

2011 BC MUNICIPAL OCCUPATIONAL HEALTH & SAFETY CONFERENCE

Protect your Municipality from
Contractor Coordinator Liability



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Tuesday November 8, 2011

PROTECT YOUR MUNICIPALITY FROM CONTRACTOR COORDINATOR LIABILITY

A. General Provisions applicable to "Owners" under Part 3 of the *Workers' Compensation Act*

1. Section 106 sets out a very broad definition of "owner":

"owner" includes

- (a) a trustee, receiver, mortgagee in possession, tenant, lessee, licensee or occupier of any lands or premises used as a workplace, and
 - (b) a person who acts for or on behalf of an owner as an agent or delegate.
- There can be multiple owners of one workplace.

2. Section 119 identifies the general duties which every owner of a workplace must meet:

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.

3. Section 124 deals with overlapping obligations when more than one person is responsible for fulfilling the same obligations:

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.
- When determining which of multiple owners should be held responsible for not meeting the statutory duties, the Board will consider who had or should have had the knowledge of, and control over, the particular workplace.

4. Board OHS Guideline: G-D3-119-1 (Owner obligations - Public lands)

- Stated purpose - "to provide some clarification of the owner's obligations with respect to publicly owned land that may be used or accessed by workers".
- Guidelines are intended to assist with providing ways of complying with the legislation - not to provide exclusive interpretations.
- Guidelines generally provide information on administrative matters and on technical matters not already addressed by Board policy.

B. Section 118

1. Section 118 contains a further obligation that an owner has in relation to a “multiple-employer” workplace, which is defined as “a workplace where workers of 2 or more employers are working at the same time”.
2. Section 118 requires a “prime contractor” to exercise specified responsibilities with respect to a multiple-employer workplace. The term “prime contractor” is defined as follows:

“prime contractor” means, in relation to a multiple-employer workplace,

- (a) the directing contractor, employer or other person who enters into a written agreement with the owner of that workplace to be the prime contractor for the purposes of this Part, or
 - (b) if there is no agreement referred to in paragraph (a), the owner of the workplace.
3. Section 118(2) specifies the primary responsibilities which the prime contractor must fulfill:

The prime contractor of a multiple-employer workplace must

- (a) ensure that the activities of employers, workers and other persons at the workplace relating to occupational health and safety are coordinated, and
- (b) do everything that is reasonably practicable to establish and maintain a system or process that will ensure compliance with this Part and the regulations in respect of the workplace.

4. Other responsibilities which the prime contractor is required to meet under the *Occupational Health and Safety Regulation* include:

- conducting an assessment of the workplace with respect to the first aid requirements in relation to all the workers in the workplace, and doing everything that is reasonably practicable to establish and maintain the required first aid equipment, supplies, facilities, and first aid attendants and services (Reg. 3.20);
- providing the "Notice of Project" to WorkSafe BC at least 24 hours before starting a construction project (Reg. 20.2(1));
- appointing a qualified coordinator for ensuring the coordination of health and safety activities for the location (Reg. 20.3(2)(a)(i)).

5. Other comments:

- In default of a written agreement designating the prime contractor, the owner will be held responsible to meet those responsibilities.
- If there are multiple owners of the "multiple-employer" workplace, there can be only one owner for the purpose of designating the prime contractor.
- There can be only one prime contractor for a multiple-employer workplace.

6. City of Surrey Decision (WCAT, July 2009)

C. Section 115(1)(a)(ii)

1. Section 115(1)(a)(ii) reads:

Every employer must

(a) ensure the health and safety of

(i) all workers working for that employer, and

(ii) any other workers present at a workplace at which that employer's work is being carried out.

2. Section 115(1)(a)(ii) extends an Employer's responsibility to ensure the health and safety of workers of another Employer who are present at a workplace at which the 1st Employer's work is being carried out.

3. Petro-Canada Decision (BC Court of Appeal, September 2009)

- The BCCA stated the following with respect to the scope of Section 115(1)(a)(ii):

The chambers judge's view that the employer must be the employer of workers at the worksite is inconsistent with the wording of S.115(1)(a)(ii), which specifically fixes an employer with responsibilities for the safety of employees at a worksite who are not its own workers.

- What exactly are the obligations on an "Employer" to "ensure the health and safety" of other workers under Section 115(1)(a)(ii) has been somewhat perplexing. The BCCA may have given a bit of clarity when it stated:

While the interpretation of this phrase ("ensure the health and safety of workers") is primarily one for the Board rather than for the Court, it is my tentative view that the degree to which an employer can "ensure" health and safety will, of necessity, be dependent on the degree of control that the employer has over the workplace.

4. BC Hydro Decision (Review Division, August 2009)

- The Review Officer described the focus of the Board's consideration with respect to Section 115(1)(a)(ii) in the following manner:

In order to determine whether the employer's work was being carried out at the workplace, it is necessary to look at the nature of the work being carried out at the workplace and the degree of involvement by the employer in that work. The more involved an employer is in how the work is conducted and the more central the eventual product or service is to the employer's business, the more likely it is that the employer's work is being carried out...

...The nature of the work being carried out must be examined, in relation to the employer's industry or core business activities. If the work contracted out was the core business of the employer, and enough control was exercised over the manner in which the work was done, it would be open for the Board to conclude that the work being carried out was the work of the employer for the purposes of section 115(1)(a)(ii) of the *Act*...

5. Other comments:

- Section 115(1)(a) deals with the occupational health and safety duties which an employer must meet. However, it is not a natural inclination for one Employer to see itself as the employer vis-à-vis workers of another Employer, who operates an independent business which is providing its services to the 1st Employer.



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"Practical mind, practical solutions."

Alan Winter received his Bachelor of Laws from the Osgoode Hall Law School in 1978, and was called to the BC Bar in 1981 and Yukon Bar in 1990. He is a member of the Labour Section of the BC Branch of the Canadian Bar Association.

Before joining Harris & Company as a partner in 2009, Alan was a partner in the Vancouver office of a large national law firm. Alan provides ongoing labour and employment-related services and advice to clients with a focus on conducting labour negotiations on behalf of employers in both the private and public sectors; and representing employers on Workers' Compensation matters involving assessments, occupational health and safety standards, and workers' claims for compensation. He also presents several training workshops to clients on a variety of labour related topics.

In September 2001, Alan was appointed by the Provincial Government to conduct a core review of workers compensation legislation and major policy in BC. The Government's legislative changes to the Workers' Compensation Act in 2002 and 2003 were based predominantly upon the recommendations contained in Alan's report.

