JOINT OPERATING AGREEMENTS: HEALTH AND SAFETY AND EMPLOYMENT ISSUES

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INTRODUCTION

This paper considers the extent of non-operator exposure to health and safety and other employment liability.

By the temis of the Canadian Association of Petroleum Landmen agreement (the "CAPL"), the designated Operator is the sole employer for the joint operations. Under Article III – Function and Duties of Operator, clause 303 states:

> INDEPENDENT STATUS OF OPERATOR — The Operator is an independent contractor in its operations hereunder. The Operator shall supply or cause to be supplied all material, labor and services necessary for the exploration, development and operation of the joint lands and the operation of any production facilities for the joint account. The Operator shall determine the number of employees respecting its operations, their selection, their hours of labour and their compensation. All employees and contractors used in it operations hereunder shall be the employees and contractors of the Operator.

Further, clause 311 provides:

> INSURANCE — The Operator shall comply with the requirements of all Unemployment Insurance, Workers' Compensation and Occupational Health and Safety legislation and all similar Regulations with respect to workers employed in joint operations...

By the above terms, thus, the placement of responsibility for employees involved in a joint operation appears clear. It is to rest with the Operator alone. As such, one would expect that the non-operator would be free from liabilities rising out of the employment relations of a project.

CAN AN EMPLOYEE HAVE MORE THAN ONE EMPLOYER?

It has been held, in cases of interrelated companies, that an individual can be an "employee" of more than one company at one time. In these cases, the courts have looked for evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within a group of related corporations[1] and have lifted the "corporate veil" to find the employee's "true employer".

1 Gray v. Standard Trustco Ltd. (1994), 8 C.C.E.L. (2d) 46 (Ont. H.C.J.)

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The classic decision of *Bagby v. Gustayson International Drilling Co. Ltd.*,[2] illustrates the underlying principles well. The plaintiff was a long-term employee of a company bought by a corporation through one of its wholly owned subsidiaries. When the plaintiff was wrongfully dismissed from that company (bankrupt by the time of trial) the Court allowed the claim of damages to stand against the parent corporation. Laycraft J.A. stated:

> It is commonplace for an employee to spend a lifetime with essentially one employer. Yet from time to time he is transferred to the employ of associated company after another as the interests of the group as a whole require. If at some point in his career, the employee finds that the particular corporate entity which is at the moment his nominal employer is bankrupt, it would be unrealistic as well as unjust to ignore his past service with other entities of the conglomerate... We are entitled to ask: In substance who is his employer? Liability for contractual obligation should flow from that answer.[3]

The parent corporation in *Bagby* was found an "employer" based on the evidence that it controlled the plaintiff's working conditions, wages, bonuses, and pension plan. Both the bankrupt company and the corporation were held jointly and severally liable to the plaintiff.

In *Sinclair v. Dover Engineering Services Ltd. and Cyril Management Ltd.*[4], the wrongfully dismissed employee had been paid by Cyril, a numbered management company which made all income tax, employment insurance, and workers' compensation payments, and further, had contracted for the employee's benefits as the "employer." In practice, however, the plaintiff had held himself out and had been held out as an employee of Dover, the latter merely contracting with the former for the above payroll services. In finding both companies jointly and severally liable, the court stated the following:

> ..[I]t can be seen that Mr. Goudal has at least an equal, if not a controlling interest in both Dover and Cyril Even though he is not the president of Dover, he is obviously a driving force behind both companies. The fact that he chose to organize the affairs of these related companies so that the plaintiff apparently worked for one while being paid by the other should not be allowed to operate to the detriment of the plaintiff, who is now employed by neither and who seeks only the proper redress for which the law provides. I am satisfied that the two defendants should be held jointly and severally liable for whatever damages may properly be due the plaintiff as a result of the termination of his employment on 31st January 1985.

