Safeguarding the Employer from an Unsafe Contractor

By Matthew Wilton (Reprinted with permission of the author.)

Employers who don the armour of a carefully-worded contract can deflect the darts of prosecution that may result from a subcontractor's breach of oh&s laws.

As a result of the 1992 Ontario Court of Appeal decision in *R v Wyssen*, employers who hire unsafe subcontractors are at greater risk of prosecution under the *Occupational Health and Safety Act*. The effect of the Wyssen decision was to confirm the dramatic changes to the common law effected by the 1990 amendments to the *Act*.

Jake Wyssen was a window cleaner who entered into a contract to clean the windows of four highrise condominiums. One of the buildings was beyond his capabilities because it had overhanging balconies. As Wyssen had done in previous years, he contracted with Joseph Coutu, an experienced window cleaner to perform the work on that building. Coutu used his own equipment, and his work was not supervised by Wyssen. The rope on Coutu's boatswain chair broke, causing Coutu to fall to his death.

Wyssen was prosecuted under the *Act*, for failing as an employer to ensure that the measures and procedures prescribed by the *Act* were carried out in the workplace. The measures prescribed for the particular tasks in issue were defined in the regulations. The Ontario Court of Appeal specifically noted the incredibly technical nature of the duties which were placed upon Wyssen to ensure that Coutu performed his work property. The Court's likely purpose in listing these technical requirements was to demonstrate that the regulations imposed obligations which only a true employer could discharge, because the application of these regulations could only be understood by a person with special expertise in the field.

The Court of Appeal decision confirmed that the definition of "employer" (a person who "employs one or more employees or contracts for the services of one or more employees, and includes a constructor, contractor or subcontractor") will include a subcontractor who performs work or supplies services. Under common law, Coutu was likely an independent contractor, and not an employee of Wyssen. Remove the definition of "employee' contained in the *Act* and Wyssen could not be held liable for the actions of Coutu. However, the Court confirmed that the *Act* will impose the duties of an employer upon a party that hires an independent contractor to provide services.

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Effect of the Decision

The duties imposed upon an employer under the *Act* are wide-sweeping. The court in the *Wyssen* case described the duties as being undeniably strict, and more importantly, non-delegable. The employer's duties under the *Act* and regulations cannot be evaded by contracting out performance of the work to independent contractors.

Companies considering hiring independent contractors must now be aware that they can be prosecuted for a subcontractor's breach of the *Act*. This places employers in a very difficult situation, because subcontractors are generally hired to provide expertise that the employer cannot provide. In order to fulfil its duties under the *Act*, the employer will be required to ensure that the subcontractor complies with what may constitute very technical safety requirements under the regulations.

Safeguarding the Employer

It is possible for the employer, at the time of hiring a subcontractor, to structure the contract and tender documents in such a way as to protect the employer in the event that the subcontractor breaches the *Act*. The danger to avoid is the possibility of being convicted as the subcontractor's employer with respect to the subcontractor's breach of the regulations. In the *Wyssen* case, for example, Wyssen was convicted for failing to ensure as an employer that Coutu, his "employee", followed certain safety procedures when carrying out his window-cleaning operation.

The employer should attempt to obtain full and accurate disclosure from the subcontractor in the contract documents. In this way, the employer can assess what steps must be taken to ensure compliance with the *Act* and regulations. Including the following terms in the contract will help the employer to avoid liability:

1. The contract should state that the subcontractor will comply with safety standards established under the *Act*, the regulations, and safety standards established by industry where applicable. The subcontractor's written safety policy should be appended to the contract.
2. In the contract, the subcontractor should state specifically which regulations under the *Act* will apply to the tasks at hand. The subcontractor should also advise the employer in writing (in the contract) exactly how the subcontractor intends to perform the work, and describe how the work will be performed in accordance with the regulations. It should be a specific term of the contract that the work will be carried out in accordance with the description of the applicable regulation.
3. The subcontractor should confirm that the appropriate instruction and training have been provided to its employees, before the work begins.

