Avoiding Substantial OH&S Liability when Hiring Contractors

By: Ryan Conlin & Jeremy Schwartz

Hire a contractor and you may inadvertently face liability as a "constructor" 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. Fail to plan or stumble on execution and you may be held responsible to ensure health and safety on the project, even though you have no expertise in construction – an unfortunate *catch-22*.

Recent court decisions have clarified the law substantially. Now is an ideal time to review your practices, policies and procedures to avoid taking on significant, unexpected liability.

Legal Framework

1. What is a "Construction Project"?

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.

2. Duties Under the Act

The Act and its regulations set out very broad and burdensome obligations for parties involved in construction work; including, in particular, "employers" and "constructors".

You can become an **"employer"** not only by directly employing a worker but also by hiring 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 that 4. "*all precautions reasonable in the circumstances for the protection of workers*" are taken.

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 (remember that phrase, "*all or part,*" because it sets the stage for inadvertent liability).

Constructors are responsible for ensuring overall 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 its 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. A project owner often has limited knowledge of the construction techniques, equipment and safety obligations required – which is why they hired construction professionals. Unfortunately, if the project 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.

The worst part is that, having assumed that responsibility inadvertently, the project owner likely took insufficient steps to satisfy the onerous due diligence obligations imposed on constructors. So, if an accident were to occur, the project owner *cum* constructor may have no legal defence.

3. How Owners Become Constructors

There is a constructor on every construction project in Ontario. For example, if a manufacturing company hires a general contractor to renovate its facilities, the general contractor is usually considered both the employer and the constructor, even if the general contractor then subcontracts some of the work.

Remember the phrase "*all or part*" in the definition of constructor? The more factors that suggest the project owner has control of the site or the workers, the more likely it will be found to have undertaken *all or part* of the project on its own behalf and so become the constructor.

Project owners do not become the constructor just because they were actively involved in overseeing quality control. The risk arises when they look beyond quality control and more actively control aspects of the work.

The following are a few common examples of how project 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

Avoiding Constructor Liability

A. Engage a General Contractor or Project Manager

Recently, in *R. v. Steelgate et. al.*, we successfully defended a factory owner who was charged after an unlicensed electrician was electrocuted during construction of Steelgate's new facility.

Steelgate hired a licenced electrical contractor to perform the work, but after only a few short days that contract ended. Steelgate then hired another licenced electrical contractor. Unbeknownst to Steelgate, that contractor employed unlicensed electricians. Steelgate had no written agreement with either contractor. That second contractor pled guilty, as employer, to violations of the Act.

Steelgate was charged as constructor and its principle was charged as a supervisor. Ultimately, the case turned on the phrase "*all or part*" in the definition "constructor". The court found that Steelgate may have exercised sufficient control over the first electrical contractor to become the constructor. Thus, the main issue for the court was: if Steelgate had undertaken 'part' of the project as constructor, could Steelgate hire a new contractor to act as constructor or was it forever saddled with the role?

The court found that when Steelgate hired a new contractor that constituted a "significant intervening event" and that Steelgate was no longer the constructor. In the authors' view, this decision recognizes the reality that many construction projects are multi-phased. If the purpose of the Act is to best ensure worker safety, not to play 'gotcha' with unsuspecting project owners, why disincentivise the hiring of competent constructors?

To interpret the definition otherwise could also lead to the bizarre situation where an accident happens at the beginning of a project, months or years later the project owner assumes the role of constructor to finish the project and the project owner is then deemed retroactively to have been the constructor for the entire project and liable for the accident.

Despite our success in *R. v. Steelgate,* we strongly recommend that project owners engage the services of an arms-length general contractor or project manager for any significant project and have them select, hire, direct and pay the contractors. It is important to contract in writing and to specify who will act as the "constructor" on the project and will comply with all legal duties and obligations of that position. This makes it clear who is responsible and provides significant contextual evidence on which the Ministry of Labour or a court may rely.

B. Take Care with Notices of Project

The Act requires the constructor to file a "notice of project" for any project with a value of $50,000 or more. The Ministry of Labour and courts may place significant weight on the party identified on the form as the constructor.

Two recent decisions highlight the potential importance of the notice of project. In *Ontario (Ministry of Labour) v. Reid & Deleye Contractors Ltd.,* Reid filed a notice of project prior to the commencement of the project. The court held that Reid was retained by the owner as construction manager and undertook to oversee the project, including assuming overall control for more than 25 contractors and health and safety on the site. The court found that Reid's failure to appeal orders (which identified Reid as constructor) raised an inference, capable of being rebutted, that Reid admitted it was the constructor.

The court rejected Reid's claim that it did not know the consequence of filing the notice of project. Reid was an experienced construction contracting company, which had acted as general contractor and constructor on numerous prior projects. The court understandably rejected Reid's

evidence that it did not understand what a notice of project was. Notably, the trial judge held that based on the role and control exercised by Reid on the site, he still would have found Reid to have been the constructor even if it had not filed a notice of project. These findings were upheld on appeal.

The findings in *Reid & Deleye* may be contrasted with the court's ruling in *Steelgate*. In *Steelgate*, the Ministry of Labour inspector gave a blank notice of project to one of the company's personnel, after the accident occurred, and directed that it be completed and returned. Steelgate's president testified that he had never seen a notice of project before and was unaware at the time what the term "constructor" meant. The court ruled during the course of argument that it was not going to rely on the notice of project under the circumstances.

To avoid this uncertainty, we recommend that project owners explicitly require the constructor to file a "notice of project" (if necessary) and to obtain all necessary permits, drawings, inspections and approvals.

C. Don't Pay Subcontractors Directly

The Ontario Ministry of Labour has published a "Constructor Guideline"[1]. The guideline does not have the force of law but courts and the Ontario Labour Relations 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 project owner pays the subcontractors directly. According to the guideline, this factor alone does not render the project owner the constructor.

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

D. "Designation of Project"

Another common way that project 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 an apartment building, the property manager hires a painter to repaint the hallways between the lot and the elevators. In this example, the project owner 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 apartment may apply to the Ministry of Labour for a "designation of project," to designate the general contractor as responsible for the resurfacing and the apartment 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 apartment may be considered the "employer" for the painting part of the project, the upside is that it can avoid constructor liability for the resurfacing work.

E. Leave Health and Safety in the Constructor's Hands

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

Project 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 project 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 project owner to take such drastic steps and require the constructor to bear the cost of any related delays.

General Recommendations

Aside from the specific recommendations set out above, we often help our clients develop policies and procedures for construction work. We recommend that all project owners 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.

---

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

For more information, please contact:
Ryan Conlin at rconlin@stringerllp.com or 416-862-2566
Jeremy Schwartz at jschwartz@stringerllp.com or 416-862-7011

UPDATE is an electronic publication of Stringer LLP
110 Yonge Street, Suite 1100, Toronto, Ontario M5C 1T4
T: 416-862-1616 Toll Free: 1-866-821-7306
E: info@stringerllp.com I: www.stringerllp.com