between an *employer* and an *employee*, which gives rise to obligations that the courts may enforce such as the *Employment Standards Code* and *Employment Standards Regulations* of Alberta, the *Workers' Compensation Act*, and the *Canadian Income Tax Act* and associated regulations.

**Employer**

A business organization or representative thereof who hires an *employee*. The Canada Revenue Agency and the Alberta government commonly refer to the *employer* as the 'payer'.

**Independent Contractor**

An individual who has a *contract for services* (rather than an *employment contract*) with the *client* or customers to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. There are four factors (refer to Appendix A) that the courts and government agencies use to determine whether or not someone is an *independent contractor*. None of the factors on its own is conclusive, but all factors contribute to the decision.

**Professional Member**

A professional engineer, professional geologist, professional geophysicist, registered professional technologist (engineering), registered professional technologist (geological), registered professional technologist (geophysical), or licensee entitled to engage in the practice of engineering, geology, and geophysics under the *Engineering, Geological and Geophysical Professions Act*, R.S.A. 2003, c. E-11.1.

**Services**

Practice of engineering, geology, and geophysics under the *Engineering, Geological and Geophysical Professions Act*, R.S.A. 2003, c. E-11.1.

**Tort**

A civil wrong, for which a remedy may be obtained, usually in the form of damages.

## 2 EMPLOYMENT RELATIONSHIP

For the purposes of this guideline, it is crucial to develop a clear understanding of the differences between being an *employee*, a *contract employee*, and an *independent contractor*. An overview of the most important differences and the criteria to determine that relationship is provided in this section.

The term '*independent contractor*' is not the typical term to describe *professional members* providing *services* to others; they are typically referred to as *consultants*. The term '*independent contractor*' or '*contract employee*' implies a longer term and more integrated relationship while '*consultant*' implies a shorter term, project-specific, and arms-length relationship. The *client-consultant* relationship is discussed in more detail in the APEGGA guideline *Development of Consulting Rate Structures and Contracts*. However, from the perspective of tax, employment standards, and law - the term '*consultant*' is not explicitly defined; *professional members* are considered either '*employees*' (which includes *contract employees*) or '*independent contractors*' (which effectively includes *consultants*).

### 2.1 CATEGORIES OF EMPLOYMENT

Following is a summary of the differences between the various categories of employment:

#### **Employee - Employer**

- *Employee* fulfils clear day-to-day duties under direct functional supervision.
- Receives fixed remuneration.
- May be entitled to overtime and bonuses.
- Is typically entitled to vacation, health (i.e., dental, prescription drug coverage, disability) insurance and other benefits.
- Enjoys greater job security.
- Income taxes, Canada Pension Plan, Employment Insurance are deducted from the *employee* by the *employer* and remitted to Revenue Canada by the *employer*.
- Is typically covered under the *employer's* professional liability insurance.

#### **Contract Employee - Employer**

- *Contract employee* is an *employee* with an *employment contract* for a fixed term.
- May receive the same functional supervision as *employee* or work independently on specific assignments.
- Less job security – in case of work shortages, *contract employees* are normally released first.
- Entitled to all minimum employment standards except termination notice, unless employment terminates prior to the end of the *employment contract*.

#### **Independent Contractor - Client**

- *Independent contractor* does work for the *client*, to provide a *service* or product for a fee.

- Remuneration may be on an hourly, fixed fee / lump sum, or cost plus basis or as a percentage of the project cost. Remuneration is typically higher than for *employees* for the same work, given that the *independent contractor* must cover his or her own overhead costs.
- No bonuses or benefits – paid only for the work completed.
- Income taxes are deemed the personal responsibility of the *independent contractor* and are not deducted at source. Arrangements regarding Canada Pension Plan and Employment Insurance vary.
- Charges Goods and Services Tax (GST) for *services* (may be GST exempted for billings up to certain amount).
- May or may not be covered by the *client's* professional liability insurance; to be negotiated as part of *contract for services*.

## 2.2 DETERMINING THE EMPLOYMENT RELATIONSHIP

*Professional members* must recognize that *employer* and *employees* “cannot themselves control the legal categorization of the nature of their relationship by labelling it ‘*independent contractor*.’”<sup>1</sup> The courts have developed tests for determining who is an *independent contractor* and who is an *employee* and will examine the specific facts of the relationship.