4. The subcontractor should confirm its WCB CAD - 7 performance rating. (The CAD - 7 rating is the Workers' Compensation Board's own rating system for classifying a company's safety record and claims experience).
5. The subcontractor should warrant that its representations in the contract documents are true.
6. The subcontractor should confirm that it has insurance, and that the employer is a named insured under this insurance.
7. The contract should contain an indemnification and hold harmless clause which provides that the subcontractor will compensate the employer if the employer is prosecuted as a result of the subcontractor's safety infractions. This indemnity clause should also include a provision that states that the subcontractor will pay the employer's legal fees, lost wage expenses and the full amount of any fines, should the employer be prosecuted and convicted because of the errors of the subcontractor. If the subcontractor is a smaller-sized corporation, the employer may wish to consider asking the principals of the corporation to agree to be personally bound for the indemnity.

Depending on the size of the project involved, it may not be realistic from a business standpoint for an employer to insist upon all of the above provisions. For example, the size of the contract may dictate that the subcontractor cannot afford insurance coverage for the project.

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In addition, the principals of a subcontractor corporation may not be prepared to sign a personal indemnification clause in favour of the employer. Finally, an indemnification clause in favour of the employer will only be effective if the subcontractor is financially solid and is still operating at the time the employer is prosecuted under the *Act*.

Insurance Limited

At present, insurance coverage to protect against prosecutions under the *Act* is limited. Companies should consult their insurance broker to determine what coverage is available. Generally, the extent of coverage will be limited as follows:

- the insurance company will only pay the legal costs and expenses incurred in defending an *Occupational Health and Safety Act* prosecution;
- the amount of legal costs and expenses payable under the policy will be specifically limited;
- most importantly, these legal costs and expenses will only be payable if the company, or named insured individual, is found not guilty of all charges under the *Act*;
- unless specifically provided, coverage will not extend to subcontractors, independent contractors and their employees;
- since almost all coverage is payable only if the insured is acquitted of the charges, there will be no indemnity offered for fines or penalties under the *Act*.

If a project is large enough, the employer may be able to insist that the subcontractor obtain insurance which includes the employer as an additional named insured. If the employer can obtain the subcontractor's agreement to obtain insurance, the employer should ask for a copy of the endorsement that the insurance company provides to the subcontractor. This will confirm that the employer is an additional named insured under the subcontractor's policy, specifically with respect to the risk of *Occupational Health and Safety Act* prosecutions.

Ongoing Supervision Needed

Even if the employer can negotiate an agreement which contains the provisions detailed above, this does not mean that the employer's ongoing role under the *Act* ends here. There are steps that the employer should take to ensure that the subcontractor is adhering to the provisions in the contract. For example, if the subcontractor's work is to be performed in stages, and if the subcontractor has advised the employer about what safety precautions must be taken, the employer should visit the work site and require that the subcontractor illustrate how the safety measures detailed in the contract are being met.

The following further steps can be taken by the employer, as the situation warrants:

1. The employer should keep its own safety file for each subcontractor which will include documentation of any safety discussions and any other internal memoranda dealing with safety procedures;
2. The employer should satisfy itself that it has enough of its own supervisors to assure the job is performed safely;
3. The employer can request that the subcontractor advise the employer on a regular basis about the safety procedures being carried out on the project. If the employer becomes aware that the subcontractor is not adhering to the safety standards it has described, the employer should warn the subcontractor in writing that any future safety infractions will be cause for dismissal.

If Wyssen had taken some of the steps set out above, he may have been able to prove that he exercised due diligence with respect to his hiring and supervision of Coutu. For example, Wyssen could have asked Coutu to outline in the contract the regulations that Coutu was required to comply with and how Coutu intended to ensure compliance. There is definitely the possibility that a subcontractor will mislead the employer about the exact nature of the regulations, and the requirements placed upon the subcontractor. However, as long as the employer took every reasonable precaution in the circumstances to ensure that the subcontractor was in compliance, then the defence of due diligence may be put forth.

Courts often indicate that the Ontario *Occupational Health and Safely Act* does not require a standard of perfection. Surely, the employer will be entitled to rely upon the subcontractor's assurances, unless the employer has knowledge that the subcontractor's assurances are false.

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This article first appeared in the July/August 1994 issue of *OH&S Law Report*.