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THE OH&S CONTRACTING CONUNDRUM: WHO IS RESPONSIBLE FOR THE SAFETY OF YOUR CONTRACTOR'S EMPLOYEES?

Prepared by Cheryl A. Edwards and Ryan J. Conlin for a feature appearing in the October/November 2002 issue of OHS Canada Magazine, which was subsequently updated for 2004 Lexpert Corporate Counsel Legal Directory, and again for the HRPAO in April of 2005

Who is responsible for the safety of your contractor's employees? The answer to this question very much depends on what jurisdiction you are in. its OH&S provisions, and the nature of the work the contractor is performing.

In Ontario, employers are responsible for the health and safety of the employees of contractors and there is no mechanism to contract out of this liability, save and except for owners who hire a general contractor (called a "constructor" in the Ontario *Occupational Health and Safety Act*) to undertake a construction project. In addition, the way in which responsibility for contract workers is structured in the OH&S legislation of each province varies. As a result, standards for the exercise of due diligence in Canada where contractors are involved is in an unfortunate state of confusion and uncertainty and woefully lacking in consistency.

This is not to say that employers ought to be able to contract away responsibility and liability for workers employed by contractors they engage. It is, however, to say that the confusion that permeates OH&S contracting provisions across Canada limits the ability of employers to create contractor safety programs that provide clear guidance to supervisors and contract administrators. The issue of contracting has become a logistical nightmare for organizations that operate across the country.

Suppose you want to undertake a project. Can you hire a general contractor who will assume all safety responsibility for the other contractors on the project? The answer is a resounding "it depends".

Or let's say your business needs an expert contractor to perform a specific task such as repairing or installing specialized equipment. Can you contract with that third party "expert" to take safety responsibility and potential legal liability for this specific task, whether inside or outside of your facility? It depends entirely on what province you are in.

And then there are the rules for bringing in a temporary agency for a short-term project. Can you assign safety responsibility and legal liability to the temporary agency or contractor who employs these workers? The answer in most jurisdictions is "no", even if they work off-site, take complete charge over their own work, provide their own supervision, use their own equipment, and work under their own safety policies and procedures.

CONFUSING LAWS

In one jurisdiction an activity (let's say installation of a new machine) can be treated as "construction" over which a general contractor may be appointed to take control and responsibility, while just across the border in another province the same activity is one over which a business owner must exercise due diligence to ensure that all requirements are met by the contractor.

In several jurisdictions (B.C. and Alberta are of note in this regard) when multiple employers are present at a workplace, whether the work is construction or not, the owner must ensure that a single "prime contractor" who controls and assumes responsibility for the safety of all workers is appointed. Otherwise, the obligations of prime contractor fall to the business owner. In these jurisdictions, there is no need to determine whether the matter is construction or not.

This may be the clearest approach, since forcing a decision respecting who will act as prime contractor makes one party declare that it will ensure the safety of all contractors and workers on the site.

In jurisdictions where assigning responsibility to a third party can occur for construction only, much energy is expended in pondering and parsing whether a matter is construction that can be given to a general contractor or non-construction that must be controlled by the business owner. Currently, the jurisdictions where *only* “construction” work can be assigned to a general contractor are Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, P.E.I., Quebec and the Yukon.

In the majority of other jurisdictions, multiple employers present at the same site, as well as the owner of the site or work location, are all concurrently responsible with the "employer" or "principle contractor". Concurrent responsibility may be an apparently laudable means to achieve the objective of safety, but the manner in which multiple parties concurrently exercise responsibility over the same workers has never really been clearly spelled out by any legislature or court.

Utilizing the words of the defining case on due diligence, *Regina v. Sault Ste. Marie*, the party with legal obligations must take "all reasonable care" in the circumstances to avoid the particular event. What is "reasonable" in the circumstances they face? *The Oxford Universal Dictionary* says that "reasonable" means "Endowed with reason. Having sound judgment. Sensible. Not irrational. Not asking for too much."

Consider an employer lacking construction expertise that engages a general contractor to construct a new facility in a jurisdiction where the owner retains residual obligations as "principle contractor". Does the business have to appoint its own construction manager for the project? Should it assign supervisors to monitor and oversee the construction activities? Must it create its own policies and procedures for construction activities, even though the project is completely controlled by the expert principle contractor? Is this "sensible, not irrational, and not asking too much"?

