Attacking the Underground Economy in the ICI Sector of Ontario's Construction Industry

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Executive Summary

1. This study was commissioned by the Ontario Construction Secretariat (OCS). The statutory mandate of the OCS is limited to the ICI sector. For this reason, *the recommendations of this study are focused on the ICI sector,* although we recognize that underground activities are also a serious problem in other sectors of the construction industry. We believe that following appropriate study and consultations, our recommendations also should be considered for application to the other sectors of the construction industry. However, there is no justification, in our view, for delaying the application of these recommendations in the ICI sector.

2. In the ICI sector, the foundation of the underground economy is the widespread practice of styling workers as "independent operators." Employers who follow this strategy:

    - escape their obligation to pay WSIB premiums,
    - avoid the requirement to make employer contributions to CPP and EI,
    - get out of the need to pay *Employment Standards Act* benefits for vacations and statutory holidays, and
    - are relieved of the requirement to make source deductions under the *Income Tax Act*.

    By styling their workers as "independent operators," illegitimate construction contractors can reduce their labour costs by as much as 50%. The annual revenue losses to governments and the WSIB exceed $1.5 billion annually. The underground economy erodes occupational health and safety, undermines the apprenticeship system and makes a mockery of the principle of a level playing field. Time and again, legitimate construction employers told us that they cannot compete against underground practices.

3. In recent years, governments and the WSIB have taken important steps to strengthen enforcement in the construction industry. These have included increased resources for audits, more site inspections, and Canada Customs and Revenue Agency's (CCRA) Contract Payment Reporting System (CPRS). Although these steps have slowed the advance of the underground economy, they have not halted its advance in the ICI sector. A new approach is needed. Taken as a whole, the recommendations we propose will enable a strengthened

approach to be taken to enforcement against those participating in underground economy activities in the ICI sector.

4. The proposed new approach to enforcement would rest on four pillars:

    1. Revocation of the current exemption of "independent operators" in the ICI sector from mandatory individual coverage under the WSIB and a statutory or regulatory reform that establishes the "responsibility of the engager" for payment of WSIB premiums;[1]

    2. A *Construction Fair Wage System* that would be applicable to *all* construction undertaken by the provincial government or any public sector or para-public sector body that receives provincial funds.

    3. An industry role in enforcement through a *Construction Industry Employment Practices Board* which would work under an administrative agreement with the Ministry of Labour and the Ministry of Training, Colleges and Universities;

    4. A system of Construction Employer Registration, based on enforcement of section 5 of the Construction Project Regulations to the *Occupational Health and Safety Act*. This regulation requires construction employers to provide basic business information to site inspectors as per Form 1000.

5. The Ministry of Labour also should explore with the industry the merits and feasibility of a system of mandatory registration of construction workers. The Ministry should also explore with the industry and with the Construction Safety Association of Ontario the possible role of a system worker registration to improved health and safety performance in the construction industry

6. *Trades Qualification and Apprenticeship Act (TQAA):* The current enforcement regime under the *TQAA* is inadequate. In the voluntary trades, enforcement is not possible. In the mandatory trades, the central problem is the infrequency of job site enforcement and the relative insignificance of the penalty (*i.e.*, being forced off the job, at least while the inspector is present.) Our core recommendations will address part of the problem. The

[1] The "responsibility of the engager" is a new concept which is discussed in more detail in the main study. In the first instance, the responsibility for WSIB premiums should rest with the engager of labour. This responsibility would apply irrespective of whether the engaged workers are employees, dependent contractors, independent operators or crew leaders who engage subordinate workers. An engager of construction labour would only be relieved of responsibility for WSIB premiums if the entity (person, partnership, company) that is engaged is otherwise properly registered with the WSIB and provides a Certificate of Clearance.

proposed *Construction Fair Wage System* would strengthen the requirement for Certificates of Qualification (or apprenticeship registrations) for tradespersons in mandatory trades working on public sector jobs. Under this policy, the provincial government would support in practice the policy goals that it espouses. The proposed *Construction Industry Employment Practices Board* would significantly increase site inspections. However, beyond these steps, it is also necessary to review the system of trade regulation with a view to considering whether the number of mandatory trades in the ICI sector should be increased.

7. Sub-contract Reporting: Since 1999, under the Contract Payment Reporting System, CCRA has required contractors to report the value of sub-contracts and the business identification number or SIN of sub-contractors. The WSIB leverages this system by requiring construction employers to provide their CPRS records. The Ontario government, however, does not participate in CPRS. We recommend that this decision be reversed.

8. The widespread prevalence of underground practices in Ontario's construction industry constitutes an urgent challenge to public policy. The recommendations we have set out provide a new approach to enforcement which will significantly augment current enforcement strategies. It is imperative that the Ontario government act quickly and decisively before conditions in the ICI sector deteriorate further.

We respectfully recommend to the OCS that it present these proposals to the Ontario government for early implementation to stem the deterioration of the legitimate ICI sector and restore a level playing field.

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March 15, 2004

Summary of Recommendations

A. WSIB Coverage

1. In the ICI sector, the independent operator exemption should be repealed.
2. In the ICI sector, executive officers of a business should be allowed to work on a construction site only if they have WSIB coverage, either through their engager or through their own business.
3. In the ICI sector, the responsibility for WSIB premiums should rest with the engager of labour. This responsibility would apply irrespective of whether the engaged workers are employees, dependent contractors, independent operators or crew leaders who engage subordinate workers. An engager of construction labour would only be relieved of responsibility for WSIB premiums if the entity (person, partnership, company) that is engaged is otherwise properly registered with the WSIB and provides a current Certificate of Clearance.
4. Certificates of Clearance should be subject to renewal, but should be valid for no longer than 30 days.
5. The current system of joint and several liability should remain unchanged.

B. Construction Fair Wage System

1. As a first step, the provincial government should re-enact the 1995 Order-in-Council with Fair Wage Schedules established in accordance with the 1995 formula and updated on April 1st of each year thereafter.
2. The *Ontario Construction Fair Wage System* should mandate the publication and updating of schedules for each construction trade on an annual basis. We recommend September 1st of each year, which allows for implementation of negotiated increases which typically occur on May 1st of each year, pursuant to the legislated bargaining cycle in the ICI sector.
3. The *Ontario Construction Fair Wage System* should use the Ontario Labour Relations Board Areas as the applicable wage zones.
4. In addition to the provincial government, the *Ontario Construction Fair Wage System* should apply to any part of the public sector in Ontario that is in receipt of provincial monies or provincial guarantees for loans, including, but not limited to:
    i. provincial government corporations, agencies, authorities, boards, etc.,
    ii. municipalities,
    iii. boards of education,
    iv. colleges and universities,
    v. hospitals,

vi. any company, agency or authority receiving capital funding from the Ontario government.

5. The *Ontario Construction Fair Wage System* should apply to all construction or repair work, regardless of the value of the contract.

6. In the ICI sector[2], Fair Wage Schedules should be based on the following formula: total compensation should mirror the prevailing negotiated wage package for the relevant trade in each Labour Board area. If the applicable negotiated wage package is reduced by local area modification or other procedure for institutional construction, a consequent adjustment should be made in the Fair Wage Schedule for that trade.

7. The Fair Wage Schedules under the *Ontario Construction Fair Wage System* should apply equally to all persons performing construction work on covered work sites, including therefore, wage-paid and piece-rate paid employees, dependent contractors, and independent operators. Where an hourly wage is not the method of remuneration, the effective hourly wage (*i.e.*, gross remuneration divided by total hours) should be equal to or greater than the hourly rate specified in the applicable Fair Wage Schedule, plus the applicable allowance for benefits.

8. The *Ontario Construction Fair Wage System* should provide that construction employers who work in the public sector will be required to register with a Public Sector Construction Registry (PSCR) which would be maintained and administered by Management Board of Cabinet. The PSCR will be administered by an inter-ministerial body of senior public servants. Registration information will be the same as that required under section 5 of Regulation 213/91 (Construction Projects) under the *Occupational Health and Safety Act*, namely:

    i. business information number, as required by the Canada Customs and Revenue Agency (CCRA);
    ii. GST and, if applicable, RST numbers;
    iii. corporation registration number under the relevant incorporating Act, or other business registration number, if the entity is not incorporated;
    iv. WSIB registration number;
    v. head office and Ontario office location(s);
    vi. principal officers;
    vii. a list of related companies (within the meaning of "associated or related activities or businesses" of s.1(4) of the *Labour Relations Act*);

[2] As per the discussion in Chapter One, our recommendations are limited to the ICI sector. The 1995 Order-in Council also applied to other construction sectors, notably civil construction. While it may be appropriate to extend the Fair Wage System to all construction sectors, our formal recommendations are confined to the ICI sector. If applied to other sectors, the principle set out here may require, for example, the Minister of Labour to consult with the OLRB as to the prevailing collective agreement within a particular Board Area. This issue does not arise in the ICI sector where all agreements are provincial, by statutory requirement.

9. The *Ontario Construction Fair Wage System* should provide that prior to commencing any public sector work, a construction employer must file with the entity for whom the work is being performed a statutory declaration that the employer is in compliance with all statutory obligations, including those under the *Income Tax Act*, the *Workplace Safety and Insurance Act*, and the *Employment Standards Act*, together with a statement confirming that on all public sector work, the employer, when engaging employees in mandatory trades, as established under the *Trades Qualification and Apprenticeship Act* (TQAA), will employ only workers who hold Certificates of Qualification or who are properly registered as apprentices under the T*QAA*.

10. The *Ontario Construction Fair Wage System* should provide that on a monthly basis, construction employers working on public sector work will file with the entity for whom the work is being performed a certified statement of payroll setting out by trade the names of the employees, their hours during the previous month, their gross wages and their effective hourly wage, net of overtime. This reporting would be similar to longstanding similar requirements for monthly certified payroll statements under the U.S. *Davis-Bacon Act*.

11. The *Ontario Construction Fair Wage System* should provide that construction employers found to be in contravention of obligations under the *Ontario Construction Fair Wages Schedules* or any of the statutes referenced by the *Ontario Construction Fair Wages Schedules* would be subject to removal from the PSCR for a period not exceeding two years, in the discretion of Management Board of Cabinet, during which time they would be barred from bidding on, or performing as sub-contractors, any public sector work.

C. Construction Industry Employment Practices Board (CIEPB)

1. Through an Administrative Agreement with the Ministry of Labour and with the Ministry of Training, Colleges and Universities, the Ontario government should delegate certain inspection and reporting responsibilities to the Construction Industry Employment Practices Board (CIEPB). This may require an amendment to the relevant statutes.

2. The CIEPB will be a non-profit corporation with a Board of Directors composed of:
    - industry representatives, equally divided between labour and management,
    - provincial and federal government representatives and representatives of the WSIB, and
    - persons nominated by the provincial government to represent other public interests.

3. The CIEPB will be funded either through an operating grant provided by the WSIB or through a surcharge on WSIB premiums. If the surcharge route is followed, the amount of the surcharge will be determined by the Board of Directors of the CIEPB. The CIEPB would be empowered to negotiate financial support from the provincial government based on expected increases in tax revenues or income from fines for non-compliance.

4. The CIEPB will employ industry experienced inspectors on such terms as it deems appropriate and focus their inspection activity as per its annual strategic plan. The focus of CIEPB activity will be site inspections, not audits.

5. CIEPB inspectors should have a statutory right of access onto any construction site and will have the right to interview workers, and the power to require production of individual identification, statutory information forms, evidence of WSIB registration, and Certificates of Qualification (where required).

6. CIEPB inspectors will have the statutory right to make relevant inquiries to ascertain whether workers are employees or independent contractors.

7. CIEPB inspectors will have the statutory duty to advise workers of their entitlements under the *Employment Standards Act* and Fair Wage Schedules. CIEPB inspectors may be authorized by workers to file *Employment Standards Act* complaints, Fair Wage complaints, or to request an occupational health and safety inspection.

8. Where a construction employer is not compliant with the *Employment Standards Act* or the *Apprenticeship and Trades Qualification Act*, a CIESB inspector may endeavour to achieve voluntary compliance. In the absence of a compliance agreement (endorsed by the Ministry), the CIEPB will refer the matter to the Ministry of Labour for enforcement.

9. Where a construction employer is believed by a CIEPB inspector to be non-compliant with WSIB and CCRA requirements, the CIEPB will report the case to the WSIB and/or CCRA.

10. The Administrative Services Agreement between the CIEPB and the relevant ministries will provide that CIEPB referrals will be acted on within not more than three business days, where "acting on" means issuing a compliance order or conducting a further investigation with a view to subsequently issuing a compliance order, if appropriate, within not more than three further days.

11. On a quarterly basis, the CIEPB will report its enforcement activities, referrals and the results of referrals. With respect to referrals to CCRA, these may be covered by confidentiality provisions of the *Income Tax Act*. On an annual basis, the CIEPB will report its enforcement activities, referrals and the results of referrals to the Minister of Labour who will convey this report to the Legislature.

12. The Administrative Services Agreement between the CIEPB and the relevant ministries will provide that CIEPB inspectors will be trained to a standard satisfactory to these ministries.

13. Subject to such policies that it may develop, and with the agreement of the relevant Ministries and the WSIB, the CIEPB may enter into an agreement with another body to carry out some or all of the mandate of the CIEPB with respect to a particular trade.

D. Contractor Registration

1. With due notice to the industry, registration requirements under section 5 of Regulation 213/91 (Construction Projects) of the *Occupational Health and Safety Act* should be strictly and comprehensively enforced.

2. Evidence of registration should be located on the site at which employers are working, per the current regulation, and should also be filed over the Internet, or otherwise, with the Ministry of Labour as soon as the employer commences work on a project.

E. Enforcement Issues:

1. The Ministry of Labour should explore with the industry the merits and feasibility of a system of mandatory registration of construction workers. The Ministry should also explore with the industry and with the Construction Safety Association of Ontario the possible role of a system worker registration to improved health and safety performance in the construction industry.
2. *Trades Qualifications and Apprenticeship Act*:
    a. In conjunction with the construction industry, the province should undertake a systematic review of voluntary and mandatory trade certification in the construction industry.
    b. All tradespersons working in the mandatory trades should be required to produce Certificates of Qualification, per the TQAA, immediately and upon request. The time permitted for an apprentice to satisfy an inspector that he or she is enrolled in an approved apprenticeship should be significantly reduced from the current three months.

3. Penalties and Liabilities: Prosecutions should be dealt with by the Ontario Superior Court of Justice.
4. *Employment Standards Act:* The Ministry of Labour should undertake a public information effort to advise construction workers of their entitlements under the ESA.
5. Contract Payment Reporting System: The Ontario government and all other public sector and quasi-public sector entities who undertake construction work should, if they are not already doing so, comply with the reporting requirements of CCRA's Contract Payment Reporting System.

Contents

Chapter 1. Introduction

Origins of this Study

This study was commissioned by the Ontario Construction Secretariat (OCS).

The OCS is a joint labour-management organization established under the *Ontario Labour Relations Act, R.S.O., 1995, as amended.* The mandate of the OCS is to address issues of common concern to unions and employers in the institutional-commercial-industrial sector (ICI) of Ontario's construction industry. The OCS receives no operating monies from government. Funding for the OCS is derived from equal labour and management contributions. In addition to its elected Board members, representatives of the Ministry of Economic Development and Trade, the Ministry of Training, Colleges and Universities, and the Ministry of Labour also participate as non-voting members of the Board of Directors.

In 1994, in response to a growing concern expressed by contractors and construction unions, the OCS conducted a survey of construction workers regarding their involvement in underground practices.[1] In 1997, the OCS presented its concerns to the Ontario government.[2]

In 1998, the OCS commissioned a study on the magnitude of the underground economy in Ontario's construction industry.[3] This study also estimated the tax losses to the federal and provincial governments and also contribution losses to the Workplace Safety and Insurance Board (WSIB). In 2001, the OCS updated these estimates.[4] The updated analysis showed an increase in underground activity and estimated that over the period, 1998-2000, the revenue loss to the federal and provincial governments and to the WSIB was approximately $1.3 billion annually.

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[1] Ontario Construction Secretariat, *Underground Work: Undermining the Construction Industry,* November 1995. Available at http://www.undergroundeconomy.ca/reports.html#report_01

[2] Ontario Construction Secretariat, *The Underground Economy: Bad for the Construction Industry, Bad for Government Too*, February 1997. Available at http://www.undergroundeconomy.ca/reports.html#report_01

[3] Ontario Construction Secretariat, *The Underground Economy in Ontario's Construction Industry*, November 1998, study prepared by ARA Consulting Group, John O'Grady Consulting Ltd. and Greg Lampert Economic Consultant Inc. Available at http://www.undergroundeconomy.ca/reports.html#report_01

[4] Ontario Construction Secretariat, *Estimates of Revenue Losses to Governments as a Result of Underground Practices in the Ontario Construction Industry: 1995-1997 compared to 1998-2000*, August 2001, study prepared by Prism Economics and Analysis Available at http://www.undergroundeconomy.ca/reports.html#report_01

In 2002, the OCS published a study analyzing competitive disadvantage in Ontario's ICI construction industry. This study reported that "both labour and management expressed deep frustrations as to what was referred to as the absence of a level playing field between the unionized and non-unionized sectors…" [5]

Mandate and Scope of the Study

In response to increased concern over the impact of the underground economy, the OCS asked T.E. (Tim) Armstrong (T.E. Armstrong Consulting) and John O'Grady (Prism Economics and Analysis) to examine the underpinnings of the underground economy and to recommend practical steps to roll back the underground economy in the ICI sector.

The statutory mandate of the OCS is limited to the ICI sector. For this reason, *the recommendations of this study are focused on the ICI sector.* We recognize, however, that underground activities are also a serious problem in other sectors of the construction industry. While the recommendations of this study centre on the problems faced by the ICI sector, we believe that our recommendations are also relevant to other sectors of Ontario's construction industry.

Implicit in our mandate was a recognition that governments alone cannot solve the problem of the underground economy. The legitimate construction industry – both unions and employers – must also step up to plate and work with governments and the WSIB to restore a level playing field.

What is meant by the Underground Economy?

The term "underground economy" can convey different meanings, depending on the context in which it is used. In its 1994 study of the underground economy, Statistics Canada used the term to mean economic activity that was not measured in the system of national accounts.[6] In other words, even if a construction job were undertaken using employment practices that were not compliant with legal requirements, the work would only have been considered

[5] Ontario Construction Secretariat, *ICI Construction in Ontario: A Review of Competitive Disadvantage and its Measurement*, May 2002, report prepared by T.E. (Tim) Armstrong, Arthur Donner and Stefan Dupré. p 27. Available at http://www.iciconstruction.com/ site /stats/statatics_publications.html The 'Armstrong Report' was specifically focused on the use of local area modification procedures to address competitive disadvantage, per s 163 of the *Ontario Labour Relations Act*. In an important observation, the Armstrong Report concluded that: "…if an arbitrator were to be persuaded that the 'cost' gap between a unionized and non-unionized contractor was attributable solely or even substantially to the costs of statutory compliance borne by the unionized firm – costs unlawfully avoided by the non-union firm – it would be difficult to justify modifying the provincial agreement at the expense of the employees of the complying unionized firm." [pp 42-43]

[6] Statistics Canada, *The Size of the Underground Economy in Canada*, by Gylliane Gervais, 1994 Catalogue No. 13-603E, No. 2

"underground" if the system of national accounts failed to measure or otherwise estimate the labour input and the final economic output. As Statistics Canada noted, very little construction work goes unmeasured in this sense.

The 1998 study, commissioned by the Ontario Construction Secretariat, focused on revenue losses to governments and to government agencies, such as the WSIB. Non-compliant activity was therefore activity that *unlawfully* under-reported or failed to report construction-related income or construction related transactions. Because the OCS report was focused on *unlawful* under-reporting, it necessarily used extremely conservative assumptions.

As will be discussed in Chapter Three of this Report, among the most important types of illegitimate conduct in ICI construction, is the *loophole* that allows many construction employers to engage workers and style them as "independent operators," rather than as employees. This practice enables construction employers to evade their obligations for source deductions under the *Income Tax Act*, escape contribution requirements for EI and CPP, ignore employee entitlements under the *Employment Standards Act*, omit to register with the WSIB, or, if registered, omit to pay premiums on a large number of their workers, and largely ignore requirements under the *Apprenticeship Trades and Qualifications Act.*

In this Report, we use the term "underground economy" or "underground practices" to include all unlawful actions that are contrary to the principle of a level playing field in the construction industry, as well as actions that exploit "loopholes" in a manner that ought to be regarded as illegitimate or non-compliant with the intent of public policy. We are not including, however, practices that may contravene collective agreements, but are not otherwise non-compliant.[7]

Underground Practices directly challenge Public Policy

The widespread prevalence of underground practices in Ontario's construction industry constitutes an urgent challenge to public policy.

1. Underground practices erode the fiscal base of governments and public agencies. The OCS's 2001 study estimated that the revenue loss was approximately $1.3 billion annually between 1998 and 2000. The increase in construction work since then would increase this estimate by at least 20%.[8]

2. The underground economy mocks the principle of level playing field. Time and again, we heard legitimate construction employers protest that, "we cannot compete."

[7] In Quebec, the CCQ includes contraventions of collective agreements in the "l'économie noire."

[8] Since 1998-2000, employment in construction has increased by over 18%. Construction spending, in nominal terms, has increased by over 25%. Statistics Canada, *Labour Force Survey*. CanaData, *Annual Construction Forecast*.

Turning a blind eye to underground practices rewards the cheaters, while penalizing those who pay their fair share.

3. The growth of the underground economy is undermining the apprenticeship system. As a percentage of employed workers in Ontario's construction industry, apprentices dropped from 7.7% in 1991 to 5.9% in 2001 – the most recent year for which data is available.[9] The fall in apprenticeship ratios is a direct challenge to the new government's pledge to *double* the number of apprentices by 2008.[10] Without rolling back the underground economy in the construction industry, it is inconceivable that this pledge will be met.

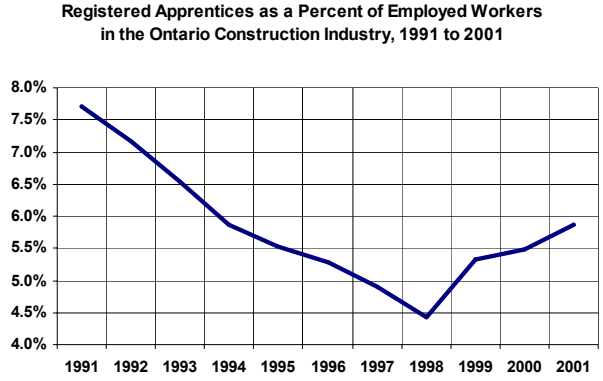
4. The underground economy jeopardizes the WSIB's prevention priority for workplace health and safety. By removing themselves from the WSIB system, underground contractors have little, if any, incentive to provide safe working conditions for their workers.

Construction is not Like Other Industries

From a public policy perspective, it is appropriate to ask whether there is a basis for devising regulations or statutes that are specific to the construction industry. A review of the construction industry's distinct characteristics, as well as statutory history, lead to an affirmative conclusion.

The construction industry is unique. *Only solutions that reflect the industry's distinct realities will succeed.* This principle has been long recognized in labour relations legislation. The

[9] Apprenticeship data from Ministry of Training, Colleges and Universities as published by the OCS. Employment data from Statistics Canada, CANSIM, Table No. 282-0012. The following graph shows the downward trend in apprentice ratios:



[10] Liberal Party of Ontario, *Achieving Our Potential: The Liberal Plan for Economic Growth*, p 12

Ontario Labour Relations Act mirrors the practice of every other Canadian jurisdiction in treating construction separately from other sectors of the economy.[11] Similarly the *Construction Lien Act* sets out a distinct system of commercial liability for construction projects.

What are the features that make the construction industry unique? We offer the following sketch of the industry's distinct features:

- Mobility: construction workers move from site to site and often from employer to employer. The duration of assignments can range from a single day to longer than a year.
- Specialization: the construction industry is characterized by a much higher proportion of specialized employers and specialized workers than most other industries. Over 90% of construction workers are employed in a recognized trade.[12]
- A High Degree of Self-Direction: the vast majority of construction projects are unique. An essential attribute of trades training is learning to apply general trade skills to specific projects. Indeed, that is why apprenticeships require 3-5 years of experience for qualification as a journeyperson. An important consequence of the trade tradition in construction is a high degree of self-direction on the part of many tradespersons. This high degree of self-direction is often accompanied by individual ownership of many of the common tools associated with a trade. These traditions, which are both pronounced and distinct in the construction industry, complicate the distinction between an employee and an independent operator.[13]
- Apprenticeship: the apprenticeship system is the principal means of maintaining the industry's skill base. The construction industry accounts for 35-45% of all apprentices.[14]

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[11] In Quebec, the recognition of the distinctive character of construction is taken a step further. Since 1968, construction labour relations have been governed by a separate statute. In 1987 this legislation was amended to integrate responsibility for vocational training in construction trades. For a description of the statutory system in Quebec, see Jean Charest, "Labor market regulation and labor relations in the construction industry: the special case of Quebec within the Canadian context," in Gerhard Bosch and Peter Philips, eds., *Building Chaos: An international comparison of deregulation in the construction industry*, Routledge (London, U.K., 2003)

[12] An exceptionally high degree of both "mobility" and "specialization" were viewed as defining characteristics of the construction industry by the *Report of the Industrial Inquiry Commission into bargaining patterns in the Construction Industry in Ontario* (May, 1976), commonly known as the "Franks Report." See pp 7-9

[13] The importance of a high degree of self-direction in defining the labour process in construction receives a full chapter treatment in Herbert Applebaum, *Construction Workers, U.S.A.*, Greenwood Press, (Westport, Conn., 1999). See chapter 5, "Independence and Autonomy."

[14] Based on data supplied by the Canadian Council of Directors of Apprenticeship

- Sub-Contracting: long chains of sub-contracting are pervasive in the industry. As one scholar noted, "while sub-contracting is a common feature of many industries, the scale on which it is used in the construction sector is unusual."[15] The pervasiveness of sub-contracting has significant implications for fixing the locus of responsibility for employment conditions, health and safety, WSIB coverage and liability for source deductions. As will be described later in this report, *without carefully crafted policies, the complex chain of sub-contracting can lead to the dilution of labour standards and the evasion of statutory responsibilities.*

- Sub-Sub-Contracting: It is common practice in some trades for a trade contractor (who is sub-contracted by a general contractor) to further sub-contract work to a worker who subsequently engages other workers to work alongside him or her on the job. This practice is especially common in the interior finishing and roofing trades, but may also occur in other trades. Sub-sub-contracting can erroneously be interpreted as evidence that an individual is an employer, not a worker.

- Dependent Contractors: Many employment relationships in construction have the surface appearance of a 'contract for services' between a construction company and an "independent operator." For example, workers may be paid a piece rate or a job rate, may be expected to provide their own hand tools, and may work for more than one construction company. In some cases, workers will be allowed to (or expected to) have family members or acquaintances work alongside them and be paid out of the piece rate. Typically, these workers are told that they are "independent operators," rather than employees. They may be required to sign a statement purporting to acknowledge this. While there may be a surface appearance of "independent operator" status, the economic reality is frequently quite different. What are portrayed as indicators of "independent operator" status are more often manifestations of profoundly unequal economic power that leaves many construction workers with no alternative but to accept work on sub-standard terms.