The question to be answered is “Whose business is it for whom the work is being performed?” An *independent contractor* performs work for *clients* to benefit his or her own company. An *employee* performs work for the benefit of the *employer's* business. To answer the question of whose business it is, the court has a fourfold test:<sup>2</sup>

1. **Control** – How much control does the individual maintain? Who decides how the work will be done and when? Does the individual have to come to work and leave at specific times or risk being disciplined? Does the *employer* maintain the right to tell a individual when he or she may take breaks or decide how the work will be done? Does the individual hire his or her own helpers or does the employer? Often, an *employee* has specific times that he or she has to report to work and take breaks, while an *independent contractor* may not.
2. **Ownership of tools** – Who owns and maintains the equipment with which the work is to be performed? ‘Tools’ includes equipment like computers, vehicles, telephone equipment, pens, paper, etc. Often, an *employer* provides equipment and materials to an *employee*, while an *independent contractor* supplies his or her own equipment and materials.
3. **Chance of profit** – How much opportunity is there for the individual to profit in the performance of his or her work? An *employee* does not usually profit when a business’s profits increase as wages are typically fixed; an *independent contractor* may make more money depending on the speed with which the job was completed, or through the difference between the materials and manpower supplied and the

1 *Wiebe Door Services Ltd. v. MNR*, [1986] 5W.W.R. 450 (Fed. C.A.).

2 *Laperrière v. Canada (Minister of National Revenue - M.N.R.)*, [2007] T.C.J. No. 170. For Albertan case law, refer to *Odd Job Bob Ltd. v. Moreau*, [2003] ABPC 48.

price charged for the job. In general, an *independent contractor* makes money if the cost charged for doing a job exceeds the cost to the *contractor*.

4. **Risk of loss** – Does the individual have a degree of financial risk in the performance of his or her work? An *employee* is usually guaranteed a fixed hourly wage regardless of the success of a business venture. If an *independent contractor* underestimates the cost of completing the job, the *contractor* may actually lose money.

The nature of the relationship is not normally decided on one factor alone. However, in cases where one party exerts a high degree of control or supervision over the way in which work is done and reserves the right to discipline the other party, it is most likely an *employer – employee* relationship. On the other hand, a lesser degree of control does not necessarily establish a *client – independent contractor* relationship. Employment relationships may contain some of the factors that would point to a non-employment relationship and vice versa. A determination is made based on all the evidence and by weighing all the factors.

The terms and conditions set forth by federal and provincial governments are constantly reviewed and revised. For example, the courts have recently rejected the business integration test on the basis that it is unhelpful and they will only look at business factors such as permanency of position, how the individual is paid, and the corporate organization in the context of the four factors outlined above. Appendix A provides a checklist developed from case law, industry, and government documents; however, this is to be used as a guideline only. It is the responsibility of *professional members* to obtain and comply with updated statutes and guidelines which most directly apply to the specific nature of their engagement.

### 3 ENGAGEMENT ISSUES

This section provides an overview of the issues to be considered by an *employer / client* and an individual entering into an *independent contractor* relationship. These issues include using recruiters; *contract for services* issues such as defining the scope of services, reporting and supervision, professional liability, quality control and assurance, professional development, ethics; and professional responsibilities, organizational integration, intellectual property, duration of contract, and advertising.

There are three primary methods of contract arrangements for an *employer or client* to engage an individual *professional member*: 1) contract arrangement directly with the individual, 2) contract arrangement with a recruitment agency that markets the skills of the individual, or 3) contract arrangement with an individual representing an incorporated, self-managing private business. The next section discusses the use of recruitment or search agencies.

#### 3.1 RECRUITMENT AGENCIES, PERSONNEL FIRMS AND EXECUTIVE SEARCH CONSULTANTS

Recruitment agencies or personnel firms are service/consulting organizations that specialize in recruiting all levels of employees in various industry sectors. Different firms specialize by recruiting in specific industry sectors, professions, or levels of

management, although most conduct recruitment for multiple industry sectors. These firms work on a contingency fee model.

Executive search consultants, or 'headhunters' work on a retainer fee model and recruit to senior management and executive level positions, some serving specific industry sectors but most offering their services to a broad base of public and private organizations.

A recruitment agency is a firm that engages in marketing the skills of *professional members*, assisting with their re-employment by organizing interviews and meetings with potential *employers*, referring resumes, etc. Some agencies also offer post-employment services, effectively remaining the *professional member's* agent to the *client/employer* even after recruitment. A recruitment agency may facilitate engagement as either a contract arrangement directly between the *employer* and the individual, contract arrangement between the *employer* and the recruitment agency that markets the skills of the individual, or contract arrangement directly between the *client* and the individual representing an incorporated business. Fees for recruitment are generally paid by the employing organization.

Recruitment agencies will often accept and retain resumes from qualified candidates. *Professional members* wishing to engage the services of a recruitment agency, personnel firm, or executive search consultants are advised to seek referrals, conduct an internet search, or use telephone directories. *Professional members* are also advised to obtain a clear understanding of the terms of the search (including the responsibility for payment of fees).

