

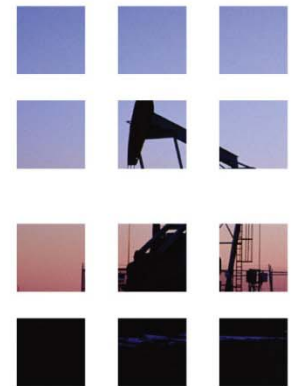


# Contractor Management: A Legal Perspective

## Enform Petroleum Safety Conference

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# I. The Mission

- Improving the comprehension of OHS standards required of:

  - Owners

  - Prime contractors

  - Contractors

- For provincially and federally regulated work sites in three provinces

  - British Columbia

  - Alberta

  - Saskatchewan

# I. Our Observations

- Timely to conduct this assessment
- There are common errors leading to OHS incidents in Western Canada
- Safety programs frequently not in compliance with the law
  - failure to appreciate all applicable jurisdictions;
  - failure to appreciate laws of jurisdiction; or
  - failure to implement all of legislation
- Implementation: Awareness of safety policies/procedures, training and supervision are frequent issues

# I. Our Observations

- Fear, overwhelming legislation and economic drivers are playing a role
- Improved understanding of the law is the first step

## *R. v. Lockerbie & Hole Eastern Inc.*

- An Alberta-based company was a sub-contractor on a work site in Toronto
- Lockerbie's employee, a 4th year apprentice electrician, made contact with a source of live electricity while stringing overhead lights and was killed
- Lockerbie was charged under Ontario's OHS Act for failing to take every precaution reasonable in the circumstances for the protection of a worker
- Among other issues, Lockerbie was accused of failing to update its lock out tag out procedure to comply with current Ontario legislative standards

## *R. v. Lockerbie & Hole Eastern Inc.* continued

- Lockerbie pleaded guilty and was fined \$250 000 plus a 25% victim fine surcharge
- One of the factors that affected the guilty plea was that its written policy for carrying out electrical work referenced Alberta standards, not Ontario standards
- The Crown Prosecutor said that “they had not addressed their mind to changing their procedures and ... making them applicable to here in Ontario”

(29 Sept. 2009) Toronto (Ont. Ct. J.)

## II. First Steps to Understanding Your Obligations: Statutes and Case Law

### A. Understanding your Jurisdiction

### B. Understanding your Worksites, as defined by each province's legislation and the Canada Labour Code, Part II ("CLC")

(a) ABOHSA and the definition of "work site"

(b) SKOHSA and the definition of "worksite"

(c) BCWCA and the definition of "workplace"

(d) CLC and the definition of "work place"

(e) General concepts relating to the definition of worksites, work areas and workplaces

# Assessing the Work Site

e.g.

“work site” means a location where a worker is, or is likely to be, engaged in any occupation and includes any vehicle or mobile equipment used by a worker in an occupation

(Alberta OHS Act s.1)

## II. First Steps to Understanding Your Obligations: Statutes and Case Law

### C. Understanding your Role

- e.g. No prime contractor role in Saskatchewan
- e.g. No contractor role in B.C.

### D. Understanding your Responsibilities

## II. First Steps to Understanding Your Obligations: Statutes and Case Law

### 1. Alberta

#### A. Governing Legislation

#### B. Roles

- Employer
- Supplier
- Contractor
- Prime Contractor
- Worker

## Employer: A General Duty, Alberta

Section 2(1) Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,

- a) the health and safety of
  - i. workers engaged in the work of that employer, and
  - ii. those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and
- b) that the workers engaged in the work of that employer are aware of their responsibilities and duties under this *Act*, the regulations and the adopted code.

(Alberta OHS Act)

## Section 3 Prime Contractor

3 (1) Every work site must have a prime contractor if there are 2 or more employers involved in work at the work site at the same time.

(2) The prime contractor for a work site is

(a) the contractor, employer or other person who enters into an agreement with the owner of the work site to be the prime contractor, or

(b) if no agreement has been made or if no agreement is in force, the owner of the work site.

(Alberta OHS Act)

## Section 3

- (3) If a work site is required to have a prime contractor under subsection (1), the prime contractor shall ensure, as far as it is reasonably practicable to do so, that this Act and the regulations are complied with in respect of the work site.
- (4) One of the ways in which a prime contractor of a work site may meet the obligation under subsection (3) is for the prime contractor to do everything that is reasonably practicable to establish and maintain a system or process that will ensure compliance with this Act and the regulations in respect of the work site.

(Alberta OHS Act)

## Definitions

- “owner” in respect of a work site means the person in legal possession of the work site or, if the person in legal possession does not request the work, the person with an ownership interest in the work site who requests that the work be done
- “work site” means a location where a worker is, or is likely to be, engaged in any occupation and includes any vehicle or mobile equipment used by a worker in an occupation.

