

# Don't Get More Than You Bargained For: Minimizing OHS Risks When Contracting for Work

## Canadian Society of Safety Engineering

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# Agenda

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- The Current OH&S Enforcement Environment
- Key Contracting Roles Under OHSA
- Complexities Arising When Contracting for a Construction Project
- Contracting for Services
- Due Diligence

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# CURRENT ENFORCEMENT ENVIRONMENT

# Current Enforcement Environment

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- Corporation: Since August 15, 1990, \$500,000 maximum **per offence** (plus 25% surcharge)
- Individual: \$25,000 (plus 25% surcharge) and/or one year imprisonment maximum **per offence**
- Jail time being sought more frequently
- Potential *Criminal Code* charges

# Current Enforcement Environment

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- Constructor, Employer(s), Supervisor(s), Directors and Officers all have potential OHSA liability
- Ministry of Labour has **discretion** in issuing orders and commencing prosecutions relating to contracted work

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# KEY CONTRACTING ROLES UNDER OHSA: “OWNER”, “EMPLOYER” AND “CONSTRUCTOR”

# Key Contracting Roles

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## Owner

An “Owner” is a workplace party who owns a workplace or construction project, but “Owner” is defined broadly

# Key Contracting Roles

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## Obligations of “Owner” of Operating Facility or Construction Project

- Determine whether any designated substances are present and provide list of such “DSRs” as part of tendering information to prospective constructor, contractors
- Comply with obligations in Asbestos on Construction Projects and in Building and Repair Operations Regulations including notifying prospective constructor, contractors



# Key Contracting Roles

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## Employer

“Employer” means “a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services...”

(Section 1, Ontario *OHSA*)

# Key Contracting Roles

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## Core “Employer” Obligations

- Ensuring that “*prescribed*” equipment, materials, protective devices are provided
- Equipment, materials, protective devices are maintained in good condition
- Equipment, materials, protective devices are used as “*prescribed*”

# Key Contracting Roles

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## Core “Employer” Obligations

- Provide information, instruction, supervision (training) to workers
- Appoint “*competent*” supervisors
- Prepare, and review annually, written safety policy, and maintain safety program

# Key Contracting Roles

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## Core “Employer” Obligations

- “Take every precaution reasonable in the circumstances for the protection of a worker”
- Sections 25 and 26 OHSA contain multiple obligations. See legislation for complete obligations

# Key Contracting Roles

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## Constructor

“Constructor” is “a person who undertakes a project for an “Owner” and includes an “Owner” who undertakes all or part of a project by himself or by more than one “Employer””. (Either “Owner” of workplace or general contractor undertaking project for “Owner”)

(Section 1 Ontario *OHSA*)

# Key Contracting Roles

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## Core “Constructor” Obligations

On a project undertaken by "Constructor" must ensure *OHSA* and Regulations carried out on project by all employers and workers, and ensure health and safety of all workers on project protected

# Key Contracting Roles

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## Constructor Obligations Under Regulations

- Complete and file MOL registration
- File Notice of Project before commencing work (Section 6 Construction Regulations defines notifiable projects)
- Supervisor for every project with five or more workers
- Competent person to inspect project at least once a week

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# COMPLEXITIES WHEN CONTRACTING FOR A CONSTRUCTION PROJECT



# Construction Project Complexities

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## The Most Important Concepts

- The “Constructor” concept
- Is it a “construction project” (*OHSA* defines)?
- Who is the “Constructor”?

# The Constructor Concept

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- Must be a constructor for every construction project
- Constructor undertakes project for the owner or is the owner if owner has undertaken project
- Classic example is circumstance where owner contracts with general contractor who agrees to act as constructor and actually exercises greatest degree of control over project

# Is it a Construction Project?

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**Construction** defined: “includes erection, alteration, repair, dismantling, demolition, structural maintenance, painting, land clearing, earth moving, grading, excavating, trenching, digging, boring, drilling, blasting or concreting, the installation of any machinery or plant, and any work or undertaking in connection with a project...”

# Is it a Construction Project?

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**Project** defined: “means a construction project, whether public or private, including:

- a) The construction of a building, bridge, structure, industrial establishment, mining plant, shaft, tunnel, caisson, trench, excavation, highway, railway, street, parking lot, cofferdam, conduit, sewer, water main, service connection, telegraph, telephone or electrical cable, pipeline, duct or well, or any combination thereof.”