Or consider the case of a business that retains a contractor for its specialized expertise (an electrical contractor, a diving contractor or a crane operator, for example) in jurisdictions such as Ontario where both that contractor and business owner are concurrently responsible as employers. Does the business owner have an obligation to appoint supervision, supply or examine safety equipment and impose policies and procedures that presumably relate to the heart of the contractor's expertise?

And what about a business that contracts in multiple jurisdictions across Canada? How can a contractor safety program possibly be crafted when in one jurisdiction a "hands on" approach requiring due diligence by the business owner is required, while in another jurisdiction in exactly the same situation a "hands off" approach is permitted? What is a sensible approach?

These situations give rise to the following questions:

- If the classic indicators of due diligence include ensuring knowledge of applicable laws, development of written policies, training, supervision, and enforcement of safety rules, how are these to be applied by a business owner when the contract workers are not the business owner's employees?
- If the standard of due diligence is the same whether the contractor brings its detailed health and safety program to the table or not, how does a business engaging in contracting determine when it can rely upon the safety program of a contractor?

WHAT THE COURTS SAY

(i) What is Construction?

As we briefly discussed above, many Canadian OH&S statutes (including Ontario) have specific provisions for the allocation of duties and obligations for contracting involving construction. This means that is vitally important that organizations be certain they understand what type of work will be treated as construction by OH&S regulators. Definitions of "construction" vary across Canada.

A recent Ontario case illustrates the kind of problems employers run into when engaging in work where there exists an issue respecting whether work is "construction" under OH&S legislation. The case involved a dispute over whether a minor modification to all light fixtures at a retail store to make them more energy efficient came within the definition of "construction" under the Ontario OHSA. The Ontario Labour Relations Board concluded that the work was construction. A significant factor in the Board's reasoning was that the contractor was making these modifications to every light fixture in the facility. The Board conceded that similar work done on a smaller scale would not necessarily come within the definition of "construction". It appears, at least in Ontario, that work that might not ordinarily be considered "construction" can, at some point, depending on its scope and significance, be treated as "construction". Among the many issues in contracting that organizations have to resolve is the question of whether or not work is "construction" under the relevant provincial legislation and case law interpretations of that legislation.

(ii) Contracting Out OH&S Liability to a "Constructor"

One longstanding aspect of the legislation of many jurisdictions (including Ontario) is clear. The business owner who engages a "constructor" or similar party, where work that is "construction" takes place, and where the constructor fully controls the work and the project, has no due diligence obligations, The constructor assumes extensive overall responsibility for health and safety.

This has been clearly confirmed in numerous cases. In *R. v. Stelco Inc.*[1]: "[T]he constructor in relation to a construction project [is] the person who enjoys and can exercise the greatest degree of control over the entire project and all working upon it in relation to ensuring compliance with prescribed safety methods and procedures. In *R. v. Bradsil 1967 Ltd.*[2]*:* "as a constructor, Bradsil's responsibility was to supervise the entire project with respect to any contraventions of the *Occupational Health and Safety Act and Regulations*, regardless of what subcontractor might be engaged in working on parts of it at any point of time ...". In *R. v. Sheppard Hedges & Green Ltd.*[3] discussing the task of identifying the principle contractor: "[T]he search must be for the one person who has authority and control over the project".

The workplace owner in these situations thus may take an entirely "hands-off" approach, and it is quite clear that the constructor or other similar party must exercise a full range of due diligence as the party expressly designated to do so.

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[1] (1989) 1 C.O.H.S.C. 76 (Ont. Prov. Ct.)
[2] (1994) O.J. No. 837 (Ont. Ct. Justice)
[3] (1997) 121 C.C.C. (3d) 556 (Nfld. C.A.)

(iii) Jurisdictions Where the Owner and General Contractor are Both Treated as "Constructor"

However, several jurisdictions render both a general contractor and the owner of a facility under construction "principle contractors" or "constructors" simultaneously. The general contractor has primary responsibility, but the owner retains some residual responsibility. There is absolutely no court guidance on the issue of how workplace owners in these jurisdictions (Newfoundland and Labrador, Nova Scotia, Saskatchewan and the Yukon are examples) are to exercise due diligence beyond the prudent selection of a qualified and experienced general contractor. There is little question that even this step, without clear court confirmation of its sufficiency, places workplace owners in these jurisdictions at risk of being found to have fallen short of due diligence requirements.

