You Can’t Contract Your Way Out of Environmental Liability

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As OHS coordinator, you need to brief your executive officers about the company's risks of liability under the OHS and environmental laws. Here's a briefing you can deliver on an essential issue, namely, potential liability for environmental violations committed by the independent contractors you engage to perform work for your company.

The Situation

A company looking to start a mining operation on a mineral deposit that it owns in Yukon hires an independent contractor to do an exploratory audit. During the work, 1,500 gallons of diesel oil leak out and flow into a nearby river that's populated with fish. Even though the contractor's negligence caused the leak, the government charges the mining company with a federal *Fisheries Act* violation. The company denies responsibility, noting that it was the contractor that built and operated the tanks and valves used to transport fuel at the project site. But the court isn't impressed and finds the company liable for depositing a deleterious substance into water inhabited by fish in violation of the Act [*R. v. Placer Developments Ltd.*, [1985] B.C.W.L.D. 581].

The Problem

Many companies hire independent contractors to conduct environmentally sensitive activities at their sites. Judicious use of qualified contractors can make operations more cost-effective and reduce the likelihood of pollution. But there may be a secondary motive for companies to entrust independent contractors with environmentally risky activities: They might think that the contractor will shield the company against liability if pollution does occur. The contractor will take the fall if things go wrong, they might assume. This assumption is flawed. The *Placer Developments* case shows this quite clearly.

Due Diligence & Independent Contractors

The obligation of corporate officers and directors is to exercise due diligence, that is, to take every reasonable precaution under the circumstances to prevent pollution and

comply with environmental laws and regulations. The more environmentally sensitive the operation, the more the company is expected to do to minimize pollution risks.

The *Placer Developments* case is significant because it shows that hiring an independent contractor to perform the operation doesn't necessarily get a company off the hook. In the words of the famous *Sault Ste. Marie* case in which the Canadian Supreme Court invented the due diligence defence, whether the activity was performed by the company's own employees or an independent contractor "will not be decisive" in determining the company's responsibility for the pollution.

So, what is decisive?

Answer: A company's liability depends on how much control it had over the activity that caused the pollution, rather than on who actually performed it. Companies, according to the court, "have a responsibility to ensure that all activities they can influence" are carried out with reasonable care. "This responsibility cannot be passed to another corporation through the simplistic maneuver of contracting out the project" to an independent contractor. If it were otherwise, companies would simply form separate corporations to do environmentally-sensitive work at their sites to avoid the risk of liability and prosecution.

Key Liability Lessons from the *Placer Developments* Case

In *Placer Developments*, there was no dispute that the contractor had committed a series of negligent acts that led directly to the leak, such as siting the plastic pipe next to a steel bar where it rubbed against the pipe and caused a fracture, leaving valves open and failing to inspect the system. But the court found the mining company responsible for the leak because it was "in the position to control or

influence the offending activity” and didn’t do so.

The court cited key factors for determining whether a company that hires an independent contractor actually has “influence” and “control” over the activity, including:

Whether the company knows or should know of the risk: The mining company had “sufficient expertise to be aware of the potential risk to the environment posed by a fuel system in northern mining camps,” the court found; and

Whether the company is in the position to control the activity: The mining company was in such a position because it negotiated the contract that set out how the project was to be carried out. In addition, the engineer overseeing the project was the company’s employee.

In sum, the company knew about the risks of a fuel leak and could have taken steps to manage them. For example, it could have inserted language into the contract requiring the contractor to use care in running the fuel system and insisted on the establishment of an inspection system. But it didn’t take any of these measures. As a result, it was guilty of a pollution offence.

Practical Strategy for Managing Liability Risks for Independent Contractor Violations

The key takeaway is that a company can’t delegate its duty to take reasonable steps to prevent pollution simply by using an independent contractor to perform environmentally sensitive activities. Ultimately, the company’s liability and that of its fellow officers and directors is judged by whether the company was in a position to influence the work and how it used that influence. The *Placer Developments* case strongly suggests that influence and control are, in large degree,

based on the company’s contractual bargaining power.

As a practical matter, this means that if a company is in the position to negotiate environmental safeguards into the contract, it will be expected to do so. At a minimum, such safeguards would include:

- Firm assurances that the contractor will carry out the work reasonably and in accordance with all environmental (and other) laws and regulations affecting the work;
- The establishment of an inspection system to verify that the contractor actually keeps its promise to comply; and
- Carrying out field inspections, audits and other actions to ensure that the contractor is compliant and that the environmental safeguards negotiated into the contract are actually being implemented once the contract takes effect.

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