In *Downtown Eatery (1993) Ltd. v. Ontario et al.*[5], a company hired and paid an employee to manage one of two night clubs operated through a consortium of companies, of which the hiring company was one. Pending the trial of the employee's action, and for unrelated reasons, a principal common to all the consortium's companies transferred all assets out of the hiring company. The Ontario Court of Appeal found all companies in the consortium to be "common employers" and thus, jointly and severally liable for the employee's damages. It stated:

> While an employer is entitled to establish

2 Bagby v. Gustayson International Drilling Co. Ltd. (1980), 24 A.R. 182 (Alta. C.A.)

3 Ibid., at p.199.

4 Sinclair v. Dover Engineering Services Ltd. and Cyril Management Ltd. (1987), 11 B.C.L.R. (2d) 176 (B.C.S.C.).

5 Downtown Eatery (1993) Ltd. v. Ontario et al., [2001] O.J. No. 1879 (Ont. C.A.).

> complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law.

In *Mosher v. Epic Energy Inc.*,[6] the employee had been recruited to oversee the operations of an oil project in the Crimea. Upon hire, he had signed a written employment contract with HFC, a subsidiary set up for the purpose of conducting off-shore hiring for a conglomerate headed by Epic. As a term of the contract Epic was listed as having the sole right to granting the employee stock options. Further, Epic made the employee's salary and expenses payments and had also supplied the employee with an employment confirmation letter for loan purposes. The court found the employee reasonably believed that HFC and Epic were not separate and distinct and, in fact, that he had been induced into believing that he was working for Epic. Accordingly, Epic was liable for the employee's breach of contract damages.

What is clear from these cases (among others[7]) is that the courts' concern for fairness to an employee will usually be given precedence over the formal contractual relations created by the associated companies involved. In other words, if an employee is considered likely to have problems collecting damages from the "formal employer" (due to bankruptcy or other like situations), a court will be inclined to find a "substantive employer" upon whom to fix concurrent liability. Or, put another way, the courts are willing to give effect to an employee's "reasonable expectations" that the substantive employer should be liable to pay.[8] There is no reason to assume this result could not arise in situations involving unrelated companies, such as companies involved in a joint venture.

In most joint operator cases, where the obligations of the operator, as employer, are clearly defined through a joint operator agreement, the operator will be found to be the sole employer. However, where the responsibilities of joint venture partners have not been clearly defined or the lines between the operator and the non-operator(s) become blurred, it is possible that the courts could find more than one employer.

For example, the operator may lack the expertise to perform certain functions. An individual is retained to perform these services and the non-operator directly pays a portion of this person's salary or enrolls him on the non-operator's benefit plan in order to receive certain benefits that are not available through the operator. In these examples, the joint operators have blurred the lines of employment by creating an honest and reasonable belief in the employee that he or she is, in truth, employed by both (or all).

In *Muhlenfeld v. Nor. Alta. Rapeseed*,[9] a decision of the Alberta Court of Queen's Bench, joint venture partners were found to be the employers of a general manager for the project and judgment was rendered against all of the joint venture partners for payment in lieu of damages and vacation pay. A central factor, again in this case, is the fact that there was some element of common ownership between the joint venture partners. The common control of the companies, however, was certainly looser than that found in *Bagby, Downtown Eatery, or Mosher,* all of which involved closely knit conglomerates.

6 Mosher v. Epic Energy Inc., [1999] B.C.J. No. 2407 (B.C.S.C.).

7 For another example of "employee control" over "payroll" considerations, see Russell Jones v. CAE Industries Ltd. (1991), 40 C.C.E.L. 236 (Ont. H.C.J.). See also: Gray v. Standard Trustco Ltd. (1994), 8 C.C.E.L. (2d) 46 (Ont. H.C.J.)

8 See also, Waddell v. Cintas Corp., [1999] B.C.J. No. 2404 (B.C.S.C.).

9 Muhlenfeld v. Nor. Alta. Rapeseed (1980), 13 Alta. L.R. (2d) 105 (Alta. Q.B.)

We can foresee a situation where an unrelated non-operator is jointly found to be the employer with the operator where the non-operator has blurred the lines of employment either through assuming responsibility for remuneration or by exercising control over the employee. In *Re Nelson and Gubbins*,[10] a manager of a townhouse complex was employed and paid by the owner of the complex. Byron Price & Associates ("Byron Price") acted as rental agent for the complex. In this capacity, Byron Price was found to be responsible for the administration of the premises and the maintenance of the complex. Vacancies at the complex were advertised in the newspapers in Byron Price's name and the complex manager's telephone number was designated as the number to which inquiries should be directed. Byron Price forwarded applications to the townhouse manager and Byron Price determined whether an application should be accepted. It was found that the townhouse manager was accountable to and took directions from Byron Price on a day-to-day basis with respect to her duties. The British Columbia Supreme Court considered whether, while employed and paid by the building owner the manager could be held, in law, to also be an employee of Byron Price. The Court stated at page 489-490:

