

"DELEGATING SAFETY?"

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In the OH&S context, there is more to a contract than meets the eye. We all think of contracting as entering into legally-enforceable agreements for supply of goods or performance of work at a fixed price. The Oxford Dictionary, commercial practice, and common sense all speak to the propriety of regarding such agreements as having full legal effect. Yet, under OH&S laws across Canada, nothing could be further from the truth.

Workplace parties holding the status of employer or work site owner often get more than they bargained for when they contract out, and a contractor violates health and safety legal standards when performing work, or encounters a hazard at the work site and is injured. Before reading further, ask yourself: Do the contractor safety practices at your corporate 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 mean automatically contracting away responsibility for worker safety or potential health and safety legal liability to the contractor.

FORGET THE CONTRACT: FACING THE LEGAL REALITY

The provisions of OH&S legislation across Canada create a web of provisions which place upon employers and work site owners duties and responsibilities for their own directly-hired workers, and for the workers of contractors. Although this is accomplished in different ways in each province, the same result follows. Some provinces¹ expressly define "employer" to mean a person who employs one or more workers or who contracts for the services of one or more workers, to perform work or supply services. In other provinces and under the federal Labour Code, where the definition of "employer" is less expansive, obligations for contractors exist as a result of general obligations placed on employers for work carried out under their control.²

These legislative provisions have historically resulted in frustration and confusion across Canada. Imagine a situation in which your corporation, recognizing that it lacks the specific expertise to carry out a function in a safe and legally-compliant manner, retains a single contractor (not a general contractor)³ with many years of experience in this function. You enter into a contract indicating that the contractor is fully responsible for compliance with all provincial occupational health and safety standards for this specific task. The contractor proceeds to perform the work and contravenes a fundamental health and safety requirement for the work, and your corporation faces prosecution for failing to ensure that the contractor complied with these legal requirements. That is exactly what you hired them to do and you relied upon their expertise! Yet the court finds that you cannot contract out of your health and safety obligations, no matter how well-drafted the contract.

That is precisely the situation which a corporation faced in the case of *Regina v. Wyssen c.o.b. Jake Wyssen Enterprises*⁴ after it retained an experienced window cleaner to perform work beyond its capabilities, and the window cleaner contravened the Ontario OHSA and was fatally injured. The court recognized that “the respondent (*Wyssen*) contracted with the more experienced window cleaner because he did not know how to do the job himself. Now he finds himself charged with a strict liability offence for failing to ensure that the “expert” he contracted for complied with the Regulations relating to scaffolds and working platforms...” The court comments that it seems “contrary to a reasonable sense of fair play” that the court should burden the Company with responsibility for ensuring that a more experienced window cleaning contractor complied with the OHSA. However, stated the court, the language used in defining the “employer” was very specific and deliberate in extending responsibility for ensuring compliance with OH&S standards, to the party who contracted for the services of an independent contractor. This case, and others like it, have drawn the ire of employers attempting to carry on business rationally by retaining contractors with necessary and appropriate expertise to carry out the work.

Interestingly, the court in *Wyssen* expressed concern that the legislation could potentially be challenged under the *Canadian Charter of Rights and Freedoms*. The court stated: “In the case on appeal, the state’s objective is the very proper one of protecting the health and safety of the worker in the workplace. The question arises as to whether the legislature has gone too far in extending the responsibility for ensuring compliance with the prescribed safety standards. It is surely an open issue as to how far strict liability with penal consequences can be extended before there is more than a minimum impairment of the subject’s s.7 *Charter* right to liberty and security of the person. This tension between the worthwhile objectives of the *Act* and the *Charter* rights of those who are swept under the all-encompassing definition of employer deserves to be explored.” The court noted that these “promising” *Charter* arguments were not raised at any stage of the proceedings and thus they could not subject this legislation to *Charter* scrutiny. It seems that no employer has to date taken up a concerted challenge to these provisions.⁵

