# Reality Check: Can You Contract Out of Being an Employer?

## Workwise Newsletter

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With great power comes great responsibility. Certainly this is true of employer-employee relationships, where the power imbalance generally tips in favour of the employer. Employers are responsible for providing training and supervision to employees, complying with minimum standards set out in employment standards legislation, deducting personal income tax from employees' earnings and remitting the deductions to the Canada Revenue Agency, deducting and submitting both the employee and employer portions of Employment Insurance premiums and Canada Pension Plan contributions, providing benefits such as vacation pay and unpaid leaves of absence, and potentially much more.

Can the responsibilities of being an employer be avoided simply by deciding to hire "contractors" instead of employees? In short: no. It's not as simple as that.

Courts apply a two-stage test to determine whether a worker is an employee or a contractor. First, the Court considers the parties' mutual understanding or common intention for their relationship. Second, the Court performs a reality check: does an objective reality sustain the parties' subjective intent?

Decisions issued by the Tax Court of Canada in the first half of 2019 provide many examples where the parties' subjective view of their contractual relationship turned out to be wishful thinking.

The case of *AE Hospitality v MNR*, 2019 TCC 116 involved a company who supplied workers to two closely related catering companies. The subjective intention of AE Hospitality and its 200-plus workers (supervisors, servers, bartenders, chefs) was to enter an independent contractor relationship. However, the Court found the facts did not substantiate that intention (at para 158):

The factors assisting in determining if a worker is an employee or an independent contractor, namely the control, the chance of profit and risk of loss and the integration factor all point to an employment relationship. In my view, the workers are not operating a business on their own account. The only parties that are operating a business and bear business risks are AE and the catering companies.

AE's workers were found to be employees, and AE was found to be a placement agency responsible for those employees under the *Employment Insurance Act* ("*EIA")* and the *Canada Pension Plan* ("*CPP*").

Similarly, in *9178-3472 Québec Inc. v MNR*, 2019 TCC 15 the Court found over 200 workers who distributed free "24 HEURES" newspapers in Montreal subway stations were in fact employees, despite having been hired as "self-employed persons" (i.e., contractors). In that case, the evidence showed the majority of the workers "agreed to be self-employed not by choice but because they had to work". However, the workers were paid minimum wage and only for hours actually worked, with no possibility of negotiation – it was clear they were not performing the services as their own business on their own account, but as employees.

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The decision in *European Staffing Inc. v MNR*, 2019 TCC 59 involved a company that placed tradespeople (millwrights, electricians, welders, industrial painters, etc.) with various clients and took the position the tradespeople were independent contractors, not employees. The Court looked at the facts and concluded otherwise: the tradespeople were employees and European Staffing was responsible for them as a placement agency under the *EIA* and the *CPP*.

In *Canada Sun Education Inc. v MNR*, 2019 TCC 117 the owner of a private school asserted the teachers at the school were independent contractors. The owner made no source deductions; the teachers had no benefits, no vacation or vacation pay, and no collective bargaining agreement. Although the evidence showed the teachers understood themselves to be independent contractors, an objective analysis weighed strongly in favour of an employer—employee relationship. As the Court stated (at para 34): "The subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts."

Tax Court decisions from the first half of 2019 also serve as a valuable reminder that it can be truly challenging to ascertain whether a worker is a contractor or an employee.

For example, in *Beach Place Ventures Ltd. v The Queen*, 2019 TCC 24 a Vancouver taxi driver who didn't own a taxi but worked as a lease-operator was found not to be an employee. The Court found the taxi driver engaged the services of the company and the taxi owner to support his taxi business.

However, in *Royal City Taxi Ltd. v MNR*, 2019 TCC 105 the Court came to the opposite conclusion about a New Westminster taxi driver. On the facts of that case, the Court found owner-operators were treated as owners, while lease-operators were treated as employees. Among other factors, the Court considered that Royal City Taxi was able to stifle lease-drivers' ability to earn revenue by limiting their access to fares, and that lease-drivers had been strictly warned against driving for Uber. Also significant was the fact Royal City Taxi paid the lease-drivers' EI premiums for several years (inadvertently, they alleged) before suddenly stopping. The Court concluded the parties' original subjective intent was to treat lease-drivers as employees, but surmised Royal City Taxi had learned other taxi corporations were dealing with lease-drivers as independent contractors and unilaterally changed its intent towards its own lease-drivers. Royal City Taxi's subjective intent to deal with its lease-drivers as independent contractors did not survive the Court's reality check.

Finally, the case of *Victoria's Five Star Cleaning Ltd. v MNR*, 2019 TCC 73 involved a janitorial worker who was told by an accountant that the company was taking advantage of him by treating him as an independent contractor rather than an employee. Although the Minister of National Revenue had concluded the janitorial workers were employees, the Court overturned this finding and confirmed the workers were in fact independent contractors. In arriving at this conclusion, the Court noted: the workers were subject to a "Subcontractor Services Agreement" and could decide which contracts to perform; they did not receive vacation pay or benefits, and received no formal training; they did not submit time sheets, but could make their own schedules, hire helpers, and use their own tools (e.g., to work faster), and could be penalized for unsatisfactory work; some workers were incorporated or had business licenses; and although workers were contractually required to obtain liability insurance the company's policy was in fact structured to cover the workers as well. In concluding the workers were independent contractors providing their services in their own business on their own account, the Court made these comments (at para 71):

…this case involves unskilled workers who do not necessarily need to invest in their businesses to effectively work as independent contractors. It is unrealistic to expect workers in the janitorial business to take the financial risks that are associated with larger scale businesses. The evidence has shown that the Workers understood the benefits and risks of being self-employed and that the intent of both parties to the relationship indicated that the Workers wanted to be considered as independent contractors; the economic reality of their businesses may not rise to a high level of entrepreneurial sophistication, but this fact alone should not derogate from their ability to contract freely as they choose simply because of the limited scale of their businesses.

There are many reasons why individuals may want to work as employees or as contractors; and many reasons why those who engage their services may want to be characterized as employers or not. While the parties' subjective intent is part of the test for characterizing these contractual relationships, parties should do a reality check early in the relationship. Field Law's Labour + Employment lawyers can assist.