> In so far as the law on this matter can be said to be clear, it is, I think, clear that existence of a master-servant relationship, or so-called contract of service, is not dependant on the right either to employ or discharge, nor on the payment of the servant's wages being the responsibility of the alleged master. The criteria for establishment of the existence of the relationship are discussed by the Alberta Court of Appeal in *Marine Pipeline & Dredging Ltd. v. Canadian Fina Oil Ltd.* (1964), 46 D.L.R. (2d) 495, 48 W.W.R. 462. Kane, J.A., giving the judgment of the Court in that case noted that Lord Thankerton, whose view was concurred in by all of the Law Lords, adopted in *Short v. J. & W. Henderson, Ltd.* (1946), 174 L.T. 417 (H.L.), a statement of the present law which places emphasis, not on the right to hire and discharge and the duty to pay wages, but on *control of the method of doing the work*, as pointing to the servant's master. The statement cited by Lord Thankerton with approval is to the effect that the principal requirement of a contract of service is "the right of the master in some reasonable sense to control the method of doing the work" and that this factor of "superintendence and control" may be decisive of the existence of the relationship.

The Court held that the element of "control" was sufficient to support the conclusion that a relationship of master and servant also existed between Byron Price and the manager. It should be noted that the only common connection between the town house's corporate owner and Byron Price was one common director.

It will certainly be rare that a non-operator will exercise control over an individual ostensibly employed by the operator. In the event, however, that the non-operator will be exercising any control over an individual employed by the operator or is directly paying any of the employee's remuneration or other perquisites of employment, we recommend that the joint operating agreement state that the all individuals employed on the project are employees only of the operator. Certainly, a written employment agreement between the operator and the employee in question stating that the employee is only an employee of the operator and is not an employee of any of the other joint venture partners would also be very helpful

10 Re Nelson and Gubbins (1979), 106 D.L.R. (3d) 486 (B.C.S.C.), affirmed (1981), 122 D.L.R. (3d) 340 (B.C.C.A.)

evidence, should the employee ultimately claim that he was also employed by the non-operator. If financial contributions are to be made for the salary or expenses of an individual employed on the joint venture project, we recommend that the non-operator contribute towards those expenses by paying into the operating account, rather than making direct payment to the employee.

OCCUPATIONAL HEALTH AND SAFETY ACT

Alberta's *Occupation Health and Safety Act*, as well as the similar Acts in the other provinces, impose a "hierarchy" of duties and obligations not only upon employers but also upon contractors, suppliers, and workers to ensure that safety is secured. The relevant definitions in the Act are as follows:

1. In this Act,

(a.0001) "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:

(e) "employer" means
(i) a person who is self-employed in an occupation,
(ii) a person who employs 1 or more workers,
(iii) a person designated by an employer as his representative, or
(iv) a director or officer of a corporation who oversees the occupational health and safety of the workers employed by the corporation;

(i.01) "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;

(j) "prime contractor" means the prime contractor for a work site referred to in section 2.1;

(k) "project" means:
(i) the construction, demolition, repair, alteration or removal of a structure, building, complex, street, road or highway, pipeline, sewage system or electrical, telecommunication or transmission line,
(ii) the digging of, working in or filling of a trench, excavation, shaft or tunnel,
(iii) the installation, modification, repair or removal of any equipment, machinery or plant,
(iv) the operation of a manufacturing, industrial or other process, or
(v) any work designated by a Director of Inspection or a Director of Occupational Hygiene as a project;

(l) "supplier" means a person who rents, leases, erects, installs or provides any tools, appliances or equipment or who sells or otherwise provides any designated substance or hazardous material to be used by a worker in respect of any occupation, project or work site;

(m) "worker" means a person engaged in an occupation;

(n) "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.