### 3.2 DEVELOPMENT OF A CONTRACT

Given the increased complexity of a typical *contract for services*, it is strongly recommended that the *client* and *independent contractor* develop a written agreement prior to the engagement - which clearly defines the scope of *services*, the level of supervision given and received, the rate of compensation, inclusion/exclusion of expenses, and the apportioning of liability. This *contract for services* should also define the employment relationship<sup>3</sup> and outline expectations to minimize misunderstandings. The APEGGA guideline *Development of Consulting Rate Structures and Contracts* discusses the development of a contract in detail.

### 3.3 SCOPE OF SERVICES

Developing a scope of *services* is essentially listing the specified tasks envisioned within the term of the *contract for services* and the delivery or performance expectations associated with the various tasks. Depending on the size and complexity of the employing organization and/or project, it may be necessary to define the specific technical discipline of the activity and skills expected or required to effectively undertake the contracted responsibilities. The APEGGA *Code of Ethics* requires *professional members* to clearly state the level of skill that should be delivered in meeting the *client's* objectives and project requirements. It is detrimental to both parties to convey inaccurate expectations of skill or abilities in the scope of the contractual relationship. The scope of

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3 *Telsco Security Systems Inc. v. Wong*, [2006] CanLII 37748 (AB E.S.U.)

*services* can also indicate the potential for future scope for the *independent contractor* based on performance of *services* or the extension of project requirements.

In some cases, the *client* may require the *independent contractor* to undertake supervision or administration of the organization's *salaried employees* and/or *client* relationships. It is important that these corporate responsibilities be clearly defined, ideally in a written agreement, which is reviewed for its legal (e.g., vicarious liability) and financial implications.

### **3.4 REPORTING AND SUPERVISION**

Clarification of reporting and supervision responsibilities is critical to the flow of work, quality control, communication, and employee development.

#### **3.4.1 Supervision Received**

When accepting an *independent contractor* engagement, the *professional member* should clarify with the *client* the amount and kind of supervision that will be received. Supervision requirements should be determined prior to the *contract for services* and should address the following:

- extent of work reviews
- availability of technical guidance
- expectations for working independently
- co-operative work on teams
- progress reporting and stewardship
- accountability

#### **3.4.2 Supervision Exercised**

When accepting a role involving the supervision of other *independent contractors* or *employees* in the *client's* organization, it is important to define the elements of the supervisory role and the expectations. Consideration should be given to defining the following:

- technical supervision and mentoring responsibility
- administrative supervision responsibility
- expectations for assuming professional responsibility for the work of those supervised
- expectations to act as a responsible member for the permit to practice
- numbers of people to be supervised
- skills of those to be supervised
- consultation requirements and availability
- expectations for training others
- authority in setting work methods
- disciplinary authority

- expectations for performance assessment of others
- accountability

### 3.4.3 Use of APEGGA Permit to Practice and Professional Member Stamp

The significance and usage of the APEGGA permit to practice and *professional member* stamp is explained in the APEGGA *Practice Standard for Authenticating Professional Documents*. An *independent contractor* may be named as a responsible member for another company's permit to practice. However, to be a responsible member, the professional must declare that he or she is a "full time employee or member of the firm [and will] undertake to provide responsible direction and personal supervision to that portion of the applicant's professional practice performed by the organizational unit."

Conventional practice includes the application of stamps as part of a quality control process of the individual or organization. The application of stamps may be a regulatory requirement. For example, National Instruments 43-101 and 51-101 require the involvement of *professional members* in the evaluation of mineral or oil/gas reserves evaluations for the purpose of public disclosure, such as mandated disclosure by securities regulators or disclosure through other regulatory bodies (e.g., National Energy Board, Alberta Energy Utilities Board) or voluntary disclosure through publications (e.g., press releases, technical papers). The *professional member* is responsible and potentially liable for the performance of professional *services*, regardless if the stamps are applied.

## 3.5 PROFESSIONAL LIABILITY

When accepting *employment contract* or *contract for services*, both parties should understand the issues relating to the assumption of liability and their ability to recover a loss. The nature of the employment relationship will determine the structure of the contract and the various clauses which apportion liability. A well-written scope of *services* is crucial. Oral or purchase order style contracts should be avoided. The contract should also define coverage requirements for both parties following termination of the contract, to cover the professional liability limitation period. Assistance in the contract form and language is available from professional liability insurers and organizations such as the Association of Consulting Engineers of Canada, most recruitment agencies, and the APEGGA *guideline Development of Consulting Rate Structures and Contracts*.

An *independent contractor* should generally not assume unlimited liability for any and all claims which may arise out of the *services* supplied, and should make sure that *contract for services* terms are explicit in outlining liability limitations. This being said, however, it should be remembered that *tort* liability has no limits and goes beyond contractual obligations. Indemnification clauses may not be honoured by the courts if *tort* liability is incurred.