The fabric of differing legislative provisions across Canada relating to contracting contains one further aspect. In contradiction of the general principle cited above that the employer is responsible for contractors and cannot contract this responsibility away, there are specific instances within the OH&S legislation of most provinces in which an employer or a work site owner may contract out work to a “prime contractor”,⁶ “principal contractor”⁷, or a “constructor”⁸. In these situations, such a contractor (for ease of reference referred to for the balance of this article as a “prime contractor”), may undertake and completely control the work on behalf of a work site or construction project owner, and if this is accomplished properly, the work site owner is absolved of responsibility. The “prime contractor” will have the responsibility for ensuring that legislative provisions are complied with and safe workplace practices are carried out at the work site. (See Sidebar **CONTRASTING PROVISIONS FOR CONTRACTING ACROSS CANADA**)

The concept of contracting to a “prime contractor” as a separate and distinct way of contracting is well recognized by courts. The intent of these legislative provisions is to ensure the existence at a work site or project of a party which to take an overall controlling and coordinating role with respect to work or a project, to maximize the safety of all workers on the site. In discussing the role of a “constructor” at a project the court in *Regina v. Stelco Inc.*⁹ stated that this

party 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. He plans and organizes the entire project. He has control over what contractors and subcontractors will be permitted to work and continue working upon the project. He controls the ultimate “purse strings” of payment for work upon the project. In planning the project and deciding whether he will undertake it, and how it will be organized, he can consider the dimensions and logistics of the project and, drawing upon his own expertise and knowledge ... he can make a reasonable assessment of what would be requisite to ensure compliance with the *Occupational Health and Safety Act* and Regulations upon the project”.

The existence of a party such as a “prime contractor” as part of the legislative scheme for contracting, adds to the confusion surrounding contracting, since some employers or workplace owners naturally, but incorrectly, assume that if another specifically-named workplace party (constructor, prime contractor) has responsibility, that they have none.

However, the existence of a party such as a “prime contractor” does not eliminate any of the responsibility discussed at the outset of this section, which a workplace owner may have when they contract directly for the services of workers. The existence of such a party should be regarded as a unique opportunity which exists in most health and safety legislation in only limited and specific circumstances.¹⁰ The existence of such a party creates the potential that a work site owner may contract away responsibility and potential OH&S liability for specific work to a general contractor, which exists only as long as the general contractor undertakes the work fully, properly and completely on behalf of the owner. This is an important caveat. If both the owner and general contractor each exercise control and responsibility, then the owner remains liable, no matter what the contract between the owner and general contractor states. A last important aspect of the legal reality pertaining to contracting is the concurrent nature of responsibilities of all of these workplace parties, and the discretion of government officials who enforce the legislation. Picture a busy workplace owner who simultaneously has OH&S responsibility for work ongoing at a facility as “employer” for its own directly-hired workers, and as an “employer” for the workers of contractors. Let’s not forget that the contractor also has OH&S responsibilities for the workers which it sends to a site under contract with the work site owner. In a given situation where an incident or accident occurs, government officials can decide whether to exercise their discretion in favour of prosecuting the party with a direct employment relationship as “employer”, or the work site owner or party who has retained the services of the contractor as “employer”, or both.¹¹ A contractor safety program as described below (under the heading “EFFECTIVE MANAGEMENT OF THE LEGAL REALITY”) will assist immeasurably in any workplace party’s efforts to satisfy investigating officials that appropriate and legally necessary steps have been taken respecting all contractors and their workers, and in steering investigators potentially toward a review of the **direct** employer’s policies, practices and diligence.

LET’S NOT FORGET THE RATIONALE BEHIND THE LAW

The frustrations of business owners and managers in deciphering and managing the legal backdrop of express (or implied) responsibilities for workers at the work site, must always be contrasted against the stark consequences to employees of contractors (or even to the work site owner’s direct employees) where clear policies and procedures for contractors and the coordination

of work of contractors, are not in place. The reality that contract workers are regularly critically and fatally injured drives the policy of broad definitions and provisions and across Canada requiring that employers and work site owners take responsibility for the safety of all workers for whose services they contract.