The Act then imposes the following safety requirements:

2(1) Every employer shall ensure, as far as it

is reasonable practicable for him 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 and the regulations.

(2) Every worker shall, while engaged in an occupation,

(a) take reasonable care to protect the health and safety of himself and of other workers present while he is working, and

(b) co-operate with his employer for the purposes of protecting the health and safety of

(i) himself,

(i.1) other workers engaged in the work of the employer, and

(ii) other workers not engaged in the work of that employer but present at the work site at which that work is being carried out.

(3) Every supplier shall ensure, as far as it is reasonably practicable for him to do so, that any tool, appliance or equipment that he supplies is in safe operating condition.

(4) Every supplier shall ensure that any tool, appliance, equipment, designated substance or hazardous material that he supplies complies with this Act or the regulations.

(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 and the regulations in respect of that work site.

Furthermore, when two or more employers are involved at a work site at the same time, the work site must have a “prime contractor”. Section 2.1 imposes the following requirements:

2.1(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.

(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.

The prime contractor sits at the apex of the pyramid of responsibility imposed by the Act. Beneath the prime contractor is the employer and beneath the employer is the worker. The Act places key obligations of notification, investigation, and rectification of hazards on the prime contractors and employers in the event of serious injuries and accidents at the work site.[11] The duty of the prime contractor has been characterized as a "general duty because in effect it is the duty to ensure that all others comply with theirs".[12]

The prime contractor has primary responsibility for ensuring, "as far as is reasonably practicable to do so, that (the) Act and the regulations are complied with in respect of the work site". Section 2.1(4) provides that one way that the prime contractor can meet its obligation under the Act, is to "maintain a system or process that will ensure compliance with (the) Act and the regulations in respect of the work site." It is possible that multiple functions are imposed on one party under the Act. In that case, the obligations of each function must be met.[13]

Complications can arise in a joint venture because of the participation of more than one corporate entity. If there is more than one operator or employer involved in work at the work site, then the Act requires that one of them be designated as the "prime contractor". If the parties have not designated the "prime contractor" in the agreement, s.2.1(2)(b) provides that the "owner" of the work site is the prime contractor.

Occupational Health and Safety will first look to the prime contractor. If a prime contractor has not been designated, then Occupational Health and Safety will look to the Act to determine the prime contractor. In this regard, we note that CAPL provides that the lands and facilities are to be held jointly as tenants in common and, therefore, it is possible that as an "owner", a non-operator could also be found a prime contractor in certain circumstances.[14] If the operator is not in existence, it is possible that Occupational Health and Safety could find that all of the non-operators are owners and, by operation of s.2.1(2)(b) designate them all to be the prime contractor. There is nothing precluding such a finding and, accordingly, the possibility cannot be dismissed.

If the operator is the only employer involved in work at the work site, then the operator will be an "employer" under the Act.

The "supplier" function is also likely attributable to the operator. As stated, CAPL expressly delineates this as one of the operator's roles and that it is to be solely the operator's role.[15] Again, however, the courts do not look merely to formal agreements. If a non-operator has lent or provided equipment for use by the operator, then it will be caught by the definition of "supplier" and could be held liable for any faulty or noncompliant equipment provided on site. As a non-operator would undoubtedly bring its own equipment relating to its particular area of expertise to the joint operations, this potential class of duties and obligations must also be considered.

There is also the risk that a non-operator will be found to be an "employer", regardless of CAPL, if the lines between the operator and the non-operator have been blurred. As discussed in the previous section, if the non-operator has directly paid a portion of the injured worker's wages or provided perquisites or exercised control over the injured worker, there is a risk that the injured worker will be found to have two employers (the

11 Sections 13 and 14.

12 R v. Spicer (1988), 88 A.R. 67 at 76 (Alta. Prov. Ct).

13 Section 2.2

14 CAPL, clause 1501.

15 CAPL, clause 303.

operator and the non-operator).

Determining who is the actual employer in a tripartite relation has been recently considered by the Supreme Court of Canada in *Pointe Claire (City) v. Quebec (Labour Court)*.[16] This was not an *OHSA* case but rather one regarding an application by a trade union to have a temporary employee included in the relevant bargaining unit of the contracting City "employer". Still, the guidelines for assessment are relevant to our discussion.

