

Winnipeg Construction Association

Comments on the

Employment Standards Review

December, 2005



The Winnipeg Construction Association (WCA) is a regional construction association representing the interests of the commercial and industrial contractors in the Province of Manitoba. Formed in 1904, the Association has a membership of almost 500 companies. The WCA has represented this membership in matters of government advocacy, human resources, procurement practices and standards. WCA representatives are active on all major boards and committees having to do with workplace issues, employment standards, fair wages, building code development, safety and injury prevention.

The construction industry in Canada is a very significant economic sector and in 2005, this sector grew by 5.4%. According to a recent Statistics Canada report, one of every 16 jobs in Canada is in construction.

The Winnipeg Construction Association is pleased to offer its comments to the Employment Standards review panel. Our comments will attempt to address some of the questions posed in the discussion document and will offer some additional suggestions which could strengthen the Employment Standards Code and offer improved guidance to employers and employees.

First of all, we would like to suggest that from our perspective the current Employment Standards Code (Code) is serving Manitoba well and we would not like to see wholesale changes that could potentially disrupt the workplace and, more importantly, further disadvantage the Manitoba employers from a competitive standpoint among other provinces.

Hours of Work and Overtime

The construction industry in Manitoba is unique in most of Canada in that it is governed by both the Employment Standards Code and the Construction Industry Wages Act (CIWA). The CIWA regulations are currently under review for the first time in a decade and will result in a new minimum wage schedule for most hourly employees in the commercial, industrial construction and road building sector. The CIWA also spells out hours of work and overtime, ratios of skilled to unskilled employees, provides a slightly different rate structure in rural areas, and offers a graduated rate of pay system for the job classifications which do not have an apprenticeship program. The CIWA is not without its problems but the WCA is strongly in favour of the continuation of this legislation – and the review process underway – and to exploring ways and means to ensuring its enforcement.

The CIWA does not cover ALL construction workers. Exemptions exist for those employees working for a building owner in maintenance, workers in the residential construction industry, and those employed in the renovation industry. Therefore the Employment Standards Code applies to those construction workers NOT covered under CIWA. In several instances the Code makes the reference “exceptin construction” making for a very confusing regulatory environment.

In an attempt to provide greater clarity in the Employment Standards Code, the sections detailing Minimum Wages, Hours of Work and Overtime, should specifically reference the CIWA and provide enough information so that an employer or an employee is able to quickly ascertain which piece of legislation applies.

Variance for Hours of Work

In the CIWA, there is provision for variance of Hours of Work in certain circumstances – such as a remote work camp. Currently application must be sought through the Director of Employment Standards and the Manitoba Labour Board for such a variance. **The construction industry would support streamlining this process and providing the Director with greater powers to issue such variances. These powers would be similar to those offered to the Director of Workplace Safety and Health under WSH legislation.**

Salaried Employees and Managers

In our view the Code was developed to protect employees in traditional employer/employee relationships. Most provinces, in their ES legislation, have developed large exemption lists which recognize that these traditional relationships do not exist in all instances. Alberta, for example, exempts a whole range of professional occupations, salespeople (commission occupations), and specifically exempts employees in a supervisory or managerial capacity. Ontario has a long list of exemptions too including teachers, inmates, police, and directors of corporations.

The Manitoba Code and its regulations are not silent in terms of their application to salaried employees. Various exemptions are provided for a large number of professions and their existence speaks to the need to allow employers and employees flexibility in work arrangements. A large number of employees working for a salary do so under some form of employment agreement that spells out expectations, salary and benefits, and hours of work or overtime.

Such arrangements offer flexibility in terms of hours and truly enhance the work life balance of thousands of people in Manitoba but should not be seen as a means for employers to require unlimited hours of work. Several jurisdictions require employers of salaried employees to recognize work beyond 44 hours per week and record this as overtime. Our concern with this would be that the employee would likely lose the flexibility they have during their regular work day. There is some question that this may be abused by a minority of employers – however, we would prefer that these exceptions be dealt with directly (enforcement and penalties) rather than having new regulations impacting a significantly larger and compliant group.

Incentive Based Workers

Incentive based work relationships are also recognized in the current Manitoba Code Regulations and commissioned salespeople are a good example. In our examination of Ontario, Alberta, and Saskatchewan, regulations also provide similar recognition of incentive based work. In our view, these should be continued in Manitoba.

“Piece work” is a slightly different variation on the incentive based theme. “Piece work” is a feature of the construction industry and this has been enshrined in the Code with exemptions for **independent contractors**. There can be no

provisions in regulation that attempt to suggest hours of work or minimum wages for these individuals. We should be clear that we will defend the right of an individual to provide services for a fee as an independent contractor. We do not however, condone any form of Income or Sales Tax avoidance, or failure to follow Workers Compensation Act provisions as they apply to independent contractors. Further, should this individual independent contractor hire a single worker, the employee-employer relationship is then deemed to exist and all of the provisions of the Code should apply to that employee.