- Liability: liability for improperly executed work is long-lived and financially significant. As a result, many companies use elaborate business organization strategies to limit liability, including the use of shell companies and related companies.

- Competition is based chiefly on Labour Cost: material costs and construction methods are fairly standard across construction employers. As a result, labour costs are the predominant factor in establishing a competitive edge. Unlike employees in most industries, construction workers face frequent spells of unemployment between jobs. As well, employment in construction is subject to a boom and bust cycle. Except during boom periods, few construction workers are in a position to refuse an employment opportunity, even when the wages and working conditions are substandard. In the absence of statutory or other institutional regulation, the normal, competitive dynamic of the construction labour market lends itself to exploitation of the workforce.

[15] Geoffrey Briscoe, *The Economics of the Construction Industry*, Batsford, (London, 1988), p 13

- Regional and Multi-Employer Wage Structures: the construction industry is distinct in the prevalence of multi-employer collective agreements. While multi-employer agreements can be found occasionally in other industries, in construction, such agreements are the norm. Construction labour markets have a strong regional character, although in some trades, the extent of geographic mobility is so great that wage structures are provincial. Nevertheless, the norm is regionally differentiated wage structures. This is especially relevant in establishing regulated prevailing wage standards.

- Tradition of Joint Labour-Management Initiatives: while instances of labour-management initiatives can be found in many industries, the construction industry is characterized, in most trades, by an elaborate and institutionalized system of labour-management co-operation. These initiatives include jointly administered benefit plans and pension plans, training funds, industry promotion funds, and apprenticeship systems. Indeed, the OCS, itself, is a reflection of this long history of joint labour-management initiative. The tradition of joint labour-management initiatives makes industry-based solutions feasible in the construction industry that would be unworkable in other industries.

- High Degree of Statutory Direction: in Ontario, and in other jurisdictions, there is a much higher degree of statutory regulation of the labour market in construction than in other industries. In the ICI sector, and now also in the Greater Toronto Area's residential sector, the *Ontario Labour Relations Act (OLRA)* specifies the duration and expiry date of collective agreements. No other sector is subject to this type of regulation. The GTA residential sector is the only area of the *private* sector where there is a legislated removal of the right to strike. The OLRA also sets out detailed formulae concerning employers' rights to move workers across local boundaries and to select workers based solely on discretion. In all other sectors, such matters are left to direct bargaining. The OLRA also sets out a procedure for arbitration of employer initiated changes to a collective agreement during the term of the agreement, based on evidence of competitive disadvantage. This procedure is available only to construction employers. The *Apprenticeship and Trades Qualification Act* requires crane operators and tradespersons in the mechanical and electrical trades to hold certificates of qualification, if they work in construction. The requirement does not apply to tradespersons working outside of construction.

Construction, in short, is not like other industries. There is a long history of recognizing that construction is different. That history cuts across labour relations, trade regulation, and commercial liability.

The distinctive features of the construction industry have two important implications for dealing with underground practices:

First, the tradition of joint labour-management initiatives make the construction industry well suited to a formalized industry role in enforcement strategy.

Second, the pervasive statutory recognition that the construction industry is different from other industries provides strong policy and legal support for legislative and regulatory solutions that are specific to the construction industry.

Notable Steps have been Taken

Governments and the WSIB have taken notable steps to strengthen enforcement in the construction industry. Below we describe a number of these steps.

- Canada Customs and Revenue Agency (CCRA) employs approximately 600 staff whose enforcement activities are focused on the construction industry. Audits are based on reporting anomalies, assessments of non-compliance risk, and random selection. In 1999, CCRA introduced the Contract Payment Reporting System (CPRS) which requires all construction businesses to report annually the details of payments to sub-contractors and to identify their business number, GST number or SIN.[16] The CPRS is central to CCRA's enforcement strategy in the construction industry. Additional information on the CPRS is provided in Appendix A to this chapter. Although CPRS is mandatory for private construction, at present, the Ontario public sector does not participate in the CPRS.

- To discourage cash payments, especially in residential renovation work, CCRA is collaborating with the Canadian Home Builders Association on a "Get It In Writing Campaign."[17]

- In 1999, the Ontario government enacted the *Fairness is a Two-Way Street Act (Construction Labour Mobility), 1999.* The *Act* imposes registration requirements and restrictions on Quebec workers and contractors that are similar to those that apply to Ontario workers and contractors in Quebec. Pursuant to the *Act*, the government established the Jobs Protection Office (JPO) in the Ministry of Labour. The JPO has 4 inspectors who work in Eastern and North-Eastern Ontario. As well, the JPO has access to approximately 60 other inspectors who are designated to work with the JPO. The JPO conducts site inspections using its own staff and also co-ordinates multi-ministry inspections. Although focused on Quebec contractors and workers, these inspection activities have also uncovered Ontario contractors and workers who are not compliant with employment and tax-related obligations. JPO inspections commenced on March 9, 2002. Up to mid-summer 2003, there had been approximately 1,760 JPO inspections and 158 multi-ministry inspections. During the

[16] The authority for the Contract Payment Reporting System is Section 238 of the Regulations to the *Income Tax Act*.

[17] Additional information on the "Get It In Writing" campaign is available at: http://www.hiringacontractor.com/En/default.asp

same period, some 250 complaints have been received, most of them through the JPO's hot line. No estimates are available on the total amount of tax revenue generated by JPO enforcement activities. However, by mid-summer 2003, there had been a gain of roughly $7.2 million in Retail Sales Tax revenues and an increase in RST registrations in Eastern Ontario. What portion of this is attributable to the JPO cannot be ascertained.

- The Ministry of Labour understandably gives priority to enforcement of the *Occupational Health and Safety Act*. The enforcement division has approximately 80 inspectors who are assigned exclusively to the construction industry. Prior to 1998, inspections were conducted based on incidents, *i.e.*, accidents, complaints of unsafe conditions, refusal to work situations, or were randomly scheduled. Now the Construction Health and Safety Program of the Ministry operates in accordance with a sector plan based on assessment of risk. Eighty percent of construction inspections are targeted to priority firms, based on risk analysis criteria.[18] In undertaking its risk analysis, the Ministry is assisted by the Construction Sector Inter-Agency Group (CONSIG) whose members include senior representatives from the Ministry of Labour, the WSIB, and the Construction Safety Association of Ontario (CSAO).

- Following the Uptown Theatre collapse in early December of 2003, the Ministry of Labour's Construction Branch conducted a GTA blitz, involving approximately 25 inspectors. This was carried out in collaboration with the WSIB. The blitz involved some 500 field visits, resulting in approximately 400 remedial directions, including prosecutions and the issuance of tickets under the *Provincial Offences Act*. The blitz revealed to the Ministry a level of non-compliance on construction sites that was higher than previously anticipated.

- Pursuant to an operational review in 1999, the Ontario government instituted the Inspections, Investigations and Enforcement Project (IIE). The purpose of the IIE is to streamline and strengthen enforcement activities across 13 ministries that are responsible for some 75 statutes and approximately 5,000 public servants. The Ministry of Labour is the lead ministry. The IIE is supported by a 12-person secretariat.

- The WSIB has expanded its audit, site inspection and revenue recovery operations in the construction industry. The number of revenue recovery specialists who are assigned exclusively to the construction industry has increased from 3 to 16. In 2002, this group identified 693 firms who had not registered and thereby generated an additional $4.7 million in premium income. It is expected that the 2003 results will exceed those realized in 2002. The targets for the coming year have been substantially increased. With the increase in the number of revenue recovery

[18] The key factors in the risk analysis are: (1) employers having two or more lost time injuries in the previous year, (2) employers with their first lost time injury in the current year, and (3) employers referred to the Ministry of Labour by the CSAO or the WSIB.

specialists, the WSIB is targeting 7,500 previously unregistered firms with estimated premium assessments of $35 million.

- The WSIB has set up an industry advisory group for the construction industry, known as the Joint Advisory Implementation Group (JAIG). There are three subcommittees of JAIG, one dealing with unregistered firms and the underground economy; another dealing with the independent operator problem, and a third dealing with miscellaneous issues of non-compliance by registered firms. It is estimated that there are approximately 120 associations who are directly or indirectly represented by those on the JAIG working groups.

- The WSIB employs approximately 75 field auditors and 10 desk auditors whose efforts are focused on uncovering under-reported payroll and misclassified workers. These audits sometimes pick up workers who have been improperly characterized as "independent operators." Suspicions arise when a large contractor, with a substantial project, reports a low payroll. The WSIB is also alerted when excessive numbers of employees are reported as being in a rate group that has a low assessment attached to it.

- Since 1993, the Ministry of Labour has undertaken enforcement of the *Apprenticeship and Trades Qualification Act* on behalf of the Ministry of Training, Colleges and Universities. Six enforcement officers were transferred to the Ministry of Labour from the Ministry of Training, Colleges and Universities. In response to criticisms of weak enforcement by the Provincial Auditor, a pilot project aimed at strengthened enforcement was undertaken in the Niagara Peninsula region. A new memorandum of understanding is being drafted between the two Ministries to strengthen enforcement.

The above list is by no means a complete canvass of the enforcement initiatives of the federal and provincial governments and the WSIB. However, *this canvass of enforcement activity will serve to rectify any inaccurate perceptions that governments have been indifferent to the underground economy or failed to appreciate the threats that the underground economy poses to important public policy objectives.*

Current Strategies need to be Augmented

While the current enforcement strategies have slowed the advance of the underground economy, they have not halted its advance, let alone rolled it back. There are four broad weaknesses in the current enforcement regime.

1. The legal framework is deficient in its treatment of contractors who style their workers as "independent operators." This problem is particularly acute in the

construction industry which is characterized by extended chains of contracting and sub-contracting.

2. Enforcement of the *Apprenticeship Trades and Qualifications Act* is divided between the Ministry of Training, Colleges and Universities (MTCU) and the Ministry of Labour. The Ministry of Labour enforces through site inspections the requirement for a Certificate of Qualification in the compulsory trades. MTCU enforces ratio requirements between apprentices and journeypersons. However, there is little enforcement of the ratio requirements in the compulsory trades. In the non-compulsory trades, enforcement is impractical.

3. Although both the Ministry of Labour and the WSIB have made significant efforts to involve the construction industry, the industry role is essentially advisory and industry representatives do not play a formally recognized or defined role in detecting offenders or otherwise contributing to enforcement efforts.

4. In public sector construction, where low bid policies are unconstrained by an effective fair wage system, evasion of obligations through use of the "independent operator" loophole is said to be the norm, rather than the exception.

In this study, we will make recommendations that address each of these problems in the current enforcement regime. Taken as a whole, the recommendations that we propose constitute a new approach to enforcement in the construction industry. This new approach will operate along side the existing enforcement regimes and should add significant strength to those regimes.

A New Approach to Enforcement

The proposed new approach to enforcement will rest on four pillars:

1. Revocation of the current exemption of independent operators in the ICI sector from mandatory individual coverage under the WSIB and a statutory or regulatory reform that establishes the "responsibility of the engager" for payment of WSIB premiums.

2. An industry role in enforcement through a new *Construction Industry Employment Practices Board* which will work under an administrative agreement with the Ministry of Labour and the Ministry of Training, Colleges and Universities;

3. An *Ontario Construction Fair Wage System* applicable to all construction undertaken by the provincial government or any public sector or para-public sector body that receives provincial funds.

4. A system of Construction Employer Registration, based on enforcement of section 5 of the Construction Project Regulations to the *Occupational Health and Safety Act*.

While there are other initiatives that this report will recommend, and which will be helpful in rolling back the underground economy in the ICI sector, it is our proposals in these four areas that constitute the core of our recommendations.

Outline of the Report

Chapter Two of this report summarizes with whom we met and what we heard.

Chapter Three examines the nature of the underground economy in the ICI sector and the central importance to the underground economy of styling workers as "independent operators."

Chapter Four describes the problem of long chains of sub-contracting and how this distinct characteristic of the construction industry operates to frustrate enforcement of employment-related obligations. Chapter Four also describes the regulations and policies of Workers' Compensation Boards across Canada and indicates how several provinces have dealt more effectively with underground abuses.

Chapter Five examines construction in the public sector and concludes that Ontario needs to adopt a comprehensive fair wage system. This chapter describes the "prevailing wage" system that has operated at the federal level in the United States (*Davis-Bacon Act*) and the systems that operate in the border states of New York, Michigan and Ohio. Chapter Five proposes an *Ontario Construction Fair Wage System* that, if implemented and effectively enforced, should rid public sector construction of the underground practices that are now so pervasive.

Chapter Six presents the case for an industry role in enforcement and proposes a *Construction Industry Employment Practices Board*.

Chapter Seven reviews contractor registration practices and recommends enforcement of the existing requirements for construction employer registration under the Construction Project Regulations of the *Occupational Health and Safety Act*.

Chapter Eight examines a number of related enforcement issues, including trade regulation, information sharing and sub-contract reporting.

Chapter Nine summarizes our recommendations.

Acknowledgements

This report would not have been possible without the co-operation and assistance of officials in the Ontario government, CCRA and the WSIB. While the conclusions and recommendations in this report are the responsibility of the authors, the authors benefited from the advice and assistance of countless officials across a number of ministries and agencies.

Additionally, the authors also benefited from discussions with senior staff in Workers' Compensation Boards across Canada. The AFL-CIO Building Trades Department was instrumental in arranging meetings with U.S. officials to discuss the history and operation of the *Davis-Bacon* Act. Finally, the authors also benefited from regular consultations with the Executive and staff of the Ontario Construction Secretariat and with employer and union representatives in the construction industry.

Appendix A: Canada Customs and Revenue Agency (CCRA) Contract Payment Reporting System (CPRS)

Contract Payment Reporting System

The Canada Customs and Revenue Agency (CCRA) is committed to maintaining public confidence in the fairness and integrity of Canada's tax system. As part of its efforts to combat underground economic activity, the CCRA has actively worked with the provinces and the private sector to encourage compliance with Canada's tax laws. This will help to ensure that honest taxpayers are not disadvantaged by those who do not comply with the law. The **Contract Payment Reporting System** is a key element in these efforts to promote compliance in the construction industry.

The reporting system was originally introduced in 1996 on a voluntary participation basis. High levels of participation are critical to the effectiveness of any reporting system. Unfortunately, the levels of voluntary participation were too low to be effective. As a result, the system became mandatory when it was announced in the February 24, 1998, Federal Budget. At that time, the CCRA made a commitment to consult with the industry to determine the most effective approach for reporting payments to subcontractors.

The reporting system has now been modified to reflect concerns that were originally raised about its implementation. Particular attention has been paid to minimizing the administrative costs of compliance. Ongoing monitoring will ensure the system's effectiveness.

Beginning January 1, 1999, construction businesses have to record payments they make to subcontractors who provide construction services. The businesses have to report these payments to the CCRA. The due date for the first reporting period was extended from March 31, 2000, to June 30, 2000. However, to facilitate transition to the new reporting system information returns for all reporting periods beginning and ending in 1999 will not be required until June 30, 2000. Note that reporting of payments made before 1999 or for periods beginning before 1999are not required.

Who will have to report?

All individuals, partnerships, and corporations whose primary business activity is construction will have to report payments made to subcontractors. For these purposes, construction has been defined as erection, excavation, installation, alteration, modification, repair, improvement, demolition, destruction, dismantling, or removal of any structure or part, including but not limited to buildings, roads, and bridges. The construction industry has made recommendations that the CPRS be extended to cover businesses in other industry sectors that are also involved with home renovations. The CCRA, in an effort to level the playing field has begun discussions with these businesses to include them in the reporting process.

What type of payments have to be reported?

Payments to subcontractors for construction services have to be reported. Goods-only payments do not have to be reported. Mixed service and goods payments have to be reported if there is a service component of $500 or more per year. Wages paid to employees do not have to be included since they are reported on T4 slips.

Who is a subcontractor?

A subcontractor is an individual, partnership, or corporation that provides construction services.

Subcontractors include businesses that are below the $30,000 limit for goods and services tax (GST) registration purposes. Payments to contractors who provide other services -- such as bookkeepers, janitors, and lawyers -- do not have to be reported.

What information will be reported?

- **Subcontractor's name** - The name or style under which the subcontractor carried on business (i.e., the subcontractor's business name as it appears on invoices, or on the cheques a payer made to the subcontractor).
- **Address** - Although the address of the sub-contractor is no longer mandatory, contractors are encouraged to provide the address whenever possible.
- **Subcontractor's identification number** - One of the CCRA's identifiers. This is either the subcontractor's Business Number, that is the same as the GST registration number, or the social insurance number of those who do not have a business or a GST number.
- **Contract payments** - The total amount paid, or credited, to the subcontractor for the reporting period including goods and service tax/harmonized sales tax (GST/HST) and provincial sales tax. If the total amount paid for services to a particular subcontractor for the year is less than $500, the payer does not have to report payments made to this subcontractor.
- **Reporting period** - Businesses can report payments on either a calendar or fiscal-year basis. Payments made after December 31, 1998, have to be reported. Payments made on a fiscal-year basis do not have to be segregated into the calendar year in which they are paid.

When is the information due?

Information returns have to be filed 6 months from the end of the reporting period. To facilitate transition to the new reporting system, information returns for all reporting periods beginning and ending in 1999 will not be required until June 30, 2000. Note that reporting of payments made before 1999 or for periods beginning before 1999 is not required.

How will information be submitted?

The payment information can be provided in a T5018 Information Return, which consists of a T5018 Information Slip *Statement of Contract Payments*, and a T50185 Summary *Summary of Contract Payments*. In order to make it easier for contractors to send the required information we will accept other forms of reporting. Although the use of a specific for is not required, the information should be reported in a column format with one line for each contractor. A summary must be included that states the number of contractors and the total amount paid to them. We continue to encourage contractors to use the return and slips that are now available to ensure that all the required information is received.

The T5018 Information Return was mailed out to all GST registrants who had indicated that they were in the construction industry. The T5018 Information Return will also be available from your local TSO.

For more information

For more information, contact the Client Services section of any tax services office or visit the CCRA's Internet site at: **http://www.ccra-adrc.gc.ca/tax/business/contract/menu-e.html**

Contract Payment Reporting System

Questions and Answers

1. How does the reporting system work?

In general terms, a business whose primary activity is construction has to file a return to report amounts paid or credited for construction services and/or a combination of goods and services supplied by subcontractors.

For more information, see Income Tax Regulation 238.

2. When will the mandatory system be implemented?

The effective date for the Contract Payment Reporting System is January 1, 1999. Businesses have to ensure that their record-keeping systems capture the information necessary to file information returns for reporting periods beginning and ending in 1999, by June 30, 2000. This date has been extended from March 31, 2000, to facilitate contractors' transition to the new reporting system.

3. I'm not in business. Does the Contract Payment Reporting System apply to me?

If you are not in business then the reporting system does not apply to you. Examples of those who are not in business and therefore do not have to file an information return are:

- individual homeowners
- provincial and municipal governments
- non-profit organizations
- housing co-operatives

4. How do you define "construction"?

Construction means activities relating to the erection, installation, alteration, modification, repair, improvement, demolition, dismantling, or removal of any part of a building, structure, surface or subsurface construction.

See the attached tables for examples of **structures, surface or subsurface construction**, and **construction activities**.

5. What do you mean by "primary activity is construction"?

If more than 50% of a business' income earning activities are construction, its primary activity is construction. In many cases there are businesses that have significant amounts of construction done for them or by them, but this activity is not their principal business. If this is the case, the business does not have to report under the Contract Payment Reporting System. If it wants to do so voluntarily, the Canada Revenue Agency will accept the information.

Example

A natural gas company may do large amounts of construction to install pipelines. However, its principal business is gas transmission, not constructing pipelines. Therefore, this business would not fall under the reporting requirement.

6. What information will I have to file on the information slip?

For most contractors there will be little if any change in the information they already keep. There are only three items required to complete an information slip. A fourth item, the business address of the subcontractor, is not mandatory -- the contractor is encouraged to provide the information if it is available. For each subcontractor, the following information is required:

- **Name**: The name or trade name under which the subcontractor carried on business.
- **Address**: The business address of the subcontractor is no longer mandatory. However, contractors are encouraged to provide the information where possible.
- **Identifier**: Subcontractor's Business Number (BN) or, for an individual without a BN, the subcontractor's social insurance number (SIN).

  A BN is essentially the nine-digit GST/HST registration number. It should appear on invoices from the subcontractor. For corporations that do not have a GST/HST number, you have to ask for a BN. For individuals without a GST/HST number, you have to ask for a SIN.
- **Amount**: The total of amounts paid or credited to a subcontractor for construction services during the reporting period and/or a combination of goods and construction services. Amounts paid or credited include provincial sales tax, goods and services tax, and harmonized sales tax when these apply.

7. What is the reporting period?

Businesses can report payments on either a calendar or fiscal year basis. Payments made on a fiscal year basis do not have to be segregated into the calendar year in which they are paid. A review of this option will be undertaken at the end of two reporting cycles as part of the overall review of the system.

8. What does "paid or credited" mean?

This means when payment is made. This could be by cheque, cash, barter, or offset against amounts owing.

9. When will I have to report?

Information returns have to be filed within 6 months of the end of the reporting period. However, to facilitate transition to the new reporting system, information returns for all reporting periods beginning and ending in 1999 will not be required until June 30, 2000. Note that reporting of payments made before 1999 or for periods beginning before 1999 is not required.

10. How will the fiscal year reporting be handled?

For those who use the fiscal method of reporting, the following table shows when to file and for which period.

- **Reporting period**: Fiscal period starting in 1998 and ending in 1999
- **Filing date**: Not required
- **Reporting period**: Fiscal period starting and ending in 1999
- **Filing date**: June 30, 2000

Example

A business has a February 28 fiscal year-end. It would file as follows:

Reporting period: March 1, 1998 to February 28, 1999

Filing date: Not required

Reporting period:March 1, 1999 to February 29, 2000

Filing date: August 31, 2000 (six months after fiscal year-end)

11. When will I have to report if my business is permanently discontinued?

Information returns have to be filed within 30 days of the date that the business stops.

12. Will I have to report on all construction subcontractors, including the small ones?

Administratively, the CRA will not require an information slip if the subcontractor was paid or credited less than $500 total for services for the reporting period. If the reporting of these subcontractors simplifies your reporting, the CRA will accept the information.

13. Will barter transactions have to be reported on the information slip?

Yes. If a subcontractor was paid through the bartering of goods or services, the fair market value of the bartered goods or services would form part or all of the amount that has to be reported.

14. What happens if I ask for a Business Number or social insurance number and the subcontractor refuses to provide it?

The *Income Tax Act* gives you the authority to ask for a Business Number or social insurance number for the Contract Payment Reporting System. You have to make a reasonable effort to get this number. After you have done this, the responsibility shifts to any subcontractor who refuses to give one. Since the subcontractor would be subject to a penalty for not giving this information, you may be asked to prove that you asked the subcontractor for it. You can protect yourself by making your requests for information in writing, and keeping copies of such requests.

15. What happens to me as a subcontractor if I refuse to give a Business Number or social insurance number?

As a construction subcontractor you have to give your Business Number or social insurance number when requested by a contractor for the Contract Payment Reporting System. If you fail to do so, you may be penalized.

16. Will contractors be required to provide a copy of information slips to subcontractors?

As the information slips are not necessary for subcontractors to file their income tax returns, providing copies of the information slips to subcontractors will be optional for contractors. By making this optional, the CRA is also responding to industry concerns about possible increased administrative costs. From the point of view of fairness and transparency, we believe this information should be shared with subcontractors and we encourage contractors to do so.

17. If a subcontractor receives an information slip, should the subcontractor reconcile the amount on the information slip to the income reported for tax purposes?

As the information slips are not necessary for subcontractors to file their income tax returns, providing copies of the information slips to subcontractors will be optional for contractors. There is no requirement or expectation that subcontractors reconcile information slips they receive with income reported for tax purposes. The total amounts reported on the slips could include non-income amounts such as payment for goods, PST, and GST/HST.

18. What should I do if the amount on the information slip is significantly different from the amount I actually received?

As the information slips are not necessary for subcontractors to file their income tax returns, providing copies of the information slips to subcontractors will be optional for contractors. However, if you receive an information slip and you believe that the amount is significantly different from what you received, you should contact the issuer of the slip to ensure the amount reported is accurate.

19. Do I have to file the information slips I receive with my income tax return?

As the information slips are not necessary for subcontractors to file their income tax returns, providing copies of the information slips to subcontractors will be optional for contractors. However, if you receive an information slip, do not file it with your income tax return.

20. Once I have a Business Number or social insurance number, is there anything I should do to protect it?

As with social insurance numbers for T4 purposes, a Business Number and a social insurance number must be protected from improper use. Those who knowingly use such numbers in an unauthorized manner are subject to a fine of up to $5,000 or imprisonment for up to 12 months.

21. Will I have to prepare an information slip for every payment made during the reporting period?

No. The total of all amounts paid or credited to a subcontractor is reported on one slip for the reporting period.

22. I have multiple offices. Can I file information slips from each of them, as this would be simpler than trying to bring all the information into a single location?

The CRA recognizes that for practical purposes businesses may need to file information slips from more than one location. This type of filing is acceptable only if the BN account number has different reference numbers for each location.

Example

A contractor with offices in Québec and Edmonton has a single BN account number, 123456789, but multiple reference numbers. With the separate reference numbers, she can file information slips from both offices.

	BN Account #	Program Identifier	Reference #
Québec City files under BN	123456789	RT	0001
Edmonton Files under BN	123456789	RT	0002

23. What happens when a contractor makes a cheque out in the name of more than one subcontractor? This is sometimes done to ensure that a subcontractor's sub-trades are paid in order to minimize the possibility of liens against the job.

The system is structured to have contractors report only on those subcontractors they deal with directly. In a case such as this, the contractor would report the amount as a payment to the subcontractor. The subcontractor would be responsible for reporting the amount as payment to the subtrade.

Example

ABC General Contractor Inc. has a contract with XYZ Drywallers Ltd. to install drywall. XYZ has part of the work done by MNOP Plasters Inc. XYZ owes MNOP $1,000 for the work. ABC writes a cheque out to XYZ Drywallers Ltd. and MNOP Plasters Inc. in the amount of $1,000.

ABC would report the $1,000 payment to XYZ Drywallers Ltd., since it contracted with XYZ.

XYZ would report the $1,000 payment to MNOP Plasters Inc., since it contracted with MNOP.

24. When will I be able to get copies of the forms?

The Contract Payment Reporting information **return** and **slips** are now available. The paper forms will be available in February 2000.

25. What form should be used for reporting this information?

The payment information can be provided in a T5018 Information Return, which consists of a **T5018 Information Slip, *Statement of Contract Payments***, and a **T5018 Summary, *Summary of Contract Payments.***

If you want to complete your T5018 using a personal computer, you can get a copy of our **T5018 PDF fillable form**. If you use this form you can complete and print it but you cannot save it on your computer.