In *Point Claire (City)*, the employment agency who placed the employee was responsible for her recruitment, evaluation, and, if indicated by the City as necessary, discipline. Further, it determined her wages, paid them, and then remitted a bill to the City for compensation. The employee's day-to-day work, however, was directed by a City manager as were the work conditions of the job site. The Labour Court found that the notion of "legal subordination" (or, in other words, the control over the employee's daily experience) was of primary consideration given that the ability to negotiate employees' day-to-day working conditions was the primary purpose of the Labour legislation. Therefore, the City was the true employer for the purposes of that Act.

The majority of the Supreme Court of Canada upheld the Labour Court's decision. It did caution, however, against relying on the concept of "legal subordination" exclusively. Rather, in determining the identity of the employer the approach must be comprehensive or "global". Factors to be considered include the selection, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration, and integration into the business by the employee. Still, the majority did agree with the Labour Court on the necessity to consider the purpose of the legislation and the relevance of that purpose to the determination of who was, in fact, the employer. Thus, it also agreed with the large weight placed by the Labour Court on the "legal subordination" factor.

Recently in *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)*,[17] (and while this was not a case regarding a dual or tripartite relation), the New Brunswick Court of Appeal again emphasized the importance of legal subordination or "day-to-day control" and its relation to the purpose of the legislation in question. In that case the issue was whether delivery drivers were employees of a dispatch company for the purposes of workers' compensation benefits and obligations. In reaching it decision the Court discussed *Pointe Claire (City)* stating:

> Although the Supreme Court has yet to endorse the practice of interpreting "employee" in its mischief sense so as to further the protective policy goals of labour and employment standards legislation, it has done so in regard to identifying the true "employer" of a group of employees.
>
> ... the Supreme Court recognized that it is permissible for administrative tribunals and courts to determine "employer" status in light f the particular policy objectives of the statute in question.

Given the affirmation expressed in *Pointe Claire (City)* of a link between legal subordination and legislative purpose, and give that reasoning has been expressly extended to issues of workers' compensation benefits by the New Brunswick Court of Appeal in *Joey's Delivery*, it is likely that legal subordination would be considered an important factor in determining the true employer

16 Pointe Claire (City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015.

17 Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission),

for purposes of responsibility under the *OHSA*. Indeed, it makes sense that the party who is in direct control over the worker and the immediate work site is considered the best placed to ensure that the *OHSA* and its regulations are properly complied with. Applying this analysis, therefore, it is likely that any and all operators (including the non-operator in the appropriate circumstances) would be considered "employers" under the *OHSA* of the workers if each supervised and controlled on a daily basis. The fact that CAPL states the operator is to "supply, or cause to be supplied" the labour for the joint operations would make little difference.

A look to the *OHSA* caselaw confirms this conclusion. Although it does not appear that a case has specifically considered a CAPL relationship, applicable situations of other joint operations, joint ventures, or (as in *Pointe Claire (City)*) "tripartite relations", have been judicially reviewed. Invariably, the courts look past the formal contracts to the employment relationship in practice.

An example of the last category and perhaps the broadest definition of "employer" was found in the recent case of *PanCanadian Petroleum Ltd. v. Holthe.*[18] There, the plaintiff had been working as a scale house operator at a facility owned and operated by PanCanadian. Her wages, however, had been paid by E-Can Oilfield Services, a labour supplier to the oil industry. When the plaintiff complained of headaches due to fumes and requested a transfer, three executives of PanCanadian met with her and told her that she was dismissed. She subsequently received a formal letter of tennination from E-Can.

The plaintiff complained to the Occupational Health and Safety Council that PanCanadian had breached section 28 of the Act which states that an employee can not be dismissed for complying with the *OHSA* and its regulations. PanCanadian argued it was not her employer and therefore could not be in breach for her dismissal. The Council defined an "employer" as "using the services of a person." As such, it held that PanCanadian was indeed in breach and ordered the reinstatement of the plaintiff.