Compliance: Education, Enforcement, Penalties

In our view, compliance with the Code is of paramount importance – perhaps more important than any new provisions. We include compliance of the CIWA in this statement. Compliance can be ensured through a combination of education, enforcement, and penalties – two of which seem to be entirely absent today.

Education must play a greater role in ensuring compliance of the Code. Over the past few years, our industry has been doing a great deal of work to improve the safety and health climate in construction Manitoba. Safety awareness and prevention work is also being undertaken by the Workers Compensation Board and the Workplace Safety and Health Division through the **SAFE Work** program. This is a safety awareness program and it appears to be resonating with the public. There are no similar programs which discuss employment standards, rights and responsibilities of workers – and of young workers in particular.

In the Manitoba Employment Standards Code Regulation, it states that the Director “may” require the posting of Employment Standards information. **We recommend we go a step beyond this and require the posting of the Code and / or the CIWA in all workplaces.** This is done in other jurisdictions including Ontario.

Enforcement of the Construction Industry Wages Act wage regulation is virtually non-existent in Manitoba. We are hoping that the anticipated changes to the CIWA regulation coupled with the education and enforcement suggestions made here, will make the CIWA more understandable and more enforceable. The Employment Standards Branch also needs to be more active on the enforcement side with spot audits and meaningful penalties.

Fines

In the event an employer is found in breach of the Code, or the CIWA, a fine can be levied by the Court. An employer will also be required to pay the additional wages or benefits that were the subject of the complaint. Fines prescribed under the Employment Standards Code are less onerous than those provided under the CIWA*.

It is our recommendation that the Code specifically describes the fines assessable under BOTH pieces of legislation with a view to ensuring that the employer and employee understand the process as they apply to different employees in the construction industry.

*CIWA Fine (not including lost wages) Provisions: "An employer who fails or neglects to comply with any provision of the Act or the regulations is guilty of an offence and is liable, on summary conviction where the employer is an individual, to a fine of not less than \$250. and not more than \$2500. or to imprisonment for a term not exceeding three months or to both and, where the employer is a corporation, to a fine of not less than \$1250. and not more than \$25,000."

Administrative Penalties

Amendments to the Workplace Safety and Health Act and the Workers Compensation Board Act have allowed for the establishment of Administrative Penalties. These are fines that can be levied by the Director against employers and employees without the normal court proceedings. **Winnipeg Construction Association does not oppose the imposition of Administrative Penalties provided there are consultations with employers on the specific nature of the proposed penalties and the manner in which they will be imposed.**

Termination Notice

The construction industry operates differently than most employers and this is recognized in Employment Standards legislation across the country including Manitoba. Construction projects are finite and Notice of Termination, in the normal sense, is unreasonable.

In the case of employees working peripheral to the construction industry, they are covered by the normal provisions of the Code which requires Notice of one pay period. Alberta, Saskatchewan, and Ontario provide a schedule of severance pay that is payable by the employer to long serving employees. Despite the fact that the Manitoba Code does not have these provisions it can be argued that

ample precedent exists in court decisions that guide the Manitoba employer in making decisions as to fair and reasonable severance pay.

Employment of Children

Winnipeg Construction Association representatives were involved in the review of the proposed Workplace Safety and Health Regulations (not yet released.) The new General Duties Regulation* actually removes references to restrictions on persons under 16 and 18 years of age from working in specific occupations. The original intent of these restrictions was to prevent young people from working in hazardous occupations, however, it became abundantly clear that hazards exist in construction as well as the fast food industry.

In the view of the construction industry, young people of 16 years and over should be allowed to work, and should not be prevented from entering apprenticeship programs at that age.

In reviewing the legislation from other provinces it would appear that attempts have been made to restrict persons under 16 from entering the workforce on a full time basis and possibly impacting their ability to attend school as legally required. We concur with this concern.

*Final Working Draft, 2005

Unpaid Leave

The majority of Manitoba employers recognize and respect the need for work-life balance and the absolute need to be sensitive to circumstances in the lives of their employees. The current Employment Standards Code provides for Maternity, Paternity, and Compassionate leave and we view these as fair and reasonable. Other jurisdictions provide for Bereavement Leave – which is not specifically addressed in Manitoba – but which we suggest is almost universally provided among the majority of Manitoba employers. As always, it must be recognized that all leaves cause stress among employers who are expected to continue to operate and to other employees are expected to fill in for those on leave.

Wage Deductions

The Manitoba Code requires that employees authorize any deductions from their pay. Further, the regulations state that employers deducting uniform purchases or cleaning may not do so if it results in pay below minimum wage. In the case of an employee that is provided meals and lodging by the employer, the regulations allow the employer to make deductions which may result in pay below minimum wage. This would not occur in the construction industry and we do not view this issue with concern.

On behalf of the Winnipeg Construction Association Board of Directors and membership, we thank you for the opportunity to share our thoughts on the Employment Standards Code.

Ronald Hambley
Executive Vice President
Winnipeg Construction Association
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