26. Can I report the CPRS payment information on other than the T5018 Information Return?

Yes. In order to make it easier for contractors to send the required information we will accept other forms of reporting. Although the use of a specific form is not required, the information should be reported in a column format with one line for each contractor. A summary must be included that states the number of contractors and the total amount paid to them. We continue to encourage contractors to use the **return** and **slips** that are now available to ensure that all the required information is received. Paper copies will be available in February 2000.

27. When will I be getting guides and other information on how the system will work?

The Contract Payment Reporting returns (including general information) will be available in February 2000.

28. What will happen if I don't file an information return or am late filing my return?

There are penalties for not filing and for filing information returns late. The CRA understands there may be difficulty in filing a new return. We will consider this in evaluating the application of any penalty.

29. Do I have to distinguish between purchases for services and for goods?

Payments to subcontractors for construction services have to be reported. Goods-only payments do not have to be reported. Mixed service and goods payments have to be reported if there is a total annual service component of $500 or more.

30. Do I have to report payments to employees?

No. Payments for employee salaries are not to be reported, as they are already included in T4 information slips. If an employee also performs construction services as a subcontractor, those subcontract amounts should be reported on a Contract Payment Reporting information slip.

31. What will stop contractors from colluding with subcontractors to avoid reporting on contract payments?

Any contractor that colludes with subcontractors to evade tax by sheltering underground activity could face criminal prosecution, with fines and penalties of up to 200% of the tax sought to be evaded.

32. Will the CRA check my records to verify if the amounts recorded on the information slips I prepare are correct?

The accuracy of what is reported for the Contract Payment Reporting System will be reviewed in the usual course of audits. The feedback from this activity will help the contractor to meet reporting requirements.

33. Will the CRA reimburse me for the costs of preparing the information?

No. Costs are not reimbursed. The costs are tax deductible.

34. How do I distinguish between an employee and a subcontractor?

Whether someone is an employee or a subcontractor is a question of fact. To help you determine this, get the pamphlet called *Employee or Self-Employed*?

35. If I make an addition to my building, will I have to file an information return?

Only if your primary business is construction would you have to report on amounts paid or credited for such work.

36. Do I have to report payments to businesses for construction work done outside of Canada?

If you are a Canadian resident and are paying a Canadian resident for construction services, you have to report the amounts paid for work performed outside of Canada.

37. Where do I send the Information Return once I have completed it?

The Information Return should be sent to the:

Ottawa Technology Centre
875 Heron Road
Ottawa, ON K1A 1A2

38. How can I get more information?

Contact the Business Enquiries section of your **tax services office**. You can find the address and telephone numbers for this office listed in the government section of your telephone book.

Chapter 2. What We Heard

The purpose of this chapter is to summarize what the authors heard in various meetings with government officials, senior staff of workers' compensation boards across Canada, U.S. officials responsible for administering the *Davis-Bacon Act*, and both employer and union representatives in the construction industry. In some cases, comments were made on a "not for attribution" basis. For this reason, we have summarized the points that were made without direct citation. Many comments are paraphrased. Others are summaries of more extended comments. In some cases, comments are in conflict.

As the title of this chapter indicates, what follows are opinions that were expressed by those whom we interviewed. The authors' own conclusions are set out in the other chapters of this report.

A list of persons and organizations with whom the authors met or consulted is attached as Appendix A.

Comparisons with Other Jurisdictions

- In Quebec, the Department of Revenue is devoting considerable attention to the underground economy, especially in construction.
- We need to take a serious look at the Quebec model and its relevance to Ontario.
- In most other jurisdictions, there is a greater incidence of auditing than in Ontario.
- No Canadian jurisdiction has instituted a "named insured" system for its workers' compensation system. All jurisdictions require an employer to report only total covered payroll by classification group. The "named insured" proposal does not figure into policy discussions outside of Ontario.
- There is increased anecdotal evidence of the growth of independent operator status. This seems to be common across the country.
- In Quebec, the CCQ requires both contractors and workers to register. The requirement is actively enforced.

Enforcement Issues

- In the construction industry, the lack of enforcement is the single greatest problem.

- The predominant philosophy of enforcement calls for resources to be allocated based on the risk of an infraction and the costs of an infraction with respect to the statute that mandates the inspection.

- Inspection priorities under one statute (e.g., the *Building Code*) may differ from priorities under another statute (e.g., *Occupational Health and Safety Act*). 'Piggy-backing' inspection activities inevitably involves conflicting priorities.

- The Building Regulation Reform Advisory Group (BRRAG) recommended contractor registration. There was resistance to this recommendation from some contractor groups.

- In the construction industry, the key to compliance is the expectation of site inspections and the high probability of a serious penalty or cost for non-compliance.

- Databases are one of the keys to risk assessment. The use of databases for risk assessment, in place of exclusive reliance on experience, addresses the problems that arise when an experienced individual retires or otherwise leaves his or her inspection role.

- There is no substitute for the knowledge that industry members have of their own industry.

- The success of the Jobs Protection Office is attributable, in large measure, to its system of contractor and worker registration, combined with ongoing and regular site inspections.

- Raising the amount of the fine or penalty for contravention may not significantly strengthen deterrence. However, it would be helpful to effect retroactive recovery of taxes, premiums, *ESA* entitlements, *etc*., owing once a contravention is found to exist. The cost of these retroactive payments would often be considerable.

- Non-compliance with Building Code requirements is a major problem in residential renovation. However, non-compliance is not a major problem in new housing construction with established builders. Nor is non-compliance a major problem in the ICI sector.

- Inspections should be randomized and more intensive. In the residential sector there is a low risk of detection for non-compliant practices.

- In the interior finishing segment of the industry, the situation is as bad in the ICI sector as it is in the residential sector.

- There may be an entitlement awareness problem among a large segment of the construction work force. *Employment Standards Act* claims may not be filed because the worker is not aware of his or her entitlements. This is especially likely if the workers have been told that they are sub-contractors, rather than employees.

- In 1999, CCRA introduced a new system, known as the Contract Payment Reporting System. CPRS applies solely to the construction industry and requires all businesses principally engaged in construction to report full details of payments made to sub-contractors, including the name of a sub-contractor, the GST or SIN number, and the amount

of money paid to the sub-contractor. The Ontario public sector should report on its payments to contractors.

- In construction, the average "contractor" employs approximately 5 workers. Small contractors are seldom, if ever, audited, so that it is rare for illegal practices of the sort we are dealing with to be uncovered by the WSIB.

- WSIB auditors gravitate to non-construction were the status issue does not arise and the pay-off to compliance efforts is much greater. There is now more construction enforcement, including some pro-active site inspection auditing of major firms by both WSIB auditors and revenue recovery specialists.

- In the past, increased enforcement has meant more inspections of large projects and legitimate contractors and no increase in the enforcement against underground operators. Part of the industry's scepticism about the value of increased enforcement is that the industry believes that enforcement has, in the past, focused on those who are already in compliance and who are easy targets.

Independent Operators

- Anyone who is working on a construction site should be considered a worker. He or she should be covered by the WSIB and should either pay premiums or have premiums paid on his or her behalf. There should be no exceptions.

- Under the [U.S.] *Davis-Bacon Act*, worker status is irrelevant. Anyone doing the work must be paid at least the Davis-Bacon prevailing wage, regardless of whether he or she is an employee, "independent operator," or a working employer.

- The prevailing view in Ontario is that "people should be permitted to be independent operators, if they wish." Up to the late 1980s, the problem was not really very troublesome in Ontario. A change resulted from a decision of the Workers' Compensation Appeals Tribunal, in which the Tribunal gave much more leeway to those claiming independent operator status.

- Part of the exploitation of independent operators is the exploitation of recent immigrants or undocumented workers.

- Part of the problem is that we are insuring payroll and not persons. In construction, we need a system of 'named insured.'

Regulated Trades Enforcement

- Enforcement of certification and ratio requirements, even for the mandatory trades, is extremely weak. The only "penalty" is to deny an employer the opportunity to indenture future apprentices.

- We need to expand the number of mandatory trades.

- Enforcement of trade licensing requirements can be undertaken by any site inspectors – occupational health and safety, building, *etc*. - as long as it is mandatory for a tradesperson to have a copy of the license on his or her person. This would only apply to mandatory trades, *i.e.*, trades for which a Certificate of Qualification is required. This would only apply to holding certifications, not to journeyperson/apprentice ratios which may not apply at a site level.

- There is a logical connection between the quality of building, which is the focus of building inspection, and certification of contractors and tradespersons.

- Building Departments would not welcome additional enforcement duties related to employment statutes and regulations. Municipalities would see this as another instance of downloading, unless adequate provincial funding was made available.

Tendering Process

- The tendering process needs a radical overhaul. It must be transparent and above board.

- We must do something about the tendering system.

Industry Role

- An industry role in enforcement must deal carefully with potential and actual conflicts of interest. It could be said by those opposing a delegation of responsibility to industry that potential abuses might arise by having members of one private sector group investigate the practices of competitors. However, a carefully-crafted model for an industry-supported inspection regime could overcome these problems.

- For the Electrical Safety Authority, the change from being a Department of Ontario Hydro to a self-standing statutory body with industry governance was the key to getting industry support for the proposed enforcement changes.

- Large contractors are also a guilty of non-compliant conduct, from time to time. The most common infractions are misclassifying workers and under-reporting of payrolls for purposes of computing WSIB premiums. The fact that non-compliance can occur, even among large and reputable construction employers, needs to be taken into account when discussing a model for an industry role.

- All government departments, ministries and agencies – both federal and provincial – would benefit from greater industry cooperation in reporting system abuses.

- Industry representatives allege significant delays on the part of inspectors or auditors in responding to industry instigated complaints of non-compliant conduct.

Public Sector Construction

- Some assert that underground practices are widespread in public sector construction in Ontario.

- In the US, as a result of the *Davis-Bacon Act*, employment conditions on public sector construction projects have become a benchmark against which the private sector is judged. The employment conditions in the public sector leverage up employment conditions in the private sector.

- In major states, the majority of public sector construction work is be done by union contractors.

- Certified payroll is the key to enforcement under the *Davis-Bacon Act*.

Construction Industry

- The construction industry has a history of being treated as distinct. Dealing with the underground economy in the construction industry will require approaches that may differ from those in other industries. Regulating construction differently is consistent with past statutory practice and should raise no Charter issues.

- The number one objective of most Chief Building Officers would be to force residential renovators to be licensed and competency tested with respect to the Building Code.

- Contractor registration has been a recurring theme of every review.

- Quebec contractors and workers became aware that Ontario did not enforce its own regulations and statutes. They consciously took advantage of this fact.

- It is estimated that there are approximately 5,000 Quebec construction workers employed in Ontario at any given time. They are often very difficult to locate. As soon as inspectors are seen coming to the site, everyone tends to disappear. The result of the contraventions by Quebec workers and contractors is that many Ontario contractors circumvent the law to remain competitive.

- ICI is "going the way of the residential sector."

- Some large general contractors are not exercising due diligence in checking on the status of the entities with whom they are contracting.

- There does not appear to be any strategy that cross-links companies with a common owner. This is a potentially serious problem in construction where many trade contractors have several "shelf companies."

- Get the industry to provide complete information on sub-contractors.

- Temporary employment agencies should be banned or tightly regulated. They are often vehicles for evasion.

Appendix A: List of Persons with Whom We Met or Consulted

- Tony Dean, Secretary of the Cabinet and Clerk of the Executive Council
- Steve Pengelly, Chief of Staff – Premier's Office (Premier Ernie Eves)
- Linda Jolley, Vice-President, Policy & Research, WSIB
- Peter Marcucci,Chief Engineer and Lucy Impera, Projects Manager, of the Electrical Safety Authority
- Brad Clark, Minister of Labour. (Meeting attended by T. E. Armtrong, J. O'Grady, E. Roberts, P. Dillon, K. Jacobs, P. Kivisto – Deputy Minister, H. Tosine – Assistant Deputy Minister, J. Hogetarp – Policy Advisor in Minister's Office, T. Steers – Co-ordinator of Stakeholder and Agency Relations, J. Vander Doelen – Director WSIB and Health and Safety Policy, A. Forest – ADM Policy Communications.)
- H. Tosine, Assistant Deputy Minister, Ministry of Labour
- John Vander Doelen, Director, Workplace Insurance Health and Safety Branch, Ministry of Labour,
- Fil Savoia, Provincial Co-ordinator, Construction Health and Safety Program, Ministry of Labour
- Ed McCloskey, Director, Occupational Health and Safety Branch, Ministry of Labour
- Paavo Kivisto, Deputy Minister of Labour
- Helle Tosine, Assistant Deputy Minister - Operations, Ministry of Labour
- Angela Forest, Assistant Deputy Minister, Policy Communications and Labour Management Services Division, Ministry of Labour
- Day-long workshop organized by Ministry of Labour (attendees: John Vander Doelen, Director, Workplace Insurance Health and Safety Branch, Ministry of Labour; Denis Gertler, Acting Director, Inspection, Investigations and Enforcement Secretariat, Ministry of Labour; Bob Onyschuk, Director, Jobs Protection Branch, Ministry of Labour; Fil Savoia, Provincial Co-ordinator, Construction Health and Safety Program, Ministry of Labour; Michael De Lint, Senior Policy Advisor, Building and Development Policy; Stephen Johnson, Assistant Director, Construction Sector, WSIB; Laura Peddle, Regulatory Services (formerly Special Investigations Branch), WSIB; Mary Cicone, Manager, Revenue Recovery, WSIB; Claudine Cousins-Wynter, Program Delivery Co-ordinator, MTCU; Brian Miki, Business Solutions Manager, Ministry of Labour; Nikki Cummings, Senior Business Consultant, Business Planning, Ministry of Labour; Bob Laramy, Director, Income Tax Related Programs Branch, Ministry of Finance; Ed McCloskey, Director, Occupational Health and Safety Branch, Ministry of Labour; JillMarie Bourgeault, Provincial Specialist Co-ordinator, Construction Health and Safety Program, Ministry of Labour)
- Rob Easto, Senior Manager, Program Development and Standards, Ministry of Training, Colleges & Universities
- Michael De Lint, Senior Policy Advisor, Building and Development Policy, and James Douglas, Co-ordinator, Policy and Legislation, Ministry of Municipal Affairs and Housing

- Denis Gertler, Acting Director, Inspection, Investigations and Enforcement Secretariat, Ministry of Labour and Fil Savoia, Provincial Co-ordinator, Construction Health and Safety Program, Ministry of Labour
- Bob Onyschuk, Director, Jobs Protection Branch, Ministry of Labour and Marie Holdcroft, Program Advisor, Jobs Protection Branch, Ottawa
- Kevin Pratt, Manager, Special Compliance Initiatives, Audit Directorate, Canada Customs and Revenue Agency; Pat O'Connor, Senior Programs Officer, Non-Filer/Non-Registrants, Trust Accounts Division, Revenue Collections Directorate (CCRA); Paul K. Rémillard, Director, CPP/EI Eligibility Division, Revenue Collections Directorate (CCRA); and Danielle Heroux, Manager, Policy, CPP/EI Eligibility Division, Revenue Collections Directorate (CCRA)
- Brian Lemire, Director, Employment Practices Branch and Tracey Mill, Director, Employment & Labour Policy Branch. Ministry of Labour
- John Wright, Chair, Large Municipalities Chief Building Officers Association and Chief Building Official, Corporation of the Town of Markham
- Charles Wiebe, Glaholt & Associates, LLP, Barristers & Solicitors re *Construction Lien Act*
- André Ménard, President and Director General of CCQ
- T. Luciano, HRDC Inspectorate
- Ron Saunders, Canadian Policy Research Network (formerly ADM-Policy: Ministry of Labour)
- Bob Christie, Deputy Minister of Finance, Phil Howell Assistant Deputy Ministry of Finance and other senior ministry officials
- OCS Executive
- Richard Lyall, Rescon
- Multiple Telephone Meetings with WCB Officials in all jurisdictions:
  - Ken Vertz, Alberta WCB
  - Syra Bacha, BC WCB
  - Albert Van Huisen, Manitoba WCB
  - Claude Savoie, NB WCB
  - Carla Barnes, Newfoundland WCB
  - Greg MacCallum, PEI WCB
  - Brian Field, Nova Scotia WCB
  - Richard Cote, Quebec CSST
  - George Marshall, Saskatchewan WCB
  - Association of Workers Compensation Boards
- George Jones, AFL-CIO

- Timothy Helm, Group Leader, Davis-Bacon Enforcement US Dept of Labor
- Terry Yellig, attorney acting for AFL-CIO on Davis Bacon issues
- Ian Welton, WSIB
- Jerry Raso, Sheet Metal Workers
- Mary Ciccone, Joanne Webb, and Dana Leshchyshyn, WSIB
- Round Table Discussion with EBAs

Chapter 3. "Independent Operators"

This chapter examines the nature of the underground economy in construction and, in particular, the central role played by contractors who style their workers as "independent operators." By focusing on the underground economy, we are not arguing that underground practices in the ICI sector are limited to the use of the "independent operator" loophole. We were told that there are contractors in the ICI sector who work for cash and who disregard all employment-related and tax obligations. We were also told that there are also employers who register with the WSIB and CCRA, but misclassify their workers or under-report their payroll. Nevertheless, the "independent operator" problem does occupy a distinctly important place in the ICI sector and poses unique challenges to enforcement.

The Underground Economy in Construction

The essence of the underground economy is non-compliance with tax and employment-related obligations.[1] The strategies that enable this non-compliance to take place differ significantly across construction sectors. In residential renovation, for example, payment in cash is the foundation of non-compliance. The underground economy in residential renovation is rightly described as a "cash economy."

In the ICI sector, new residential construction, and civil construction, most transactions are too large to allow for cash payments. This is not to say that cash payments do not take place in these sectors. Rather, cash payments are not the foundation of underground practices. In the ICI sector, new residential construction, and civil construction the most common form of non-compliance is styling workers as "independent operators." In this manner, construction contractors can illegitimately reduce their labour costs by as much as 50%. In the ICI sector the underground economy is an "independent operator" economy, not a "cash economy." This is also likely the case in the civil sector and in new residential construction.

Figure No. 3-1 summarizes the different patterns of underground practices across construction sectors.

[1] KPMG, *Strategic Analysis of Underground Employment in the Construction Industry*, (Ottawa), 1997. The study was overseen by a joint government-industry committee, supported by Human Resources Development Canada. This study reviews the various forms of non-compliance.

Figure No. 3- 1
Patterns of Underground Practices across Construction Sectors
(Authors' Estimates based on Discussions with Industry and Government Officials)

	ICI Construction	New Residential Construction	Civil Construction	Residential Renovation
Approximate Share of Construction Expenditures*	14 – 18%	35 - 40%	30 - 35%	14 – 18%
Cash Payments to Contractors and Workers	Less Significant	Less Significant	Less Significant	Very Significant
Use of Out-of-Province Building Materials	Very Significant in Eastern and North-Western Ontario	Very Significant in Eastern and North-Western Ontario	Less Significant	Moderately Significant in Eastern and North-Western Ontario
Styling Employees as Independent Contractors	Very Significant	Very Significant	Moderately Significant on Smaller Projects	Very Significant

* Based on Ontario Construction Secretariat, *The Underground Economy in Ontario's Construction Industry*, November 1998

Cost Advantage of Styling Workers as "Independent Operators"

Styling "dependent contractors" as "independent operators" confers a significant and illegitimate competitive advantage on construction employers who use this procedure. By representing these workers as "independent operators" who are sub-contracted, rather than employed, to do a job, a contractor avoids the obligation to make WSIB, EI, and CPP contributions, as well as requirements for vacation and holiday pay. In addition, employers with a payroll of more than $400,000 (approximately the equivalent of 6-10 tradespersons) are liable to pay Employer Health Tax.

Figure No. 3-2 summarizes the cost advantage across various construction trades of styling dependent contractors as "independent operators."

Figure No.3- 2
Illegitimate "Independent Operators" - Contractors' Avoided Payroll Costs
(2004 Rates)

	Electrician	Inside Finishing	Bricklayer	Roofer	Form Work / Demolition
Statutory Contributions:					
• WSIB premiums	3.03%	6.83%	12.21%	12.34%	16.47%
• CPP - employer contributions	4.95%	4.95%	4.95%	4.95%	4.95%
• EI - employer contributions	2.77%	2.77%	2.77%	2.77%	2.77%
• EHT (at maximum rate)	1.95%	1.95%	1.95%	1.95%	1.95%
Employment Standards Act:					
• Statutory Holidays	3.46%	3.46%	3.46%	3.46%	3.46%
• Vacation Pay	4.00%	4.00%	4.00%	4.00%	4.00%
Total Avoided Payroll Costs	20.16%	23.96%	29.34%	29.47%	33.60%
Allowance for Reduction in Remuneration arising from Underreporting of Taxable Income	13-18%	13-18%	13-18%	13-18%	13-18%
Total Illegitimate Competitive Advantage	33-38%	37-42%	42-47%	42-47%	46%-51%

As Figure No. 3-2 shows, if only direct payroll costs are considered, the illegitimate competitive advantage ranges from 20.16% to 33.60%. However, evaded payroll costs significantly understate the illegitimate competitive advantage. Contractors are not required to apply source deductions for income tax to sub-contractors. As a result, "independent operators" receive a gross pay, without any deductions. Moreover, contractors are not required to file T-4 slips reporting their payments to sub-contractors. In principle, of course, an "independent operator" is obliged to report all of his or her net income from employment. In practice, many "independent operators" report only a fraction of their employment income. The extent of underreporting is discussed by Statistics Canada in its 1994 study of the underground economy. In that study, Statistics Canada analyzed data for the period 1985 to 1992 and concluded that unincorporated construction businesses (*i.e.*, "independent operators") concealed approximately 60% of their net income from Revenue Canada.[2] The prevalence of underreporting of income by "independent operators" is widely known in the construction industry. As a result, many illegitimate contractors require "independent operators" to work at a lower rate of remuneration than would be the case if 100% of employment income were reported to the Canada Customs and Revenue Agency. This adds a further saving on labour costs of some 13-18%. *Consequently, the total cost*

[2] Statistics Canada, *The Size of the Underground Economy in Canada*, (June 1994), Cat. No. 13-603E, No. 2, based on Table 2, page 13

advantage of styling workers as "independent operators" can rise to more that 50% of labour costs in some trades.

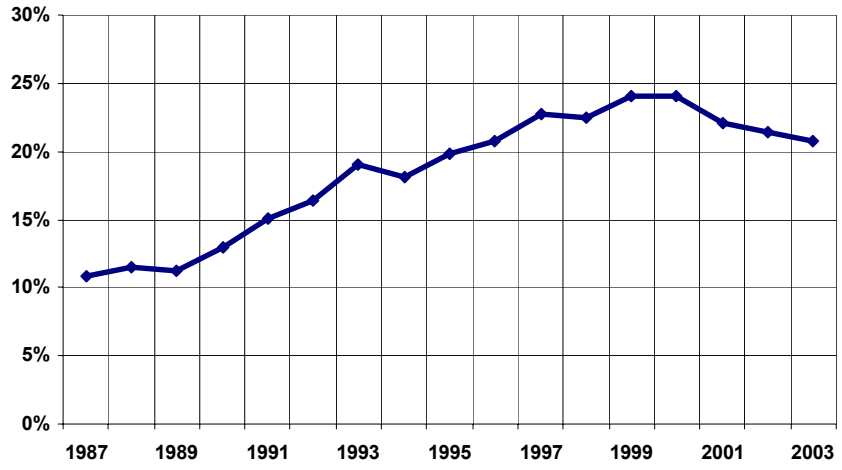
In the ICI sector, combating the underground economy requires first and foremost a strategy to deal with the widespread practice of styling workers as "independent operators."

The Tilted Playing Field and the Growth of "Independent Operators" in Construction

In Ontario, in 1987 (the first year for which data were collected), 10.8% of employed workers in the construction industry were self-employed *and* did not employ any other workers, that is to say, they were "independent operators" or at least were so described. By 2003, the proportion of who were self-employed and did not employ any other workers had increased to 20.7%. Over 80% of these "independent operators" were unincorporated, a secondary indicator that their "independent operator" status is doubtful. Construction is a risky business and liability is an important consideration. Legitimate independent operators have strong reasons to incorporate, even though this adds to certain administrative costs.[3]

Figure 3-3 shows the increase in the proportion of Ontario construction workers who are or who purport to be independent operators, that is, self-employed and not employing any other workers.

Figure No. 3-3
Self-Employed Workers with No Employees
as a Percentage of Total Employed Work Force
in Construction Industry, Ontario 1987 - 2002



Source: Statistics Canada, CANSIM Table No. 282-0012

[3] From 1987 to 1992, the proportion of incorporated construction workers who do not employ other workers rose from 1.5% to 3.8%. Statistics Canada, CANSIM. Table No. 282-0012.

It is naïve to believe that the near doubling in the proportion of purportedly "independent operators" is attributable to an increase in the intrinsic attraction of self-employment or to changes in the way in which construction is organized and supervised in Ontario. Rather, the rapid growth in the proportion of supposed "independent operators" is indicative of the competitive advantage that accrues *to those construction employers* who style their workers as "independent operators."

Example of an "Independent Operator"

The essential fraudulence behind the practice of styling workers as "independent operators" cannot be captured by statistics. To understand the nature of the practice requires an example.

As part of litigation proceedings, the International Union of Painters and Allied Trades obtained sworn affidavits from a number of painters who had been employed as "independent operators." The following extract from one of these affidavits is representative of their tone and content. The affidavit leaves little doubt that *these "independent operators" were employees in all but name.*

Figure No. 3-4
Extract from Sworn Affidavit of an "Independent Operator" in the ICI Sector

1. For the entire 12 months of the year 2000 I performed painting work for [Company X]… During this time I performed painting work for [the company] in the Ottawa area, mainly in the ICI sector…
2. When I was hired by the company, the company made it clear to me that I would be paid a 'straight cheque.' The company paid me $16.00 per hour for performing painting work with no source deductions whatsoever… I was not paid vacation pay.
3. [The company] supplied all materials, tools and equipment required to do my job, including paint, brushes, ladders, rollers, etc. The company required me to be at work every morning at 7:00 am and I was required to work at least an 8 hour day. However, at times, the company required me to work more than 8 hours per day or on weekends when there was a deadline to meet.
4. My supervisor was basically the owner of the company and he worked alongside me. As such, he was constantly supervising my work and would often push me to work faster. He would also direct me as to what he wanted done on a particular day and the area he wanted me to work on and how it was to be done.

continued

5. During my year with [the company], the number of painters working alongside me in the ICI sector would vary. However, during the busy summer months, there were as many as 15 painters working alongside me… [A]ll of the painters working for the company were paid in the same manner as I was, with no source deductions whatsoever… [T]hey were also working under the same conditions as I was with respect to the supply of tools, equipment and materials and hours worked and level of direction and supervision by the company.

Source: Submissions of International Union of Painters and Allied Trades and the Ontario Council of the International Union of Painters and Allied Trades in an arbitration proceeding, July 9, 2002 (Arbitrator: G. Surdykowski)

It is apparent from this affidavit that *illegitimately styling workers as "independent operators" is about evading payroll costs. The practice has nothing whatsoever to do with changing the way that construction work is undertaken and supervised*. The "independent operator" loophole is simply a licence to compete illegitimately by evading payroll costs that a legitimate construction employer must pay.