On appeal to the Alberta Court of Queen's Bench, the court found that the particular wording of section 28 did not require that the party being charged be an employer as the provision referred to "any person who..." However, it also stated that even if the section did require an "employer", the Council's definition was entirely reasonable given the purpose of the *OHSA*. What was important under the Act was that the person in charge of the employee's safety on a daily basis at the work site be the one held accountable. Obviously, by this reasoning, non-operators could be found to be "employers" under the Act.

Further indication of who will be considered an employer under the Act was supplied in the Alberta case of *R v. Spicer*.[19] There, Lac Minerals had put together a joint operation to drill and produce a gas well. Unfortunately the well blew, killing two workers and injuring eight. At the time of the accident Lac's oilfield consultant, Harold Spicer, was present and in control of the operations. Glen Blakely, manager of the service rig assisting in the work being done on the well, was also there. Both were charged as "employers" with "failure to ensure the reasonable safety of workers by allowing them to remain in an explosive atmosphere." Mr. Spicer was also charged as a "prime contractor" with "failure to ensure every employer and worker complied with the Act and regulations."

The court determined that Harold Spicer was not an employer. The only definition he would possibly fit under (it was thought) was that of section 1(e)(iii): a person designated by an employer as his

18 PanCanadian Petroleum Ltd. v. Holthe, [1998] A.J. No. 1269 (Alta. Q.B.).

19 R v. Spicer (1988), 88 A.R. 67 (Alta. Prov. Ct).

representative. Lac itself was not an "employer" as it had no direct control over the workers on site. Rather, it had acted only as a general contractor to the other companies which, in turn, directed their own labour forces. Since Lac was not an employer then neither could its representative be. The first charge against Spicer was dismissed. Still, Lac *was* considered to be the prime contractor, and so too, therefore, was Spicer.

Westwood Wells and its manager Glen Blakely were found to be "employers". Through Blakely the company directly controlled the work and work conditions of the employees at the work site at the time of the accident. Also, Blakely had described himself as the "on-site supervisor" for Westwood Wells and was treated by both its employees and by Spicer as such. In other words, as in the *Point Claire (City)*, *Joey's Delivery* and *Pan Canadian* cases, the "legal subordination" concept was the paramount consideration in employer determination once again.

The difference between the employer and the prime contractor duties were explained in *Spicer*.[20] Employers have what has been termed a "primary duty". This is an immediate, direct duty to ensure the safety of their workers and others at the site. Where more than one employer is present these duties co-exist, although the standard of care may vary between them based on the particular hazard involved and the employer's area of expertise. In other words, it may be more "reasonably practicable" for an employer with a certain expertise to identify and deal with a hazard within that expertise. If the hazard is outside its special knowledge, it may then perhaps be sufficient for that employer to rely on the expertise of another. Breaches in the standard of care in any given case are to be determined on its facts.

The prime contractor's duty, also termed the "general duty", is to ensure that the employers comply with their duties. This is a positive obligation and it will be no defence for a contractor to simply claim that it relied on the expertise of the employers in a situation. Indeed the court in *Spicer* stated that "blind reliance on the expertise of those whose actions you are to supervise is in effect no supervision at all." The extent of independant knowledge expected by a court to be possessed by the prime contractor in order to assess and act in a crisis situation will be a matter of fact. Although the prime contractor may not understand the principles fully behind an occurrence, they should at least understand the dangers of what is going on.

Another interesting statement in the case above should be noted: that of potential personal liability for corporate acts under the *OHSA*. The court stated, "there is clear precedent for attributing liability to *de facto* owners of corporations in certain circumstances." Although this occurs usually in civil judgments, the "veil" can also be lifted in quasi-criminal situations.[21] However, for a court to hold someone personally liable there must be something more than just a majority ownership in the corporation. Rather, the court held, the acts of the personal Defendant must be identified with the corporation. It may be that such liability is found because the Defendant is the company's "guiding mind and will", but other considerations may suffice.

A non-operator is also likely a "person" for the purposes of the Act. The following sections are noteworthy:

> 7(1) When an officer is of the opinion that work is being carried out in a manner which is unhealthy or unsafe to the workers engaged in the work or present where the work is being carried out, the officer may in writing order the person responsible for the work being carried

20 The court in R v. Spicer adopted the reasoning here of R. v. Atcon (1983), 49 A.R. 318 (Alta. Q.B.).

21 See also R v. March, 181 A.P.R. 256 (Nfld S.C.).

out:

(a) to stop the work which is specified in the order, and

(b) to take measures as specified in the order that are, in the opinion of the officer, necessary to ensure that the work will be carried out in a healthy and safe manner,

or either of them, within the time limits specified in the order.