Consider the fatal accident involving Mr. Duc Nguyen, an employee of Chemidyne Corp. An Alberta employer in the business of slaughtering and processing beef, Cargill Ltd., contracted with Chemidyne to provide employees for daily cleaning and sanitizing of the plant. Mr. Nguyen had been employed by Chemidyne for approximately five months. He was assigned to clean a chain carrying hooks from the killing floor of Cargill. To perform his work he accessed a mezzanine level, which the court heard was a restricted access area of the Cargill plant. There were two open and unguarded drive shafts at the mezzanine level. Mr. Nguyen stood in front of the unguarded drive shaft to reach and clean hooks, wearing a loose-fitting apron, and was fatally injured after becoming entangled in the drive shaft and suffering massive injuries. The court in imposing significant penalties on both Cargill and Chemidyne called the result from sending this worker to work in this area "clearly foreseeable and virtually inevitable".¹²

Or consider the fatal accident of Mr. Robert Mumby, a 61-year old maintenance employee with Ancaster Tool Company Inc. Mr. Mumby worked for a company known as Georgia Pacific Inc. in Ontario until his retirement, and subsequently began work for Ancaster Tool, under contract to Georgia Pacific. Because of his expertise and experience, Mr. Mumby did no other work but maintenance of Georgia Pacific equipment. Mr. Mumby was performing work on a piece of equipment consisting of two screw augers driven by two separate motors. The power source to only one of the motors was locked out. A control room operator in another area of the building, unaware that maintenance was being carried out by a contractor, started the machine while Mr. Mumby was at the side of the machine, and he was pulled into the auger and killed.

The inquest report into Mr. Mumby's death released August 18, 1999, states: "An assumption was made that the safety procedures outlined in the (Georgia Pacific) safety manual would be communicated to those workers from Ancaster Tool Company Inc. who were working on machinery. Evidence showed that this assumption could not be proven ... Overall, the evidence presented by witnesses indicated that Robert Mumby was aware of the safety regulations but for some reason did not lock out the machine properly. His co-worker was unaware of the safety regulations and therefore did not recognize that incorrect procedure had been followed and, finally, the control room operator started up the machinery since he was unaware that maintenance was currently being carried out."

The inquest jury in Mr. Mumby's case, as well as in the situation involving a double fatality to contract workers at Dofasco Inc. in a 1977 case (See **SIDEBAR**) expressed concern that requirements of already-stringent OH&S laws be reviewed to ensure that responsibility for contract workers' safety, as between the work site owner and the contractor, is even more clearly defined.

EFFECTIVE MANAGEMENT OF THE LEGAL REALITY

Short of a proper *Charter* challenge, or legislative change, neither of which are currently on the horizon, employers, work site owners and managers must wrestle with the OH&S pitfalls of

retaining contractors and arrive at appropriate management strategies.

Too frequently, the only strategy consists of complete reliance on a letter or contractual provision, signed by the contractor, stating that the contractor is fully responsible and liable under health and safety provisions. (This is not to say that contractual provisions are completely unimportant-- See **SIDEBAR KEY CONTRACT PROVISIONS**). Another strategy involves handing out a "contractor safety booklet" for workers to follow within a facility, or to perform work at a site such as a construction project. These are not effective or legally sufficient control strategies. Yet there exists a tendency, from the smallest to the most significant and sophisticated employers across Canada, to attempt to control contractor safety through the use of these pieces of paper.

What then are the appropriate steps to establish an appropriate contractor safety program or "best practices" to ensure the safety of contractors? As unbelievable as it may seem, there exists an almost complete lack of specific legal guidance available in any case decided in Canada on contractor liability.¹³

In the few cases that have specifically commented upon this matter, the comments are very general. In *Wyssen* discussed above, the court recites the comments of legal counsel who, in attempting to justify apparent unfairness of enforcing employer responsibilities against the party who had contracted away the work, stated to the Ontario Court of Appeal that "the 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". Since *Wyssen* was decided, no case that has come to this author's attention has defined how "easily" due diligence for contracting can be established.