Trends in Self-Employment in the Construction Industry across Different Trades:

Industry representatives indicated that the incidence of workers illegitimately styled as "independent operators" varies across trades. The carpentry trade and finishing trades were judged to be the most vulnerable. This is borne out by a comparison of rates of self-employment across trade groups. Owing to the small sample at the occupational level in the Labour Force Survey, to present reliable data, we have taken three year averages for groups of trades. At the occupational level, it is not practical to make a distinction between incorporated and unincorporated status. Figure No. 3-5 summarizes these data.

Figure No. 3-5
Rates of Self Employment by Trade Group,
Construction Industry - Ontario
1987-89 Average compared to 2002-03 Average

	Average 1987-1989	Average 2001-2003
All Construction occupations	23.90%	29.90%
Finishing Trades	34.80%	50.50%
Carpenters and Cabinetmakers	26.00%	41.90%
Masonry & Cement Finishing	13.50%	27.90%
Mechanical Trades	12.40%	18.10%
Electricians	4.00%	16.80%

Source: Statistics Canada, *Labour Force Survey*, Special Tabulations for OCS

As can be seen from Figure No. 3-5, the rate of self-employment among all construction trades increased from an average of 23.9% in the period 1987-1989 to 29.9% in 2001-2003. However, among several trade groups the increase was much sharper. Among workers in the finishing trades, the rate of self-employment increased to 50.5%. Among carpenters and cabinet makes, the rate increased to 41.9%. Significant increases were also evident among masonry workers and cement finishers, the mechanical trades and electricians, even through the incidence of self-employment among these trade groups was below the industry average.

Trends in the Proportion of Independent Operators in the Construction Work Force across Provinces:

There are significant differences in the incidence of "independent operators" in the construction work force across Canada. To some extent, these differences may arise from regional differences in the nature of the construction industry. However, regulatory and enforcement practices are also likely to be factors. Figure 3-6 shows the average proportion of independent operators in the employed construction work force for the years 2001-2003. For these purposes, independent operators are taken to be self-employed persons who do not employ other workers.

Figure 3-6
Self-Employed Construction Workers who do Not Employ other Workers
as a Percentage of Total Employed Construction Work Force
Average Annual Rates, 2001-2003

	Incorporated	Unincorporated	Total
Newfoundland	Not reported	6.4%	Not computed
PEI	Not reported	8.8%	Not computed
Nova Scotia	2.5%	13.0%	15.5%
New Brunswick	0.9%	10.6%	11.5%
Quebec	4.5%	9.0%	13.5%
Ontario	4.7%	16.7%	21.4%
Manitoba	3.3%	18.5%	21.8%
Saskatchewan	3.6%	14.2%	17.8%
Alberta	7.3%	11.6%	18.9%
British Columbia	5.8%	20.8%	26.6%
Canada	5.0%	14.7%	19.7%

Source: Statistics Canada, CANSIM Table No. 282-0012

Figure 3-6, it should be stressed, is Statistics Canada's *economic* classification of workers in construction. *Administrative* classifications under workers' compensation boards can differ. For example, in the ICI sector in Alberta, only incorporated individuals can seek independent operator status under the Workers' Compensation Board. Keeping in mind that Figure 3-6 depicts economic classifications, British Columbia has the highest rate of independent operators. Nova Scotia, New Brunswick and Quebec have the lowest rates of independent operators.

■

The fact that large numbers of construction workers have been styled as "independent operators" does not mean that all persons who are describes as self-employed are actually dependent contractors who should be treated as employees for all purposes. There are some legitimately self-employed construction workers who would meet the common law tests for self-employment status. We believe, however, that the number of such individuals is significantly smaller than the number of persons who are styled as "independent operators." Under the *Workplace Safety Insurance Act*, as will be discussed in the next chapter, there are persuasive policy reasons for setting aside the distinction between employees and independent operators, for purposes of coverage. This cannot be said about the

Employment Standards Act. The distinction between employees and independent operators remains pertinent to the *ESA* as do the procedures under the *Act* for adjudicating status questions

Summary:

Styling dependent contractors as "independent operators" enables a construction industry employer who adopts this practice to evade payroll costs ranging from 20% to over 50% of what they otherwise would have been. *In the ICI sector, the illegitimate use of "independent operators" is a foundation of the underground economy.* While misclassifying workers and under-reporting payroll are also significant, the "independent operator" issue is of particular importance and raises distinct policy and enforcement problems.

All jurisdictions in Canada have seen an increase in the proportion of construction workers who are, or who are purported to be, "independent operators." In Ontario, in 1987, 10.8% of construction workers were self-employed *and* also employed no other workers. In 2003, that proportion increased to 20.7%. In broad terms, this increase reflects the growth of underground practices in the ICI sector, new residential construction, and civil construction.

There appear to be important differences in the rate of underground practices across trades. The problem appears to be significantly more pronounced in the finishing trades and in carpentry, although it is evident, to some degree, in all trades. Across Canada, there are differences in the proportion of construction workers who are, or purport to be, "independent operators."

In the ICI sector, rolling back the underground economy requires a strategy to deal with the widespread practice of styling workers as "independent operators." Without such a strategy, enforcement efforts will be seriously flawed.

Chapter 4. WSIB Coverage in the ICI Sector

This chapter deals with the two issues:

- who should be covered by the WSIB?
- who should be responsible for paying premiums?

These two issues are inextricably bound together. They cannot be resolved separately.

Why is Coverage a Problem?

The underlying rationale for the current *Workplace Safety and Insurance Act* is set out in the 1913 report of Ontario Chief Justice William Meredith.[1] Under the Meredith scheme, injured workers would be paid benefits related to their earnings through an industry financed scheme for as long as the work-related disability endured. These benefits would be in lieu of damages under the common law tort system. Employees, therefore, lost the right to sue. And conversely, by virtue of paying premiums into the insurance scheme, employers were relieved of liability for civil damages. In a strict sense, therefore, workers' compensation is predicated on an employer/employee relationship. The exception to this principle is an individual who is an "independent operator." An "independent operator" is defined by the *Act* as a person who "carries on an industry… and who who does not employ any workers for that purpose." The *Act* allows "independent operators" to apply for individual coverage, but does not make such coverage mandatory.

In most industries, disputes seldom arise over whether an individual is an employee or an "independent operator." In complex organizations, a worker's status may not be in dispute, but there may be disagreement who is the actual employer. In most industries, the number of persons affected by such disputes is numerically small and can be efficiently handled by case-by-case adjudication. The construction industry, however, is different.

In the first place, the practice of sub-contracting is so pervasive in the construction industry that the distinction between employees and "independent operators" is easily blurred. The foundation of the underground economy in the ICI sector is the practice of styling workers as "independent operators." By styling workers as "independent operators" an employer escapes not only the obligation to pay WSIB premiums, but also the requirement to pay certain *Employment Standards Act* benefits, make employer contributions for CPP and EI, and administer source deductions under the *Income Tax Act*.

[1] Meredith, William, *The Workmen's Compensation Act with Reports on Laws Relating to the Liability of Employers*, (Toronto, 1913), King's Printer.

Unlike most other industries, *in the construction industry, there is a veritable army of workers who are styled by their employers as independent operators.* In 2003, Statistics Canada reported that 80,000 construction workers (or 20.7% of the construction work force) were "independent operators," *i.e.*, they were nominally self-employed and hired no other persons to assist them.[2] The scale of the "independent operator" problem overwhelms the system's capacity for case-by-case investigation and adjudication. From 1985 to the end of 2003, the Workers Compensation Appeals Tribunal (WCAT) and its successor, the Workplace Safety and Insurance Appeals Tribunal (WSIAT) adjudicated approximately 140 cases identified as construction industry cases. Of these, only 28 involved determination of status, as at least one of the issues before the Tribunal Panel. It is patently unrealistic to expect a system of case-by-case investigation and case-by-case adjudication to address comprehensively the "independent operator" problem in the construction industry. It seems clear that the vast majority of "independent operator" cases are never subject to investigation or adjudication.

It might be thought that a simple administrative test could be devised that would enable the WSIB to bring the "independent operator" problem under control. This is not the case. In the absence of a clear-cut statutory definition of employee, the distinction between an employee and an "independent operator" is a matter of common law. In Canada, the most recent judicial statement of the common law principles is found in the 2001 Supreme Court decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*.[3] The relevant extracts from *Sagaz* are reproduced at Appendix A. It is not our purpose in this study to review the subtleties of the common law tests. It is sufficient to point out that when CCRA endeavoured to distill the common law tests into administrative guidance, it produced a five page guideline that included some 35 questions on the basis of which officials were to make a determination. A copy of this guideline is attached at Appendix B. The WSIB uses a more structured questionnaire, based on the same factors and considerations. A copy of this questionnaire is attached as Appendix C. The current questionnaire has proven ineffective in addressing the scale of evasion. Indeed, despite the comprehensive nature of the questionnaire, the number of "independent operators" has increased dramataically. There is simply no way that the answers given in the questionnaire can be administratively verified. Indeed, there is reason to believe that some workers are instructed to complete the questionnaire in such a manner that the worker will be characterized as an "independent operator."

Much of the difficulty in the construction industry stems from the unique traditions that operate in construction and which blur the usual distinctions between an employee and an "independent operator." It is common in many trades for construction workers to provide their own hand tools. It is also common in many trades for construction workers to function under minimal supervision. In the ICI sector, non-union employers often pay their workers on a piece-rate basis which can easily be portrayed as a sub-contract for a specific service rather than an employment relationship. As well, the mobility of construction work means

[2] Statistics Canada, *Labour Force Survey*, CANSIM, Table No. 282-0012

[3] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc* [2001] 2 S.C.R.

that it is normal for a construction worker to be hired on a short-term basis and often by a succession of employers. All of these factors create a surface appearance of a sub-contract relationship rather than an employment relationship. The problem of determining status becomes even more complex if one accepts as implicit in the common law tests, the now well established notion of "dependent contractors," *i.e.*, persons whose relationship to their engager has the trappings of a sub-contract relationship but whose position in terms of economic power is closer to that of employees.[4]

A second coverage problem for the WSIB is persons who are judged to be employers because they engage other persons to assist them. Board policy and WCAT/WSIAT jurisprudence are clear: an individual can be an employer or a worker, but not both. On its face, this would appear to be a reasonable principle. Indeed, in most industries, a clear-cut either/or categorization is appropriate. In construction, however, the situtation is more complex. It is common practice for non-union employers in the ICI sector to "sub-contract" not only to individuals, but to crews. In construction, an individual can change his employment status in the space of a few weeks. For example, an individual might be a wage-paid employee on one job, a piece-rate paid "independent operator" on the next job, and then, on a third job, find himself working alongside co-workers whom he has hired, but still in a dependent contractor relationship with the engager. On still another job, the individual might be working as a *de facto* partner with another person, though still in the same position of fundamental economic dependence on the contractor-employer. *For many workers in the construction industry, this fluidity and informality of the employment relationship is an essential aspect of their economic reality.* It would be naïve to infer from these practices that the workers are entrepreneurs, *i.e*., that they are "in business." Rather these common place characteristics of the construction labour market are manifestations of the fundamental imbalance of economic power that prevails most of the time. Except in

[4] The concept of "dependent contractor" was introduced into legal discussions in 1965 by Harry Arthurs. In the early 1970's, the *Canada Labour Code* and seven of the ten provincial *Labour Relations Acts* were amended to recognize "dependent contractors," who were to be accorded the same rights under the respective statutes as "employees." The *Ontario Labour Relations Act* was so amended in 1975. At section 1, the *Act* provides as follows:

> "'dependent contractor' means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that *the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor*." [emphasis added]

See: Harry Arthurs, "The Dependent Contractor: A Study of the Legal Problem of Countervailing Power," 1965, 16 *University of Toronto Law Journal* 89.
See also, Law Commission of Canada, "The Legal Concept of Employment" at http://www.lcc.gc.ca/en/themes/er/tvw/fudge/fudge_toc.asp

boom conditions, non-union construction workers must take employment on whatever terms it is offered.

We conclude then that coverage issues, which are generally not a serious problem in most other industries, are a systemic problem in the construction industry. The "independent operator" exemption from mandatory coverage is a loophole that has accommodated widespread evasion and made a mockery of the principle of a level playing field. As well, the WSIB's reliance on a clear-cut either/or distinction between workers and employers is at odds with the reality of the construction labour market where sub-contracting to a crew is common place.

Practice in Other Canadian Jurisdictions

Appendix D to this chapter provides a detailed discussion of how other workers' compensation boards in Canada define and deal with "independent operators." In this section, we highlight some of the salient features of their policy and practice.

British Columbia

- The *Act* distinguishes between workers and independent operators and provides that a worker includes an independent operator admitted by the Board upon application.
- Independent operators are not covered by the Act unless they make successful application for coverage.
- By policy, the Board has established that an independent operator must have a business existence independent of the person for whom he/she works.
- By policy, the Board has created an intermediate category "labour contractor", a hybrid between worker and independent contractor, who might not meet the tests of an independent contractor, but who is eligible for registration. Upon registration, the labour contractor bears the sole burden or paying premiums on behalf of his/her employees. (It seems that this category is similar to the "dependent contractor" definition in the Ontario *Labour Relations Act*.)
- In determining independent operator status, the Board places emphasis on whether the individual exists as a business enterprise independently of the person for whom the work is being done. Also relevant are a number of the traditional tests derived from the common law jurisprudence.

Alberta

- Under the Alberta *Act*, independent operators are styled "proprietors" and are defined as those who operate a business that "usually" performs work for more than one person concurrently, and who do not employ any workers.

- Proprietors may apply for personal coverage. If they do not obtain personal optional coverage, they are covered as "workers".

- A worker may avoid coverage by incorporation. The *Act* provides that the director of a corporation performing work is exempted from coverage, but has the option to apply for personal coverage.

- In summary, all independent operators/proprietors are covered in Alberta, unless they incorporate and become directors of their operating corporations.

Saskatchewan

- The Act defines "worker" in broad terms. While it makes no mention of "independent operator", it gives the Board broad, unrestricted authority to deem anyone performing work to be covered by the Act.

- Acting under its broad authority, the Board, by policy, has stipulated that all independent operators are required to be covered, either by optional personal coverage or by coverage provided by the person or entity who engages them.

- Saskatchewan is the only Canadian jurisdiction with "wall-to-wall" coverage, although it is achieved through Board policy rather than directly by legislation.[5]

Manitoba

- The *Act* defines an independent contractor as a self-employed person. The Board has power to deem an independent contractor to be a worker, in which case he is regarded as a worker employed by himself.

- By policy, the Board has determined that "independent contractors" are only those persons performing work or services directly for homeowners. Independent contractors, so defined, are not covered by the *Act*.

[5] Manitoba, through its policy, provides coverage for all independent operators except those in the residential sector working directly for homeowners. Alberta, in its Act, provides comprehensive coverage excluding only those independent operators who incorporate and are directors of their corporations. New Brunswick, by policy, covers everyone, workers and independent operators, but only where three or more persons are engaged. In all other jurisdictions, independent operator coverage is voluntary, on application to the particular Board.

- The equivalent of "independent contractors" in all other covered industries is the "labour contractor". By Board policy, labour contractors must be engaged in *bona fide* enterprises, must not employ other workers and must work regularly for more than one principal.

- A labour contractor may apply for personal coverage. All labour contractors who do not acquire personal coverage are deemed to be workers of the principal.

- In sum: only independent contractors working for homeowners are not covered by the *Act*, but they may apply for coverage. All others are covered, either as workers, labour contractors who apply for and receive personal coverage, or labour contractors who, in the absence of coverage, are deemed to be workers.

Ontario

- The *Act* defines an "independent contractor" as "a person who carries on a [business in a covered industry] and who does not employ any workers for that purpose."

- The WSIB relies on a five-page questionnaire [Form 1169] to determine whether an individual is an "independent operator." The questionnaire follows the tests set out in *Sagaz* and thereby covers both the organizational test and the control test.

- "Independent operators" are not required to take out WSIB coverage, nor is their engager required to cover them. However, "independent operators" may apply for individual coverage on a voluntary basis.

- Section 12(1) empowers the WSIB to deem certain individuals to be workers for purposes of coverage.

- If an individual employs other persons, he or she ceases to be an "independent operator" and becomes an employer. As such, he or she is obliged to registered as an employer.

Quebec

- The *Act* contains a definition of independent operator, the principal features of which include the carrying on of activities simultaneously for several persons, the supplying of required equipment and the duration of the job.

- If persons are held by the Commission (CSST) to be independent operators, their engager is not required to declare their remuneration nor pay compensation premiums on their behalf.

- In making status determinations, the Board follows the statutory definition (see above), as well as additional tests established by CSST policy, including the method of payment, the nature of the work schedule, the payment (or otherwise) of benefits, the right to delegate work, and the assumption, or otherwise, of any financial losses.

- A person found by the CSST to be an independent operator is not covered by the Act, but may apply for optional personal coverage. If he/she employs others, he/she must pay compensation premiums on their behalf.

- The statute governing labour relations in Quebec's construction industry also recognizes "independent contactors," but restricts their employment to certain types of construction, namely heavy equipment operation and "maintenance, repair and minor renovation.

New Brunswick

- New Brunswick is unique on the independent contractor issue in providing that all persons performing work are covered, so long as they work in establishments where three or more persons are engaged.

- Given New Brunswick's "Rule of Three", it has no need to distinguish between workers and independent operators. Thus, in operations where two workers are engaged, whether they are workers or independent contractors, there is no coverage. In enterprises or undertakings where three or more persons are engaged, all are covered, regardless of their status.

Nova Scotia

- Like New Brunswick, Nova Scotia has a "Rule of Three". Accordingly, in operations of fewer than three, there is no coverage, regardless of the status of the persons performing the work.

- Where three or more persons are engaged, only workers are covered. Independent operators may apply for and receive coverage. The Board, in making its determination as to status, uses the CCRA guidelines, which, in the main, mirror the jurisprudential criteria.

Prince Edward Island

- The *Act* refers to an independent operator as a person who is neither an employer nor a worker, but performs work of a nature covered by the *Act*. Such persons may seek coverage under the *Act* by application to the Board.

- In its policy, the Board outlines, in some detail, the grounds on which it distinguishes between workers and independent operators. Particular emphasis is placed on whether the person operates a separate, independent business. Other tests are largely drawn from the common law and include the well-established control and organizational tests set out in the jurisprudence.

- Those found by the Board to be independent operators may apply for coverage, but in the absence of a successful application, they are not covered by the *Act*.

Newfoundland

- The *Act* recognizes the category "independent operator" as one who is neither an employer nor a worker, but performs work of a nature within the scope of the *Act*. By policy, the Commission has further defined independent operators to be non-incorporated, self-employed individuals who do not employ other workers.

- Independent operators may apply to the Commission for personal coverage.

- If an independent operator is incorporated, the corporation is obliged to register with the Commission. If there is no incorporation, and the Commission is called upon to determine whether a person is an independent operator, it has the discretion to do so, based upon the answers to a questionnaire focusing on four principal tests that derive from the common law jurisprudence dealing with the distinction between independent contractors and employees.

Northwest Territories and Nunavut

- The *Act* provides that self-employed persons are not workers covered unless the Board deems otherwise.

- The Board has a published policy outlining the criteria used to determine whether a person is an independent operator. The tests, some nine in all, are the more significant control and organizational tests developed under the common law.

- While the Board may determine that an individual is an independent operator, applying the stipulated tests, there is a heavy onus upon such person to establish that he/she is not a worker.

Yukon

- Independent operators, styled as "sole proprietors" under the *Act*, are self-employed persons who do not employ any workers. The *Act* empowers the Board to extend coverage to sole proprietors (or independent contractors).

- The Board has published policies indicating the factors it takes into account in determining proprietor or independent operator status. Those factors include whether the person works for more than one employer concurrently; whether he/she advertises or otherwise solicits business; whether major equipment and materials are supplied; and whether he/she is free to control the manner in which the assigned work is performed.

- Using these criteria, the Board has sole discretion to determine whether an independent operator is included or excluded from the *Act*.

The Case for Revoking the Independent Operator Exemption from Mandatory Coverage

We have concluded that in the ICI sector of the construction industry, the independent operator exemption should be revoked. Coverage should be mandatory for all persons working on a construction site, irrespective of whether they are employees, independent operators, or a "working employers." By "working employers," we mean persons who employ others, but also work along their employees.

Six reasons bring us to the conclusion that wall-to-wall coverage is the only practical solution for the ICI sector. (In the next section, we will deal with the issue of where the responsibility for premiums should lie in the sub-contract chain.)

1. *Whether coverage should be mandatory ought to be determined by the nature of the industry, not the nature of employment relationships in the industry.* Coverage is mandatory for the construction industry because this industry has injury and fatality rates that exceed the average for the economy as a whole.[6] Construction work is inherently dangerous. Public policy has a broad interest which encompasses prevention of fatalities and injuries, compensation for the dependents of persons injured or killed, and compensation of workers whose ability to earn a living in their normal occupation was either interrupted or diminished by an accident.

2. *The certainty of coverage should be invariant to changes in employment status.* Wall-to-wall coverage reflects an important reality of the construction labour market, namely

[6] In 2002, WSIB claims per 1,000 employed workers were approximately 118 in construction and 69 for total employment in the province. The rate of lost time injuries was approximately 23 in construction and 18 for total employment in the province. These estimates are based on comparing WSIB claims data, as reported in the WSIB annual report to total employment as reported in the Statistics Canada *Labour Force Survey*.

that in the non-union sector, it is common for a person to change his or her employment status over the course of a short period of time.

3. *Exempting independent operators from WSIB coverage promotes shamming*, i.e., styling workers as independent operators so as to evade payment of WSIB premiums.

4. *Making coverage mandatory for independent operators establishes a level playing field in the construction industry.* Under the current optional coverage system, a contractor who engages independent operators can undercut a contractor who hires employees. It might be said that independent operators have simply agreed to take on the risk from injury themselves. If that argument is accepted, then making the playing field level would require that the right to decline coverage should be extended to the contractor who hires employees. Following that path, however, would undermine the whole logic of workers' compensation. *The only way to make the playing field level is to require all persons working in construction to be covered by the WSIB.*

5. The original rationale underlying workers' compensation was to substitute publicly administered benefits for the vicissitudes and uncertainties of an employer's civil liability. However, the longstanding provision making coverage available on an individual basis to independent operators has clearly expanded the purpose of workers' compensation. In addition to its original purpose, workers' compensation is also a socially administered insurance scheme for persons at risk of workplace injury, even when those persons are not employees. *Like any insurance scheme that is available on an individual basis, workers compensation is subject to what economists term "moral hazard," namely the risk that there will be a self-selection process that results in persons taking out insurance or electing to cover themselves only when they perceive the risks to be higher and electing not to cover themselves when they perceive the risks to be lower. The normal insurance practice for dealing with this problem is to require all members of the insured group to be covered, thereby ensuring that risks are properly pooled.*

6. Several other jurisdictions apply wall-to-wall coverage or approach this standard. Saskatchewan, for example, has wall-to-wall coverage by virtue of its Board's policy. Similarly, Manitoba covers all independent operators (called "labour contractors") except those performing work or services directly for homeowners. In B.C., many so-called "independent operators" are covered by the "labour contractor" definition which, in application, is similar to Ontario's dependent contractor provision in our *Labour Relations Act*. In other jurisdictions – the Northwest Territories is a good example – the tests for avoiding "worker" status are sufficiently stringent so as to virtually preclude independent contractors from avoiding coverage.

7. *Unfunded liabilities are an industry liability. The burden of defraying unfunded liabilities should be spread over the entire industry.* A person who hires only one worker to work along side him must register as an employer and pay premiums that, in part, are used to defray the construction industry's share of the unfunded liability. It is

patently unfair to impose that obligation on a person who hires a single worker, while letting the person who hires no employees entirely off the hook.

Tightening the Criteria for Executive Officer Exemptions in Construction

It serves little purpose to close the independent operator loophole and then allow abuse of the executive officer exemption from WSIB coverage. Any independent operator can incorporate as a business or register as an unincorporated business. By designating himself or herself as an "executive officer" of the business, an independent operator might trigger the executive officer exemption. The relevant provisions of the *Workplace Safety and Insurance Act* are as follows:

> Sec 11 (2): Subject to section 12, the insurance plan does not apply to workers who are executive officers of a corporation.
>
> Sec 12 (2): Upon the application of a Schedule 1 or Schedule 2 employer who is a corporation, the Board may declare that an executive officer of the corporation is deemed to be a worker to whom the insurance plan applies. *The Board may make the declaration only if the executive officer consents to the application*. [emphasis added]

The principle that should apply is that only persons who are covered by the WSIB should be allowed to work on a construction site. Executive officers would be allowed to work on a construction site, but only if they are covered. This principle could be implemented by amending the *Act* or the Regulations to stipulate that, in the construction industry, executive officers of a firm or corporation who perform on-site work must be included in the covered payroll.

Responsibility for Payment of Premiums

Wall-to-wall coverage requires a further specification of who, in a potentially long chain of sub-contracting, should be responsible for premiums. To address this question, we propose introducing the concept of "responsibility of the engager." This concept differs from the currently applicable principle of joint and several liability, sometimes known as "liability of the principal."

The *Workplace Safety and Insurance Act* recognizes the importance of long chains of sub-contracting through the principal of joint and several liability. This liability, however, is a residual liability. It applies to the principal, *i.e*., the party that lets a contract. At the top of the chain are the general contractor and the owner of a construction project who bear ultimate liability for the payment of WSIB premiums down the sub-contract chain. This liability can be discharged by requiring sub-contractors to provide a "Certificate of

Clearance," which confirms that the sub-contractor is registered with the WSIB and that the account is in good order. Certificates of Clearance are valid for 60 days.

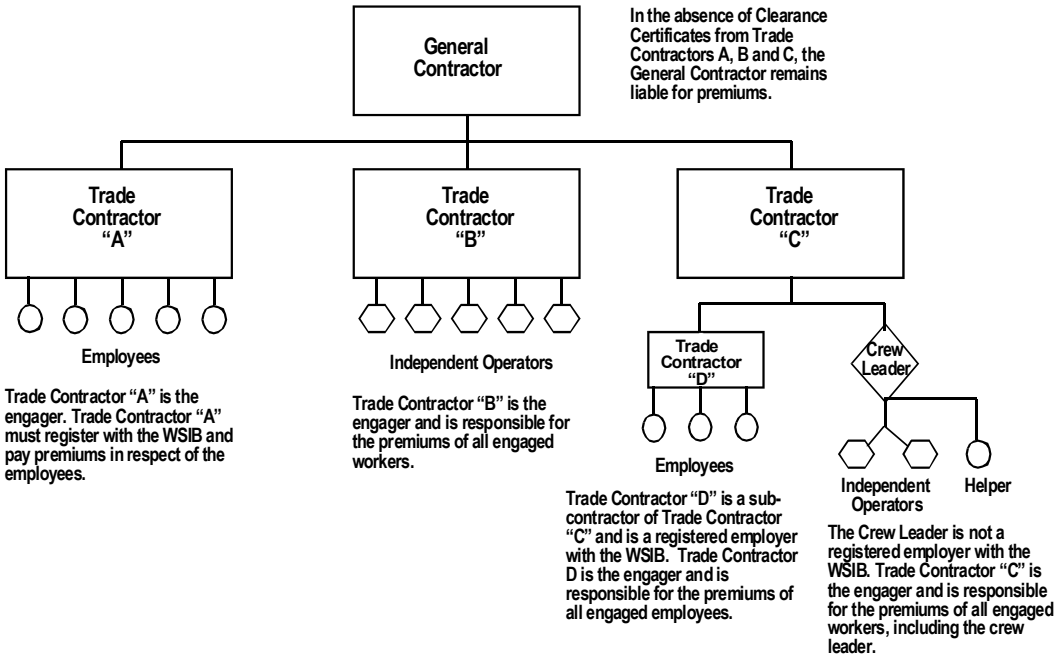
The principle of joint and several liability does not address the question of where responsibility for premium payments should lie *in the first instance*. What is needed is a parallel concept which we term "responsibility of the engager." We define "responsibility of the engager" as follows:

> An engager of construction labour is responsible for the payment of WSIB premiums for all labour engaged under a contract unless the entity (person, partnership, company) that is engaged is otherwise properly registered with the WSIB and provides a Certificate of Clearance.