When negotiating conditions of the contract, liability, and indemnification or limitation of liability, it is recommended that consideration be given to the following:

- fixing the maximum amount of liability to the amount of coverage for insured claims and a percentage of fees, construction cost, or specific dollar amount for uninsured claims

- fixing the duration of the liability
- fixing the scope of work for which liability is assumed
- limiting or fixing the type of liability (consequential, direct damages, etc.)

This applies to all situations, not just those where the *independent contractor* obtains separate coverage.

Other considerations with respect to liability include the following:

- responsibility for defense costs
- extent of consequential damages, if applicable
- post-contract liability
- protection from the actions of third parties
- remedies for negligence, omissions and willful acts on the part of the *employer/client* or third parties
- responsibility for insurance premiums following completion of the contract and/or survivability of the *employer/client* organization

In certain contract situations, the *professional member* will require a 'hold harmless' clause, particularly where neither the *client* nor the *independent contractor* are in a position to provide adequate professional liability (errors and omissions) insurance coverage. *Professional members* are referred to APEGGA *Guideline of Considerations for Establishing a Professional Practice* for a discussion of these issues.

The requirement for professional liability coverage must be critically reviewed to consider the scope of *services* and supervisory responsibilities, the potential exposure to liability, and the acceptable level of risk. Where professional liability insurance is required on a continuing or a project-defined basis, the *professional member* should explore the possibility of being added under the *employer's* or *client's* insurance coverage, if possible. *Employees* often expect that the *employer* has appropriate professional liability insurance coverage for their areas of operation. However, as this can vary across organizations, *employees* should explicitly confirm professional liability coverage with their *employer*.

The *client* and *independent contractor* must discuss the risks associated with the project and the management of those risks. APEGGA does not require that *professional members* carry professional liability (errors and omissions) insurance. However, many *clients* do require insurance. And the insurance providers themselves may require that professional members carry professional liability insurance, before granting comprehensive general liability insurance. If insurance coverage is not available to the *independent contractor*, the *contract for services* must clearly and fairly reflect the level of liability being assumed by each party.

### 3.6 QUALITY CONTROL AND ASSURANCE

It is important for both the *professional member*, engaged as an *independent contractor*, and the *client* to understand the elements of professional practice. The APEGGA document *Professional Practice - A Guideline* presents the requirements for quality management and professional practice.

Factors to be considered in providing quality professional *services* as an *independent contractor* include the following:

- the availability of adequate facilities, resources and equipment
- effective loss control and risk management practices
- a business contract that recognizes and rewards value, and one that does not put the *professional member* in a situation of compromising professionalism for cost
- an environment that fosters professional development by way of technical training, effective communication and teamwork
- quality practices using codes, standards, work reviews, document management, planning and management review
- a professional practice management plan (PPMP) that addresses ethics, professional responsibility, quality assurance, document management, communications, and control. (refer to the APEGGA *Guideline for Professional Practice Management Plans* for more information)

### 3.7 PROFESSIONAL DEVELOPMENT

The *Code of Ethics* requires that *professional members* “undertake only such work as they are competent to perform by virtue of training and experience”. It is imperative that every *professional member* establish a personal program of continuing education to maintain and upgrade his or her knowledge and competence. The *independent contractor* should be prepared to supply a summary of his or her competency profile to a *client*.

Likewise, *clients/employers* also have an obligation to ensure that *professional members* maintain technical competence in all areas in which the *client/employer* offers or uses professional *services*. This is achieved through education and training programs such as:

- formal training sessions conducted by the *employer* or by recognized outside organizations,
- informal on-the-job training under the guidance of qualified personnel,
- informal knowledge sharing between employees through workshops and networks, and
- supporting *professional members’* participation in APEGGA’s mandatory Continuing Professional Development (CPD) program.

In most cases, however, the *client’s* training budgets are not available for *independent contractors*, who are expected to be personally responsible for their professional development. Active participation by *independent contractors* in various technical and professional societies is one way to achieve their professional development goals.

### 3.8 ETHICS AND PROFESSIONAL RESPONSIBILITIES

In seeking, obtaining, and maintaining employment, *professional members* engaged as *independent contractors* have an obligation to conduct themselves in an ethical manner and provide the professional *services* to the best of their abilities. This applies to the

manner in which they compete with other *professional members* for employment; portray their training, skills and experience to *clients*; and the manner in which they conduct their business affairs.

