

Brief Your CEO: Using Safety Consultants Doesn't Shield Company from OHS Liability



A contractor is hired to take down an inoperative overhead crane with a 285-ton capacity at a Nova Scotia steel plant. After speaking to a safety consultant, the contractor decides to lower the 20-ton hook assembly from the crane manually without using a power-controlled braking system. The crew loses control of the hook as it's being lowered and the crane crashes 75 feet to the ground. Miraculously, nobody is killed. But one worker suffers a serious foot injury. The contractor is charged with an OHS violation: failing to provide safety instructions to the crew. We were only following the consultant's recommendations, it claims. But the court isn't impressed and finds the contractor guilty [*R. v. Adam Clarke Company Limited*].

THE PROBLEM

While judicious use of outside consultants can promote safety and minimize risk of injury, some companies may have a secondary motive: They think that relying on the consultant's advice will shield the company against OHS liability if an incident or violation occurs. But this is a flawed assumption. The *Adam Clarke* case shows this very clearly.

EXPLANATION

The obligation of you and your fellow officers and directors under the OHS laws is to exercise due diligence. In other words, you're expected to take every precaution reasonable in the circumstances to ensure that the work the company controls is carried out in accordance with the laws and in such a way as to minimize foreseeable risks.

Due Diligence & Safety Consultants

What role does an outside safety consultant play in helping a company and its officers meet the standard of due diligence'

Hiring a consultant might be one of the reasonable precautions you must take to show due diligence, especially if the consultant supplies essential expertise that the company doesn't have in-house. In such circumstances, *not* seeking a consultant's advice could enhance your OHS liability risks. However, simply getting and relying on an expert's advice isn't enough to establish due diligence, especially when the company controls the work and makes the final decision on how it's performed.

***Adam Clarke* and the Principles in Action**

That's the moral of *Adam Clarke*. The contractor in that case did float the idea of lowering the hook assembly manually to the consultant. And the consultant gave the go-ahead. The contractor thus claimed that it had shown due diligence. But the court didn't accept the argument. It pointed out that the "consultant was paid by and under the direction of the" contractor. And, ultimately, it was the contractor that made the final decision to proceed.

The question then became whether the contractor had done enough to prevent the accident. The court said it didn't. It was foreseeable that lowering a 20-ton hook without a power

braking system would be dangerous, the court said. The contractor didn't take the proper precautions, according to the court:

- The contractor failed to do an on-site inspection;
- It didn't notify the workers of the risks the work involved;
- There was no on-site supervision or direction; and
- The contractor didn't give adequate consideration to the age and condition of the hook assembly in deciding how to lower it.

Consequently, the court found the contractor guilty.

THE SOLUTION

Hiring a safety consultant can help prevent incidents and injuries; but it can't shield you against OHS liability. Ultimately, your liability will be judged not by what a consultant says but by what you did and didn't do to look after safety. The duty to show due diligence, in other words, can't be delegated to a consultant. As a corporate director, you don't have to get involved in the day-to-day details. But you do have to get your hands dirty to some extent. To show due diligence, a corporate director must do things such as:

- Exercise general oversight over the company's OHS program and policies;
- Monitor incident trends, injury reports, complaints, etc.;
- Ensure that supervisors are competent, workers are properly trained and contractors follow appropriate health and safety practices; and
- Ask questions about and pay attention to safety.