This approach is similar to that used in Manitoba where Board policy fixes liability on the principal for whom the work is performed, deeming the principal to be the employer of the persons in question.

The following graphic illustrates how the "responsibility of the engager" would apply in conjunction with the revocation of the independent operator exemption.

Figure No. 4-1
Illustration of Responsibility of the Engager



In this model the "independent operator" category would be redundant, as it would be superseded by the "responsibility of the engager." An engager would be responsible for premiums regardless of whether an individual is an employee, a dependent contractor, an independent operator, or a sub-contracted crew leader with subordinate employees. In a small number of cases, an individual might register as an employer, but effectively work without employees most of the time. In these situations, premiums could be paid by either the engager or the individual.

Summary of Recommendations

1. In the ICI sector, the independent operator exemption should be repealed.
2. In the ICI sector, executive officers of a business should be allowed to work on a construction site only if they have WSIB coverage, either through their engager or through their own business.
3. In the ICI sector, the responsibility for WSIB premiums should rest with the engager of labour. This responsibility would apply irrespective of whether the engaged workers are employees, dependent contractors, independent operators or crew leaders who engage subordinate workers. An engager of construction labour would only be relieved of responsibility for WSIB premiums if the entity (person, partnership, company) that is engaged is otherwise properly registered with the WSIB and provides a current Certificate of Clearance.
4. Certificates of Clearance should be subject to renewal, but should be valid for no longer than 30 days.
5. The current system of joint and several liability should remain unchanged.

Appendices

Appendix A: **Extracts from: *Sagaz Industries Canada Inc., Sagaz Industries Inc., and Joseph Kavana v. 671122 Ontario Limited, formerly Design Dynamics Limited***

Appendix B: **CCRA: Workers engaged in construction – employees or self employed workers? (December 2003)**

Appendix C: **WSIB: Form 1169A - Independent Operator Questionnaire for Construction**

Appendix D: **Comparison of the Regulatory Treatment of Independent Operators across Canadian Workers' Compensation Boards**

Appendix A: Extracts from: *Sagaz Industries Canada Inc., Sagaz Industries Inc., and Joseph Kavana v. 671122 Ontario Limited, formerly Design Dynamics Limited, [2001] 2 S.C.R.*

Various tests have emerged in the case law to help determine if a worker is an employee or an independent contractor. The distinction between an employee and an independent contractor applies not only in vicarious liability, but also to the application of various forms of employment legislation…

The Federal Court of Appeal thoroughly reviewed the relevant case law in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553. As MacGuigan J.A. noted, the original criterion of the employment relationship was the control test set out by Baron Bramwell in *Regina v. Walker* (1858), 27 U.M.C. 207, and adopted by this Court in *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605. It is expressed as follows: "the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work" (*Hôpital Notre-Dame de l'Espérance v. Laurent, supra,* at p. 613).

This criterion has been criticized as wearing "an air of deceptive simplicity" (Atiyah, *supra*, at p. 41). The main problems are set out by MacGuigan J.A. in *Wiebe Door, supra,* at pp. 558-59:

> *A principal inadequacy [with the control test] is its apparent dependence on the exact terms in which the task in question is contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. In addition, the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.*

An early attempt to deal with the problems of the control test was the development of a fourfold test known as the "entrepreneur test". It was set out…and applied by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.), at p. 169:

> *In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant… . In the*

> *more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.*

As MacGuigan J.A. notes, a similar general test, known as the "organization test" or "integration test" was used by Denning L.J. (as he then was) in *Stevenson Jordan and Harrison, Ltd. v. Macdonald*, [1952] 1 *The Times* L.R. 101 (C.A.), at p. 111:

> *One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.*

This decision imported the language "contract of service" (employee) and "contract for services" (independent contractor) into the analysis. The organization test was approved by this Court in *Co-operators Insurance, supra* (followed in *Mayer, supra*), where Spence J. observed that courts had moved away from the control test under the pressure of novel situations, replacing it instead with a type of organization test in which the important question was whether the alleged servant was part of his employer's organization.

However, as MacGuigan J.A. noted in *Wiebe Door*, the organization test has had "less vogue in other common-law jurisdictions", including England and Australia. For one, it can be a difficult test to apply. If the question is whether the activity or worker is integral to the employer's business, this question can usually be answered affirmatively. For example, the person responsible for cleaning the premises is technically integral to sustaining the business, but such services may be properly contracted out to people in business on their own account. As MacGuigan J.A. further noted in *Wiebe Door*, if the main test is to demonstrate that, without the work of the alleged employees the employer would be out of business, a factual relationship of mutual dependency would always meet the organization test of an employee even though this criterion may not accurately reflect the parties' intrinsic relationship.

Despite these criticisms, MacGuigan J.A. acknowledges, at p. 563, that the organization test can be of assistance:

> *Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer", because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright [in Montreal] addressed the question "Whose business is it? [Emphasis added.]*

According to MacGuigan J.A., the best synthesis found in the authorities is that of Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at pp. 737-38 (followed by the Privy Council in *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 A.C. 374, per Lord Griffiths, at p. 382):

> *The observations of LORD WRIGHT, of DENNING, L.J., and of the judges of the Supreme Court in the U.S.A, suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor, and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. [Emphasis added.]*

Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, *supra*, sets out the "enterprise test" at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks…

In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan, supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations . . ." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:

> *[I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose .... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in*

> *all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.*

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

Appendix B: CCRA: Workers engaged in construction – employees or self employed workers? (December 2003)

December 2003

Workers engaged in construction – Employees or self-employed workers?

Introduction

This document provides information on what the Canada Customs and Revenue Agency (CCRA) looks at when determining whether a person working in the construction industry is an employee or a self-employed worker.

Employer responsibilities

All employers are required by law to deduct Canada Pension Plan (CPP) contributions and Employment Insurance (EI) premiums from amounts they pay to their employees. Employers must remit these amounts along with their share of CPP contributions and EI premiums. For more information on employer responsibilities and obligations, visit the following Web page: http://www.ccra-adrc.gc.ca/tax/business/payroll/menu-e.html

If a payer is not sure whether an individual is an employee or a self-employed worker, the payer can request a ruling from the CCRA. The worker can also ask for a ruling. More information on the ruling process is available in *How to obtain a Ruling for Canada Pension Plan and Employment Insurance purposes*.

How to determine if a person is an employee or a self-employed worker

To determine whether an individual is an employee or a self-employed worker, the CCRA has to analyze the factual working relationship between the worker and the payer. Over time, the courts have established four criteria to use during this process:

- **Control** – This criterion looks at the right of the payer to exercise control over the worker.
- **Tools and equipment** – This criterion looks at who supplies the tools and equipment required by the worker to complete the task.
- **Chance of profit / Risk of loss** – This criterion looks at the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit and risk of financial loss in performing his or her tasks.

- **Integration** – This criterion looks at whether the worker hired to perform the services is performing them as a person in business on his or her own account. It asks the question "whose business is it"? Is the worker operating his or her own business, or is his or her work done as an integral part of the payer's business?

(See our pamphlet ***RC4110 Employee or Self-employed?*** for more information.)

Who is a self-employed worker?

In general, a self-employed worker is someone who undertakes a task to produce a given result and is not directed or controlled by the person for whom the services are being performed. The self-employed worker is free to use his or her discretion in specific areas that were not specified in the contract in advance.

Indicators of a self-employed worker

The following indicators can be used to help determine whether or not a person is a self-employed worker (not all of the following indicators may be present in every case):

- A self-employed worker is usually free to work when, and for whom, he or she chooses.
- A self-employed worker may be given blueprints or other specifications to complete a specific contract; however, this does not indicate control over the way the work is to be done.
- A self-employed worker does not necessarily have to perform the services personally and may hire another party to complete the work or help complete the work.
- A self-employed worker is usually paid on a "price per job basis." The price is normally the result of negotiation between both parties.
- A self-employed worker is normally hired for a specific job (or on a job-by-job basis) rather than in an ongoing relationship.
- A self-employed worker is normally able to provide his or her services to different payers at the same time.
- A self-employed worker may develop a harmonious, professional relationship with a prime contractor over a long period of time. This relationship would not affect the employment status of the self-employed worker, as long as the status of transactions between the two remained as a business-to-business relationship.
- A self-employed worker normally has to redo substandard or improperly completed work at his or her own expense.
- A self-employed worker is usually responsible for providing the equipment or facilities used in performing his or her services. The fact that a worker provides small hand tools is not normally a strong indicator of a worker's employment status.
- A self-employed worker is usually responsible for repairs and maintenance costs for the tools and equipment he or she provides and that are required to perform the work.

- A self-employed worker may end up using his or her own pick-up truck to deliver scaffolding, air compressors, generators, power saws, cement mixers, or other pieces of his or her equipment and materials to the job site. This type of activity indicates that the worker has invested in assets used to deliver his or her services.

- A self-employed worker would normally be liable if he or she does not fulfill the obligations of the contract.

- A self-employed worker can realize a profit or suffer a loss in a business sense. The worker is subject to a real risk of financial loss due to investments in tools and equipment and a real liability for expenses such as materials, salary, repairs, and maintenance costs on equipment, as well as other business expenses.

Displaying a business presence as a self-employed worker

The existence of a "business presence" normally indicates a worker is self-employed. Listed below are some examples of a business presence that a self-employed worker may exhibit.

- The worker has developed accounts with suppliers and clients.

- The worker advertises his or her services for hire in the newspaper, the yellow pages, or specialized trade journals.

- The worker maintains an office and staff.

- The worker has his or her own liability insurance.

- The worker has a business license.

- The worker is registered as a business with different government departments and agencies for things such as goods and services tax or business name registrations.

- The worker maintains a separate bank account for the business, and the worker negotiates business loans or a line of credit.

- The worker has a separate business telephone line.

- The fact that a worker is a member of a trade union does not exclude the worker from being a self-employed worker.

Who is an employee?

In general, an employee is someone who is hired to perform specific duties under the direction and control of the party that hired him or her. Under the terms and conditions of employment, a worker is not normally in a position to make a profit or suffer a loss. An employee is not viewed as operating his or her own business—instead, the worker is viewed as an integral part of the payer's business.

Indicators of an employer-employee relationship

The following indicators can be used to help determine whether or not a person is an employee (not all the following indicators may be present in every case):

- An employer has the right to control how, when, and where the worker does the work. The employer does not have to use this authority—the fact that the authority exists is enough to show control.
- An employer normally establishes or sets the hours of work for the employee.
- An employer normally determines the rate of pay.
- An employer usually pays employees by the hour, day, week, or month as opposed to a negotiated "price per job basis."
- The more continuous and exclusive the working relationship, the more it indicates an employer-employee relationship exists.
- Benefits, such as paid vacation, sick days, health insurance, medical and or dental plan, pension plan, etc., are sometimes made available to an employee by an employer.
- An employee does not normally have the ability to hire and send his or her own replacement; he or she normally must render the services personally.
- While employees sometimes supply their own hand tools, the employer normally supplies the larger hand tools and equipment required by the worker to complete his or her duties.
- The fact that a worker is required to supply his or her own hand tools does not indicate the worker is self-employed.
- Employees often receive training or direction from the employer on how to complete assigned tasks.
- Generally, an employer can decide to fire an employee, and an employee may quit the job without obligation.
- An employee is not normally in a position to realize a business profit or loss.
- An employee is not recognized as having a business presence.

Can a worker be classified as both an employee and a self-employed worker?

Each case must be reviewed on its own merits. It is possible for a worker to be considered an employee under one contract or agreement while at the same time being considered a self-employed worker under another contract or agreement. However, regardless of which classification the worker falls under, he or she cannot be considered both an employee and a self-employed worker under the same contract or agreement.

Corporations

In general, for purposes of the CPP and the EI Act, where a worker operates through his or her personal services corporation and that corporation enters into a contractual arrangement to provide services to a third party, the third party will not normally be seen as being the employer of the worker. This does not mean that the worker is self-employed. The worker, in most cases, would be an employee of his or her own corporation.

Need more information?

To get more information, call or visit your tax services office. The telephone numbers and addresses are listed in the government section of your phone book and on our Web site at www.ccra.gc.ca/tso. You can also order or download forms and publications from our Web site at www.ccra.gc.ca/forms.

Legislative references:

Paragraph 5(1)(a) of the EI Act
Paragraph 6(1)(a) of the CPP

Appendix C: WSIB Form 1169A Independent Operator Questionnaire for Construction

WSIB ONTARIO CSPAAT — Workplace Safety & Insurance Board / Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

print reset

Construction Industry Questionnaire Attachment

Thank you for contacting the Workplace Safety & Insurance Board (WSIB). In order for us to make a determination regarding your status under the Workplace Safety and Insurance Act, the following must be completed in full and supporting documentation attached.

Please read and complete this form and the attached Construction Industry Questionnaire. Attach the requested documents and return to the WSIB by fax, mail or in person.

start

1. How many hours per week do you work for your current contractor?	**2.** On what basis is your salary calculated (hourly, weekly, piecework, etc.)?
3. What equipment is necessary to complete your work?	
4. Who provides the equipment?	Who pays for the equipment?

5. Do you hire: *(please check either yes or no)*

part-time help? ☐ yes ☐ no full-time help? ☐ yes ☐ no casual help? ☐ yes ☐ no

sub-contractors? ☐ yes ☐ no family members? ☐ yes ☐ no

If you answered yes to any box in question **5**, please advise:	**6.** How many helpers do you hire?	**7.** Date hired (dd/mmm/yyyy)

Upon signing the Construction Industry Questionnaire, you agree to provide the WSIB the right to verify your responses.

Please include copies of:

- **Canada Customs & Revenue Agency (CCRA, formerly Revenue Canada) Employer Number (if applicable), and Business Registration/Articles of Incorporation from the Ministry of Consumer and Business Services (MCBS).**
- **Brochures/pamphlets/yellow page ad used to advertise your business, if applicable.**
- **Proof that you file GST.**
- **All invoices and contracts for work completed for your current contractor within the last six (6) months. If not available, please explain:**

- **Five (5) to seven (7) invoices or contracts for work completed for other contractors within the last six (6) months. If not available, please explain:**

- **Purchase orders/receipts for materials supplied within the last three (3) to six (6) months. If not available, please explain:**

- **Last filed tax return with CCRA - T1 General with Statement of Business Activities (T2124).**

Cellular Telephone No.	e-mail address (if applicable)

Additional Information

The Workplace Safety and Insurance Act does not automatically cover individuals ruled to be Independent Operators. These individuals may request coverage through the WSIB's Optional Insurance Policy.

Please return with the completed Construction Industry Questionnaire.

Contacting the Workplace Safety & Insurance Board

Business Hours:
8:30 a.m. -- 4:30 p.m.,
Monday to Friday.

Head Office
Simcoe Place
200 Front Street West
Toronto ON M5V 3J1

Teletypewriter (TTY)
1-800-387-0050

Internet
e-mail address:
wsibcomm@wsib.on.ca
Web site address:
www.wsib.on.ca

Guelph
1 Stone Road West, 4th Floor
Guelph ON N1G 4Y2
Telephone: (519) 826-4650
Toll-Free: 1-888-259-4228
Fax: 1-888-266-0771

Hamilton
120 King Street West, 4th Floor
Hamilton ON L8N 4C5
Telephone: (905) 523-1800
Toll-Free: 1-800-263-8488
Fax: (905) 523-7014

Kingston
234 Concession Street, Suite 304
Kingston ON K7K 6W6
Telephone: (613) 544-9682
Toll-Free: 1-800-267-9461
FAX: (613) 544-1510

Kitchener
55 King Street West
Kitchener ON N2G 4W1
Telephone: (519) 576-4130
Toll-Free: 1-800-265-2570
Fax: (519) 576-2667

London
148 Fullarton Street
London ON N6A 5P3
Telephone: (519) 663-2331
Toll-Free: 1-800-265-4752
FAX: (519) 663-2333

North Bay
128 McIntyre Street West
North Bay ON P1B 2Y6
Telephone: (705) 472-5200
Toll-Free: 1-800-461-9521
Fax: (705) 472-9801

Ottawa
99 Metcalfe Street, Suite 700
Ottawa ON K1P 1E8
Telephone: (613) 237-8840
Toll-Free: 1-800-267-9601
Fax: (613) 239-3321

Sault Ste. Marie
153 Great Northern Road
Sault Ste. Marie ON P6B 4Y9
Telephone: (705) 942-3002
Toll-Free: 1-800-461-6005
Fax: (705) 942-7582

St. Catharines
301 St. Paul Street, 8th Floor
St. Catharines ON L2R 7R4
Telephone: (905) 687-8622
Toll-Free: 1-800-263-2484
Fax: (905) 687-7117

Sudbury
30 Cedar Street
Sudbury ON P3E 1A4
Telephone: (705) 675-9301
Toll-Free: 1-800-461-3350
Fax: (705) 675-9367

Thunder Bay
1113 Jade Court, Suite 200
Thunder Bay ON P7B 6V3
Telephone: (807) 343-1710
Toll-Free: 1-800-465-3934
Fax: (807) 343-1977

Timmins
Ontario Government Complex
Highway 101 East, P.O. Bag 4020
South Porcupine ON P0N 1H0
Telephone: (705) 235-6130
Toll-Free: 1-800-461-9856
Fax: (705) 235-6140

Toronto
200 Front Street West, 15th Floor
Toronto ON M5V 3J1
Telephone: (416) 344-1004
Toll-Free: 1-800-387-0080
Fax: (416) 344-2711

Windsor
2485 Ouellette Avenue
Windsor ON N8X 1L5
Telephone: (519) 966-0660
Toll-Free: 1-800-265-7380
Fax: (519) 972-4181

Special Investigations Branch
Action Line: 1-888-745-3237
E-mail: sileads@wsib.on.ca

Prevention Division
Telephone: (416) 344-1016
Toll-Free: 1-800-663-6639

French Language Services
Telephone: (416) 344-2003
Toll-Free: 1-800-465-5606

Multilingual Services
Telephone: (416) 344-2000
Toll-Free: 1-800-465-5606

To request brochures
Telephone: (416) 344-4200
Toll-Free: 1-800-465-5606

WSIB ONTARIO CSPAAT
Workplace Safety & Insurance Board
Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail
200 Front Street West Toronto ON M5V 3J1
200, rue Front Ouest Toronto ON M5V 3J1

Determining Worker/ Independent Operator Status

Construction Industry

Introduction

The responses below will indicate whether the individual is an independent operator or a worker under the Workplace Safety & Insurance Act (the Act).

Workers are entitled to benefits provided by the Act and their employers must pay premiums to the Workplace Safety & Insurance Board (WSIB).

Independent operators may elect to be considered and covered as "workers" under the Act. If they want insurance, they must pay their own premiums.

Contractor means the firm that hires the individual to do construction work.

Who should complete this questionnaire?

- Persons who do construction work
- the contractor(s) (or their respective representatives).

After completing the questionnaire, if the responses indicate that the individual is an independent operator, the individual and the company must sign the declaration at the end of the questionnaire to verify that the answers accurately reflect the work relationship. Submit the questionnaire to the Workplace Safety & Insurance Board, Operations, 200 Front St. West, Toronto, Ontario M5V 3J1 (or your local WSIB office) for confirmation.

The individual and the company may submit separate questionnaires if:

- they disagree about the answers to some or all of the questions, or
- the individual wishes to submit the financial information, required to support the answers in **Part 3**, to WSIB in confidence.

Part 1

Please fill in the blanks or check the appropriate box.

What service does the individual provide for the contractor?

What is the main business of the contractor?

Are the terms of the work relationship stated in a written contract?
If yes, please include a copy of this contract. Y ☐ N ☐

Does the individual have a current or previous WSIB account number? Y ☐ N ☐

If yes, please state this number.

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Part 2

Instructions

After accepting the work, does the individual require further instruction from the contractor in order to complete the work? Y ☐ N ☐

Does the individual have to follow the contractor's instructions about the standards and specifications to which the work must comply? Y ☐ N ☐

Is the answer "yes" to 1 or more of the 2 questions in this section? Y ☐ N ☐

Hours of Work

Does the individual work the same hours as everyone else who does the same job on the site? Y ☐ N ☐

Order of Work

Is the work scheduled and coordinated with the work of others who are hired by the contractor? Y ☐ N ☐

Training/Supervision/Discipline

Is the individual trained or supervised by the contractor or by an experienced employee of the contractor? Y ☐ N ☐

Union Agreement

Are the work activities governed by a collective agreement setting rates of pay, vacation pay, etc.? Y ☐ N ☐

Ruling by Revenue Canada

Has Revenue Canada made an official written ruling that the individual is independent? Y ☐ N ☐

If yes, please include a copy of this decision

These decisions are made using the form entitled "Request for a ruling as to the status of a worker under the Canada Pension Plan or Unemployment Insurance Act".

Method of Payment

Is the individual paid according to a standard pay or rate scale? Y ☐ N ☐

Part 2 Score

How many answers fall within the grey box in Part 2?

Part 3

Does the individual own, lease, rent or pay for more than 80% (in dollars/month) of the assets (e.g. equipment) that are used in doing the work?

Y ☐ N ☐

If no, skip to the next part.

If yes, does the individual own, lease, rent or pay for:

material: _____ Y ☐ N ☐

equipment: _____ Y ☐ N ☐

tools: _____ Y ☐ N ☐

supplies: _____ Y ☐ N ☐

equipment repairs & maintenance Y ☐ N ☐

damage or loss to materials Y ☐ N ☐

damage or loss to equipment Y ☐ N ☐

labour Y ☐ N ☐

other (please specify) Y ☐ N ☐

Beside each of the items above, please state the approximate value of each item or its cost (in dollars/month).
Individuals may submit separate questionnaires if they wish to submit this information in confidence.

Are more than 20% (in dollars/month) of these payments made to the contractor or to an agency selected by the contractor? (Please circle those items for which the contractor or an agency controlled or selected by the contractor receives payments). Y ☐ N ☐

Does the contractor have the right to make decisions that could affect more than 20% of these payments? Y ☐ N ☐

Is the contract valued at less than $900/week? Y ☐ N ☐

Part 3 Score

How many answers fall within the grey box in Part 3

Part 4

Personal Services Required
Is the individual expected to do the work personally? Y ☐ N ☐

Service to General Public
Does the individual act as representative of the contractor when serving the general public?. Y ☐ N ☐

Does the individual invoice customers on behalf of the contractor? Y ☐ N ☐

Does the individual file GST returns with Revenue Canada? Y ☐ N ☐

Does the individual advertise by means of business cards, truck signs, yellow pages, newspapers or other publications, etc.? Y ☐ N ☐

Has the individual registered as a sole proprietor and/or "limited" company or partnership with the Provincial Ministry of Consumer and Commercial Relations? Y ☐ N ☐

Of the 5 answers in this section, do 3 or more fall in the middle column? ↑ Y ☐ N ☐

Full Time Required
Does the individual work exclusively for one contractor? Y ☐ N ☐

Continuing Need for Service
Do the combined hours of work of the individual and all other persons who provide the same type of service for the contractor equal 40 hour/month or more (on average in a year)? Y ☐ N ☐

Continuing Relationship
Does the individual work for the same contractor continuously (year after year)? Y ☐ N ☐

Doing Work on Contractor's Work Site
Does the individual work on a work site that is owned or controlled by the contractor? Y ☐ N ☐

Hiring, Supervising and Paying Assistants
Does the individual need the contractor's approval to hire, fire or discipline employees? Y ☐ N ☐

Does the contractor tell the individual to hire others to assist with the work? Y ☐ N ☐

Is the answer "yes" to 1 or more of the 2 questions in this section? Y ☐ N ☐

Working for more than one Contractor at a Time
Does the individual regularly work for more than one contractor in the course of a two-week period? Y ☐ N ☐

Termination
Can the individual or the company end the relationship at any time without legal penalty for breach of contract? Y ☐ N ☐

Part 4 Score

How many answers fall within the grey box in Part 4

Part 5

In **Part 2**, 4 or more answers fall in the box?  Y ☐ N ☐

In **Part 3**, do 4 answers fall in the box? Y ☐ N ☐

In **Part 4**, do 5 or more answers fall in the box? Y ☐ N ☐

If the answer in this box is "N" 2 or more times, the individual is a **worker** under the Workplace Safety & Insurance Act (the Act).

If the answer in this box is "Y" 2 or more times, the individual is an **independent operator** under the Act.

Applying for Insurance

If the responses indicate that the individual is an **independent operator**, the individual:

- must submit the questionnaire and applicable supporting documents to the Workplace Safety & Insurance Board, Operations, 200 Front St. West,Toronto, Ontario M5V 3J1 (or the local WSIB Office).
- and the contractor(s) that hire the individual must sign the declaration below. (If some of the responses vary depending on the contractor, submit more than one completed questionnaire with the signatures of the appropriate principal(s)).

Declaration

To the best of my knowledge, information and belief, the information contained in this document is true.

I/we understand that the WSIB reserves the right to audit and verify these responses. If these responses do not truly represent the nature of the working relationship, the WSIB may reverse the determination of status retroactively to the date that the working relationship began.

Personal information on this form is collected under the authority of the Workplace Safety and Insurance Act, 1997, and may be used to register/determine your status for coverage and to administer and enforce the Act. If you have any questions, please contact your Customer Service Representative/Account Manager or call 1-800-387-8638.

Individual's Name (print please)	Signature	Date (dd-mmm-yyyy)
	Please print form & sign before returning to WSIB	

Address

	Postal Code	Telephone Number	FAX Number
		( )	( )

Contractor(s) Name(s)	Authorizing Name & Signature	Position	WSIB Account Number
	Please print form & sign before returning to WSIB		
	Please print form & sign before returning to WSIB		
	Please print form & sign before returning to WSIB		
	Please print form & sign before returning to WSIB		

If the WSIB confirms independent operator status, will a WSIB account number or optional insurance be desired? Y ☐ N ☐

Appendix D. Comparison of the Regulatory Treatment of Independent Operators across Canadian Workers' Compensation Boards

The mischaracterization of employees as "independent contractors" is not unique to Ontario. All of the other nine provinces, as well as the three territories, have wrestled with this question. The issue arises in almost every statute dealing with employment matters, as well as in taxing statutes. The issue is addressed directly in workers' compensation legislation, which must deal with both the determination of a worker's status and, where independent operator status is found, the rights and obligations of independent operators in respect of workers' compensation coverage.

