Employer v. Contractor: The Manitoba Distinction



By Jamie Jurczak, Taylor McCaffrey LLP

In Manitoba, as in other jurisdictions, OHS laws set out various safety duties and obligations for those performing particular roles in a workplace, such as employers, workers, supervisors, owners or prime contractors. Manitoba's *Workplace Safety and Health Act* ('WSHA') also provides for duties on the part of 'contractors.' The distinction under Manitoba law between the duties of employers and those of contractors is important. But it can be difficult to determine into which category an individual or company falls. A decision by the Manitoba Labour Board, however, provides some guidance on making this determination.

What the Law Says

'Contractors' are defined under WSHA as 'a person who, pursuant to one or more contracts, directs the activities of one or more employers or self-employed persons involved in work at a workplace.' But contractors aren't explicitly part of the definition of 'employer' under WSHA, which includes:

- Every person who, by himself or his agent or representative, employs or engages one or more workers; and
- the Crown and every government agency.

The contractor distinction in Manitoba is important because

contractors have different duties towards workers than employers under WSHA. A contractor's duties to workers are defined by the extent of control it might have over those workers, recognizing that the workers' employer likely has more control over the workplace and those workers than a contractor would. (See, Sec. 7.1 of the WSHA for these specific duties.)

The Class A Home Case

In *Class A Home and Yard Services Ltd. v. Manitoba (Workplace Safety and Health)*, [2014] CanLII 53906 (MB LB), Sept. 4, 2014, a decision by the Manitoba Labour Board (leave to appeal abandoned), the important distinction between 'contractors' and 'employers' for the purposes of WSHA was addressed. This case also gave the Board an opportunity to establish criteria to determine whether a person or business is a 'contractor' or an 'employer' under WSHA.

Class A offered various cleaning and maintenance services to clients, by coordinating with various subcontractors to provide the services to its clients. The subcontractors entered into written agreements with Class A, which stated that the subcontractors were not employees, but independent contractors. The agreement's template had been reviewed by the Canada Revenue Agency, which agreed that the contract suggested that the subcontractors were indeed independent contractors, not employees of Class A, for the purposes of tax treatment. All subcontractors were required to register their businesses with The Companies Office and provide proof of registration as a business. Although Class A provided safety training to subcontractors, it was made clear to the subcontractors that they were responsible for ensuring the safety of their workers and equipment in accordance with safety laws.

A high rise window washer who was working for one of the subcontractors, a sole proprietor named GP, fell from a

building due to what appeared to be faulty fall protection equipment. Class A was issued Improvement Orders for failing to meet certain duties of an 'employer' towards the injured worker. The Workplace Health and Safety Division took the position that Class A was GP's employer and therefore, also the employer of GP's workers. Class A appealed the Improvement Orders. Although Class A didn't deny that it had duties towards GP and his workers under WSHA, its position was that its duties were those of a 'contractor.' Class A argued that the tests used in the employment standards context to determine whether someone was an employer or contractor could and should be applied in the WSHA context.

The Director denied the appeal, relying on Ontario law, despite the fact that the definition of 'employer' under Ontario's *Occupational Health and Safety Act* ("OHSA") is markedly different from the definition of 'employer' in Manitoba. Under OHSA, the definition of 'employer' expressly includes 'contractors,' which isn't the case under WSHA. The Director also concluded that the Ontario case law interpreting the definition of 'employer' under OHSA created a common law definition of this term, essentially making all contractors employers.

Class A appealed the Director's decision to the Manitoba Labour Board, which rescinded the Improvement Orders. The Board held that the Director erred in her statutory interpretation of the terms 'employer' and 'contractor' under WSHA. The two terms had different definitions and thus different meanings, which was significant given the different duties imposed on each. The Board also ruled that it was an error to apply Ontario law given the different definitions of employer in the two jurisdictions and that the Ontario case law didn't create a common law definition of employer.

The Board further held that a factual analysis needed to be undertaken to determine whether an entity was, in fact, a contractor, as opposed to an employer, in any given

circumstance. To determine which category an entity falls into under WSHA, the Board said it's appropriate to apply the factors set out in *Knights of Columbus and C.B.*, [2010] MBCA 110 (CanLII), Nov. 26, 2010, used to determine when a worker is an employee in the employment standards context. These factors include:

- The level of control over an individual's activities;
- The provision by an individual of his or her own equipment;
- The hiring by an individual of his or her own helpers;
- The degree of financial risk taken by an individual;
- An individual's opportunity for profit or risk of loss;
- An individual's degree of responsibility for investment and management; and
- Other factors, including exclusivity, tax treatment, benefits and written agreements.

Ultimately, the question is 'whether the person who has been engaged to perform the services is performing them as a person in business on his own account or is performing them in the capacity of an employee.' In answering this question, the totality of the parties' relationship must be examined and no single factor will be determinative.

Key evidence before the Board as to Class A included that GP:

- Entered into the independent contractor agreement with Class A;
- Hired his own workers and paid them;
- Filed his own tax returns as a sole proprietor and issued T4's to his workers;
- Obtained his own workers' comp coverage for his workers;
- Owned the majority of his own tools and equipment (including the alleged faulty fall protection equipment);
- Had the ability to take on other work outside of Class A clients; and

- Was allowed to set his own schedule.

The Board ultimately concluded that GP was performing services as a business in his own account and, therefore, Class A didn't have the duties of an employer towards GP or his workers, but rather, those of a contractor.

Bottom Line

This case demonstrates not only the importance of understanding the different definitions and duties arising out of the OHS laws in a particular jurisdiction, but also the importance of the proper characterization of the business relationship between parties who are working together on a project or at a worksite. Their respective rights and obligations with respect to safety can vary considerably, depending on how they're classified. Also, it's important to remember that calling oneself a "contractor" won't be enough'the actual substance of the business relationship will be examined. Businesses and individuals alike should give some consideration to the factors discussed above and use these factors to structure their working relationship in a manner that will best ensure all parties are meeting their respective safety obligations ' whether as 'employers' or 'contractors.'

This case also shows that the differences in OHS laws between jurisdictions can be very important. It may not always be the case that what applies in one jurisdiction applies in another. Things might have been different for Class A if it was operating in Ontario, where the definition of employer includes contractors. It's, therefore, always important for both businesses and individuals looking to operate in multiple jurisdictions to take the time to look at the specific OHS laws in each jurisdiction and understand how their duties may differ depending on where they're operating.

Jamie Jurczak is a partner at Taylor McCaffrey LLP. Jamie's preferred area of practice is occupational health and safety.

She’s experienced in defending employers charged under provincial and federal OHS legislation and is well versed in assisting clients in responding to serious workplace incidents, addressing administrative appeals of regulatory orders and performing regulatory compliance reviews and audits. She frequently speaks at conferences and seminars on various topics relating to OHS legal liability and due diligence. You can contact her at 204.988.0393 or jjurczak@tmlawyers.com.