(iv) Situations Where Multiple Parties Have Concurrent OH&S Liability

Still more problematic is the application of due diligence standards to the situation where multiple workplace parties simultaneously have legal responsibility for the same activity. Courts do not hesitate to confirm the liability of one employer for the actions of another employer that is on-site or with which it has contracted. One often-cited statement to this effect involved a case in which an Ontario construction employer's worker was injured on a defective scaffold platform, constructed by a second employer on the same site. Even though the employer of the injured worker did not know the scaffold was improperly built, it was nonetheless convicted of failing to ensure that the scaffold was properly erected.[4] The court commented that the fact that one

[4] R. v. Structform International Ltd. (1972) O.J. No. 1711 (Ont. Ct. Gen. Div.)

employer may have an obligation to ensure that a regulation is complied with does not lessen the obligation of the other employer. "The case law is clear that one employer cannot point a finger at another employer [that] might be closer to the situation. Every employer has a duty to see that the workplace is safe and in the complexity of construction it is important that every employer use knowledge, due diligence, etc., to ensure that the workplace is safe. An employer is not entitled to say it is somebody else's responsibility".

Similarly, in the case of *R. v. Ted Newell Engineering Ltd.*,[5] the court confirmed that an employer has obligations to workers of other employers in the workplace in order to prevent fragmentation of responsibilities for a safe workplace. "Coordinating responsibilities are imposed on the owner and principle contractor and other overlapping responsibilities on the employer."

But while courts are more than prepared to say "employer" duties may not be contracted away, no matter what the circumstances, this does not assist employers in determining how to diligently address such things as retaining an expert to repair a machine, conduct diving operations or perform other specialized work.

(v) Leading Ontario Cases on Concurrent Responsibility under OH&S Legislation

The leading case regarded as providing assistance in this issue is *R. v. Wyssen*.[6] In that case, the Ontario Court of Appeal cites an Ontario Ministry of Labour prosecutor as stating: "[T]he more removed an employer was in fact from the concept of a true employer as we understand it at common law, the more easily could he establish the defence of due diligence". This may be some

[5] (2001) B.C.J. No. 2046 (B.C. Prov. Ct.)
[6] (1992) 10 O.R. (3d) 193 (Ont. C.A.)

(but not much) comfort to the employer seeking to know how it may establish "due diligence."

The Court of Appeal in *Wyssen* went on to confirm that even though the employer in that case had contracted with a highly specialized expert window cleaner, after determining that it did not itself have the necessary expertise to perform the work, the employer was nonetheless in the position of acting as a virtual insurer that the expert contractor would comply with complex provisions of regulations for window cleaning. The acknowledgement of the Crown that there might be some more logical way of establishing due diligence for the employer that contracts for the services of another employer has never been the subject of further elaboration by any court in Canada.

The case of *R v. Grant Forest Products*[7] involved the conviction of an Ontario business owner who engaged temporary workers to perform work on its equipment after participating in a half-day contractor safety orientation session. At trial in that case (which was, as discussed below, ultimately appealed to the Ontario Court of Appeal) the court commented as follows:

"...the requirement to demonstrate due diligence in owner/contractor relationships varies in accordance with such factors as the relative experience, expertise and competence of the contracting parties, to name but a few. In some cases, it may be satisfied by proof of the exercise of reasonable care and meaningful effort in the selection of a contractor. In others, as in the situation before the court, it may require application of the entire panoply of workplace protective measures expected of a conscientious and safety-minded manufacturer."

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[7] R. v. Grant Forest Products Inc., (2002) O.J. No. 3374 (Ont. Ct. Justice)

One charge related to failing to train workers to shut down equipment before an adjustment was made. (A contract worker touched equipment and suffered an amputation. A problem with the equipment reported by the contract worker had been checked and resolved by a supervisor just a few hours prior to the accident). The court commented that the employer had provided only general training to workers and that it should have provided specific lockout instructions. The business owner had a detailed 1/2 day safety orientation session for contractors in which it instructed them not to work on any live equipment, and took the position at trial that prohibiting the temporary workers from shutting down and locking out equipment was safer than attempting to train them in the specifics of lockout.

Interestingly, while the *Grant Forest Products* case in Ontario suggested that a prudent selection/pre-qualification system may be sufficient in some circumstances, in *R. v. Nova Scotia (Minister of Transportation and Public Works)*[8] the Nova Scotia Court of Appeal held that a prudent selection process for contractors was not sufficient, and that effective on-going monitoring by the owner was necessary. This case confirms that there is little question that even with an effective pre-qualification system in place, workplace owners are at risk of being found to have fallen short of due diligence requirements without evidence of at least on-going monitoring of contractors.