This appendix reviews the statutory and regulatory provisions and administrative policies of workers' compensation systems across Canada. For ease of reference, a summary to this appendix highlights the salient points of practice in each jurisdiction.

British Columbia

The relevant provisions of the British Columbia *Workers Compensation Act*, R.S.B.C. 1996, c.492 are as follows. Section 1 defines "employer" to include "every person having in their service under a contract of hiring…written or oral, express or implied, a person engaged in work in or about an industry [covered by the Act]". "Worker" is defined to include "a person who has entered into or works under a *contract of service*…written or oral, express or implied, whether by way of manual labour or otherwise". The "worker" definition also includes "an independent operator admitted by the board under section 2(2)". Section 2(2) empowers the Board to direct that the *Act* applies "to an independent operator who is neither an employer nor a worker as though the independent operator was a worker" or "to an employer as though the employer was a worker."

The Board's Assessment Manual contains further elaboration on the distinction between a "worker" and "independent operator". It states, under Item AP1-1-1, that "a worker is an individual who performs work under a contract with an employer and has no business existence under the contract independent of the employer. …A worker cannot be an "independent firm". The Item goes on to note that the term "independent operator" is referred to, but not defined in the *Act*. The Item continues "An independent operator performs work under a contract, but has a business existence independent of the person or entity for whom that work is performed. An independent operator is an 'independent firm'."

The Assessment Manual creates another category called "independent firm". The stated purpose is "to identify those persons who are required by the Act to register with the Board as employers of workers, or from whom, as unincorporated employers or independent operators, the Board will accept a registration through the purchase of Personal Optional Protection for themselves. An independent firm performs work under contract, but has a business existence…independent of the person or entity for whom that work is performed.

An independent firm may be an individual, a corporation or another type of legal entity. A worker cannot be an independent firm." An independent contractor is said to fall within the category "independent firm". It is not immediately clear why the terms "independent firm" and "independent contractor" are both required.

Under Item AP-1-1-7, the Board has created an additional category called "labour contractor" for the purpose, according to the Assessment Manual, of assisting in determining whether an individual is a worker or independent firm. The Manual states that "labour contractors" include proprietors or partners who (i) have workers and supply labour to only one firm at a time; (ii) are not defined as workers, do not have workers or do not supply major materials or major revenue-producing equipment, *but who contract a service to two or more firms on an ongoing simultaneous basis*; or (iii) may or may not have workers, but contract a service including *one piece of major revenue-producing equipment* to a firm or individual. Labour contractors may voluntarily choose to register as employers *if* they have workers, or, if they do not have workers, may apply for optional personal coverage as independent operators.

Comments:

The bottom line on the principal issue with which we are concerned is that "independent operators" are not required to be covered by the B.C. *Act* unless they make application for coverage: see s.1(f) ("Worker includes…an independent operator *admitted* by the Board under section 2(2)") and also section 2(2) ("The Board may direct that this Part applies on the terms specified in the Board's direction (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker"). Officials assure us that independent operators are never "admitted" by the Board unless they voluntarily apply for coverage, so that it is accurate to conclude that *except on application*, they are not covered by the *Act*.

In determining whether a person is an independent operator or a worker, a major test is whether the individual doing the work exists as a business enterprise *independently* of a person or entity for whom the work is done. In making this determination, a number of factors are considered by the Board, including whether the services are essentially "services of labour"; the degree of control exercised by the person for whom the work is done; the prospect of profit or loss by the individual doing the work; whether the individual provides the major equipment; whether an individual's business enterprise is subject to regulatory licensing, and if so, the identity of the licensee; whether the individual doing the work is engaged by one person or works intermittently for different persons; and whether the individual being engaged is able or required to hire other persons.

As to the "labour contractor," we were told by officials that the B.C. forest products and trucking industries lobbied for the creation of a "labour contractor" category that the Board would accept for registration, who might not meet the tests of an independent contractor, but who, upon registration, would bear the sole burden of paying premiums and accepting liability for injuries to his/her employees. Officials advised that the "labour contractor" designation is currently under active review and indicated that it might well be altered in material respects. But whether or not there are changes, this unique category is not one

created by the Act and, under the Board's policy, is intended to apply to someone who is neither an "independent operator" nor "worker" who voluntarily applied for coverage.

Alberta

The relevant provisions of the Alberta *Workers' Compensation Act*, R.S.A. 2000, c.W-15 are as follows. Paragraph 1(1)(j) defines "employer" to mean (i) an *individual firm,* association, body, or corporation that has, or is deemed by the Board…to have one or more workers in…its service…; (ii) a *proprietor* whose application is approved under section 15; (iii) a *corporation* where the application of a director of a corporation is approved under section 15 and (iv) a *partnership* where the application of a partner in the partnership is approved under section 15. Section 1(1)(w) defines "proprietor" as "an individual who owns and operates a business, the general business activity of which usually involves performing work for more than one person concurrently, and in connection with which the individual does not employ any workers". Section 1(1)(z) states that "worker" means a person who enters into or works under a *contract of service*…". In the case of both proprietors and workers, the definitions include persons or entities, which the board, in its discretion, may deem to be proprietors or workers.

Section 15 provides that an employer, partner, proprietor and director of a corporation are not 'workers' unless they apply to the Board for coverage, and the Board approves the application. Section 16 empowers the Board to deem individuals who perform work for another person in a covered industry to be "a worker". Under section 16(1)(c), a *director* of the corporation performing the work of the corporation is excepted from the deeming provisions of section 16 however, the situation is different for "partners" and "proprietors"; if they do not apply for and obtain coverage under section 15, they are deemed to be "workers" under section 16.

As indicated, a director of a corporation (as well as an employer, a partner and a proprietor) may apply to the Board under section 15(1) for coverage under the *Act*, but is not obliged to do so. Thus a director who is performing work in support of the business of the corporation is not covered unless he/she, acting voluntarily, makes a successful application to the Board under section 15(1). Officials advise that there have been situations where a husband and wife have incorporated and the wife, rather than the husband, is the sole director of the corporation. In that case, the corporation must register as an employer and premiums must be paid on behalf of the worker-husband. In most cases, however, the worker is the sole director of the corporation. As indicated above, such sole director is not deemed to be a worker under s.16.

A "partner" may make an application for "worker" status under section 15 of the *Act*. If successful – and assuming the partnership has no employees – then he is a "worker" *of the partnership*. Otherwise, he is deemed by section 16(1) to be a worker of the principal who employs him. The same principle applies with respect to proprietors, i.e., an individual who owns and operates a business, the general business activity of which usually involves performing work for more than one person concurrently, and in connection with which the individual does not employ any workers. The proprietor may apply for and, if successful, receive coverage as a worker under section 15. Otherwise he/she is considered to be a

worker of the principal, pursuant to section 16(1). Accordingly, both partners and proprietors are covered by the Act, either as a result of a successful application under s.15, in which case they are employees of the partnership or proprietorship, or because of the deeming provisions of s.16, in which case they are employees of the principal engaging them. If they employ others, they cease to be proprietors or partners, as the case may be. As employers, they have the option to take out coverage, but as business owners, they are not required to do so. They must, however, provide coverage for the workers in their employ.

Comments:

In essence, what we refer to as "independent operators" in Ontario are characterized as "proprietors" or "partners" in Alberta. Such individuals may receive coverage by way of application under s.15. However, if they are not covered pursuant to a voluntary application under s.15, they are deemed to be workers under s.16.

As indicated above, a director of a corporation who is performing work for the corporation is not required to be covered by the *Act*, although such director has the option, under section 15, to apply for coverage. Incorporation by a single individual frequently occurs in Alberta, especially in the oil, gas and construction industries, at the behest of the principal engaging the individual, in order for the principal to avoid responsibility for workers compensation assessments and the related obligations.

Thus, only directors of a corporation performing the work of the corporation are not covered under the Alberta *Act*, unless they make a successful application for coverage under s.15. This unique situation means that if a worker wishes (or is induced) to avoid coverage, he/she must incorporate and be a director of the corporation. In the view of some, this creates an artificial, and perhaps unfair and administratively cumbersome situation – unfair, because the person is in reality a worker, whose assessments should be paid for by the principal and administratively cumbersome for the Board, which has to deal with a large number of individual registrations by sole directors, from whom assessment collections must be made.

Saskatchewan

The relevant provisions of *The Workers' Compensation Act, 1979*, s.s. 1979, c.W-17.1 are as follows. "Employer" is defined to include "any person, corporation, firm, association or body having in its service any worker engaged in any work in, about or in connection with an industry…" (s. 2(f)). "Worker" means "a person who has entered into or works under a *contract of service*…written or oral, express or implied, whether by way of manual labour or otherwise…and includes any other person not otherwise coming within this definition who, under this Act *or under any direction or order of the board is deemed to be a worker*" (s. 2(t)(iv)).

Section 9(2) of the *Act* establishes that a person operating defined equipment is deemed to be a worker of the principal when the principal contracts with another person for the use of that equipment. Section 22(1)(i) empowers the board to determine "whether any worker is within the scope of the *Act*".

The Saskatchewan Board's policy with respect to the coverage of independent workers (Policy 15/2000) defines "independent worker", "contract for service", and "multiple contracts". It then goes on to stipulate what is to be considered when determinations are made by the Board concerning the coverage of an independent worker. It states that "workers who are truly self-employed and who have no employees are to be allowed to obtain their own account with the Board". It also provides that "generally, *personal* coverage for an independent worker…is to be granted if the worker is able to provide satisfactory evidence that they are involved in *multiple contracts* with more than one employer…". The policy also stipulates that "workers who provide on-site labour and who do not have personal coverage are deemed to be workers of the employers to whom they supply their work". The Saskatchewan Board interprets such "workers" to include "independent contractors".

Comments:

So far as the statutory definition is concerned, only "workers" – i.e. those with a contract of service – are automatically covered by the *Act*. The Board's authority to direct that independent operators are covered by this *Act* is based on the combined operation of sections 2(t)(iv) and 22(1)(i). Independent operators who are truly self-employed and have no employees are allowed to obtain coverage on their own account. However, those who do not obtain personal coverage are deemed to be workers. Thus, under the Board's policy, "independent contractors" must have personal coverage or, in the absence of personal coverage, must have their premiums paid by the person who engages them.

To summarize, the coverage of independent persons or contractors is not dealt with specifically in the statute, but is left to the unfettered discretion of the Board. The result of the Board's policy is that all independent operators/workers are required to be covered, either by personal coverage or by coverage provided by the person or entity who engages them.

Manitoba

The relevant provisions of the *Manitoba Workers Compensation Act*, R.S.M. 1987, c.W-200 are as follows. Section 1(1) defines "employer" to include "a person who has in service under a contract for hiring, …written or oral, express or implied, a person engaged in work in or about an industry". Like most other Acts, "employment" is defined broadly to include employment in an industry or any part, branch or department of an industry. The same section defines "worker" to include "a person…who enters into or works under a *contract of service*, written or oral, express or implied, whether by way of manual labour or otherwise". The definition also refers to "a person deemed [by the board] to be a worker under section 60(2.1)" and also "an independent contractor who is *admitted* by the Board as being within the scope of Part I under Section 75".

Section 60(2) vests the board with jurisdiction to determine a number of matters, including, under subparagraph (j) "whether or not any worker in any industry is within the scope of this Part and entitled to compensation…". Section 60(2.1), entitled "Deemed Worker and Employer" provides that "…where a person who is not a worker under Part I performs work

for the benefit of another person, the Board may deem the first person to be a worker and the second person to be the employer of the first person…". Section 75 of the *Act* deals specifically with independent contractors. Section 75(1) provides that "an independent contractor may, *on his own application*, be admitted by the Board as being within the scope of this Part, subject to such terms and conditions, and for such a period as the board may deem adequate and proper". Section 75(2) provides that where an independent contractor is admitted, he shall be deemed to be a worker employed by himself. Section 75(3) provides that "independent contractor" includes a self-employed person engaged in any of the industries covered by the *Act*.

In a Policy Statement dealing with independent contractors issued on February 24, 1989, the Board's Finance & Assessments Department sets out the Board's overall policy. The term "independent contractor" is limited to those persons performing work or services directly for *homeowners*. The equivalent in other industries and sectors, including the remainder of the construction industry, is "labour contractor". A labour contractor is said to be "a proprietorship, partnership or corporation involved in a *bona fide* business enterprise which performs work or services other than for homeowners and which:

> does not engage workers (other than the proprietor, the partners or the directors of the corporation) whose annual assessable earnings exceed the minimum level of earnings; and
>
> can satisfy the board that it contracts with more than one principal concurrently and works regularly for more than one principal.

The Policy also states that "labour contractors who are unincorporated and employ no workers may apply to the WCB for independent contractor coverage; and *if the WCB accepts the application*, the provisions of this policy dealing with independent contractor coverage apply to the labour contractors" – i.e., they are deemed workers in their own employment and become entitled to the protection and benefits of the *Act* upon payment of the appropriate premiums. The section also deals with labour contractors who employ workers and who apply for and receive coverage as employers. In the latter case, they are required to pay an assessment for the assessable earnings of the workers they employ.

The Policy continues, providing:

> If a person performing work for services in a compulsory industry is not an employer, an independent contractor with personal coverage or a labour contractor with personal coverage, *the person, and any workers hired by the person, are for the purposes of the Act, deemed to be workers in the employ of the principal for whom the work was performed, and the principal is deemed to be the employer of those persons.*

Comments:

The above establishes that the Manitoba Act covers labour contractors (i.e., those performing construction work for persons other than homeowners who do not engage covered workers and who can satisfy the Board that they contract with more than one principal concurrently) if they successfully apply for coverage. If they do not have personal coverage, they are deemed to be workers of the principal. Thus, only "independent contractors" (i.e., those working for homeowners) need to apply for coverage in order for it to be in effect. If the labour contractor engages a worker or workers whose annual assessable earnings exceeds the minimum level of earnings and is engaged in a *bona fide* business enterprise, then he/she falls within the definition of employer and is covered as such by the *Act*. The result is that only independent contractors working for homeowners need to apply for coverage in order for it to be in effect.

Ontario

The relevant provisions of *The Workplace Safety & Insurance Act*, 1997, S.O. 1997, c.16 are as follows. Under section 2(1), "employer" means "every person having in his, her or its service under a *contract of service*…another person engaged in work [in a covered industry] and includes…a deemed employer". The same section states that "Independent operator" means "a person who carries on a [business in a covered industry] and who does not employ any workers for that purpose". Section 2(1) also states that "Worker" means "A person who has entered into or is employed under a *contract of service*…" and includes "A person deemed to be a worker of an employer by a direction or order of the Board" and "A person deemed to be a worker under section 12".

Under section 12(1) of the *Act*, the Board is empowered to declare that certain persons are deemed to be workers, including independent operators. Section 12(2) empowers the Board to declare that "an executive officer of [a] corporation is deemed to be a worker" but "only if the executive officer consents…".

Section 141 of the *Act* pertains to who is liable for unpaid premiums owed to the WSIB when a person retains a contractor or subcontractor. The primary liability rests with the person or firm engaging the workers, but the liability is, in effect, joint and several. Under section 142, the owner (as defined in the *Construction Lien Act*) of the premises on which the work is being performed has a duty to see that the "employer" pays the required premiums, and if the owner fails to do so, he/she is liable to make those payments to the Board. (See references to the *clearance certificate*, supra.)

The WSIB requires "persons who do construction work and/or contractor(s) or their respective representatives" to complete the Determining Worker/Independent Operator Status Questionnaire – Construction Industry [1169 A08/02] as a means to determine an individual's status under the *Act.* The WSIB reviews the completed questionnaire and all supporting documentation to determine whether the individual in question is a "worker" covered by the *Act* or an "independent contractor" who is not automatically covered but may

apply for coverage. The questionnaire is comprehensive, and in some respects, complex. It is divided into five parts, the first four parts being substantive, and the fifth part is a summary. The questionnaire addresses almost every conceivable aspect of the working relationship. For the purposes of this report, it is unnecessary to review the substance of the questionnaire except to say that the comprehensive list of questions are very similar to the questions relevant to the common law test for determining employee/independent contractor status, as set out in the *Sagaz* decision and cover both the *organizational* test and the *control* test.

Upon receipt of the completed and signed questionnaire, the WSIB decision-maker reviews all responses along with all supporting documentation and renders a decision on whether the individual is a worker or independent operator. If the WSIB confirms independent operator status, the individual can then decide if optional insurance coverage is desired. If the individual is deemed to be a worker, then the person engaging his/her services is required to pay the WSIB premiums.

There is a duty on the person engaging contractors and subcontractors on their construction sites who are aware of workers being used by the contractors and subcontractors, to ensure that the contractors and subcontractors are registered with the WSIB and that their accounts remain in good standing with the WSIB. An account is in good standing when all insurable earnings have been reported and corresponding premiums have been remitted to the WSIB. Principals[7] are required to ask contractors and subcontractors for a WSIB *clearance certificate*. These certificates have a dual purpose: They act as confirmation to the principal that contractors/subcontractors are registered and have met all WSIB reporting and payment obligations. The clearance certificate also waives the WSIB's authority to hold the principal responsible under the joint and several liability provisions of section 141 of the *Act*. Certain key areas of the clearance certificate are critical: namely, the rate group and classification unit, which must match the work being conducted; and the legal name printed on the certificate must match the legal name of the company conducting the work.

Comments

The effect of these provisions is that an "independent operator" who does not employ any person is *not* covered by the *Act* unless he or she makes an application under s.12(1), or unless the WCB reviews the working relationship and determines that the individual is, in fact, a worker under the *Act* and therefore entitled to claim for benefits. However, as soon as an independent operator employs one or more persons to help in the construction activity, he or she becomes an employer, as defined by the *Act*. In one respect, namely the provision that engaging a single person is sufficient to convert an "independent operator" into an "employer", the *Act* is more stringent than the provisions in two jurisdictions, Nova Scotia and New Brunswick.

[7] Under operational policy 14-02-04 "clearance certificates", "principal" is defined as "the person letting a contract (purchasing services) but the following note is added: "However, in the construction industry a principal who purchases services from one or more contractors is frequently called the *"general contractor"* and the contractors are called *"subcontractors"*.

Quebec

The relevant provisions are contained in *An Act Respecting Industrial Accidents and Occupational Diseases*, R.S.Q. c.A-3.001. The terms "Employer", "Independent Operator", and "Worker" are all defined in Section 2 of the *Act*. "Employer" is a person who, under a contract of employment, uses the services of the worker for the purposes of his establishment. "Independent Operator" is a person who carries on work for his own account, alone or in partnership, and does not employ any worker. "Worker" is a person who does work for an employer for remuneration under a contract of employment or in an apprenticeship. Domestics, care-givers for children or the handicapped, and athletes are excluded.

Section 9 of the Act deals with independent operators and reads as follows:

> An independent operator who in the course of his business carries on activities for a person similar to or connected with those carried on in the establishment of that person *is considered to be a worker* in the employ of that person unless:
>
> he carries on the activities:
>
> > simultaneously for several persons;
> >
> > under a remunerated or unremunerated service exchange agreement with another independent operator carrying on similar activities;
> >
> > for several persons in turn, supplies the required equipment and the work done for each person is of short duration; or
> >
> > In the case of activities that are only intermittently required by the person who retains his services [sic].

Under the Quebec *Act*, employers are not required to declare the remuneration of independent contractors and thus are not required to pay premiums in respect of their work. The Quebec Commission ("CSST"), in a guide to employers on how to comply with the "Statement of Wages" filing requirements, has instructed employers how to determine the status of an individual whose services have been retained. The essential elements of this determination are as follows. It must first be determined if the person was engaged under an employment contract ("worker") or a contract for services ("independent operator"). The CSST has set out five questions that must be addressed to make this determination.

- Method of payment – was the person recruited in response to an offer of employment (a worker) or did the person respond to a call for tenders (independent operator);
- As to work schedule, must the person be present in the workplace at specific times and/or work a minimum number of hours in a given period (worker) or is the person not required to be in the workplace at specific times or to work a minimum number of hours (independent operator);

- Employee benefits – Is the person entitled to employee benefits (worker) or not (independent operator).
- As to replacement and assistance, is the person restricted in latitude in delegating work to another person (worker) or has the person full latitude in delegating work (independent operator);
- As to the possibility of financial loss, does the person assume responsibility for business expenses (e.g., liability insurance, the operation of the place of business, the purchase of tools and equipment (independent operator) or not (worker).

The CSST stipulates that if the majority of the "contractual features" are those of an employment contract (that is three of the five stipulated questions) an employer may assume that the person has worker status and that his remuneration must be declared. Similarly, if the majority of the contractual features are those of a *contract for services*, the person may be assumed to be an independent operator and his remuneration is not required to be declared.

If the independent operator has one or more employees working for him, he automatically has employer status and his own remuneration is not required to be declared. However, as an independent operator he must register with the CSST and declare the wages of his workers. An employer may subscribe for personal coverage.

The final determination involves examination of Section 9 of the *Act* (*supra*) to determine whether the independent operator is a "deemed worker". An employer engaging an independent operator must determine whether the independent operator's activities are similar to or connected with his or her own activities. If they are not, his remuneration does not have to be declared. And if they are, but if they are carried out in the manner described in s.9(1) – i.e., simultaneously for several persons; under an exchange agreement with another independent operator carrying on similar activities; or for several persons, supplying the required equipment for each person for short durations – his remuneration does not have to be declared. There is also a provision in the Quebec Guidelines that even where the independent operator's activities are similar to or connected with the employer's, his remuneration does not have to be declared by the employer if the services in question are carried out for less than 420 hours per calendar year.

It should also be noted that the statute governing labour relations in Quebec's construction industry also recognizes the status of "independent contactor," but restricts employment to certain types of construction. An "independent operator" is defined as:

> a person or a partnership holding a specialized contractor's licence issued under the Building Act who or which, for others and without the assistance of an employee, carries out personally…
>
> (i) construction work defined in this Act, if the licence pertains to the 'Heavy equipment contractor' or 'Excavation and earthwork contractor' subcategories;

(ii) maintenance, repair and minor renovation work defined in this Act, if the licence pertains to any other subcategory.

Comments

In the result, an independent operator – *i.e.*, one whose activities are not similar to or connected with the activities of the person who gives him work; whose activities are carried out simultaneously for several enterprises; whose activities amount to less than 420 hours of work per calendar year for the person engaging him; or who works under a "remunerated or unremunerated service exchange agreement" with another independent operator carrying on similar activities – is only covered by the CSST if payment is made for optional personal coverage. An independent operator who is also an employer is covered by the CSST only if payment is made for personal coverage, which is also optional. The person who gives work to the independent operator does not have to pay assessments for him.

To summarize, independent operators, confirmed as such by the Board in accordance with its published criteria and who meet the tests for determining independence set out in section 9 of the *Act* are not required to be covered. Under labour relations legislation, they are restricted in the types of construction work they may do. Independent contractors must be licensed by the Régie de Bâtiments which administers the *Quebec Building Code*.

New Brunswick

The relevant provisions of the New Brunswick *Workers' Compensation Act*, R.S.N.B. 1973, c.W-13 are as follows: "Employer" is defined in section 1 of the Act to include "every person having in his service under contract of hire…, written or oral, express or implied, any worker engaged in any work in or about an industry". Also included in the definition is a "deemed employer". This presumably is a reference to the Commission's authority under s.87(2) of the *Act* to "deem" certain persons "employees" in particular contexts, none of which appear to be relevant to this analysis. Two aspects to the "employer" definition should be emphasized. First, the New Brunswick Board takes the position that the phrase "having in his service under contract of hire" is sufficiently broad to include both "workers" and "contractors", including "independent contractors". It will be noted that neither "contractor" nor "independent contractor" are defined terms under the Act. Thus, New Brunswick is unique among Canadian jurisdictions on the independent contractor issue, since it construes the *Act* to mean that so long as the person or entity engaged performs *work*, they are covered by the *Act*, subject to the numerical limitation established under Regulation 82-79, described below. *Hence New Brunswick has no occasion to apply tests to distinguish between employees and independent contractors.*

"Worker" is defined in section 1 of the *Act* to mean "a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise…". The New Brunswick Commission has construed this definition to embrace persons under both "contracts of service" (employees) and "contracts for services" (independent contractors). Section 70(1) of the *Act* provides for joint and

several liability on the part of the contractor and the person for whom the work is undertaken for assessments, with the proviso that unless contrary contractual provisions are made, the contractor is *primarily* liable. The same principle is carried through in subparagraphs (2) and (3) of section 70 where there are subcontractors. We are advised that the Board rarely goes after the person for whom the work is performed, i.e. the principal or owner. This is because the owner usually shields himself by obtaining a clearance certificate from the contractor, attesting to the fact that the contractor has paid the required assessments. The owner also has it within his power to hold back sufficient funds to cover premium liability in the absence of a clearance certificate.

New Brunswick has a mechanism known as the "Rule of Three". It is not contained in the *Act*, but rather in Regulation 82-79. Section 3(1) of the Regulation provides that "an industry is excluded from the scope of Part I of the *Act* (coverage) unless it has throughout its operations in the year at least three workers at the same time, usually *employed* therein". Officials assert that the New Brunswick Board places no significance on the words "employed therein" and that the Board takes the position that this provision of the Regulation includes both *employees* and *independent contractors*. The effect of this interpretation is that no business is covered if there are only one or two persons engaged. There are no excluded industries in New Brunswick. Regulation 82-79 is supported by section 6 of the *Act* that reads:

> The Lieutenant-Governor In Council may by regulation exclude from the scope of this Part any industry or industries *in which not more than the stated number of workers fixed by such regulation are usually employed*.

Comments:

New Brunswick is unique among Canadian jurisdictions on the independent contractor issue, since it construes its *Act* to mean that as long as the person or entity engaged performs construction work, they are covered by the *Act*, subject to the numerical limitations established under Regulation 82-79. In other words, all persons performing work, whether "employees" or "independent contractors" are covered in workforces of three or more. For this reason, the New Brunswick Board takes the position that it need not apply tests to distinguish between employees and independent contractors.

To summarize, no operations are covered by the *Act* where fewer than three persons are engaged. On the other hand, all other operations (except in the fishing industry, where the numerical ceiling for exclusion is 25 workers) are covered, regardless of the status of the persons performing the construction work.

Nova Scotia

The relevant provisions of the Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c.16 are as follows. Section 2(n) defines "employer" to include "every person having in the persons service *under a contract of hiring*, written or oral, express or implied, any person engaged in any work [in a covered industry]". Section 2(ae) defines "worker" to include "a

person who has entered into or works under a *contract of service*, written or oral, express or implied" and "any other person who, pursuant to Part I, the regulations or an order of the Board, is deemed to be a worker…".