At all times during and after the term of a contract, it is the *professional member's* responsibility is to adhere to the *Code of Ethics*, regardless of their employment relationship. A clear understanding of the *services* required is essential to ensure that the *independent contractor* will not put himself or herself in a compromising position. Recognizing that the prospective *client* may not have previous experience with employing the *services* of a *professional member*, the *independent contractor* should ensure that the *client* is aware of the obligations required of *professional members*. Confidentiality must be maintained and conflicts of interest be avoided. If the *independent contractor* is concerned that the *services* required will be in conflict with the *Code of Ethics* (e.g., conflict of interest), this should be discussed with the *client* and a satisfactory resolution achieved. In the absence of satisfactory resolution, the *professional member* must decline the opportunity to enter into *contract for services* with the *client*.

### 3.9 ORGANIZATIONAL INTEGRATION

The degree to which an *independent contractor* can best provide *service* to a *client* is directly related to the knowledge and relationship that the individual has with other *employees* participating in the project and the operating practices of the organization.

Responsibility for work output and quality control is directly related to the degree of direction given to the *independent contractor* (Section 3.4). This may vary from a senior professional working with minimum supervision to a Member-in-Training who must be directly supervised by a *professional member*.

Some additional clarity associated with organizational integration include the use of facilities (e.g., office space, materials, stationery and vehicles), ownership of tools (e.g., computer) used to perform the work and the degree to which the work is considered to be an integral part of the business (e.g., part of the organizational chart, receives or requires training by the *client*). Many organizations have developed ISO quality management programs: it is important to understand and comply with *client* policies and procedures for tasks; including safety, quality control and reporting.

### 3.10 INTELLECTUAL PROPERTY

Proprietary knowledge can be a critical ingredient to business performance. Intellectual property and proprietary knowledge includes patents, trade secrets, know-how, confidential practices and a range of other privileged information such as client lists and project/contract details. It is both unlawful and contrary to the *Code of Ethics* to divulge, misrepresent or otherwise release information and property that is proprietary to the *client* without permission. Identifying and handling intellectual property should be addressed in the *contract for services*; often in a confidentiality clause. However, note that the *independent contractor* is obligated to treat confidential information as confidential, even if the contract is silent on the matter. When the terms of the *contract for service* result in a copyright, patent, or other form of business venture, the *contract* should identify the applicable terms of participation or remuneration.

### 3.11 DURATION OF CONTRACT

Typically, for a *contract for services*, a time-specific agreement will be entered into for a specified scope of *services*. The duration of the contract may be determined by the *client* or may be negotiated based on the *independent contractor's* estimate of completion date. In either case, it should be understood by both parties that the *client* is entitled to receive the *services* contracted for in the timeframe specified and is prepared to compensate the *independent contractor* for *services* performed in the manner agreed to in the contract.

For the protection of both parties, the contract may contain specific clauses. Cancellation clauses allows for contract cancellation by either party given mutually-agreed-to notice periods. Consideration can also be given to the compensation required for a *client* to terminate a contract without notice. Upon mutual agreement, contracts may be extended for the *services* originally contracted for or renewed for additional *services* required. Additional clauses may address actions for which termination without compensation will apply and may normally focus on mutually agreed upon measurements of performance or conduct. Non-competition clauses should be reasonable, with realistic definitions of time, geography and scope specific to the *services* provided to the *client*. Confidentiality clauses can extend after termination and would reasonably address items discussed in the previous section including know-how and customer information.

### 3.12 ADVERTISING

The most common means for *professional members* to advertise their *services* is through a personal résumé. *Professionals members* may use additional means to advertise, such as business cards and insertions in publications. The content of these and all other forms of advertising should comply with APEGGA's *Guideline for Advertising of Professional Services*. Care should be taken to ensure that information is accurate and that details presented do not contravene confidentiality agreements with previous *employers* and *clients*. The individual must only represent expertise in those areas in which he or she is fully competent.

## 4 BUSINESS OPERATION

In Section 3, considerations regarding provision of professional *services* by *independent contractors* were outlined, focusing on the *client-independent contractor* relationship. However, the employment of *professional members* has ramifications extending beyond the immediate parties involved. These include tax authorities, the general public, insurers, and the courts for issues of liability and the allocation of risk.

This section provides an introduction of employment and business terminology and issues that will govern the responsibilities of the *client* and *independent contractor* in areas of taxation, employment standards and Workers Compensation coverage. The statutes are frequently revised and *professional members* are strongly advised to reference current applicable documents of the Canada Revenue Agency, Alberta Employment, Immigration and Industry and Worker's Compensation Board, which are posted on their respective websites.

#### 4.1 ACCOUNTING, TAX AND LEGAL

Both the *independent contractor* and the *client* should consult accounting, tax, and legal expertise to determine the specific needs for the particular business and employment relationship. Starting with the right information should preclude costly and time-consuming problems, in addition to ensuring proper compliance with governing laws and practices. In cases when a contract is set up through a recruitment agency, this may be done by the agency.

