

Responsibility for Occupational Health and Safety

The Case of the Prime Contractor

WHEN I PUT PEN TO PAPER FOR THIS COLUMN, THE PUBLIC CONSULTATION process for WorkSafeBC's proposed amendments to the Occupational Health and Safety Regulation (OHSR) was drawing to a close. The proposed amendments with respect to Forestry Operations and Related Activities are particularly extensive and far too detailed to review in this column. However, given that amendments to the OHSR appear imminent, a closer look at liability for occupational health and safety under the *Workers Compensation Act* (the Act) is timely.

The starting premise under the Act is that everyone has responsibility for occupational health and safety. The Act defines numerous categories of actors ('owners,' 'employers,' 'directors and officers,' 'supervisors,' 'workers,' 'suppliers' and 'prime contractors') and imposes obligations and potential liability upon each.

Obligations often overlap, and a clear definition of responsibilities is sometimes elusive. One of the most difficult areas in this respect relates to the role of the 'prime contractor.' A prime contractor only exists in the case of a 'multiple-employer workplace.' The 'owner' is the default prime contractor, but under the Act an owner may contract out of this responsibility. Finally, the prime contractor serves a coordination function—its job is to coordinate the occupational health and safety activities of others and to implement a system to ensure compliance with the Act and OHSR at a multiple-employer workplace.

While this is an important function to be sure, it's not the be all and end all of occupational health and safety, and it certainly does not supplant the many other obligations and corresponding liabilities that exist for occupational health and safety under the Act. 'Owners,' 'employers,' 'directors and officers,' 'supervisors,' 'workers' and 'suppliers' each remain responsible for the occupational health and safety obligations specifically assigned to them under the Act.

The proposed amendments to the OHSR attempt to flesh out the requirements of a prime contractor in the context of a forestry operation. First, the owner must ensure the prime contractor is 'qualified,' so the important question is: what is 'qualified?' At a minimum, one would expect detailed knowledge of the Act and OHSR, as well as extensive experience with all aspects of a logging operation.

Second, the owner must ensure that only the prime contractor is engaged as 'the' prime contractor for a given workplace. Presumably, the idea is that if there are two prime contractors engaged for a workplace, then prime contractor responsibility defaults back to the owner.

Finally, the proposed amendments state that the owner must ensure that the prime contractor has authority over all 'employers,

workers and other persons' at a multiple-employer workplace to the extent necessary for the prime contractor to meet its responsibilities. This is a difficult, if not impossible, proposition.

When we speak of 'authority' among private parties, we can only really speak of authority based upon contractual rights. Assuming a hypothetical world where all existing contractual relationships start again from scratch, all the owner can do is negotiate contracts whereby its various contractors enter into separate agreements with the prime contractor wherein, for some form of consideration from the prime contractor, the contractors agree to comply with the directions of the prime contractor. Anything short of this agreement would not provide the prime contractor with any real, enforceable authority.

As awkward and unwieldy as this hypothetical world may seem, the real world where binding contracts already exist is even more difficult. How is an owner going to compel a contractor with an existing contract to agree to amend the contract to become bound to the authority of a third-party prime contractor? What is the contractor going to want in exchange? What about those 'other persons?' How do they become bound to the prime contractor's authority?

The practical effect of this proposed amendment is that owners may have to retain prime contractor responsibility in some cases where they had planned otherwise. Perhaps this outcome was the whole idea. 🐾

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