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To Employ or Not to Employ: Is That the Question?

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Cases Considered:

Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission), 2009 ABQB 241, overturning *Donald Luka v. Lockerbie & Hole Industrial Inc. and Syncrude Canada*, Alberta Human Rights and Citizenship Commission, February 15, 2008 (Beth Bryant)

An appeal of a Human Rights Panel ("Panel") decision brings to the fore an issue that has arisen in many human rights cases. When there is a complaint of discrimination in the area of employment under s. 7 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A 200, c. H-14 ("*HRCMA*"), who will be considered an "employer"? This is especially pertinent in the current marketplace in Alberta where workers are often contractors or sub-contractors.

Section 7 *HRCMA* reads:

> 7(1) No employer shall
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> (a) refuse to employ or refuse to continue to employ any person, or
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> (b) discriminate against any person with regard to employment or any term or condition of employment,
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> because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person.

Of note is that unlike some other jurisdictions (e.g., British Columbia), "employer" is not defined in the *HRCMA*.

In *Donald Luka v. Lockerbie & Hole Industrial Inc. and Syncrude Canada*, Donald Luka complained to the Alberta Human Rights and Citizenship Commission ("Commission") that he was discriminated against by Syncrude and Lockerbie under s. 7 of the *HRCMA*. Luka complained about a drug and alcohol policy implemented by Lockerbie on Luka's prospective employment with Lockerbie on the Syncrude site in Fort McMurray. Kellogg, Brown and Root ("KBR") performed a general contracting or supervision role on behalf of Syncrude on the site.

Luka was employed by Lockerbie and was asked to transfer to the Syncrude site. This was a promotion. The caveat to the opportunity was that Luka pass a pre-access alcohol and drug test that Syncrude, through KBR, insisted that all contractors require of their employees. Luka did not pass the test and Lockerbie did not use him on the site. Luka did subsequently work on the site for a different company. (The cases do not provide information on whether Luka passed a drug and alcohol access test for the second employer.) Syncrude did not know about any of this information until after Luka complained to the Commission.

Evidence provided by Syncrude indicated that Syncrude was not a party to a collective agreement, and that any unionized workers operate on the site as part of the contractor workforce. Lockerbie was a contracting company that had no corporate relationship with Syncrude.

At the Panel hearing, Syncrude made an initial objection that it was not an "employer" under the *HRCMA*, and hence not subject to s. 7. The Panel concluded that Syncrude was an employer for the purposes of s. 7, and went on to find that the complainant had not been discriminated against on the basis of disability or perceived disability.

Syncrude appealed the preliminary finding of the Panel that it was an employer to the Alberta Court of Queen's Bench (*Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission*). While the Director of the Commission argued that Syncrude had the onus of establishing that it was not an employer under the *HRCMA* because it sought an exemption from the application of s. 7(1), Justice T.D. Clackson held that the complainant had the onus of demonstrating a *prima facie* case of discrimination, one aspect of which included establishing that Syncrude was an employer under the *HRCMA* (Luka, Q.B. decision at para. 20).

Luka worked for a contractor of Syncrude. One legal test which has evolved to address whether a contractor is an "employer" under human rights law requires economic dependency upon the company and subjection to the effective control of the company; see *Sharma v. Yellow Cab Ltd.* (1983), 4 C.H.R.R.D/1432 (B.C. H.R.T.). The "control" test has been interpreted and applied to a number of rather unconventional relationships, often resulting in a finding that there was an employment relationship for the purposes of human rights law. For example, the following relationships were determined to be "employment":

- A regular customer of the complainant's employer and the complainant: *Jalbert v. Moore* (1996), 28 C.H.R.R. D/349 (B.C.C.H.R.);
- An actress auditioning for a movie role and a film production company: *Fernandez v. MultiSun Movies Ltd.* (1998), 35 C.H.R.R. D/43 (B.C.H.R.T.);
- An applicant for volunteer training and a feminist organization sponsoring the training: *Nixon v. Vancouver Rape Relief Society* (2002), 42 C.H.R.R. D/1 (B.C.H.R.T.), reversed on other grounds *Nixon v. Vancouver Rape Relief Society*, 2003 BCSC 936, affirmed *Nixon v. Vancouver Rape Relief Society (No. 2)* (2005), 42 C.H.R.R. D/20 (B.C.C.A.), leave to appeal to S.C.C. refused SCC No. 31633 February 1, 2007;

- A live-in caregiver and the brother of the patient: *Milay v. Athwal* (No. 1) (2004), 50 C.H.R.R. D/386 (B.C.H.R.T.).