Operation of a business requires the proper systems and procedures such as invoicing, payroll, cash flow, Canada Revenue Agency remittances, etc. which will also serve to determine the employment classification by the Canada Revenue Agency. Care and attention is prudent in setting up the structure prior to engagement for professional *services*. Refer to APEGGA's *Guideline of Considerations for Establishing a Professional Practice* for more information.

#### 4.2 CANADA REVENUE AGENCY, CANADA PENSION PLAN, AND EMPLOYMENT INSURANCE

The Canada Revenue Agency (CRA) defines the various forms of employment under the *Income Tax Act* and associated regulations.<sup>4</sup> *Independent contractors* are responsible for their own taxes and can claim certain deductions for expenses they incur to earn income. The responsibility for their own taxes means that they handle the tax money before having to remit it to the government – a beneficial tax situation which allows them to 'pay themselves first', making major Registered Retirement Savings Plan (RRSP) contributions with little or no interest, business investments, etc. The ability to 'pay themselves first' is one of the most attractive features of being an *independent contractor*. There are CRA rules in place which limit the self-employed individual's ability to defer taxes and in certain situations obligate them to pay income tax by instalments. One caveat: *independent contractors* must be disciplined in retaining sufficient funds to pay the CRA payroll deductions.

If payroll deductions are unpaid or if the CRA deems the *independent contractor* a de facto *employee*, the *employer* contracting the *services* could be liable for payroll deductions (Canada Pension Plan (CPP), Employment Insurance (EI), Workers Compensation Board (WCB) premiums). The *employer* will likely recover those costs from the individual. The CRA may also disallow income splitting or deductions from revenue for vehicles, computer and office equipment, etc. that an *independent contractor* would be entitled to make.

*Independent contractors* are typically entitled to charge Goods and Services Tax (GST) for their *services*. However, only part of this amount must to be remitted to the government (total GST collected minus GST paid).

#### 4.3 EMPLOYMENT STANDARDS BRANCH

Employment Standards Branch (Alberta Employment, Immigration and Industry) is responsible for administering Alberta labour laws, and considers: the business relationship, taxation, and autonomy. In general, the *Employment Standards Code* (the Code) applies to *employees* and *contract employees*, but does not apply to *independent*

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4 Available online at: <http://www.canlii.org/ca/sta/i-3.3/>

*contractors*. The *employer* may be held liable for vacation pay, overtime and minimum severance pay if the *independent contractor* is effectively an *employee*<sup>5</sup> and recovery of these costs may occur against the individual.

The Code contains restrictions on the ability of an *employer* to recover a loss that is the consequence of poor performance of work by an *employee*. The Code bars an *employer* from deducting, setting off, or claiming against the earnings of an *employee* sums for faulty workmanship, or poor performance of work. The *employer's* remedy would be to pursue the matter in the courts in an action for negligence, rather than deduct the amount from pay. In contrast, a *client* and an *independent contractor* could negotiate contractual terms that would require the *contractor* to forfeit payment if work is unsatisfactory or not performed according to standards set out in the *contract for services*.

#### 4.4 WORKERS' COMPENSATION BOARD

An *independent contractor* may be required to maintain his or her own WCB Account. Further, the protection available to an *employer* under the *Workers' Compensation Act* may not be available if the individual providing the service is an *independent contractor*. It is strongly advised that WCB be contacted to determine the extent of coverage available.

## 5 SUMMARY

Many *professional members* consider alternatives to a traditional employer - *employee* relationship. This guideline outlines the issues with working as an *independent contractor* so that individuals and companies may consider their options and appropriately manage the issues.

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5 *Telsco Security Systems Inc. v. Wong*, [2006] CanLII 37748 (AB E.S.U.)

## APPENDIX A - EMPLOYMENT RELATIONSHIP CHECKLIST

There are a number of questions that the Canada Revenue Agency and Alberta Employment, Immigration and Industry use to determine whether or not someone is an *employee* or an *independent contractor*. By merely saying that one party is *independent contractor* or having a *contract for services* does not decide that the party is independent. And none of the following factors on its own is conclusive; all contribute to the decision on whether an individual is an *employee* or an *independent contractor*. This table is based on a compilation by the Canadian Federation of Independent Business (CFIB) and other sources.<sup>6</sup>

