

The following common law rules, developed by the courts, should be used as a guide to determine if an employer/employee relationship exist:

- (a) the project authority exercises supervisory control (as distinct from inspection of work) over the contractor;
- (b) the project authority, not the contractor, is responsible for providing the tools or facilities required to perform the work;
- (c) the contractor has no opportunity to subcontract or hire other persons to achieve the objective;
- (d) the work to be performed is an integral part of the work of the organization and is comparable to the work being carried out by public servants.

The significance of this for the Federal Crown is that departments, by virtue of the *Public Service Employment Act*, do not have the authority to enter into contracts creating an employment relationship. In addition to this, it is government policy that no contract may be entered into if the terms of the contract or the actual work situation creates an employer/employee relationship between Her Majesty and the contractor. This rule was laid down by Treasury Board when it became obvious that departments were using service contracts to circumvent the problems created by a shortage of "person years".

Notwithstanding recent Court decisions, the Department of Justice has provided the opinion that, in the absence of any statutory definition of "employment in the Public Service", reliance must be placed on the above common law tests to determine the existence of employer/employee relationships as distinct from the relationship between a contracting authority and an independent contractor.

With a request for a service contract, clients will sometimes use a job description of a former or current government employee. This is easy to recognize as it usually starts with words like "under the supervision of" and ends with "perform all other related duties". The presence of words like "assist", "help", "as required by", "in consultation with" are also good indications that an employer/employee relationship may develop in the performance of the work.

If you are in doubt about a particular contractor's relationship to the Crown, you should request the client to consult Legal Counsel (JUS) and provide you with a legal opinion. From a contractual point of view, the SXM role is to protect the Crown from employer/employee relationships to the extent possible in the contract. However, it is of critical importance that the client,