# Is it a Construction Project?

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- b) “the moving of a building or structure, and
- c) Any work or undertaking, or any lands or appurtenances used in connection with construction”

# Is it a Construction Project?

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## Analysis

1. Are any objects being worked upon within definition of project?

If so, consider

2. Are any of the activities within definition of construction?

# Is it a Construction Project?

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## Analysis

- If the activity is construction and the object is a project, the work will be construction (i.e. repair of a structure, construction of a building or parking lot)
- If the activity is construction but the object is not a project (i.e. repair or alteration of machinery as opposed to structure or plant) it will often be industrial (or at least a non-construction activity)
- Installation of machinery or equipment and structural maintenance are always construction as a result of definition

# Identifying the “Constructor”

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## Role Of The “Constructor”

The “Constructor” in relation to a construction project is the party who exercises the greatest degree of control over the entire project and all working upon it. The “Constructor” plans and organizes the entire project...”



# Identifying the “Constructor”

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## Scenario

An “Owner” decides to add an office to an operating wastewater complex. It retains ABC Contractors as “Constructor” and ABC files the NOP, hires all trades, supervises, monitors, coordinates and controls the office construction project

Who is the “Constructor”?

# Identifying the “Constructor”

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## Scenario (cont'd)

But the “Owner” issues a daily work permit to all contractors who enter its site. The “Owner” also insists that all contractors follow its site safety procedures.

The “Owner” also has its own Project Manager involved in daily meetings and giving direction on safety issues which require resolution.

Who is the “Constructor”?

# Identifying the “Constructor”

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## Keeping Control Over Project With Constructor

- “Constructor” should select and approve subcontractors
- “Constructor” must train, instruct, provide policies for, meet with, organize and schedule contractors and subcontractors
- “Constructor” must control, monitor, inspect and direct safety aspects of construction project

# Multiple Constructors

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## Scenario

An “Owner” wishes to proceed with two capital projects - the installation of new boilers in one location at its premises at the same time in the same area as it is adding a new office. Can it have two separate “Constructors” for these separate projects?

# Multiple Constructors

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## Strategies for Owner Wishing to Separate Simultaneous Projects

- Apply for “designation” of two projects as separate projects with separate “Constructors” (s. 4 Construction Regulations)
- Each “Constructor” can file separate Notice of Project and attach with NOP detailed description and outline of geographic location. Detail separation by time or space
- Each respective “Constructor” must carefully maintain control and direction over each project

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# CONTRACTING FOR SERVICES

# Contracting for Services

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- All contracting that is not a construction project:
  - Window cleaning
  - Janitorial services
  - Security services
- No “constructor”
- Contracting in capacity of “employer” and must discharge the obligations of an “employer”

# Contracting for Services

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Where “Employer” obligations exist, there is no ability to contract away responsibility and liability to another “Employer”. No matter how well the contract is written, or how specialized the contractor, the “Employer” cannot fully contract out of *OHSA* obligations



# Contracting for Services

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## ***R. v. Wyssen* (1992, Ontario Court of Appeal)**

- Window cleaning case
- “Employer” includes *contracts for service*
- Recognition that definition contrary to sense of fair play. In *Wyssen*, the “Employer” contracted out work to a contractor due to his expertise
- Stated that defence of “due diligence” applies, and acknowledged that “due diligence” may be carried out in different manner where contract for services

# Contracting for Services

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## ***R. v. Wyssen* (1992, Ontario Court of Appeal)**

- *Wyssen* stated that the “Employer” must “ensure” obligations met, and this “puts an “Employer” virtually in the position of an insurer who must make certain that the prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors”

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**DUE DILIGENCE WHERE ACTING  
AS “CONSTRUCTOR” OR  
“EMPLOYER” (OWN WORKERS OR  
CONTRACTING FOR SERVICES)**

# Due Diligence

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## What is Due Diligence?

- It is a legal standard which allows a defence if stringent, court-developed standards can be met by workplace party
- It is a standard by which an organization's steps and its supervisor's steps to protect workers can be judged on an ongoing basis

# Due Diligence

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## “Hands on” or “Hands off” Due Diligence?

- Must decide between “hands on” or “hands off” approach to due diligence
- “Hands off” approach only possible when “Owner” fully and completely contracting “construction project” to “Constructor”
- Otherwise, must practice “hands on” due diligence

# Due Diligence

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## Summary of Due Diligence Elements

- Knowledge of legal obligations( organization, individual representatives)
- Determining and assessing all potential workplace hazards- ongoing
- Corrective action at workplace based on assessment of hazards- ongoing
- Appropriate pre-job orientation and training of workers on site- ongoing

# Due Diligence

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- Review familiarity with OH&S legislation before retaining contractor (even if contractor is an “expert”)
- Prequalification of contractor before hire, by confirming appropriate rules, “competent” supervision, training, monitoring and other policy matters
- Check contractor’s safety record

# Due Diligence

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- Competent supervisors provided?
- Ongoing supervisory monitoring to confirm practices and procedures followed
- Reminders of safety expectations (“toolbox” talks)
- Ongoing communication of hazard information to workers, particularly with complex tasks, multiple trades
- Enforcement of safety infractions with discipline
- Diligent ongoing documentation





## Questions?

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