QUESTION	EMPLOYEE	INDEPENDENT CONTRACTOR
<b>1. Control</b> The main difference between <i>employees</i> and <i>independent contractors</i> is the employing company's authority to exercise control over not only what work will be done, but the manner in which it is done. Even if the control is never exercised, this factor is strong evidence that an <i>employer - employee</i> relationship exists. With an <i>independent contractor</i> , the <i>client</i> is entitled to stipulate what is done or what result is achieved but not the manner in which it is completed.		
Does the individual work primarily for the company?	Yes. If the individual must devote full time to the business of the <i>employer</i> , the <i>employer</i> then has control over the amount of time the individual spends working and therefore restricts him or her from other gainful work.	No. If the individual markets <i>services</i> to anyone who wants them, provides <i>services</i> to others, or represents a number of firms at the same time, it can indicate independent status.
Does the company control the manner, method, routine, schedule, and location of the individual's work?	Yes. If an individual is required to comply with instructions about when, where, and how to perform work in the order or sequence set out by the <i>employer</i> , it shows the individual is not free to follow his or her own pattern of work, but must follow the established routine or schedule of the <i>employer</i> .	Typically works without detailed directions or procedures; uses own experience and expertise to do the job.
Payment of traveling and other incidental expenses?	Yes. Payment by the <i>employer</i> of the individual's traveling expenses and other expenses incidental to the <i>employer's</i> business can indicate control over the individual.	No. The <i>independent contractor</i> typically pays own expenses out of expected compensation.

6 Canadian Federation of Independent Business (CFIB), available URL: [http://www.cbisc.org/servlet/ContentServer?pagename=CBSC\\_AB%2Fdisplay&lang=en&cid=1102079893391&c=InfoResources](http://www.cbisc.org/servlet/ContentServer?pagename=CBSC_AB%2Fdisplay&lang=en&cid=1102079893391&c=InfoResources) last verified: 2006-05-25. Robert Mot, CA, published in the November 1990 edition of CMA Magazine, and an opinion letter of Feb. 19, 1986 provided by KMG Thorne Riddell, Chartered Accountants, for Camosun University (NACUBO Business Officer, August 1992). Refer to *671122 Ontario Ltd v. Sagaz Industries Canada Inc.*, [2001] 2S.C.R. 983. For Albertan case law, refer to *Odd Job Bob Ltd. v. Moreau*, [2003] ABPC 48 and *Telsco Security Systems Inc. v. Wong*, [2006] CanLII 37748 (AB E.S.U.)

## Guideline for Contract Employees and Independent Contractors

V1.0

QUESTION	EMPLOYEE	INDEPENDENT CONTRACTOR
Does the company contribute on behalf of the individual to employee benefit plans? Are the plans for the specific benefit of employees?	If so, this tends to indicate an <i>employee</i> relationship.	No.
Training of the individual (i.e., Member in Training) by an experienced <i>employee</i> , by correspondence, by required attendance at meetings, or other methods.	It is a factor of control because it indicates the <i>employer</i> wants work performed in a particular manner.	No. An <i>independent contractor</i> generally uses his or her own methods and comes with his or her own expertise. Therefore, the <i>independent contractor</i> should receive no training from the <i>client</i> , except on company procedures.
Does the company coordinate or supervise the individual's work?	Yes. Individual works in <i>employer</i> -established order to allow for supervision.	No. Works any way desired to provide required service or product.
Does the individual submit regular reports to the company?	Reports on work efforts as part of supervision. It indicates control in that the individual is compelled to account for his or her actions.	Reports only as agreed upon.
Does the company specify the hours of work?	Yes. Specified hours of work are a strong indication that the individual is an <i>employee</i> .	No. Freedom to choose his or her own time of work is an indication that the individual is an <i>independent contractor</i> .
Does the individual lease / rent office space or is he or she provided the facilities by the <i>employer</i> ? Work done on the <i>employer's</i> premises is not by itself an indication of control but it does imply that the employer has control especially when work can be done elsewhere.	Yes. An individual working in the <i>employer's</i> place of business is physically within the <i>employer's</i> direction and supervision. Providing the work space, equipment and the furnishings necessary to the work tends to indicate control on the part of the <i>employer</i> .	No. If the individual has a substantial <i>independent investment</i> (i.e., lease rent, own) in the facilities used in performing <i>services</i> this tends to show an independent status.
Is a specific result required?	No. Employees are available to the company for a variety of tasks in a continuing relationship.	Yes. An <i>independent contractor</i> is usually hired to do a very specific job. Once completed the business relationship is over.
Does the company have the right to discharge the <i>services</i> of the individual?	Yes. Indicates control through the ever persistent threat of dismissal.	Yes, as per the termination clauses of the <i>contract for services</i> . An <i>independent contractor</i> normally cannot have his or her work terminated unilaterally without liability, as long as he or she produces a result which measures up to the specifications of the <i>contract for services</i> .