Section 3(2) of the *Act* empowers the Lieutenant-Governor in Council, by regulation, to exclude any employer or class of employers and any worker or class of workers from coverage. Section 4(1) provides that subject to section 3(2), the Board may, "*on application* admit any person…not otherwise [covered]…". Section 4(2) states: "the Board may, on the application of an independent contractor, admit the independent contractor [to coverage under the *Act*] as if the independent contractor were a worker where the independent contractor performs work…within the scope of [the *Act*]". Section 4(3) provides that where an independent contractor is admitted, the independent contractor becomes a worker or an employer, as the case may be, and is covered by the *Act*. Sections 140 and 141 provides for liability for assessments for contractors, principals and subcontractors. Under these provisions, liability is joint and several, with the primary liability falling upon the person who hires the worker directly.

Under Regulation 22/96, as amended, the Executive Council has enacted the "Rule of Three" provision similar to New Brunswick's numerical rule. Section 15 of the Regulation provides that "every business or undertaking is excluded from the application of the *Act* until at least three workers are at the same time employed in the business or undertaking". Section 15 is subject to sections 16, 17 and 18 of the Regulations. Section 16 deals with two specific situations: *i.e.*, first, where the business or undertaking is being carried on partly by the employer and partly by one or more contractors; and second, where the business is being carried on entirely by two or more contractors of an employer. In those two situations, the rule of three, as enunciated in section 15, is not applicable. Sections 17 and 18 deal with who is to be included in the "worker" count. It should be noted that under the Board's Policy No. 9.1.3, it is provided that when a contractor having more than three workers hires a contractor with fewer than three workers, *all* workers are considered to be workers of the larger contractor and are covered by the *Act*.

The Board has also published policy guidelines dealing, *inter alia*, the "Employer-Employee Relationship", said to be important, in part, "because employers are not permitted to reduce their worker's remuneration to pay for their workers' compensation coverage". This guideline states "an employer's workers cannot register for workers' compensation coverage for themselves". The guidelines also provide that the WCB uses the CCRA's guidelines to determine the nature of a worker's relationship with an employer. The CCRA's tests are similar to those set out in the *Sagaz* decision, and cover both the *organization* and *control* criteria.

Comments:

Officials emphasize the importance of the Three Person Rule (section 15 of the Regulations) and confirm that employers are not required to register with the Board until the third worker is hired, noting that subcontractors are counted as workers. In short, the Rule of Three exclusions apply to businesses or undertakings that employ fewer than three workers. We were further advised that the "proprietor" of a business is not required to register with the Board and that his/her personal coverage is optional. And so long as such proprietors limit

their "businesses" by hiring fewer than three employees, their employees are not covered by the *Act*.

The Three Person Rule opens the door very wide for independent contractors to escape obligations under the Nova Scotia *Act*. As proprietors of their businesses, even if they perform the work of their trade, and regardless of the number of employees, if any, they engage, they are *not* required to have personal coverage. And if they engage fewer than three employees, those employees are also excluded from coverage under the three person rule.

Prince Edward Island.

The following are the relevant provisions of the Prince Edward Island *Workers Compensation Act*, S.P.E.I. 1994, c.W-7.1. Section 1(1)(k) of the *Act* defines "employer" to include "every person who has in service under a contract of hiring…any person engaged in any work in or about an industry within the scope of this *Act*…". The definition also includes principals, contractors and subcontractors to whom reference is made in section 76. Section 1(1)(m) defines "employment" very broadly to cover the whole or any part of any establishment, undertaking, work, operation, trade or business within the scope of the Act. Section 1(1)(z) defines "worker" to include "a person who enters into or works under a *contract of service*…". The same section includes, under the definition of "worker", an independent contractor who is admitted by the Board as being within the scope of Part I under section 4 of the *Act*.

Section 2 of the *Act* deals with its scope. In essence, it states that the *Act* applies to all workers and employers except those who are excluded by the regulations. Under the P.E.I. *Act*, the Board has the power to exclude employers or workers with the approval of the Lieutenant-Governor In Council. Section 4 of the *Act* reads "An independent operator, not being an employer or worker, but performing work of a nature within the scope of this Part, may be admitted by the Board as being entitled for himself or herself and his or her dependants to the same compensation as if he or she were a worker within the scope of this Part".

Section 75 through 79 of the *Act* deal with liability for assessments. They are very similar to the provisions in most other compensation Acts, imposing joint and several liability for assessment payments on the owner or principal, the contractor and any subcontractors, with the primary responsibility resting with the person who directly employs the workers. As in Newfoundland, reference is made to the *Mechanics' Lien Act*, and under s.77, the owner, as custodian of any holdback, is obligated to make the first payment to the Workers Compensation Board for any outstanding assessments; otherwise, the directors of the owners are personally liable.

In Policy No. 2-24, the Board expands on the distinction between a "worker" and an "independent operator/contractor". The latter is said to mean an individual who "organizes and manages a separate business on their own; advertises and solicits business on their own behalf; bears the burden of expenses of the business; has the regulatory authority to operate on their own; works for more than one employer concurrently and is available to work regularly for more than one employer; provides, in addition to their own labour, major

equipment used solely for the business, or supplies of the materials related to work being performed. The Policy goes on to say that in distinguishing between the two, the Board regards the most significant factors as those related to control of the work done, the manner in which it is done, and the degree of control and supervision exercised. Five aspects of the control test are set out in the Policy, i.e., *does the employer determine where, when and how the work is to be performed; supervise the workers; determine the hours of work; retain the right to hire and fire; and supply the major equipment and facilities used by the worker*. The Policy says that where the answer to *most* of these questions is positive, "then the relationship of employer/worker almost certainly exists". It goes on to say, "it is also likely to exist if the individual is performing work which is central or integral to the functioning of the employer's business on a regular basis". Thus, both the *control* and the *organizational* tests are incorporated into the Board's determination, in accordance with the reasoning in the *Sagaz* case.

Comments:

The result is that "independent operator", determined in accordance with the Board's criteria, are not covered by the province's *Workers Compensation Act* unless they apply for coverage.

Newfoundland and Labrador

The Newfoundland and Labrador *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c.W-11, contains the following relevant provisions. Section 2(1)(j) defines "employer" to include "a person having in his or her service under a *contract of hiring*…written or oral, express or implied, a person engaged in a work in or about an industry" covered by the *Act.* The employer definition also includes "principal, contractor or subcontractor" for the purposes of determining liability for premium payments under section 120. Under section 2(1)(z) "worker" means "a person who has entered into or works under a *contract of service*…written or oral, express or implied, whether by way of manual labour or otherwise". Under section 19(1)(i), the Workplace Health, Safety & Compensation Commission ("WHSCC") is given exclusive jurisdiction to determine "whether a worker in an industry is within the scope of this Act and is entitled to compensation…". Under section 20.6, the WHSCC is also given the power to make regulations, subject to the approval of the Lieutenant-Governor-in-Council.

Section 38 of the *Act* states that the *Act* applies "to workers and employers engaged in, about or in connection with an industry…except those industries, employers or workers that the Lieutenant-Governor In Council may exclude by regulation". Section 38(2) states that the WHSCC also has the regulatory power to *exclude* employers or workers "where appropriate". On application, the Commission also has the broad power under section 38(3) to *include* industries, employers or workers that are otherwise excluded. Section 39 entitles the WHSCC to admit an employer to coverage "as if the employer were a worker".

Section 41 provides that "an independent operator, not being an employer or a worker, but performing work of a nature that would be within the scope of the *Act*, *may be admitted* by

the Commission as being entitled for himself or herself and his or her dependants to the same compensation as if he or she were a worker within the scope of this *Act*". It will be noted that this section may be invoked only on the application of an independent operator. This may be contrasted to the provisions of section 40(1) of the *Act* where the Lieutenant-Governor In Council may by regulation include certain persons within the scope of the Act who are not workers including, under subsection (d) "independent operators in the logging industry". *No such provision is made for the inclusion of independent operators in the construction industry*.

There are certain special provisions applicable to the construction industry alone, namely section 89.4, which excludes the construction industry from earlier labour market re-entry provisions applicable to industry at large, i.e., the duty to cooperate in the return to work and the obligation of the employer to re-employ injured workers. Section 120 of the *Act* contains provisions similar to those in most other Acts with respect to liability for assessment payments by the principal, a contractor and a subcontractor, providing, in effect, for joint and several liability, with the primary liability resting on the contractor or person who employs the construction worker directly. Section 121 deals with holdbacks under the *Mechanics' Lien Act*, and provides that the person holding back monies under the *Act* is required to ensure that payments made out of the holdback are to be applied first to overdue WCB assessments. Finally, section 123 enables the WHSCC to make regulations, with the approval of the Lieutenant-Governor-In-Council, prescribing the obligations of a construction employer with respect to return to work of injured workers.

Under the WHSCC's "Client Services Policy Manual", Policy No. ES-01 has been enacted, defining "proprietor", "partner" and "independent operator", the latter definition being "a non-incorporated self-employed individual who does not employ workers". The effect of the Policy is that these three categories of persons, none of whom would otherwise be covered by the *Act*, may have coverage *extended* to them by the WHSCC on a year-to-year basis. The Policy indicates, by implication, that none of these categories, including independent operator, would be covered except by *admission on application*, as contemplated by section 40(1) of the *Act*.

Comments:

Those persons who are deemed by the WHSCC to be "independent operators" – i.e., non-incorporated, self-employed persons who do not employ workers – are not required to register under the *Act* but have the option to apply for personal coverage. The WHSCC typically becomes aware of persons claiming to be independent operators in one of two ways: either when a principal or engager applies to the Commission for a certificate of clearance or when a principal or engager files its Statement of Payroll, as it is required to do annually under Regulation 25. In the latter case, the Statement of Payroll is required to include a listing of all subcontractors and if a listed subcontractor is an individual who does not employ others, the Board may inquire into his status further.

When the status issue comes before the WHSCC, the Commission requires the individual to complete a questionnaire that focuses on four of the principal tests that derive from the common law dealing with the distinction between independent contractors and employees.

This process is only applicable to non-incorporated individuals. The Commission requires *all* incorporated entities to register, regardless if the individual is self-employed. Coverage is therefore mandatory for all *workers*, including the owner, directors and managers, even if the owner is the only worker.

Yukon

The relevant provisions of the Yukon *Workers' Compensation Act*, R.S.Y. 2002, c.231 are as follows. Section 2 of the *Act* provides "this *Act* applies to all employers and workers in all industries". Section 4 of the Act empowers the Workers' Compensation Health & Safety Board ("YWCH&SB") to extend coverage of the Act to those persons not considered "workers" under the *Act*. The Board deems certain persons to be workers of an employer upon an employer's application and acceptance by the Board. Section 117(1) of the Act defines "employer" to include "every person, firm, association, organization or corporation having in their service one or more workers in an industry" and includes under subsection (c) "a sole proprietor deemed by the board to be an employer" and under subsection (f) "any person deemed…by the board to be an employer". Section 117(1) also includes the definition of "sole proprietor" as "a self-employed person, including a partner in a partnership, who carries on or engages in any industry and does not employ any workers in connection with that industry". The term was changed from "independent operator" to "sole proprietor" with the introduction of the 1992 *WCA*. An individual is considered to be a "sole proprietor" when the conditions of Policy A-12, (see para. 3, *supra*) are met.

"Worker" is defined to include "a person who performs services for an employer under a contract of service". The definition of worker also includes "a director of a corporation carrying on an industry in the Yukon, unless the board, on application by the director, deems the director to not be a worker". "Worker" also includes "any person deemed by the board or by regulation to be a worker".

The YWCH&SB has issued Policy No. AS-12 entitled "*Independent Operator/Contractor or Proprietor*", which reads as follows:

> An independent operator, contractor or proprietor, is considered to be an individual who does not employ workers and who:
>
> - works for more than one employer concurrently and is available to work regularly for more than one employer.
> - advertise or otherwise solicit business through their own effort directly with the person or principal for whom the work is being performed and assumes as an asset all "goodwill".
> - provide, in addition to their own labour, major equipment used solely for the business or supplies the materials related to the work being performed.

> *Where all of the above conditions apply, the person will be considered to be an independent operator, contractor or proprietor*.
>
> Where none of the above conditions apply, the person will be considered to be a worker in the employ of the person engaging and remunerating the individual for the work performed.
>
> Where *some* of the above conditions apply, the person *may* be considered to be an independent operator, contractor or proprietor.
> [all italics added]

In addition, a Policy, AS-19 entitled "*Optional Coverage"* defines optional coverage as "[meaning] the coverage available upon application by a ...sole proprietor…, to those persons not automatically covered under the *Act*." Under this policy, the level of coverage a sole proprietor may purchase for themselves is an amount not less than $14,000 and not greater than the Maximum Wage Rate for the year. In the case of a work-related disability resulting in a time-loss claim, the average weekly earning will be based on the lesser of the applicant's actual proven earnings and coverage in place at the time.

There is also a Policy, GC-08 entitled "*Definition of a Worker*", the relevant portions of which provide as follows: "The Workers' Compensation Act does not define contract for service…as it applies to workers. The purpose of this policy is to define [this term]". The policy continues to set out the following definitions:

> "Contract of service means 'contract of service, express or implied' and includes:
>
> 1. Direct evidence of right or exercise of control;
> 2. Method of payment;
> 3. The furnishing of equipment; and
> 4. The right to terminate.'
>
> 'A master servant relationship exists'."

"Contract for service" is also defined by the Policy as follows:

> "The employer is entitled to direct what is to be done, but not to control the manner of doing it. 'A master servant relationship does not exist'."

Comments:

Policy AS-12, *Independent Operator/Contractor or Proprietor*, became classed as "under review" with the introduction of the 1992 *WCA*. The YWCH&SB is addressing the area of self-employment in its strategic plan and elements are being reviewed under the current Act review. At this time, for those individuals meeting the definition of sole proprietor, coverage is *optionally* extended under the *Act*. Application by the sole proprietor must be made and accepted by the Board under the conditions set out. It may therefore be concluded that independent operators (defined as "sole proprietors" under the Yukon *Act*) are *not* covered by the *Act* unless they make a successful application for coverage.

It is noteworthy to mention that in cases where work is performed in an industry involving contractors, subcontractors (and, in some cases, sub-sub-contractors), the *Act promotes* coverage under section 72, which holds all parties in the work chain to be jointly and severally liable for assessments relating to that work.

Northwest Territories and Nunavut

The relevant provisions of the *Workers' Compensation Act*, R.S.N.W.T. 1988, c.W-6, are as follows. Section 1(1) of the *Act* defines "employer" to mean "a person who or a body that employs one or more persons under a *contract of service*…". "Self-employed person" is defined to mean "a person, including a partner in a partnership…[who] does not employ under a *contract of service* any workers…". "Worker" means a person employed under a *contract of service* and includes a person deemed to be a worker under various provisions of the *Act* and regulations. Section 9 of the **Act** provides that "self-employed persons and directors of corporations performing work as part of the business of the corporation, are not workers" under the *Act* unless the Board deems otherwise.

Section 9(1) of the *Act* provides that "self-employed persons and directors of corporations performing work as part of the business of the Corporation are not workers for the purposes of [the] *Act*". Section 9(2) provides that notwithstanding s.9(1), the Board may deem self-employed persons and directors to be workers if the rate of remuneration is within the Board's rules and the appropriate assessments are paid.

The Board has published a Statement of Policy with respect to the determination of worker and independent operator status. The criteria used are similar to those used by other Canadian compensation boards and, in part, reflect the common law tests: namely, control of the manner in which the work is done; the ownership of equipment and/or licenses; the presence of independent initiative; whether payment is on a piece-work basis; whether other persons are employed; the terms of work and/or engagement (e.g., the establishment of fixed hours, etc.); the continuity of work and whether work is performed for more than one party; and whether the individual operates a separate business enterprise.

Comments:

Board officials advise that in the Northwest Territories and Nunavut, there is a heavy onus on anyone seeking to establish that a person is *not* a "worker" covered by the *Act* and that they are, on the proper tests, "independent operators". The onus is particularly difficult to meet where the individual in question is working for only one firm. One notable exception to this is a truck driver who owns his/her own truck and clearly bears the risk of profit and loss. But as in Saskatchewan, the determination is in the Board's sole discretion. Unlike Saskatchewan, however, "independent operators" are not covered automatically, but must still meet the tests set out in the Statement of Policy.

In the Nunavut Territory, an identical *Compensation Act* has been passed, the *Nunavut Workers Compensation Act,* and the same principles apply with respect to the worker/owner operator rationale.

Chapter 5. A Fair Wage System for Construction in Ontario's Public Sector

This chapter discusses the importance of the public sector in the construction labour market. The chapter also explores the reasons for the prevalence of underground practices in public sector construction. The history of the 'prevailing wage' system in the United States is reviewed. The chapter then sets out a proposal for a *Fair Wage System for Construction in Ontario's Public Sector*.

Public Sector Construction in Ontario

Public sector spending on construction accounts for roughly 24% of total construction spending in Ontario.[1] Roughly 2/3 of this spending was in civil construction, *i.e*., roads and bridges. The remainder was chiefly the construction of buildings.[2] Within the ICI sector, in recent years, the public sector has accounted for an increasing share of total building construction. Figure 5-1, on the following page shows the trend since 1996, together with the CanaData estimate for 2003 and forecast for 2004 to 2006.

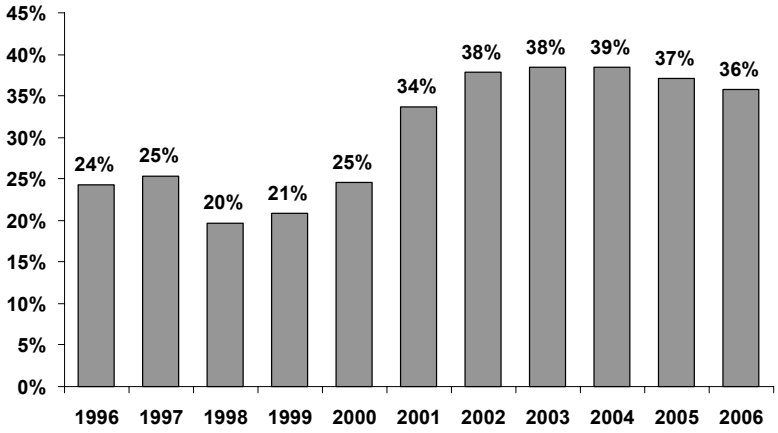
As can be seen from Figure No. 5-1, since 1996, the share of public sector construction work in total ICI construction has ranged from 24% to 38%. For the next three years, CanaData projects that public sector construction work will be at the high end of that range. Clearly, *in the ICI sector, public sector construction work is an important factor in determining prevailing labour market conditions in the overall construction industry.*

In Ontario, for the last several years, government policy has not used public sector construction to promote a level playing field. Rather, *governments have unwittingly allowed their low-bid policies to create a competitive environment that encourages underground practices*. For this reason, we believe that a revitalized fair wage system is important to rolling back the underground economy in Ontario's ICI sector.

[1] Statistics Canada, CANSIM, Table 032-0002. Public Sector capital construction spending in Ontario averaged 23.9% over the period 1994-2003. In 2003, the public sector share was 26.2%. This excludes repair expenditure for which the most recent data is 2001. However, the inclusion of repair data does not noticeably alter the picture.

[2] Estimates based on comparing CanaData sectoral estimates and Statistics Canada data.

Figure 5-1
Institutional Share of ICI Construction in Ontario, 1996 to 2002 Actual,
2003 CanaData estimate, 2004-2006 CanaData Forecast[3]



Labour Market Implications of Unrestrained Low Bid Policies in the Public Sector

As noted in Chapter One, the labour market dynamics of the construction industry differ in important ways from those of other industries. Especially important is the much shorter duration of jobs and the frequent spells of unemployment between jobs. A U.S. study describes how these characteristics of the construction industry interact with low bid policies in the public sector to produce perverse effects, in the absence of prevailing wage systems of regulation.

> "The construction industry differs from other industries in terms of the brevity of most building projects, the short-lived attachment between employers and employees, and the methods used by government to contract for work. *These factors combine to create fierce downward pressures on wages and benefits in public construction projects, which go to the lowest bidder.* As material costs are fairly standard for all contractors, *wages are one of the few areas in which contractors can gain a competitive advantage.* Unlike employees in most industries, employees in construction are seldom employed for long by a single firm. Instead they work for one firm on one project and when that is completed, seek work on another project, often with another firm. Weather and industry cycles may cause long delays between jobs. *Except in periods when construction is booming, employees are not in a position to refuse a job because pay and benefits are substandard.* Prevailing wage laws

[3] Based on CanaData, *Annual Construction Forecast, 2004-2006*. CanaData's actual data for 1996-2002 are derived from Statistics Canada.

were developed to protect wage levels under this competitive bid system. [Emphasis added.]"[4]

In the Ontario context, the erosion of employment standards is inextricably linked with the practice of illegitimately styling workers as "independent contractors." Construction employers who adopt this procedure, purport to put themselves and their workers outside the ambit of *Employment Standards Act*, beyond the EI system, and outside the workers compensation system. Indeed, construction employers who style their workers as "independent contractors" will often assert (incorrectly) that, by virtue of having a sub-contractor relationship rather than an employment relationship, they have no employer responsibility under the *Occupational Health and Safety Act.* The nature of the construction labour market is such that, except in boom conditions, few workers are able to refuse or protest these conditions of employment. The lower labour costs that are achieved by these practices provide a significant, if illegitimate, competitive edge. In the public sector, the prevalence of low bid policies rewards these contractors.

Ontario's Current "Fair Wage System"

For many years, the Ontario government has had a Fair Wage Schedule which is applied to civil and ICI construction that is directly undertaken by the provincial government. There is, however, no "Fair Wage Act" on the books. Rather, Ontario's fair wage policy is based on an Order-In-Council enacted by Cabinet under its General Executive Council authority. This Order-In-Council directs the Ministry of Labour to develop Fair Wage Schedules. For ICI construction, the threshold is contracts in excess of $100,000 in value. While a threshold may appear superficially attractive, establishing a threshold tends to encourage evasion by breaking up contracts so as to fall below the threshold. In the United States, under the Davis-Bacon Act, the threshold for the application of fair wage schedules is $2,000. This effectively covers all federal construction work.

Prior to 1995, Fair Wage Schedules were established intermittently. Schedules were devised on a regional basis for each construction trade. However, there were no fixed intervals for reviewing the operative schedules. In non-urban areas, data for the schedules were collected through surveys. In urban areas, the controlling comparisons were the prevailing union rates. In general terms, the non-urban fair wage rates averaged approximately 65% of the union rate in the particular zone. In urban areas, the fair wage rates were equivalent to approximately 80-85% of the prevailing union rate. Both urban and non-urban Fair Wage rates were wages only. No provision was made for non-statutory benefits.

In 1995, the approach to fair wages was changed. By Order-In-Council, dated March 29, 1995, the Ministry of Labour was required to publish *annually* on April 1 of each year a Fair Wage Schedule setting out the hourly rate of wages which "the Ministry recognizes as being generally accepted as current" in various regions of the province. Provisions

[4] Dale Belman and Paula B. Voos, *Prevailing Wage Laws in Construction: The Cost of Repeal to Wisconsin*, The Institute for Wisconsin's Future, (October, 1995), p 5. Available at: http://www.wisconsinsfuture.org/research.htm

were also made for an additional 15% of the fair wage rate to be paid in the form of non-statutory benefits. It is to be noted that this formula did not mirror negotiated wage and benefit packages, since negotiated benefits invariably exceeded 15% of direct wages. In urban areas, the fair wage rate was set at 85% of the prevailing union wage rate in the same area, plus an additional 15% in lieu of non-statutory benefits or up to 15% in non-statutory benefits. In non-urban areas, all the fair wage rate was payable as direct wages. Owners were required to maintain a registry of all contracts that were subject to the Fair Wage program. Employees were given the right to inspect this registry so as to ascertain whether they were receiving the appropriate fair wage.

The last Fair Wage Schedule was enacted, effective April 1, 1995. Following the change of government, the requirement to publish a new Fair Wage Schedule each year was repealed by the Executive Council on August 30, 1995. Since April 1, 1995, the Fair Wage Schedule has not been updated. Accordingly, the currently applicable Fair Wage Schedule is the schedule that was effective on April 1, 1995 and which reflected, by formula, the union rates that were applicable in 1995. As a practical matter, these rates are now approximately 60-65% of the union wage package.[5]

Federal Fair Wage System

The federal *Fair Wages and Hours of Labour Act* provides for establishing a fair wage schedule for construction work undertaken by the federal government. The federal *Act* was initially adopted in 1935. The federal *Act* defines fair wages as "wages as are generally accepted as current for competent work in the district in which the work is being performed." The *Act* also provides that the working hours of persons employed on federal construction contracts shall not exceed 8 hours in a day or 48 hours in a week, except if there is authorization from the Minister of Labour. The Regulations to the federal *Act* provide that the various regional directors (Moncton, Montreal, Toronto, Winnipeg and Vancouver) "may, from wage surveys and other information in respect of wages" as deemed pertinent, ascertain the appropriate Fair Wage Rate.

A significant provision of the federal act is section 5 which states, in effect, that the recipient of a federal grant, payment, subsidy, loan, advance or guarantee must comply "insofar as may be practicable" with the operative Fair Wage Schedules. There is no

[5] The following table compares negotiated wages and benefits with Fair Wage scheduled wages and benefits for electricians working in the ICI sector in Toronto:

	Wages	Benefits	Total
Union Rate at April 1, 1995	$27.88	$8.44	$36.32
Fair Wage Rate at April 1, 1995 (85% + 15%)	$23.70	$3.56	$27.26
Union Rate at March 1, 2004	$30.82	$12.65	$43.47

In 1995, the total Fair Wage (wages + benefits) was 75% of the union rate for electricians. At March 1, 2004, the total Fair Wage total is 63% of the union rate. The union rates are scheduled for re-negotiation, with effect from May 1, 2004. This will further widen the gap.

requirement, however, in the federal Act for Fair Wage Schedules to be updated on a regular cycle.

The Conservative government discontinued the practice of updating the Fair Wage Schedules in the early 1980's. As a result, by the 1990's, the operative schedules were below the market for most trades, thereby making the schedules redundant. In 1998, the Liberal government initiated a policy review and commissioned the Stanley Report. Pursuant to the recommendations of that report, the government re-instituted the Fair Wage Schedules and applied the appropriate provincial standard to hours of work, based on the provincial Employment Standards legislation.

Statistics Canada conducted surveys and collected information to assist in developing new Fair Wage Schedules. The last federal Fair Wage Schedule applicable to Ontario was published on December 18, 2000. In many parts of Ontario, the fair wage rate is the same, or virtually the same, as the ICI union rate that was effective on May 1, 2000, exclusive of benefits. The federal schedule has not been updated since December 18, 2000.

Fair Wages in the Municipal Sector and Broader Public Sector

Three Ontario municipalities have Fair Wage Schedules: Toronto, Hamilton and Thunder Bay. In Toronto, the first Fair Wage Schedule was adopted in 1893. Toronto's Fair Wage Schedule is revised every three years, based on recommendations by industry and employer organizations. In Toronto, the Fair Wage Schedule essentially mirrors the prevailing union wage package, *inclusive* of benefits. The City of Toronto, it should be noted, is bound to most of the province-wide ICI agreements.