(2) When an officer is of the opinion that this Act or the regulations are not being complied with, he may in writing order the person who, in his opinion, is not complying with the Act or the regulations to take measures as specified in the order that are, in the opinion of the officer, necessary to ensure that this Act and the regulations will be complied with, within the time limits specified in the order.

(3) Measures specified in the order referred to in subsection (2), where the order is made in respect of the failure by a person to comply with section 25(6) or 28, may require one or more of the following:

(a) that the disciplinary action cease;

(b) reinstatement of the worker to his former employment under the same terms and conditions under which he was formerly employed;

(c) payment to the worker of money not more than the equivalent of wages that the worker would have earned if he had not been dismissed or received disciplinary action;

d) removal of any reprimand or other reference to the matter from the worker's employment records.

(4) If the worker has worked elsewhere while the dismissal or disciplinary action has been in effect, those wages earned elsewhere shall be deducted from the amount payable to him under subsection (3)(c).

10(1) When a person has begun or is about to begin a project and a Director of Inspection or a Director of Occupational Hygiene is of the opinion that the health and safety of any worker who is or will be present at the project is not being or will not be protected, a Director may in writing order that person to stop that project or to refrain from beginning that project, as the case may be.

(2) A Director of Inspection or a Director of Occupational Hygiene shall not rescind an order made under subsection (1) until he is satisfied that the person to whom the order was made has taken the measures that, in the opinion of the Director, will protect the health and safety of the workers concerned

(3) A Director of Inspection or a Director of Occupational Hygiene may require any person who has begun or is about to being a project to furnish to a Director, within the time specified by a Director, the plans, drawings and specifications that are reasonably necessary for determining whether the health and safety of the workers concerned is being or will be protected.

28 No person shall dismiss or take any other disciplinary action against a worker by reason of that worker acting in compliance with this Act, the regulations or an order given under this Act.

As has been mentioned several times above in passing, the liability that is imposed in *OHSA* cases

is "joint and several". In other terms, regardless of a party's own particular proportion of blame, the penalty (at least the fine) may be fully collected from any one party. It is then up to that party to obtain indemnification from its co-defendants.

The application of joint and several liability in *OHSA* cases was explained in *R v. Napanee (Town)*.[22] There, three municipalities had contracted to share the construction and operation of a common water and sewage treatment facility. To this end they created a joint management board (the "Board") and hired a supervisor to oversee the operations. Overworked, the supervisor failed to ensure that the Ontario Act's regulations were complied with regarding "confined space entry". Unfortunately, as a result, a worker was overcome by fumes upon entering a manhole and subsequently died.

The supervisor, the Board, and the municipalities were all charged as employers with: (1) the failure to ensure that measures and procedures prescribed under the regulations were carried out in the workplace; and (2) the failure to take "every precaution reasonable in the circumstances for the protection of a worker."[23] The charges against the Board were dismissed as it was found it was not to be a legal entity. The supervisor, and the municipalities jointly, were convicted of both charges as "employers".

In addressing the issue of joint and several liability, the court stated that while there may be "equities" between the parties which would affect their respective obligations to contribute to a civil judgment, there is no equity in criminal or quasi-criminal law. Thus, if corporations (or persons) are proven to jointly occupy a relevant status in connection with a truly "joint venture" and a breach attaches criminal or quasi-criminal culpability, the law demands that joint and several liability be ordered.