(Alberta OHS Act s.1)

## Contractor: General Duty (Alberta)

### Section 2(5):

Every contractor who directs the activities of an employer involved in work at a work site shall ensure, as far as it is reasonably practicable to do so, that the employer complies with this *Act*, the regulations and the adopted code in respect of that work site

### Section 1(b):

“Contractor” means a person, partnership or group of persons who, through a contract, an agreement or ownership, directs the activities of one or more employers involved in work at a work site

(Alberta OHS Act)

## II. First Steps to Understanding Your Obligations: Statutes and Case Law

### 2. British Columbia

A. Governing Legislation

B. General Obligations under the BCWCA

C. General Obligations under the BCOHSR

D. Roles

- Owner
- Employer
- Supplier
- Prime Contractor
- Supervisor
- Worker
- Director/Officer

## II. First Steps to Understanding Your Obligations: Statutes and Case Law

### 2. **British Columbia**

#### E. General Comments Regarding Part 23 of the BCOHSR: Oil and Gas

## Five Examples of B.C. Issues: #1

The prime contractor obligation in B.C. differs from AB

- For example:
  - the prime contractor agreement must be in writing between the owner and the directing contractor, employer or other person
  - a prime contractor at a "construction project" must be "qualified"

## Five Examples of B.C. Issues: #2

- Unlike Alberta, there is a broad, independent duty for B.C. workplace owners

- s. 119 of the BCWCA

Every owner of a workplace must

- (a) provide and maintain the owner's land and premises that are being used as a workplace in a manner that ensures the health and safety of persons at or near the workplace,
- (b) give to the employer or prime contractor at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards to the health or safety of persons at the workplace, and
- (c) comply with this Part, the regulations and any applicable orders.

## Five Examples of B.C. Issues: #3

- Unlike Alberta, there is an independent oil and gas related duty for B.C. owners

- s. 23.31 of the BCOHSR

The owner must ensure that the work area is sized, constructed and laid out so that

(a) all the required equipment may be safely moved and operated, and

(b) emergency response activities may be carried out.

## Five Examples of B.C. Issues: #4

s. 124 BC WCA

If

(a) one or more provisions of this Part or the regulations impose the same obligation on more than one person, and

(b) one of the persons subject to the obligation complies with the applicable provision,

the other persons subject to the obligation are relieved of that obligation only during the time when

(c) simultaneous compliance by more than one person would result in unnecessary duplication of effort and expense, and

(d) the health and safety of persons at the workplace is not put at risk by compliance by only one person.

## Five Examples of B.C. Issues: #5

s. 117 BC *Workers Compensation Act*

### **General duties of supervisors**

117(1) Every supervisor must

- (a) ensure the health and safety of all workers under the direct supervision of the supervisor,
- (b) be knowledgeable about this Part and those regulations applicable to the work being supervised, and
- (c) comply with this Part, the regulations and any applicable orders.

## Five Examples of B.C. Issues: #5

- (2) Without limiting subsection (1), a supervisor must
  - (a) ensure that the workers under his or her direct supervision
    - (i) are made aware of all known or reasonably foreseeable health or safety hazards in the area where they work, and
    - (ii) comply with this Part, the regulations and any applicable orders,
  - (b) consult and cooperate with the joint committee or worker health and safety representative for the workplace, and
  - (c) cooperate with the Board, officers of the Board and any other person carrying out a duty under this Part or the regulations.

## *Petro-Canada v. British Columbia (Workers Compensation Board)*

- Petro Canada had franchise agreements with entities that ran Petro-Canada service stations in Langley, B.C.
- The agreements stated that Petro-Canada was not an employer of the workers at the gas stations
- At a Petro-Canada gas station in Langley, a gas station worker was the victim of a robbery
- The perpetrator gained access to the area behind the service counter by kicking down a small swinging door, which was the only barrier to entry, and held the worker at knifepoint
- The WCB Prevention Officer performed an inspection after the incident and noted that although a pay window and better lighting had been installed, no action had been taken to improve the layout and design of the sales register counter

## *Petro-Canada v. British Columbia (Workers Compensation Board)* continued

- The Prevention Officer noted that better layouts and designs were used in newer Petro-Canada stations.
- There was also a “gas and dash” incident at a Petro-Canada station in Surrey, and the gas attendant was struck by the driver’s vehicle when he attempted to stop the thief.
- After both incidents, the WCB Prevention Officer issued orders that Petro-Canada had contravened s. 115(1)(a)(ii) of the WCB Act:

“Every employer must ensure the health and safety of ...(ii) any other workers present at a workplace at which that employer’s work is being carried out”

## *Petro-Canada v. British Columbia (Workers Compensation Board)* continued

- Specifically, Petro-Canada had failed to perform a risk assessment, as required by section 4.28 of the BCOHSR:

“a risk assessment must be performed in any workplace in which a risk of injury to workers from violence arising out of their employment may be present”
- The WCB Review Officer stated that there was no doubt that the individual licensees were responsible for ensuring the safety of their own employees. The question was whether there were parallel safety obligations on Petro-Canada, even though it did not have a presence in the day-to-day activities of the individual service stations.

