

Avoiding Substantial OH&S Liability when Hiring Contractors

Jeremy Schwartz

Property owners and managers may inadvertently face liability as “constructors” under Ontario’s *Occupational Health and Safety Act* (Act) for violations and accidents involving subcontractors and their employees. Per offence, constructors may face fines of up to \$500,000, and individuals may face fines of up to \$25,000 and one year in jail.

The Act provides a way to contract out of that liability, but this requires careful planning and execution. Now is an ideal time to review your policies and procedures to avoid taking on significant, unexpected liability.

Tragic Context

Many of us watched recent coverage of the tragic deaths of four workers who fell from a collapsed platform while working at an Etobicoke apartment building on Christmas Eve. Then, in February, a worker fell to his death from a Scarborough apartment building. These accidents, among others, have sparked a Ministry of Labour safety blitz across the Province.

Legal Framework

1. What is a “Construction Project”?

Property owners and managers (for simplicity, I’ll refer to all collectively as “owners”) often hire subcontractors to perform construction work. The Act defines “construction” very broadly. The definition does not include maintenance work, but the dividing line is often difficult to draw. For example, changing one light bulb is not likely construction. Changing 100 light bulbs could be construction.

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2. Duties Under the Act

The Act and its regulations set out very broad and burdensome obligations for parties involved in construction work.

An “**employer**” may include not only a party that employs a worker directly, but also a party that hires a subcontractor or independent contractor. Employers are responsible for ensuring: 1. their workers and supervisors are competent and properly trained; 2. all necessary health and safety policies are in place and that workers and supervisors are trained on them and compliant; 3. all workers have and use appropriate, safe methods and equipment, and that their work is done in accordance with the law; and 4. they must take “*all precautions reasonable in the circumstances for the protection of workers.*”

A “**constructor**” undertakes the construction project *for* an owner (like a general contractor), and may include an owner who undertakes all or part of the project by himself or by more than one employer. Constructors are responsible for ensuring safety on the project, and for making sure that all workers, supervisors and employers comply with their obligations as well.

A “**project owner**” includes generally the property owner as well as their agents and delegates (including property managers and management companies). Project owners have very limited responsibility. They need only prepare a list of designated substances present on site and provide that list on project tenders and to the constructor.

This makes perfect sense. An owner often has limited knowledge of the construction techniques, equipment, and safety obligations required – that is why they hired construction professionals. Unfortunately, if the owner is not careful, it may inadvertently find itself wearing the *constructor's hat* or the *employer's hat*, and all the obligations and potential liability that come with them.

3. How Owners Become Constructors

There is, generally speaking, a constructor on every construction project in Ontario. For example, if an owner hires a general contractor, the general contractor is usually considered both the employer and the constructor, even if the general contractor then subcontracts some of the work.

However, the more factors that suggest the owner has control of the site or the workers, the more likely it will be the constructor. Owners do not become the constructor just because they were actively involved in overseeing quality control. The danger for owners comes when they look beyond quality control and more actively control aspects of the work.

The following are a few common examples of how owners may inadvertently take on the role of constructor:

- Hire more than one contractor directly to work on the site at times that coincide
- Assign their own employees to work alongside the contractor's workers
- Personally supervise aspects of the work and direct workers
- Personally respond to safety issues and related incidents

The Ministry of Labour has published a "Constructor Guideline"¹. The guideline does not have the force of law, but courts and the Board usually give it substantial weight.

The guideline provides an example of an owner who hires a general contractor, who then subcontracts to various subcontractors. The owner pays the subcontractors directly. According to the guideline, so long as the owner only pays the invoices, the general contractor remains the constructor.

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Despite the foregoing, the caselaw indicates that payment of invoices may be viewed as contextual evidence that the owner exercised direct control over subcontractors. As such, owners should avoid paying subcontractors directly whenever possible.

Avoiding Constructor Liability

A. Engage a General Contractor or Project Manager

We strongly recommend that owners engage the services of a general contractor and have them select, hire, direct and pay the contractors personally. It is important to contract in writing,

¹ www.labour.gov.on.ca/english/hs/pubs/constructor/index.php.

and to specify who will act as the “constructor” on the project and will comply with all legal duties and obligations of that position.

We also recommend that you require the constructor to file a “notice of project” with the Ministry of Labour (if necessary), and to obtain all necessary permits, drawings, inspections and approvals.

B. “Designation of Project”

Another common way that owners get into trouble is when they hire a contractor to provide a service that is not directly related to the main project.

For example, while a general contractor resurfaces the parking lot in the basement of a condominium, the property management company hires a painter to repaint the hallways between the lot and the elevators. In this example, the property management company may inadvertently become the constructor for the entire project, despite only contracting directly with the painter.

The best option would be for the general contractor to hire and direct the painter. However, if the general contractor is unwilling, the management company may apply to the Ministry of Labour for a “designation of project,” to designate the general contractor as responsible for the resurfacing and the management company only for the painting. This is only possible where the two aspects of the project are divided either in time (one finishes before the other starts) or space (there is a clear physical separation between them).

Although the management company would likely be considered the “employer” for the painting part of the project, the upside is that it avoids constructor liability for the resurfacing work.

C. Leave Health and Safety in the Constructor’s Hands

Responsibility for safety is one of the most important obligations of the constructor. If the owner takes an active role in ensuring safety or responding to unsafe conditions, it runs a significant risk of becoming the constructor.

Owners should communicate any safety concerns to the constructor and leave it to them to address the issue. Where the constructor fails to remedy the situation, the owner could consider shutting down the project and requiring the constructor to provide a safety plan for the project. Ideally, the written contract should permit the owner to take such drastic steps and require the constructor to bear the cost of any related delays.

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General Recommendations

Aside from the specific recommendations set out above, we often help our clients develop policies, procedures for construction work. We recommend that all property owners and managers have such policies in place and ensure that all personnel, from those who engage contractors and general contractors, to on-site personnel, be trained to avoid missteps that could saddle the company with constructor liability.

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