As the *Occupation Health and Safety Act* is "quasi-criminal" legislation, the consequences of non-compliance (particularly if faced with numerous charges) can be onerous indeed. They are prescribed as follows:

> 32(1) A person who contravenes this Act or the regulations or fails to comply with an order made under this Act or the regulations or an acceptance issued under this Act is guilty of an offence and liable
>
> (a) for a first offence
>
> (i) to a fine not more than $150 000 and in the case of a continuing offence, to a further fine of not more than $10 000 for each day during which the offence continues after the first day or part of a day, or
>
> (ii) imprisonment for a term not exceeding 6 months,
>
> or to both fines and imprisonment, and
>
> (b) for a 2nd or subsequent offence,
>
> (i) to a fine of not more than $300 000 and in the case of a continuing offence, to a further fine of not more than $20 000 for each day or part of a day during which the offence continues after the first day, or
>
> (ii) to imprisonment for a term not exceeding 12 months.
>
> or to both fines and imprisonment.
>
> (2) Notwithstanding subsection (1), a person who fails to comply with an order made under

22 R v. Napanee (Town) (1990), 8 C.O.H.S.C. 121 (Ont. Prov. Ct).

23 Comparable to section 2(1) of the Alberta OHSA.

section 8 or as varied under section 11 is guilty of an offence and liable to a fine of not more than $300 000 or imprisonment for a term not exceeding 12 months or to both fine and imprisonment.

It is difficult, for the non-operator, to have any say over the conditions in the workplace in the absence of control. In fact, it is the presence of control that could result in liability under the Act. Nevertheless, in the event of a workplace fatality or serious injury or accident, we recommend that the non-operators satisfy themselves that the Act has been complied with and that there is continued compliance.

EXTENT OF NON-OPERATOR EXPOSURE TO CLAIMS OF THIRD PARTIES

An "employer" of an employee is vicariously liable for torts committed by the employee in the course of his employment. What happens if a non-operator lends an employee to the operator and the employee tortiously injures a third party? Has the temporary employer, the operator, become the employer in the event of vicarious liability? Or, does the non-operator remain the employer?

The House of Lords, in *Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool) Ltd.*,[24] held that the question of vicarious liability is determined, not by the terms of any agreement, but essentially by application, again, of the "control test" to determine who was the employer at the relevant time.

> Many factors have a bearing on that result. Who is paymaster, who can dismiss how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion, but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorized to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of perfouning it. It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done.[25]

The temporary employer may be held to be vicariously liable where "entire and absolute control" has been assumed by the temporary employer. However, if the general employer continues to pay the workers or has reserved the authority to discipline or telininate, then the general employer will likely remain the employer for vicarious liability purposes. It is also possible, however, that where both the operator and non-operator exercise significant control over the worker, both could be subject to a ruling of vicarious liability and that their liability would be assessed according to their respective degrees of fault.[26]

24 Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool) Ltd., [1947] A.C. 1 (H.L.)

25 Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool) Ltd., [1947] A.C. 1 (HL.) at p.

26 This principle was applied in MacPherson Builders (1978) Ltd. v. W.A.C. Excavators Ltd. (1981), 35 N.B.R. (2d) 150, at 152-154 (Q.B.)

Indeed, in the recent British Columbia Supreme Court case of *F.S.M. v. Clarke*,[27] vicarious liability *was* assessed against two separate and distinct entities as "employers". The employee in question had been a dormitory supervisor in the late 1960s and early 1970s of a native residential school operated by the Anglican Church. The plaintiff had been sexually molested by the dormitory supervisor while a student at the school. The court found that both the Church and the federal government had "governed" the activities of the school by directing the activities of the principal. In turn, it was the principal who was responsible for the conduct of the dormitory supervisor. Accordingly, and relying heavily on the "control test", both the Church and the government were found to have been "employers" of the dormitory supervisor at the time in question and, therefore, were both vicariously liable for his wrongful conduct.

The decision in *F.S.M.* was greatly influenced by a previous case with similar facts, *B. v. Flint.* In discussing *Flint* and applying its reasoning the court in *F.S.M* noted that the residential school had been operated as a "joint enterprise characterized by joint control and cooperative advancement of each party's interest." This description appears applicable to CAPL joint operating situations. Accordingly, it is entirely possible that the reasoning in *F.S.M.* could be used to assess vicarious liability against both an operator and a non-operator where those parties exercise joint control over an employee. Indeed, based on *F.S.M.*, it appears that the possibility of dual vicarious liability exists even where the control over the employee is rather indirect.

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27 F.S.M. v. Clarke, [1999] B.C.J. No. 1973 (B.C.S.C.).