In a decision involving *Regina v. Al Silverberg* (1963), c.o.b. as *Dominion Sheet Metal & Roofing Works*¹⁴, where extensive due diligence steps on the part of an employer who utilized contractors for roofing work were argued to be sufficient, the court commented that it was clear from *Wyssen* that the definition of "employer" in the *OHS Act* makes a corporation an employer when contracting for services, and went on to state: "That is not to say that under the definition of due diligence, the fact that a party has subcontracted work will have no bearing on whether due diligence has been made out. There is no distinction in law between the legal duties placed on a direct employer or secondary employer (*counsel had characterized the employer as a "secondary" employer*), but there may be a distinction in the steps that they take to demonstrate due diligence to a court."

DUE DILIGENCE IN CONTRACTING

These few decided cases confirm that to meet long-standing requirements for contractor activities, sufficient steps must be taken to demonstrate to a court that "due diligence" has been exercised to avoid contraventions. Whether these steps are followed by a "prime contractor" or similar party with overall control of a work site, or whether these steps are exercised by an employer contracting for services, a proper contractor safety program must echo the elements from decided key "due diligence" cases.

Employers and parties such as "prime contractors" must engage in much more than paper

sign-offs and general steps such as handing out safety rules. Such non-specific steps are not held to amount to "due diligence" in any case involving a safety system for direct hires, and they are equally insufficient as an effective, operating system¹⁵ to ensure that legislative requirements respecting contractors are met and that safety of contractors is protected. A program which will be regarded as proper and sufficient for contracting is increasingly recognized as containing a number of consistent elements. Many of the suggested practices which follow take their lead from the practices of general contractors acting as "constructors" or "prime contractors", who for years have accepted their clear responsibilities to ensure the safety of contractors.

A Contractor Safety Program and Practices Must Reflect Knowledge of Legal Requirements. A written contractor safety program must start by recognizing the legal concepts applicable for contracting, and the concepts which have become entrenched in health and safety decision-making by courts as constituting "due diligence". A contractor safety program must recognize and distinguish between situations where a "hands-on" due diligence strategy is required when contracting, and where a "hands-off" strategy may be utilized when contracting with a party such as a prime contractor or constructor.¹⁶

A program must also encourage, as part of the process of pre-qualification of contractors (discussed below) a process for the employer, usually through contract coordinators, to make reasonable efforts to know the legal requirements applicable for contract activities. Ignorance of the law is never a defence in any situation. While knowledge of each intricate aspect of regulatory provisions or codes for a contractor being retained for its expertise is not reasonable, some knowledge is necessary in order to review whether the contractor has a system in place to carry out the work under the legislation in an apparently safe manner.

There Must be Knowledge of the Workplace and Its Hazards. In addition to knowledge of the law, employers and parties such as "prime contractors" must take reasonable steps to assess all potential workplace hazards. This involves an ongoing and active assessment of hazards, particularly in situations of ongoing change such as construction projects or where multiple contractors are present and intermingling together or where the workplace environment is not familiar... This is crucial in order for contractors to be informed of workplace hazards.

In a case involving serious burn injuries to a contract worker after a steel beam was brought too close to a power source at a construction site, the court commented specifically: "The defence of due diligence fails inasmuch as it is uncontradicted that the defendants never checked the qualifications or the training in proper safety procedures of the people they hired. More importantly in my view, they never attended at the job site at any time to see that...proper safety measures were being followed." In sentencing the company and its president for conviction of the Ontario *OHS*, the court agreed with the prosecutor that no one from the company visited the site to assess power lines encroaching on the project. The contractor had received no instruction on hazards or safety... "He was just left to his own devices and we know the result".¹⁷

There Must Be Meaningful Assessment of The Contractor's Health and Safety Program (Pre-Qualification of the Contractor). A fundamental requirement of "due diligence" is the need to establish a detailed and functioning safety system. As an employer contracting for services there will not be direct involvement in creating the system, yet processes must be in place

for advance review of the contractor's system.

