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What's in a name? Construction Owners Association of Alberta and Construction Labour Relations – An Alberta Association Concerned about "Employer" in the Alberta Human Rights Act

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Cases Considered:

Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission), 2010 ABCA 184

It is fairly rare that two agencies not parties to an action would seek leave to intervene in a human rights appeal. I am not terribly surprised that the Alberta Human Rights Commission (formerly the Alberta Human Rights and Citizenship Commission) has appealed the 2009 Court of Queen's Bench decision in *Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission)*, 2009 ABQB 241. As I noted in my previous post on this case, the decision of Justice T.D. Clackson involving the interpretation of who is considered an "employer" under s. 7(1) of the *Alberta Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 (now *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5) appeared to be contrary to both existing case law and the spirit of "large and liberal" interpretation normally given to human rights legislation. Apparently, there are Albertan companies and associations who share an interest in the outcome of the appeal.

This case was originally heard by the Human Rights Panel (now Tribunal), wherein Donald Luka argued that he was discriminated against by Syncrude and Lockerbie under s. 7 of the Act (see *Donald Luka v. Lockerbie & Hole Industrial Inc. and Syncrude Canada*, Alberta Human Rights and Citizenship Commission, February 15, 2008). Section 7 provides that "No employer shall (a) refuse to employ or refuse to continue to employ any person, or (b) discriminate against any person with regard to employment or any term or condition of employment" on the basis of protected grounds.
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 was unaware of this information until Luka complained to the Commission.

Evidence provided by Syncrude indicated that Syncrude was not a party to any collective agreement, and that any unionized workers operating on the site were employed by individual contractors. 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 Act, 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*). The Director of the Commission argued that Syncrude had the onus of establishing that it was not an employer under the Act, because it sought an exemption from the application of s. 7(1). Justice T.D. Clackson disagreed, and 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 Act (*Lockerbie,* Q.B. decision at para. 20).

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 (e.g., volunteers, customers), often resulting in a finding that there was an employment relationship for the purposes of human rights law.

On the issue of whether Syncrude was an employer under s. 7(1), the Panel that heard the case originally 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 Panel determined that it did not have jurisdiction to hear the complaint because the relationship between the company and owner-operators of trucks (who were alleged to have discriminated against Cormier) was that of "dependent contractor" rather than employer and employee. On Cormier's appeal to the Alberta Court of Queen's Bench, 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 Act 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 relied on the preamble of the Act 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.), and *Canadian Pacific Ltd. v. Canada (Human Rights Commission)*, [1991] 1 F.C. 571). These, together with the facts of the case, led the Panel to conclude that Syncrude was an employer for the purposes of s. 7 of the Act. Of particular importance was the fact that Syncrude set out stringent conditions for the workers it allowed 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. He pointed out that 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 (*Lockerbie*, 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 (*Lockerbie*, 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 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.

As noted, two associations sought to intervene in the appeal to the Alberta Court of Appeal. Intervention allows a non-party to join ongoing litigation with the court's permission. Usually intervention is permitted when a judgment has the potential to affect the rights of non-parties, who therefore want to be heard by the court. Justice Berger, in his reasons on the application for leave to intervene, cites the decision in *Papaschase Indian Band v. Canada (Attorney General)*, [2005] A.J. No 1273 at para. 2, where the court states: "an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court".

One of the applicants to intervene, the Construction Owners Association of Alberta ("COAA") (http://www.coaa.ab.ca/) represents owners who use construction services on a daily basis as well as those who provide construction services. COAA's stated objective is to provide "leadership to enable our owner members to be successful in their drive for safe, effective and productive project execution in their industry."

The Construction Labour Relations – An Alberta Association ("CLR") (http://www.clra.org/) represents "the interests of contractors in the general construction sector, including industrial contractors, who have bargaining relationships with trade unions" (*Lockerbie*, Court of Appeal decision at para. 3).

Justice Berger was convinced that both associations should be permitted to intervene (by filing a joint factum) on the basis of affidavits submitted by representatives of each of the organizations. The Association representatives argue that the outcome of the appeals will significantly affect their members' interests because it will affect their duties under the Act. They also indicate that finding Syncrude is an employer under s. 7, a situation where the owner, prime contractor or prime subcontractor on industrial construction projects have no relationship with the worker "will increase considerably the complexity of an already complicated area of human rights law.

It would also impose onerous obligations on the owner of an industrial construction site, a prime contractor and a prime subcontractor" (*Lockerbie*, Court of Appeal decision at para. 8). Furthermore, they assert that finding them to be employers under the Act "may impact the status of an owner, a prime contractor or prime subcontractor under other legislation" (para. 8).

It appears that the intervenors are conflating different issues. It is quite clear that "employer" is to be determined in a large and liberal fashion under human rights law, but not necessarily under the other types of legislation about which they are concerned (e.g., the *Criminal Code*). Second, the "onerous obligations" that would be imposed on the owner, prime contractor and prime subcontractor would be to abide by the human rights legislation. I agree with the Panel that it would be contrary to the basic principles of anti-discrimination and human dignity to think that "an entity could avoid its duties under human rights law by inserting a contractor between the company and the workers it requires to build its project" (*Luka*, para. 63). It remains to be seen what weight the intervenors' arguments are given and how the Alberta Court of Appeal will resolve the issue of what constitutes an "employer" under Alberta's human rights legislation.