## *Petro-Canada v. British Columbia (Workers Compensation Board)* continued

- The Review Officer concluded that Petro-Canada was an “employer” in this case:
  - The Retail License Agreement made it clear that the licensee was simply an agent of the employer
  - Petro-Canada had specifically retained the right to inspect the service stations for safety concerns and the right to dictate safety policy, to a certain extent
- Petro-Canada argued that it was not an “employer” under section 115
- The B.C. Court of Appeal upheld the Review Officer’s Orders
- Petro-Canada met the definition of “employer” in section 1 of the WCB Act

## *Petro-Canada v. British Columbia (Workers Compensation Board)* continued

- The Court stated that the real issues the Review Officer needed to review were these:
  - Was Petro-Canada's work being carried out at the service station?
  - In the context of this case, did Petro-Canada's degree of control over the workplace permit a finding that it had failed to ensure the safety of workers?
- The Review Officer's reasons were sufficient to convince the Court that Petro-Canada had failed to ensure worker safety, contrary to section 115.
- The Court was untroubled by Petro-Canada's concern that a broad definition of "employer" in section 115 would open the floodgates:

"It is my tentative view that the degree to which an employer can "ensure" the health and safety will, of necessity, be dependent on the degree of control that the employer has over the workplace"

## II. First Steps to Understanding Your Obligations: Statutes and Case Law

### 3. Saskatchewan

#### A. Governing Legislation

#### B. Roles

- Owner
- Employer
- Supplier
- Contractor
- Supervisor
- Worker
- Self-employed Persons

#### C. Part 29 of the SKOHSR: Obligations specific to the Oil and Gas Industry

# Some Unique Features of Saskatchewan Legislation

- Again, no prime contractor role
- Owner role tied to location of work **under a poorly drafted** list of terms:
  - place of employment
  - worksite
  - any plant used as a place of employment
- Part 29 of the SKOHSR, Oil and Gas amended in 2007 such that **all 37 obligations now rest not only on contractors, but owners as well**
- Section 5 of SKOHSR regarding overlapping responsibilities is difficult to understand, interpret and implement. Slightly similar scheme in B.C. under s.124 BC WCA
- Like B.C., but unlike AB, there is a supervisor duty tied into the duties of others

# Overlapping Roles

s. 5 SKOHSR

**(5) Where a provision of these regulations imposes a duty or requirement on more than one person, the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement.**

## Overlapping Roles

- (6) Notwithstanding subsection (5) but subject to subsection (8), **if the person with the greatest degree of control fails to comply with a provision described in subsection (5), the other persons are not relieved of the obligation to comply with the provision if it is possible for them to comply, and they shall comply with the provision.**
- (7) If the person with the greatest degree of control complies with a provision described in subsection (5), **the other person are relieved of the obligation to comply** with the provision:
- (a) **only** for the **time** in which the person with the greatest degree of control **is in compliance with the provision;**

## Overlapping Roles

(b) **only** if **simultaneous compliance** by more than one person would result in **unnecessary duplication of effort and expense**; and

(c) **only** if the health and safety of workers **is not put at risk** by compliance by only one person.

(8) If the person with the greatest degree of control fails to comply with a provision described in subsection (5) but one of the other persons complies with the provision, the other persons, if any, to whom the provision applies are relived of the obligation to comply with the provision in the circumstances set out in clauses (7)(a) to (c), with any necessary modification.

## Overlapping Roles

(9) Where a provision of these regulations imposes a duty or requirement on a person to ensure that another person carries out or refrains from carrying out a specified action, the person on whom the duty or requirement is placed has complied with the provision if that person establishes that he or she took **all reasonable steps** to ensure that the second person carried out or refrained from carrying out the specified act.

## Obligation to Supervise

- s. 17 of the SKOHSR requires an **"employer or contractor"** to ensure that "all work at a place of employment is sufficiently and competently supervised" and to further ensure that supervisors "have sufficient knowledge of all of the following with respect to matters that are within the scope of the supervisor's responsibility" and that supervisors comply with the SKOHSR and SKOHSR.
- Supervisors, under the same section, have a duty to "ensure that the workers under the supervisor's direction comply with the Act and any regulations made pursuant to the Act that apply to the place of employment".
- s.412 of the SKOHSR references very specific supervisory duties for "an employer, contractor, or owner" regarding any oil or gas exploration, drilling, servicing, testing or production operation"

## II. First Steps to Understanding Your Obligations: Statutes and Case Law

### 4. Federal Legislation: CLC Three highlights

- Roles limited to "employer" and "employee"

- "Employer" can be broadly construed:

  - s. 122(1) defines employer as "a person who employs one or more employees and includes an employers' organization **and any person who acts on behalf of the employer**"

- Beware to those "granting access": s. 125 references numerous duties upon employers granting access to the work place

# III. Conclusions and Practical Considerations

# Exercising Due Diligence as a Prime Contractor, Contractor, Owner

- There is no magic formula; area very vague and untested before Courts
- What is required depends on each jurisdiction, each specific work site, and the role of parties at that site
- Complexity of legislation makes compliance difficult for even the most sophisticated stakeholders
- On rare occasions, parties can contract out of roles
- Contracting out does not always eliminate risk to the party contracting out due to collateral roles, collateral OHS legislation and the ultimate impact of an incident

## Back to Basics: A Final Message

- Know the law
- Have a well-documented safety program that complies with the law
- Ensure there is not discrepancy between program and practice
- Know how to react to a “serious incident”