A practice known as "pre-qualification" is increasingly recognized as an acceptable and appropriate best step for before-hire assessment of contractors, to ensure that they have in place practices to comply with legal requirements. There is no existing case law which has commented upon this process, but it has become generally accepted that such steps would include:

- making reasonable inquiries to ensure that the potential contractor has a health and safety policy and detailed program to implement the policy. This would include review of whether they have written policies, practices and procedures for the hazards in the workplace;
- making reasonable inquiries to confirm that appropriate instruction, training and orientation has been provided to the contractor's employees before they start work, and whether there are systems of reminders of policies and rules through pre-job and ongoing site meetings;
- determining whether the potential contractor has a record of conviction under health and safety legislation or if any supervisors have such a record;
- determining if the potential contractor will have adequate levels of supervision, including sufficient and competent supervisory staff and processed for monitoring of compliance by supervisors;
- determining whether the potential contractor will be using subcontractors. Retaining the right of approval over some contractors and for removal and replacement if necessary is important when contracting;
- determining whether the potential contractor practices enforcement of compliance with policies and procedures with discipline as necessary.

This is often the "toughest sell" for a safety manager attempting to introduce a detailed contractor safety program. Safety managers frequently battle misconceptions and attitudes amongst senior management which prevent implementation of proper contractor safety programs, but on the aspect of pre-qualification in particular I frequently hear: "My managers don't believe that we need to do all of this"; or "Can you explain this in writing to my senior management because I'm being asked to just create a safety sign-off for contractors rather than all of this stuff".

It should be noted that pre-qualification processes which simply require completion of a pre-established, one-size-fits-all questionnaire will not in many cases be of assistance in establishing due diligence. The purpose of such inquiries is to meaningfully assess the contractor's program for carrying out their work in a duly diligent manner. Thus the inquiries must be specific to the work and result in sufficient information to assess the contractor's ability to carry out the work in compliance with necessary standards.

It is also appropriate and acceptable to require that the contractor submit a site-specific safety plan for review by the site owner or "prime contractor" with tender documents. This can be a particularly effective mechanism to pre-qualify a contractor in a situation where the work site owner or prime contractor is not intimately familiar with safety requirements and legislative requirements which it should be assessing the contractor against.

It is worth a last comment that a contractor who cannot successfully meet pre-qualification processes is not necessarily a contractor which must be rejected. Many smaller contractors will not successfully meet the expectations of pre-qualification. In appropriate circumstances, particularly where the contractor will be performing work which requires compliance with the site owner's policies in any event, it may be possible to ensure that the contractor is trained and supervised and monitored by supervisory staff at the facility. Of course, this leads to questions of why the work should continue to be contracted. Short of resolving this issue, these steps are preferable to the commonly-seen approach of blind reliance on the smaller contractor to carry out work in compliance with safe work practices and legislative requirements.

Contractors Must be Monitored to Ensure Compliance. In the same manner that direct supervisory monitoring will take place by a work site owner of its own direct employees, monitoring of compliance by contractors must take place in a contracting situation. Monitoring should increase depending on the nature of the risk and any indication of compliance problems. Any non-compliance with the work site owner's policies or the contractor's own policies or site-specific safety plan must result in warnings and if necessary removal of the contractor from the site. Hopefully, contractual provisions between the parties will permit such action in a case of contravention. (See Sidebar **KEY CONTRACT PROVISIONS**).

There Must be Ongoing Communications and Coordination of Work. Because of the dynamic nature of the workplace, particularly construction workplaces, or work sites where multiple contractors may be performing work or intermingling with work site employees, courts have stated that ongoing communication by supervisors about risks and hazards involved in the work being performed is part of "due diligence". **It is crucial that the work site owner or constructor have a policy of ensuring that contractors and workers are familiarized with the work or project site, and informed of any foreseeable risks or hazards, prior to work commencing. Thereafter, as work proceeds,** site meetings to organize the work and explain safety aspects of the work to contractors should occur regularly, to remind contractors of important safety aspects of work and rules, and advise of any new hazards or problematic issues arising at the project or work site which could endanger workers.

The above suggestions constitute some key areas which must be examined in a contractor safety program. As is always the case in discussing the topic of "due diligence", there is no exhaustive list as to what an employer, or party such as a "prime contractor" or "constructor" can do to act with "due diligence" to prevent liability under legislation. Due diligence steps required will always depend upon the care which is objectively reasonable in the circumstances. It is very clear, however, that creative and effective means must be found to ensure "due diligence" for contractor safety.