## Guideline for Contract Employees and Independent Contractors

QUESTION	EMPLOYEE	INDEPENDENT CONTRACTOR
Is the individual able to end the employment at any time?	Yes. Can end employment at any time, given specified notice periods.	Yes, as per the termination clauses of the <i>contract for services</i> . The <i>independent contractor</i> cannot unilaterally terminate the contract without liability; he or she is responsible for completing the <i>services</i> as agreed upon.
<b>2. Ownership of Tools and Equipment</b> Where the <i>employer</i> supplies tools, equipment, materials, etc., it is indicative of control. However, this does not necessarily apply to occupations where it is customary for employees to use their own hand tools (i.e., mechanics).		
Does the company supply tools, equipment, materials, etc.	Yes. It is indicative of control over the individual. It also indicates a substantial investment in the business.	No. This indicates (depending on the size of the investment) that the individual is in the business as an <i>independent contractor</i> with an investment into that business.
<b>3. Chance of profit</b> This indicates that an individual is in the business to make money		
How much opportunity is there for the individual to profit in the performance of his or her work?	An <i>employee</i> does not usually profit when a business's profits increase as wages are typically fixed.	In general, an <i>independent contractor</i> makes money if the cost charged for doing a job exceeds the cost. A <i>contractor</i> may make more money depending on the speed with which the job was completed, or through the difference between the materials and manpower supplied and the price charged for the job.
<b>4. Risk of Loss</b> This indicates that an individual is at risk of losing money as opposed to earning a fixed wage / salary or ongoing commission.		
Could the individual incur losses in the performance of his or her work	No. An <i>employee</i> is usually guaranteed a fixed hourly wage regardless of the success of a business venture.	Yes. If an <i>independent contractor</i> underestimates the cost of completing the job, the <i>contractor</i> may actually lose money.

## Guideline for Contract Employees and Independent Contractors

QUESTION	EMPLOYEE	INDEPENDENT CONTRACTOR
<p><b>Business Integration</b></p> <p>The courts have rejected the business integration test on the basis that it is unhelpful. However, this test may be considered in the context of the previous four tests.</p> <p>Integration has to be considered from the point of view of the individual working, not the <i>employer</i>. Where the individual integrates the <i>employer's</i> activities to his own commercial activities, this demonstrates an independent status. The individual is acting on his own behalf; he or she is not dependent on the <i>employer's</i> business and is in business for him or herself.</p> <p>Where the individual integrates his or her activities to the commercial activities of the <i>employer</i>, an <i>employer-employee</i> relationship probably exists. The individual is acting on behalf of the <i>employer</i>; he or she is connected with the <i>employer's</i> business and is dependent on it.</p>		
Are the individual's <i>services</i> integrated into the day-to-day business operations?	Yes.	It depends on the scope of <i>services</i> agreed upon.
Is the individual restricted from hiring associates or engaging substitutes if he or she is absent from work?	Yes.	No.
Is the individual permitted to engage in private practice where his or her <i>services</i> can be offered to the public?	Not usually. Depends upon the <i>contract for employment</i> .	Yes.
Is there a provision that he or she may not assume outside duties to the detriment of his or primary <i>services</i> to the company?	Usually.	No.
Does the individual have to follow a schedule of fixed hours of work which is to be followed without substantial deviation?	Yes.	No.
Is the individual subject to the direction and control of the <i>employer</i> , or must he or she comply with the <i>employer's</i> general policies?	Subject to control of the employer.	May be subject to general policies.
Is the individual accorded the rights and privileges which the <i>employer</i> has created or established for <i>salary employees</i> (i.e., benefit plans, vacation pay, etc.)?	Yes.	No.
Does the individual hire others?	No.	Yes. Hiring one's own <i>employees</i> indicates that an individual is an <i>independent contractor</i> , unless the supervising and payment of assistants is by the <i>client</i> which shows control over all individuals on the job.
<p><b>Business Factors</b></p> <p>The courts only look at permanency of position, how the individual is paid, and the corporate organization in the context of the factors outlined above.</p>		
Is the position permanent?	Typically has indefinite employment status.	Hired for a set time period, as required.

## Guideline for Contract Employees and Independent Contractors

QUESTION	EMPLOYEE	INDEPENDENT CONTRACTOR
How is the individual paid?	Payroll. Compensated regularly, at specified time periods (by the hour, week, or month as may be considered strong evidence of an <i>employer</i> - <i>employee</i> relationship	Via invoice for <i>services</i> rendered, typically paid on per-job basis in a lump sum. However, time sheets may serve as the invoice.
Is the person an individual, sole proprietor, partnership, or corporation?	Individual.	Sole proprietor, partnership, or corporation.
Certificate of Incorporation or Certificate of Business Registration.	No.	Yes.
Is the individual covered under the company's WCB plan? Or does individual have Workers Compensation Insurance # (WCB account) & GST #.	Typically covered by <i>employer's</i> WCB plan. However, the fact that an individual may be covered under a WCB plan does not necessarily establish that the individual is considered an <i>employee</i> for CRA purposes.	It depends. Seek advice from WCB. GST # and remittances required (may be exemptions if billings do not exceed a certain amount), seek advice from an accountant.