

CONTRACTOR SAFETY MANAGEMENT: THE CONTINUED RISE IN COURT EXPECTATIONS AND HOW TO MEET THEM

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In the OH&S context, there is more to a contract than meets the eye. Workplace parties holding the status of “employer” or work site owner often get more than they bargained for when they contract out work. Imagine that a contractor violates health and safety legal standards when performing work, or encounters a hazard at the work site and is injured at your workplace. Ask yourself: Do the contractor safety practices at your company’s workplace consist of reliance on contractual sign-offs in which the contractor agrees to be “fully responsible for compliance with all applicable health and safety legislation and standards”? Or do your practices consist of handing out a “contractor safety booklet” to all contractors upon hire and on a regular basis? You may be surprised to learn that contracting out work (and such steps as contractual sign-offs and handing out booklets) does not automatically or properly contract away responsibility for worker safety or potential OH&S legal liability.

Legal provisions pertaining to OH&S contracting vary by province or territory. Some jurisdictions impose responsibility and legal liability when contracting through definitions (i.e. in Ontario, through definitions of “employer”, and “constructor”), while in other jurisdictions obligations and liabilities are set out within the duties of the party (i.e.

the “employer” in many jurisdictions, including the federal jurisdiction, has responsibility for a workplace it controls and for all parties accessing the workplace).¹

Forget the Contract: Facing the Legal Reality

Because of the extended definition of “employer” under Ontario’s OHSA, for example, employers or work site owners often get more than they bargained for when they contract out work, and a contractor violates health and safety legal standards, or an injury occurs at the work site. A recent decision of the Ontario Court of Appeal, *Regina v. Pioneer Construction Inc.* (2006), CanLII 15621 (Ont. C.A.) illustrates how the expanded definition of “employer” increases exposure to potential OH&S liability prosecution.

Pioneer Construction Inc. confirmed once again that, as a result of the extended OHSA definition of “employer”, expectations placed on employers are broad in scope. *Pioneer Construction* retained a contractor, P.D. Brooks, to deliver sand and salt to *Pioneer’s* worksite at a Ministry of Transportation storage site. Pioneer had purchased and installed a conveyor at the storage site to move the sand mix from vehicles to sand “domes” for storage. The conveyor was not properly guarded to prevent access to moving parts. A P.D. Brooks driver delivered a load of salt and sand to the Ministry site. The driver exited his vehicle near the conveyor, and decided entirely on his own to pick up a sledge hammer to loosen the sand when the flow of sand stopped on a conveyor.

¹ The legal provisions are often contradictory as well – in this article we discuss the fact that in one jurisdiction, Ontario, an organization acting as “employer” can never contract out of its OH&S responsibilities. An “employer” is a party that employs workers or contracts for the services of workers. However, an organization in the same jurisdiction who owns a construction project may in specific circumstances contract away “constructor” responsibilities to a party that controls the construction project.

He lost his footing and fell on the conveyor, ultimately receiving injuries that caused his legs to be amputated below the knee.

The Court of Appeal determined that *Pioneer* was the “employer” of a non-employee driver who was directly employed by the common carrier delivering sand to the yard. The court commented: “Just as a contractor who hires the services of a tradesperson through another employer (a sub-contractor) assumes responsibilities as an employer for that trades person while that person is working in a workplace under the control of the contractor, so *Pioneer* became the employer of (the injured worker) when he was working in a workplace controlled by *Pioneer* providing services to *Pioneer*. The narrow definition of “employer” advanced by *Pioneer* (on the appeal) is inconsistent with a purposive interpretation of the statute.” *Pioneer* was convicted and fined \$100,000.

The Continued Rise in Court Standards – How Can You Meet Them?

Unfortunately, few Canadian OH&S court decisions have explained how an “employer” may apply the standards of due diligence when contracting. The court’s comments on due diligence in *Grant Forest Products Inc.* (Trial decision July 26, 2002, Justice P. Belanger (Ont. C.J.), affirmed by Ont. C.A. May 31, 2004) illustrate the lack of clarity in expected standards in this important area of OHS law.

Grant Forest employed temporary workers to perform a specialized task involving planing boards beside operating equipment. A detailed half-day contractor safety orientation was provided to the temporary workers, which included instructions in dangers of touching the equipment and instructions to shut down equipment before any work was performed on live equipment. The court found that the employer *Grant Forest*

had provided only general training to the contract workers: it should have provided specific lockout instructions in the circumstances. The circumstances, according to court findings, were that contractors had been accessing the area without stopping the equipment. A contract worker jumped up on the equipment to adjust it and suffered an amputation of several fingers. The company was fined \$100,000.

The court's assessment of due diligence did not fully clarify standards which employers who contract for services are to meet. The court commented: "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 measure expected of a conscientious and safety-minded manufacturer".

Canadian OH&S case law recognizes that there can be a difference in the manner in which the "employer" who contracts for services will carry out their due diligence obligations. But while the company that contracts for services will be removed in fact from the employees of contractors and their due diligence steps will reflect this, they must in law demonstrate that they have taken all reasonable care to avoid contraventions. The question of what to do must be approached in a pragmatic fashion. A company contracting for services should consider the direct, specific steps which it can take to ensure that a prospective contractor will comply and is complying – by

prequalifying, assessing, and as necessary training, monitoring and enforcing safety standards where it has "employer" obligations.

R. v. Nova Scotia (Minister of Transportation and Public Works), is a helpful case, cautioning that pre-qualification does not, on its own, constitute sufficient due diligence when contracting. The Nova Scotia Ministry of Transportation and Public Works (TPW) retained a contractor (BML) to perform ongoing maintenance of traffic control devices. An OHS inspector observed BML repairing a traffic light with a boom truck positioned too close to the wires. TPW was charged with the contravention. The court recognized that TPW had a prudent pre-qualification and selection process for contractors. BML was chosen by TPW as a contractor because it had an impressive safety manual and corporate policy. BML also had a practice of conducting safety meetings for each project. Moreover, BML's boom truck operator had 34 years of experience.

Although the system appeared "complete and reasonable" on paper, the court held that prequalification alone was insufficient to meet TPW's OH&S obligations. No hazard assessment was conducted. The boom truck operator was not warned about the potentially fatal hazard. TPW failed to provide effective on-going monitoring of BML workers and was convicted. The court stressed colourfully that more was required than pre-qualification, and entering into a commercially viable contract, by stating: "TPW cannot hide behind BML's naked promise to carry out the work reasonably and legally." The contractor had the responsibility to carry out its safety plan, but TPW also had a responsibility to ensure that the system was implemented and monitored. The court clearly stated that reliance on an experienced and qualified contractor is not sufficient. Monitoring to confirm that the contractor is doing what it claimed it would do in a safety plan, is essential.

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