SIDEBAR

CONTRASTING PROVISIONS FOR CONTRACTING ACROSS CANADA

CONTRACTING WHERE WORK OF CONTRACTORS IS DEFINED AS "EMPLOYER" OR WORK SITE OWNER RESPONSIBILITY

- Where definition of "employer" includes contractors, or worksite owner has responsibility for safety of all workers on site, cannot legally contract away responsibility and potential liability under the OH&S legislation, no matter what contract language is used. (This is also the case for "prime contractor" responsibilities to its contractors. See below.)
- Government officials have discretion to charge direct or indirect "employer" of worker, or both, with violations of the OH&S legislation
- Employer must take a "hands-on" approach and exercise due diligence for all direct employees and employees of contractors.
- All contract language should confirm pre-qualification processes and system for properly handling presence of contractor.

CONTRACTING WHERE "PRIME CONTRACTOR" OR "CONSTRUCTOR" MAY UNDERTAKE WORK AND RESPONSIBILITY FOR EMPLOYER OR OWNER

- Where legislation permits, the owner of a workplace or project may either choose to control the work of contractors (i.e.; perform work as own "prime contractor" or "constructor" and retain responsibility and potential OHS liability), or may legally contract away responsibility and potential liability to a constructor or "prime contractor".
- In such situations, there is a unique opportunity to contract away responsibility and liability to the "prime contractor" or "constructor". Work must, however, be fully and completely controlled by "prime contractor" or similar party within the provisions of governing provincial legislation, or responsibility may still be regarded as the owner's. "Prime contractor" must take "hands-on" approach as above.
- Owner must decide between a "hands-on" approach taking control as constructor or prime contractor, or a "hands-off" approach upon retaining a "prime contractor".
- All contract language should confirm "hands-on" or "hand-off" approach chosen.

SIDEBAR

KEY CASES INVOLVING LIABILITY FOR CONTRACTING

- Potash Corporation of Saskatchewan – Penalty of \$300,000 imposed in August, 1998, after contracting for workers to repair a cover on a vat containing potash/water mixture heated to approximately 90° Celsius. Three contract employees fell through a section of the cover. Two workers were fatally injured and one severely burned. The corporation had warned its own workers about the potential danger, but apparently had not informed the contractor. The contractor employing the workers, Bedry & Sons, was also convicted and fined \$10,000.
- Dofasco Inc. – Received a total fine of \$675,000 in February, 1999 for three separate workplace accidents at its Ontario facility. \$400,000 of this total arose out of an incident in which two workers of a contractor retained by Dofasco were fatally injured during a confined space entry. A gas check failed to detect the presence of argon gas in the tank. The direct employer of the two workers, Steelcat Task Force Inc., received a fine of \$100,000 for failing to inform workers of confined space entry hazards;
- Georgia Pacific Canada Inc. – Received a fine of \$100,000 In November, 1998, for a lockout contravention at its Ontario facility. A worker for Ancaster Tool Company, under contract to Georgia Pacific, was present to perform routine maintenance on a screw auger. The worker locked out only his end of the equipment. An operator for Georgia Pacific, not having been informed that work was underway, turned on the equipment, causing fatal injuries to the worker. The direct employer of the worker, Ancaster Tool Company Inc., received a fine of \$65,000 (More on this case in article);
- Cargill Ltd. of Alberta – Fined \$40,000 in July, 1991, after a contract cleaner’s employee was fatally injured in the workplace. Cargill had lockout procedures for its own personnel and required them to remain away from the area of the accident, involving an unprotected drive shaft, yet directed a worker of the contractor to perform work in the area. The employer of the worker, Chemidyne received a fine of \$8,000.00 (More on this case in article);
- Westinghouse Canada Inc. – Received a fine of \$100,000 in January, 2000. Two contract workers were in Ontario facility drilling a hole in a concrete floor to install new electrical breakers, when their drill contacted a buried electrical conduit. An explosion and extensive fire, causing critical injuries to the workers followed. Drawings apparently showing the location of the conduit were not at site but available. The direct employer of the workers, Comstock Canada Limited, continues to face charges.