Instead of achieving a picture of overlapping diligence, or twice the diligence from two separately responsible employers, the imposition of obligations on multiple workplace parties without further guidance from the courts or the governments involved seems to have the opposite of the intended

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[8] [2002] N.S.J. No. 436 (Prov. Court)

effect. If each party simply assumes that the other party has responsibility for the safety of the workplace and workers, or decides that "double" due diligence is not sensible but does not know what is reasonable, the result is far less than satisfactory.

Compliance with due diligence standards where multiple overlapping responsibilities exist suggests employers must take steps that any reasonable person would say are illogical: double training, double supervision, double policies, double monitoring and double enforcement in all circumstances. In theory, this is required of any employer that retains any contractor, no matter how expert, in order to be absolutely certain of meeting due diligence standards. Anything short of this, even the application of a reasonable pre-qualifying and selection process for contractors, has not been clearly endorsed by courts.

CONTRACTING AND THE CRIMINAL CODE

On March 31, 2004, the Bill C-45 amendments to the *Criminal Code* came into force. The changes created an explicit mechanism designed to make it easier to convict corporations and other organizations of criminal negligence based in part on the actions of defined “representatives”. The definition of “representative” in section 1(2) of the *Criminal Code* includes contractors, clearly demonstrating a legislative intention to extend the employer’s obligations and liabilities under the *Criminal Code* to situations involving workers of a contractor the employer has hired.

Section 217.1 of the *Criminal Code* imposes an explicit duty on all those who direct work to take reasonable steps to prevent bodily harm to any person arising from work. An organization that engages a contractor can be convicted of criminal negligence if the contractor, as its “representative”, violates a legal duty (either the explicit duty in section 217.1 of the Code or any duty under OH&S

legislation or at common law) in a manner showing "wanton or reckless disregard" and senior officers of the employer have failed to take reasonable steps to prevent the actions of the contractor.

It must be appreciated that for the conduct of a "representative" to be considered "wanton and reckless" the Crown Prosecutor must prove that the actions of the accused contractor/representative were a marked and substantial departure from what a reasonably prudent person would have done in the circumstances. Courts have held prosecutors to a very high standard to establish "wanton and reckless disregard"(i.e., only the most egregious violations of a legal duty would be considered "wanton and reckless") which is one of the reasons that criminal negligence prosecutions for OH&S offences are expected to be relatively rare.

The *Criminal Code* provisions now hint that it may be impossible for an organization to shift responsibility for the health and safety of the contractor's employees away from the organization to the contractor, despite the very unique provisions for the activities of contractors in a particular jurisdiction which might otherwise seem to do just that.

A question that has been raised repeatedly with us in the context of the *Criminal Code* and contractors, is that there is a real conflict between contracting out OH&S liability to a third party, as legally permitted under provincial legislation, (eg. general contractor acting as "constructor" under the Ontario OHSA) and the owner's *Criminal Code* obligations. The question is: Are owners putting themselves at risk under the *Criminal Code* by not taking any actions with respect to OH&S relating to a contractor's workers at a project**,** because the owner is specifically permitted to avoid doing so, for the purpose of being treated as the project "owner" rather than the "constructor" by the Ministry of Labour?

Although there is no clear-cut answer to this question, it is difficult to imagine that an owner would be considered to be “wanton and reckless” for following prevailing OH&S regulatory provisions in a jurisdiction in a prudent manner. Some owners may wish to carefully add an additional oversight responsibility, even when contracting with general contractors who will fully control and perform construction work as “constructors” or similar such parties. It does seem unlikely to this author that an owner would be at great risk of prosecution when acting as a “prudent owner”, but it must be remembered that police investigators may not be familiar with the intricate provisions of contracting under OH&S legislation, so they may be confused, at least initially, about why the owner of the project was not taking action with respect to OH&S issues.

CONSTITUTIONAL CHALLENGES IN ONTARIO

The Ontario Court of Appeal had occasion recently to revisit the issue of contracting in the context of a *Charter* challenge brought to the OHSA definition of “employer” in *R. v. Grant Forest Products Inc*.[9]

Over ten years before, one Justice of the Ontario Court of Appeal in the *Wyssen* case questioned whether a provision where an owner is responsible for contractors, no matter how expert, and in all circumstances, was not simply too broad. "The question arises as to whether the legislature has gone too far in extending the responsibility for ensuring compliance with the prescribed safety standards.”

