

Occupational Health and Safety Council

Appeal Hearing

December 18, 2008

Decision upon Application By:

City of Edmonton – Appellant

And

Workplace Health and Safety – Respondent

Board Members

Eugene Sarrasin – Appeal Panel Chair, Employer Representative,
Occupational Health and Safety Council
Wendy Clark – Public Representative
Occupational Health and Safety Council
Ernest Tessier – Worker Representative
Occupational Health and Safety Council

Appearances:

There were no appearances by any named party and the hearing was by written submission only.

The Appeal Panel (the Panel) convened on December 18, 2008 to hear an appeal pursuant to Section 16 of the *Occupational Health and Safety (OH&S) Act*. (Act)

Section 16 of the Act reads:

16(1) A person

- (a) to whom an order is issued under section 9, 10, 11, 12, 14, 25 or 33, or
 - (b) whose licence has been cancelled or suspended, may appeal the order, cancellation or suspension to the Council.
- (2) An appeal under subsection (1) shall be commenced by serving a notice of the appeal on a Director of Inspection within 30 days from the date that the order being appealed from was served on the person making the appeal.
- (3) After considering the matter being appealed, the Council may by order
- (a) confirm, revoke or vary the order being appealed,
 - (b) confirm the cancellation or suspension,
 - (c) reinstate the cancelled licence, certificate or permit,
 - (d) substitute a suspension for a cancellation, or
 - (e) remove or vary a suspension.
- (4) When an appeal is made to the Council under subsection (1), the Council shall hear the appeal and render a decision as soon as practicable.
- (5) An appeal lies to the Court of Queen's Bench from an order of the Council on a question of law or a question of jurisdiction and on hearing the matter the Court may make any order, including the awarding of costs, that the Court considers proper.
- (6) An appeal under subsection (5) shall be made by way of originating notice within 30 days from the date that the order of the Council is served on the person appealing the order of the Council.
- (7) When an appeal is commenced under subsection (1), the commencement of that appeal does not operate as a stay of the order, cancellation or suspension being appealed from except insofar as the chair or a vice-chair of the Council so directs.
- (8) When an appeal is commenced under subsection (5), the commencement of that appeal does not operate as a stay of the order of the Council being appealed from except insofar as a judge of the Court of Queen's Bench so directs.

The specific reasons for appeal are:

The City of Edmonton disagrees with the order issued by Workplace Health and Safety Officer Casey Leahey (the Officer) under Client Contact Report CLEY-7KEQCT. The Appellant contends the Occupational Health and Safety Act R.S.A. 2000, Chapter O-2, Section 3 provides an owner with a mechanism to assign the role of Prime Contractor to a contractor.

The respondents contend that:

- The Officer contends there is no prime contractor system in place at the worksite to ensure compliance with the OH&S Act, Regulation and Code. As no agreement is in force for this work site, the City of Edmonton is deemed to be the Prime Contractor from the time of the incident to the present.
- Further investigation has determined that verification for compliance to prime contractor legislation on behalf of the City of Edmonton has not been occurring.

The Issue to be Resolved:

Is the City of Edmonton the Prime Contractor in accordance with section 3 of the Act?

Submissions Considered by the Appeal Panel

From the Appellant, City of Edmonton

- OHSC Appeal Questionnaire – completed by Jeffrey D. Fitzgerald
- Contract Form between Michels Canada Co. and the City of Edmonton dated October 30, 2006.
- Contract General Conditions, pages 1, 2 and 19.
- Contract Supplementary General Conditions, page 1
- Design and Construction Meeting Minutes dated November 20, 2006, November 30, 2006, October 22, 2007, December 6, 2007, January 14, 2008, February 5, 2008, March 18, 2008, April 24, 2008, May 29, 2008, June 26, 2006, July 17, 2008, July 31, 2008 and September 4, 2008.

From the Respondent, Workplace, Health and Safety (WH&S)

- Package of information relating to the appeal obtained from both the Appellant and the Respondent including:
 - OHSC Appeal Questionnaire – completed by Jeffrey D. Fitzgerald
 - Client Contact Report CLEY-7KEQCT issued to the City of Edmonton on October 22, 2008, Tab 12 in the information binder.
 - WHSC overview, Tab 2 in the information binder.
 - Lead Investigator, Casey Leahey, notes, Tab 4 in the information binder.
 - Submission binder produced from WH&S, containing appellant's information, WH&S investigation, investigating officer notes, interviews and findings [as applicable]

Facts:

The following is a list of facts agreed to by the parties and considered by the appeal panel:

- There is a signed contract between the City of Edmonton and Michels Canada Co. dated October 30, 2006 assigning prime contractor responsibility to Michels Canada Co.
- Design and Construction meeting minutes reflect Michels Canada Co. is designated the prime contractor for the contract.

Other factual information considered by the Panel.

- Legal definitions of wording used in the Act.

Position of the Parties:

Appellant,

The City of Edmonton contends they are not the prime contractor as an agreement was signed October 30, 2006 which assigns prime contractor responsibility to Michels Canada Co. It is the prime contractor's responsibility to ensure compliance with all applicable legislation.

Respondent,

WHSC contends that no agreement was in force due to the absence of any system or process that would ensure compliance with the Act and regulations at the work site. WHSC recognizes the City of Edmonton as the work site prime contractor.

Remedy Requested:

The City of Edmonton is requesting the order issued in Client Contact Report CLEY-7KEQCT be revoked.

Decision:

The prime contractor requirement is defined in the Occupational Health and Safety Act R.S.A. 2000, which states:

- 3(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.*

As per the Act section 3(2) (a) there is a signed contract assigning prime contractor responsibility from the City of Edmonton to Michels Canada Co.

The legal definition defined in Blacks Law Dictionary of “in force” as it relates to contracts means “legally valid.” As per the Act section 3(2) (b) the agreement between the City of Edmonton and Michels Canada Co. assigning prime contractor responsibility is legally valid (in force).

The decision of the Panel is:

The order issued under Client Contact Report CLEY-7KEQCT is revoked.

Occupational Health and Safety Council Appeal Panel

Eugene Sarrasin, Appeal Panel Chair
Occupational Health and Safety Council
Employer Representative

Wendy Clark
Occupational Health and Safety Council
Public Representative

Ernest Tessier
Occupational Health and Safety Council
Worker Representative