SIDEBAR

KEY CONTRACT PROVISIONS

While contract language cannot be used to avoid legal responsibility and potential liability, appropriate wording of contracts and purchase orders can assist in confirming steps which all parties will take during performance of the contract. All contracts where control of contractors is required for "due diligence" should include:

- Confirmation of obligation of contractor to comply with legislative requirements and industry standards (despite inability of employer or work site owner to rely completely upon this, it should still be confirmed)
- Confirmation that contractor will follow all applicable policies and procedures of site owner
- Confirmation that contractor shall attend safety and coordination meetings for purpose of informing contractor of health or safety hazards at the work location
- Prohibition against contractor entering into of subcontracts without prior approval
- Confirmation of right to require contractor to take additional steps such as additional training or appointment of additional supervision, and right of employer or prime contractor to stop work or ultimately terminate contract without penalty if work not being performed safely by contractor
- Confirmation of obligation to furnish evidence of compliance with all applicable Workers' Compensation legislation at designated time intervals. This should include confirmation of personal coverage by owners of business if owners will be performing work
- Confirmation of contractor's obligation to indemnify employer or prime contractor for any losses including fines or legal expenses arising from health and safety liability

¹ For example, the legislation of Yukon, Nova Scotia and Ontario.

² For example, British Columbia's general duty clause for employers states that they must ensure the health and safety of "all workers working for that employer, and ... any other workers present at a workplace at which that employer's work is being carried out ..."

³ One exception where responsibility and liability may potentially be contracted away successfully, is where a general contractor is retained as "constructor", "prime contractor" or "principle contractor" to take responsibility for the entire site or project and all contractors on the site. This exception is discussed in further detail below.

⁴ (1992) 10 O.R. (3d) (Ont.Ct.Appeal).

⁵ It appears that an unrepresented defendant in *A.D.M. Steel*, Unreported Decision of Justice of the Peace McNish, Toronto, Ontario, May 5, 1995 raised the issue, but the challenge to the legislation, as the court calls it, was dismissed without reasons.

⁶ See, for example, the legislation of British Columbia and Alberta.

⁷ See, for example, the legislation of Newfoundland, Quebec, Manitoba.

⁸ See, for example, the legislation of Ontario, Yukon, Prince Edward Island, Nova Scotia

⁹ (1989), 1 COHSC 76 (Ont.Prov.Ct.).

¹⁰ For example, this concept is only applicable for contracting activities involving construction projects in provinces such as Manitoba, Ontario, Nova Scotia, Yukon.

¹¹ While the specific legislative scheme and thus the specific manner in which the party could be prosecuted varies from province to province, this concept applies to all jurisdictions. In a case where our busy employer has also concurrently retained a general contractor as a "constructor" or "prime contractor", government officials may have to analyze whether the party with overall responsibility for the workplace or project, as applicable, is the prime contractor and not the owner. If so, the owner will likely not face any consequence, responsibility having been successfully and properly contracted to a general contractor.

¹² *Regina v. Cargill Ltd.* (1991) 5 COHSC 137 (Alta.Prov.Ct.).

¹³ For clarity, there are numerous cases in which corporations have been convicted and their programs found deficient, but there exists very little by way of comment on the appropriate content of a proper system.

¹⁴ Unreported Decision of Provincial Court Judge Babe, Toronto, Ontario, August 24, 1995

¹⁵ The leading case from which all decisions on due diligence flow, *Regina v. Sault Ste. Marie* (1978) 85 DLR (3d) 161 (SCC) stated expressly that the defence of due diligence or taking all reasonable care required establishing a system, and establishing that the system is operating effectively.

¹⁶ While a detailed contractor safety program would set out practices for these two separate types of legal situations when contracting, the steps in this list of practices focus primarily on practices where "hands-on" requirements as an employer exist.

¹⁷ *Regina v. A.D.M. Steel*, cited above.

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