On the issue of whether Syncrude was an employer under s. 7(1), the Panel relied on a number of legal decisions. In the case of *Re Cormier and Alberta Human Rights Commission* (1984), 14 D.L.R. (4th) 55 (Alta. Q.B.), the court dealt with the issue of whether the owner-operator of a truck was the employee of a firm that sub-contracts with people to haul material from a mine site. The case arose from an allegation that the trucking company refused to enter into a contract with the complainant because of his race. The Panel determined that it did not have jurisdiction to hear the complaint because the relationship between the company and owner-operators was that of "dependent contractor" rather than employer and employee. The matter was appealed to the Alberta Court of Queen's Bench.

On appeal in *Cormier*, Justice McDonald noted that the trucks were owned by the operators, who were responsible for all operating expenses. The company provided the work for each operator, controlled the manner in which the work was done, and paid the owner-operators on an hourly basis. Justice McDonald also noted that the status of "dependent contractor" was unknown in Alberta law and thus the Panel's decision was in error. Justice McDonald based his conclusion on two premises:

> a) the interpretation of words in one context for a particular purpose may not govern the interpretation of the same words in another context (*Cormier*, at para. 47); and
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> b) the *Individual's Rights Protection Act* (as the *HRCMA* was then called) should be given a remedial and liberal construction (*Cormier*, at para. 48).

Thus, the matter was returned to the Panel for reconsideration on the basis that there was an employment relationship.

In *Luka*, the Panel also relied on the Preamble of the *HRCMA* and the functions of the Commission as set out in s. 16, together with the broad interpretation provided in Cormier and three other human rights cases (*Re Prue (*1984), 57 A.R. 140 (Q.B.), *Pannu, Kang and Gill v. Prestige Cab Ltd* (1986), 73 A.R. 166 (C.A.), *Canadian Pacific Ltd. v. Canada (Human Rights Commission)*, [1991] 1 F.C. 571) and the facts of the case to conclude that Syncrude was an employer for the purposes of *HRCMA* s. 7. Of particular importance was the fact that Syncrude set out stringent conditions for the workers it utilized to have access to its site. Further, the Panel held it would be a façade to think that a company could insulate itself from a human rights complaint by inserting a contractor between the company and the workers it requires to build its project (*Luka*, Panel decision at para. 63).

Justice Clackson of the Court of Queen's Bench disagreed. He noted that the issue of "utilization" must be taken in context. There are cases where a broad definition of "employ" would not describe the relationship between the parties. Justice Clackson also interpreted the cases relied upon by the Panel as having a common element of an "agreement" between the

parties. Without an agreement there can be no employment (*Luka*, Q.B. decision at para. 36). Further, in the case of a contractor and a sub-contractor, there is no agreement between the owner and the sub-contractor. The sub-contractor is working on the owner's project but not for the owner (*Luka*, Q.B. decision at para. 37).

Justice Clackson went on to state (at para 38) that if any of the traditional criteria relied upon to define "employment" in other legal contexts (e.g., tax and labour) are present, then the person is an employer for the purposes of *HRCMA* s.7. If not, there must be an express or implied agreement made between the putative employer and the complainant in order for s. 7 to apply. If not, s. 7 does not apply.

Justice Clackson's reliance on agreement, rather than utilization or control, for the basis of finding an "employment" relationship is problematic. It ignores the numerous decisions in which human rights law was found to apply under "employment", yet it would be difficult to conclude there was an agreement to work for the respondent in these situations: customer, volunteer, or brother of client. Further, there have been cases where a sub-contractor has been found to be an "employee" for the purposes of human rights law. In *Ayris v. Volker Stevin Contracting Ltd.* (2005), 54 C.H.R.R. D/456 (Alta. H.R.P.), the Panel held that a female backhoe operator who worked for All Canadian Excavating on a Volker-Stein job site could launch a complaint under s. 7 against the on-site supervisor who was employed by Volker Stevin. The Panel held that employment connotes the way a person earns their livelihood and that it should be interpreted broadly for human rights purposes.

It seems that the Panel was correct in finding that s. 7 applied to Syncrude. Thus, the Queen's Bench decision may be appealed by the Director, as it has implications for any number of people who are working in the same type of role as Luka was.