[9] [2004] O.J. No. 2250 (C.A.)

Grant Forest Products, at trial and on appeal, argued that the principle of "overbreadth" recognized by the Supreme Court of Canada as an important principle of fundamental justice under section 7 of the *Charter,* ought to be brought to bear in considering the contrast in Ontario which exists for a business owner who wishes to contract for a construction project and the business owner who wishes to contract for expert services. The principle of overbreadth has been applied to strike down legislation where the means of achieving a legislative objective are broader than necessary, thus contravening section 7 of the *Charter*. The company took the position before the court that the unavailability of an option to select a competent expert contractor as an employer, in contrast to the availability of this option when contracting a construction project, made the legislation too broad in Ontario.

The Court of Appeal refused to revisit the reasoning in *Wyssen* and dismissed the appeal. Leave to appeal to the Supreme Court of Canada was not sought by the company. It is now clear (at least in Ontario) that any change to the system for contracting under OH&S legislation will have to come from the legislature.

OTHER CHALLENGES TO CURRENT CONTRACTING PROVISIONS IN ONTARIO

Charter challenges have not been the only source of discussion and debate respecting the effectiveness of the current contracting provisions in Ontario. In one of Ontario's most tragic contracting cases, the fatal injury of two Steel Cat Task Force employees at a Dofasco facility in 1997, the two contract workers were overcome by argon gas after entering a confined space. The contractor had not been informed of the presence of residual argon gas. The inquest jury recommended that workplace owners ought to be required to enter into a legally enforceable agreements defining the owner's and contractor's

respective responsibilities relating to training and supervision of contract workers on-site, in order to better protect workers in contracting situations.

The Ontario Ministry of Labour also initiated a complete review of the provisions of the *Occupational Health and Safety Act* in 1997, and raised questions of whether the "employer" and "constructor" definitions, and systems of protecting contract workers, were clear and sufficient to meet the needs of Ontario workplaces. Despite extensive submissions made by many industry groups, and even some labour groups, no action has been taken to review or revise these definitions further. Despite a number of high profile OH&S-related announcements and enforcement initiatives by the Ontario Ministry of Labour in the past two years, there is no indication that the contracting issue will be revisited anytime soon.

Questions will continue to be raised about why we lack an effective, coordinated approach to the important issue of contracting across Canada. Employers want a system that provides clear choices and clear direction respecting due diligence standards to be applied. Even more important, Canadian workers deserve far better protection than what is currently offered when it comes to contracting.

EFFECTIVE CONTRACTOR SAFETY PROGRAMS

Generally, best practices for an effective contractor safety program should contain a number of elements, all of which draw upon long standing "due diligence" principles. A caution is in order, however, that standards must be tailored to each particular workplace and situation. Further, these standards have not all been the subject of court comment or endorsement. Some prudent considerations for a contractor safety program even amidst the minefield of confusing and conflicting OH&S provisions across Canada are as follows:

- Written policies and procedures pertaining to contracting activities (no matter how rare) should be part of corporate health and safety policies and procedures.
- Policies and programs must reflect the legal requirements of the jurisdiction (Each province and territory, as well as the federal jurisdiction, is different).
- Training in both legal and policy requirements must be provided for contract administration staff and the supervisors responsible for contract workers.
- Where necessary (i.e., in situations in which the prime contractor or constructor cannot take overall responsibility for safety) a person with knowledge of the OH&S provisions, regulations and industry standards for the work performed under contract must be in charge for the contracting employer no matter how expert the contractor is.
- Detailed processes for pre-selection or pre-qualification of contractors to assess their safety programs and potential safety performance should be established.
- The decision-making process respecting due diligence should take into consideration contractors who are temporarily on the site; performing work at remote work locations; performing work involving contractor's specialized expertise; intermingling with other contractors; and those with other relevant matters for consideration.
- Where appropriate, processes requiring familiarization of the contractor with the relevant workplace hazards, and policies and procedures for work should be established.
- Where relevant, processes to ensure ongoing communication between the work site owner and the contractor, as well as between contractors

(timing of work, safety-related aspects of work, equipment and machinery and workers intermingling) should be established.

- Where appropriate, contractors should be monitored to ensure compliance with legal requirements and industry standards.
- Contracts should use language consistent with legal approaches available (hands-on or hands-off where available), and setting out clearly the responsibilities of the respective parties to ensure that work under contract is performed safely.

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