In the broader pubic sector – hospital, colleges and universities, cultural institutions, etc. – fair wage schedules generally do not apply, unless the institution or agency is subject to flow-through obligations under the federal *Fair Wages and Hours of Labour Act.*

The U.S. Prevailing Wage System: Davis-Bacon Act

In the U.S., the prevailing wage system is founded in the *Davis-Bacon Act*. This legislation was first enacted in 1931. The *Act* was subsequently amended in 1934 to remedy enforcement deficiencies. The *Davis-Bacon Act* applies only to construction projects directly undertaken by the federal government. However, the *Davis-Bacon Act* is frequently referenced by other federal statutes, such as grants in aid of highway construction. Construction work under "referenced statutes" accounts for approximately three-quarters of all covered construction work.

The principle of the *Davis-Bacon Act* is a minimum prevailing wage in a specific geographic area. Administrative practice has used counties as the geographic unit. The "prevailing wage" is based on surveys carried out by the U.S. Department of Labor. Administrative practice for determining the "prevailing" rate based on these surveys has varied. Currently, if 50% of the reported wage rates under a survey are the same, then

that rate is deemed the prevailing rate. Otherwise, the mean average applies. Effectively, though not explicitly, this ties the prevailing rate to the union rate, if the union rate is observed in 50% of the survey sample. Previously the required incidence for designation as the "prevailing" wage was 30% of the reported wage rates. If the "prevailing wage" is the union rate, then it is updated whenever the union rate changes. If the "prevailing wage" is the mean average derived from a survey, adjustment occurs approximately every three years. The wage amount is the complete wage package, *inclusive of benefits.*

A companion statute to the *Davis-Bacon Act* is the *Copeland Anti-Kickback Act*. This statute requires prime contractors to file certified payroll statements showing hours, gross pay and effective hourly pay. This is known as the WH347 form. A copy of this form is attached as Appendix A. U.S. officials regarded this payroll reporting as essential to effective enforcement. The Davis-Bacon standards apply to all workers on covered construction projects, regardless of whether they are employees, working employers, or independent operators. An effective hourly rate must be computed for workers paid on a piece rate.

Every six months, covered public bodies make a compliance report to the Department of Labor. The Department also has inspectors who enforce compliance with the applicable "prevailing wage" standard. The most common form of non-compliance on the part of contractors is misclassifying workers and paying them at a lower trade. The remedy is simply to "make whole." There is no penalty for non-compliance *per se*. However, a contractor who is found guilty of "disregard of obligation" can be barred from doing federal work for three years. Debarment is usually triggered by a fraudulent payroll statement.

Unions, it should be noted, are not permitted to make deductions for job targeting funds from wages paid pursuant to "prevailing wage" standards.

Many states have "prevailing wage" laws. In some instances, the state simply picks up the federal "prevailing wage" schedule. In other instances, the state has its own procedures for determining the "prevailing wage." Some states conduct regular surveys. Others apply the union wage. Still others apply the union wage, but allow for hearings to be held where interested parties wish to present evidence to rebut the presumption that the union wage is the prevailing wage.

The three "border states" – Michigan, Ohio and New York – have traditionally been used as comparables by Ontario. In Michigan, by legislation, the prevailing wage is tied to the union wage package (i.e., wages plus benefits).[6] In Ohio, the same procedure applies.[7] In New York, the prevailing wage is tied to the union wage package. However, this link can be broken if a dissenting employer provides evidence that unionized employers

[6] Allan Evans, Department of Consumer and Industry Services, Wage and Hour Division http://www.michigan.gov/bwuc/0,1607,7-161-15499_15542_15549---,00.html

[7] Mr. Kennedy (Chief of Division and Attorney) Ohio Department of Commerce, Division of Labor & Worker Safety, Wage & Hour Bureau http://198.234.41.198/w3/webwh.nsf?Opendatabase

employ less than 30% of the workers in a specific trade and in a specific locality. While the legislation affords an opportunity to rebut the presumption that the union rate is the prevailing rate, we were told there has been no instance of that procedure being used. Thus, the union rate is effectively the prevailing rate in New York state.[8]

In the U.S., the prevailing wage system has made public sector construction a benchmark for fair labour standards. Rather than contribute to the climate of non-compliance and the downgrading of employment standards, public sector construction in most parts of the United States is a bulwark of fair labour standards. Certainly a system that has operated for over seventy years must be regarded as durable, workable, and effective. *To assist in rooting out underground practices in public sector construction, Ontario should adopt a comprehensive fair wage system.*

Implementing A Fair Wage System for Ontario

As noted earlier, the current statutory authority for Ontario's Fair Wage schedules is an Order-In-Council enacted by Cabinet under its General Executive Council authority. *As an overdue first step, the provincial government should re-enact the 1995 Order-in-Council with Fair Wage Schedules established in accordance with the 1995 formula and updated on April 1 of each year thereafter.* There are, however, significant gaps in the Fair Wage System established by the 1995 Order-In-Council. These include:

- inapplicability to the broader public sector, *i.e.*, municipalities, school boards, hospitals, colleges and universities, and cultural institutions,
- the absence of a registry of qualified constructors and the consequent inability to bar non-compliant constructors from public sector work. In Quebec, we were informed by the CCQ that barring non-compliant contractors from undertaking public sector work is a highly effective deterrent,
- the absence of an effective enforcement system, based on certified payroll reports,
- the absence of any requirement for statutory declarations of compliance under other relevant statutes, *e.g.*, source deductions for Income Tax, EI and CPP contributions, WSIB registration, and general compliance with the *Employment Standard Act* and the *Apprenticeship and Trades Qualifications Act.*

To address these gaps requires going beyond the 1995 Order-in-Council. As a long-term solution, therefore, Ontario should adopt a comprehensive *Construction Fair System.* This system could be founded in a broader Order-in-Council or may require legislation. In keeping with the 1995 Order-in-Council, whose scope extended beyond the ICI sector,

[8] Charles Durbin, Department of Labor, Bureau of Public Work, State of New York http://www.labor.state.ny.us/business_ny/employer_responsibilities/prevailing_wage_info.html

we propose that Fair Wage Schedules also be applicable to civil and residential construction when that is undertaken by a public sector body.

Principles that should Govern a Construction Fair Wage System for Ontario

1. The *Ontario Construction Fair Wage System* should mandate the publication and updating of schedules for each construction trade on an annual basis. We recommend September 1st of each year, which allows for implementation of negotiated increases which typically occur on May 1st of each year, pursuant to the legislated bargaining cycle in the ICI sector.
2. The *Ontario Construction Fair Wage System* should use the Ontario Labour Relations Board Areas as the applicable wage zones.
3. In addition to the provincial government, the *Ontario Construction Fair Wage System* should apply to any part of the public sector in Ontario that is in receipt of provincial monies or provincial guarantees for loans, including, but not limited to:
    i. provincial government corporations, agencies, authorities, boards, etc.,
    ii. municipalities,
    iii. boards of education,
    iv. colleges and universities,
    v. hospitals,
    vi. any company, agency or authority receiving capital funding from the Ontario government.
4. The *Ontario Construction Fair Wage System* should apply to all construction and repair work, regardless of the value of the contract.
5. In the ICI sector[9], Fair Wage Schedules should be based on the following formula: total compensation should mirror the prevailing negotiated wage package for the relevant trade in each Labour Board area. If the applicable negotiated wage package is reduced by local area modification or other procedure for institutional construction, a consequent adjustment should be made in the Fair Wage Schedule for that trade.
6. The Fair Wage Schedules under the *Ontario Construction Fair Wage System* should apply equally to all persons performing construction work on covered work sites, including therefore, wage-paid and piece-rate paid employees, dependent contractors, and independent operators. Where an hourly wage is not the method of remuneration, the effective hourly wage (*i.e.*, gross remuneration divided by total hours) should be equal to or greater than the

[9] As per the discussion in Chapter One, our recommendations are limited to the ICI sector. The 1995 Order-in Council also applied to other construction sectors, notably civil construction. While it may be appropriate to extend the Fair Wage System to all construction sectors, our formal recommendations are confined to the ICI sector. If applied to other sectors, the principle set out here may require, for example, the Minister of Labour to consult with the OLRB as to the prevailing collective agreement within a particular Board Area. This issue does not arise in the ICI sector where all agreements are provincial, by statutory requirement.

hourly rate specified in the applicable Fair Wage Schedule, plus the applicable allowance for benefits.

7. The *Ontario Construction Fair Wage System* should provide that construction employers who work in the public sector will be required to register with a Public Sector Construction Registry (PSCR) which would be maintained and administered by Management Board of Cabinet. The PSCR will be administered by an inter-ministerial body of senior public servants. Registration information will be the same as that required under section 5 of Regulation 213/91 (Construction Projects) under the *Occupational Health and Safety Act*, namely:
    i. business information number, as required by the Canada Customs and Revenue Agency (CCRA);
    ii. GST and, if applicable, RST numbers;
    iii. corporation registration number under the relevant incorporating Act, or other business registration number, if the entity is not incorporated;
    iv. WSIB registration number;
    v. head office and Ontario office location(s);
    vi. principal officers;
    vii. a list of related companies (within the meaning of "associated or related activities or businesses" of s.1(4) of the *Labour Relations Act*);
8. The *Ontario Construction Fair Wage System* should provide that prior to commencing any public sector work, a construction employer must file with the entity for whom the work is being performed a statutory declaration that the employer is in compliance with all statutory obligations, including those under the *Income Tax Act*, the *Workplace Safety and Insurance Act*, and the *Employment Standards Act*, together with a statement confirming that on all public sector work, the employer, when engaging employees in mandatory trades, as established under the *Trades Qualification and Apprenticeship Act* (TQAA), will employ only workers who hold Certificates of Qualification or who are properly registered as apprentices under the T*QAA*.
9. The *Ontario Construction Fair Wage System* should provide that on a monthly basis, construction employers working on public sector work will file with the entity for whom the work is being performed a certified statement of payroll setting out by trade the names of the employees, their hours during the previous month, their gross wages and their effective hourly wage, net of overtime. This reporting would be similar to longstanding requirements for monthly certified payroll statements under the U.S. *Davis-Bacon Act*.
10. The *Ontario Construction Fair Wage System* should provide that construction employers found to be in contravention of obligations under the Ontario Construction Fair Wages Schedules or any of the statutes referenced by the Ontario Construction Fair Wages Schedules would be subject to removal from the PSCR for a period not exceeding two years, in the discretion of Management Board of Cabinet, during which time they would be barred from bidding on, or performing as sub-contractors, any public sector work.

Over and above the proposed *Ontario Construction Fair Wage System,* the provincial government should undertake, in return for receiving all pertinent information under the federal Contract Payment Reporting System (CPRS), to ensure that public sector constructors file with the CCRA the reporting forms required under the CPRS. This will facilitate enforcement of source deductions, EI and CPP contributions.

Appendix A: Form WH 347 - Certified Payroll Report Form for Work on Davis-Bacon Jobs (pursuant to Copeland Anti-Kickback Act)

U.S. Department of Labour, Employment Standards Administration

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

PAYROLL

(For Contractor's Optional Use; See Instructions, Form WH-347 Inst.)

Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

OMB No.: 1215-0149
Expires: 03/31/2006

NAME OF CONTRACTOR ☐ OR SUBCONTRACTOR ☐	ADDRESS	
PAYROLL NO.	FOR WEEK ENDING	PROJECT AND LOCATION / PROJECT OR CONTRACT NO.

(1) NAME, ADDRESS, AND SOCIAL SECURITY NUMBER OF EMPLOYEE	(2) NO. OF WITHHOLDING EXEMPTIONS	(3) WORK CLASSIFICATION	OT. OR ST.	(4) DAY AND DATE — HOURS WORKED EACH DAY	(5) TOTAL HOURS	(6) RATE OF PAY	(7) GROSS AMOUNT EARNED	(8) DEDUCTIONS: FICA	WITH-HOLDING TAX			OTHER	TOTAL DEDUCTIONS	(9) NET WAGES PAID FOR WEEK
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We estimate that it will take an average of 56 minutes to complete this collection of information, including time for reviewing instructions searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding these estimates or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, ESA, U. S. Department of Labor, Room S3502, 200 Constitution Avenue, N. W., Washington, D. C. 20210.

Date _____

I, _____ _____
(Name of Signatory Party) (Title)

do hereby state:

(1) That I pay or supervise the payment of the persons employed by

_____ on the
(Contractor or Subcontractor)

_____; that during the payroll period commencing on the
(Building or Work)

_____ day of _____, _____, and ending the _____ day of _____, _____,

all persons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said

_____ from the full
(Contractor or Subcontractor)

weekly wages earned by any person and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 CFR Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended (48 Stat. 948, 63 Start. 108, 72 Stat. 967; 76 Stat. 357; 40 U.S.C. 276c), and described below:

_____

_____

_____

_____

(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for laborers or mechanics contained therein are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therein for each laborer or mechanic conform with the work he performed.

(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

(4) That:

(a) WHERE FRINGE BENEFITS ARE PAID TO APPROVED PLANS, FUNDS, OR PROGRAMS

☐ – in addition to the basic hourly wage rates paid to each laborer or mechanic listed in the above referenced payroll, payments of fringe benefits as listed in the contract have been or will be made to appropriate programs for the benefit of such employees, except as noted in Section 4(c) below.

(b) WHERE FRINGE BENEFITS ARE PAID IN CASH

☐ – Each laborer or mechanic listed in the above referenced payroll has been paid, as indicated on the payroll, an amount not less than the sum of the applicable basic hourly wage rate plus the amount of the required fringe benefits as listed in the contract, except as noted in Section 4(c) below.

(c) EXCEPTIONS

EXCEPTION (CRAFT)	EXPLANATION

REMARKS:

NAME AND TITLE	SIGNATURE

THE WILLFUL FALSIFICATION OF ANY OF THE ABOVE STATEMENTS MAY SUBJECT THE CONTRACTOR OR SUBCONTRACTOR TO CIVIL OR CRIMINAL PROSECUTION. SEE SECTION 1001 OF TITLE 18 AND SECTION 231 OF TITLE 31 OF THE UNITED STATES CODE.

* U.S. G.P.O.:1997 519-861

Chapter 6. An Industry Role in Enforcement

This chapter discusses the need for an industry role in the ICI sector to augment the enforcement activities of governments and the WSIB. The chapter also examines other models involving "delegated administrative authority."

The Site Inspection Deficit

In the construction industry, effective enforcement requires both regular site inspections and audits of relevant records. In Ontario, neither the level of site inspections nor the level of auditing is sufficient to deter non-compliance. The WSIB has acknowledged the need to increase its audit resources and has taken steps in this direction. However, it is important to keep in mind that the construction industry is dominated by small firms. Approximately 50% of construction establishments employ fewer than 20 employees.[1] Most of these employ fewer than 5 workers.[2] As a result, in construction, the cost of an audit can be high, relative to the likely return per audit.

It is also important to keep in mind that in construction, the foundation of the underground economy is styling workers as "independent operators." This device cannot be revealed by audits of records. Such audits may give rise to suspicions, but they are unlikely to provide conclusive evidence that the so-called "independent operators" are actually employees. The determination of a worker's status requires an inquiry into the facts surrounding the relationship and the worker's circumstances, including such factors as incorporation, ownership of equipment, and working for multiple contractors. Evidence on these factors is unlikely to emerge from an audit. For the most part, an audit will indicate only that the volume of construction work undertaken would normally be associated with an employee work force of a certain size. Nevertheless, this can be important information. With wall-to-wall coverage under the WSIB, as recommended in Chapter Five, coverage of "independent operators" will no longer be an issue. However, the "independent operator" issue will still be relevant under the *Employment Standards Act* and the *Occupational Health and Safety Act*. Effective curtailment of the illegitimate styling of workers as "independent operators" will require a system of regular site inspections. *While increasing audit resources is important, the greatest weakness in Ontario's system of enforcement is the site inspection deficit.*

[1] Statistics Canada, CANSIM, Table No. 282-0076

[2] OCS, ConX, based on Statistics Canada, Canadian Business Patterns (December 2002)

Advantages of an Industry Role in Enforcement

Undoubtedly considerable information on suspected non-compliant contractors can be derived from comparing administrative data, *e.g.*, building permit applicants, and WSIB and CCRA registrations. However, *in the construction industry, local knowledge can often provide far greater insight into patterns of non-compliance.* Nevertheless, industry members are unlikely to expend any significant effort to provide such information to the government. To some extent, doing so runs against the grain. Many industry members also report instances when they provided information to government with little evidence that action was taken. It matters not whether such claims of inaction on the part of government are valid. They are part of the industry's perception. As well, many legitimate employers fear that the principal effect of increased enforcement will be to increase the level of scrutiny of legitimate employers, since they are the easiest targets to inspect.

If industry's insight into local conditions in the construction industry is to be marshalled on behalf of restoring a level playing field, then industry itself will need to be involved in enforcement. The construction industry has a history of industry based initiatives, many involving joint labour-management co-operation. It makes sense to leverage this tradition of industry-based initiative to restore a level playing field. However, if the construction industry is to be involved in enforcement, it is also appropriate for the industry to bear some of the costs related to enforcing standards that are specific to construction. *In the absence of an industry contribution the industry cannot expect additional enforcement resources for construction to withstand competing demands for limited public resources*.

There are important precedents that demonstrate the value of an industry role in enforcement.

Example: Electrical Safety Authority

In 1912, the *Electricity Act* mandated Ontario Hydro to perform safety inspection functions of electrical installations. This function was performed by Ontario Hydro's Inspections Department. When Ontario Hydro was broken into five successor companies, the inspections function was assigned to the Electrical Safety Authority (ESA). The ESA is a non-profit company. Through an Administrative Agreement with the Ministry of Consumer and Business Services, the ESA undertakes electrical safety enforcement. As such, the ESA exercises "delegated administrative authority" for enforcement under the *Electricity Act* and the Electrical Code.

The ESA is an industry-based body. It is financed chiefly by fees charged for mandatory electrical permits. The ESA's Board comprises 3 electrical contactors, 2 representatives of electrical utilities, 1 manufacturer in the electrical manufacturing sector, 1 general contractor, 1 representative of the electrical engineering profession, and 3 persons appointed by the province. The ESA enjoys strong support and co-operation from the electrical contracting industry. This was not always the case with the former Inspections Department of Ontario Hydro. Evidence of this support can be seen in the industry's support for an expanded

enforcement role for the ESA involving contractor licensing and enforcing the requirement for electricians to have a C of Q.

The ESA employs some 200 inspectors, all of whom have at least 10 years of field experience prior to being recruited. Inspectors are typically journeyperson electricians, electrical engineering technicians or technologists or registered professional engineers.

An instructive example of industry support for enforcement through the ESA is the recent pilot project in Hamilton-Wentworth. The ESA entered into an agreement with the regional municipality to inspect contractors for municipal licences and another agreement with the Ministry of Labour to inspect electrical workers on construction sites for Certificates of Qualification (or registration as an apprentice). The ESA had no delegated authority other than to ask for production of a municipal licence or C of Q. Instances of non-compliance were referred to the Municipality or the Ministry of Labour. To check for municipal licences and C or Q's required additional inspection time. The electrical contractors association in Hamilton-Wentworth provided supplementary funding for this expanded enforcement role, on the understanding that the association would be reimbursed from additional licensing revenues received by the municipality. The results of this industry-supported initiative were notable. In the first six months of 1998, only 52% of ESA permits for electrical work in Hamilton-Wentworth were taken out by properly licensed contractors. By the first six months of 2001, this proportion had increased to 77%.

The ESA is an example of a number of key themes in strengthened enforcement. First, the ESA is an industry-based body and, as such, is able to draw on a much higher degree of industry co-operation and support, including financial support. Second, as an industry body, the ESA is able to recruit experienced industry field staff for its inspection functions. And third, site inspections are essential to enforcement and can be leveraged across various statutory requirements.

Example: Technical Standards and Safety Authority

The Technical Standards and Safety Authority (TSSA) is a non-profit corporation with an Administrative Agreement with the Ministry of Consumer and Business Services to provide inspection and enforcement services in respect of pressure vessels, elevating devices, amusement devices, fuel systems for furnaces and power systems (natural gas, propane and petroleum), and stuffed and upholstered articles. Like the ESA, the TSSA exercises "delegated administrative authority." Previously inspection and enforcement functions were carried out directly by the Ministry of Consumer and Business Services.

The TSSA was established in 2001. The TSSA's Board of Directors is composed half of industry representatives and half of consumer representatives. The Board is assisted by industry advisory councils in each area of enforcement activity as well as a consumers advisory council.

Example: Commission de la construction du Québec

The Commission de la construction du Québec (CCQ) was established in 1987 pursuant to a new statutory regime to govern the construction industry in Quebec. An earlier feature of construction labour relations in Quebec was sector-based "parity committees," composed equally of labour and employer representatives, which exercised regulatory power with respect to labour standards, pursuant to the 1934 *Collective Agreements Decrees Act*.

The CCQ is governed by a joint board of directors, composed equally of union and employer representatives. The CCQ oversees labour relations in Quebec's construction industry and also has responsibility for occupational training in construction, including both apprenticeship and journeyperson upgrading. The CCQ is financed by a levy of 1.5% of gross wages. In addition, there is a levy of $0.20 per hour that is used to finance training. The CCQ governs all construction sectors, except residential renovation and maintenance or service work. Benefit programmes in the construction industry, including vacation pay, are administered by the CCQ.

Within the CCQ's jurisdiction, piece-rate remuneration is not allowed. Sub-contracting is permitted only to registered employers. That is to say, sub-contracting is not permitted to an independent operator. Sub-contractors must employ at least one person.

In 1994, the Quebec Ministry of Finance estimated that approximately $1.7 billion of economic activity is underground in Quebec. Roughly half of this underground activity occurs in construction, including the renovation sector. The CCQ estimated that within its jurisdiction, in 1994, underground work constituted about 40-45% of all work. It should be noted, however, that the CCQ's definition of "underground work" included infractions of the collective agreements under its purview, *e.g*. cash payments at a below-collective agreement rate, non-payment of overtime, and non-payment of fringe benefit contributions to CCQ. Today the CCQ estimates that such underground work represents 10-15% of all work in its jurisdiction. Most underground work is in the residential sector.

Through an agreement with the Quebec Ministry of Finance, the CCQ receives approximately $2.0 million annually to finance site inspections. The CCQ currently employs, with the assistance of the Quebec Ministry of Finance, 360 persons dedicated to enforcement. Of these, 110 are field staff and 75 are auditors. The remainder are support staff. In 1994, the CCQ employed only 42 field staff. The Quebec Ministry of Finance estimates that the income tax generated by CCQ enforcement activities averages approximately $160 million per year. Currently the CCQ does not do inspections on weekends. However, they do some after-hours inspections.

Enforcement is straight forward. All workers and employers must be registered with the CCQ. Therefore, during a site inspection, a worker must be able to produce a "certificate of competence" issued by the CCQ. Similarly, the workers' employer must be registered with the CCQ. It will be recalled from the discussion above that sub-contracting is only permitted to registered employers. An independent operator cannot be a sub-contractor. All employers must submit monthly reports on hours worked. These can be cross-checked with the

estimated value of the contract to see if the wage portion is realistic. The CCQ receives all building permit data from the Régie du bâtiment. (Note, in Quebec, building permits and building inspections are provincially administered.) The CCQ also co-operates with the CSST (Quebec's workers compensation board). Apprenticeship ratios are enforced on a global basis, by audit. Inspectors can issue a stop work order on a project if a contractor is unlicensed or can order uncertified workers off the job. Commonly, non-compliant workers and contractors are given 24-48 hours to bring themselves into compliance. There have been about 75 stop work orders in the past year. In recent years, total infractions have run at approximately 8,000 per year.

CCQ penalties for non-compliance generate approximately $2.0 million in revenues. These monies flow to the provincial government, not the CCQ. The Quebec government's grant to the CCQ for enforcement is approximately equal to the revenues received by the Quebec government from fines imposed by CCQ inspectors. Contractors that are found non-compliant may be barred from bidding on public sector work.

Challenges in Devising an Industry Role

There are several issues that must be addressed in devising a role for the construction industry in employment-related enforcement.

Unlike technical enforcement of building codes and technical standards, employment related enforcement does not directly arise from concern over public safety. The principal beneficiaries of increased enforcement are governments, through increased tax revenues and the industry through the restoration of a level playing field. Even in the case of increased WSIB premium revenues, it is not strictly speaking the WSIB that benefits, but rather the legitimate industry. Similarly, enforcement of *Employment Standards Act* entitlements benefits the legitimate industry. The benefits to the public are much less direct.

The primary responsibility for enforcing statutory requirements and maintaining a level playing field falls to the government. There is no philosophical justification for departing from this principle. And indeed, both the federal and provincial governments and the WSIB devote considerable resources to enforcing statutory requirements. While there are serious problems in the construction industry, those problems would be infinitely worse in the absence of the enforcement activities that governments and the WSIB currently undertake. Incremental increases in enforcement activity are to be urged and welcomed. However, a fundamental change in the structure and strategy of enforcement in the construction industry is unlikely to be achieved without an industry role in enforcement and an industry contribution. In our view, the industry role and the industry contribution go together. The industry role should be attractive to industry members because it holds out the real promise of significantly greater enforcement. While there will be revenue advantages to governments and government agencies, there will also be direct benefits to the legitimate industry arising from significantly greater enforcement.

In designing an enforcement model, it is important that there be checks against the abuse of enforcement powers. Where such abuses are brought before the courts, the entire enforcement model could be called into question. In our view, an important check is that the power to impose penalties, *e.g.*, fines, stop work order, or bars from bidding on work, should be vested in persons who are public servants within the meaning of the *Public Service Act* and who are accountable, therefore, to the Minister and to the Legislature. Delegating the power to impose penalties when there are technical violations of building codes, *etc*. and important public safety considerations is far different from imposing penalties on business competitors when there are contestable violations of employment standards. We do not believe that it is sound public policy to delegate to persons who are not public servants, the power to impose fines for non-compliance with labour standards. However, we do believe that it is appropriate for government to delegate powers of inspection. The powers of inspection are significantly enhanced when they are accompanied by the power to conclude a settlement whereby a non-compliant employer agrees to fully comply with the relevant statutory or regulatory requirements. Such voluntary agreements should be subject to approval by the responsible Ministry. Therefore, in devising an industry role in enforcement, we believe that the emphasis should be placed on the power of inspection and the right to achieve a compliance agreement. Inspectors should refer non-compliance situations to public servants who will make the appropriate decisions on penalties and prosecutions.

Ad hoc referrals of non-compliance situations to the WSIB or to the Ministry of Labour have not encouraged confidence on the part of the construction industry. Ministry and WSIB officials will argue that this lack of confidence is unwarranted. It is pointless to debate the merits of these complaints. Both sides can cite examples that support their view. What is important is that the lack of industry confidence is a fact of life and that it is based on experience, however, representative or unrepresentative that experience may have been. The industry's view is not going to be changed, except by a new enforcement model. Important features of that model must be strict timelines for acting on industry referrals and an administrative structure within the industry that ensures that referrals are well-founded. As well, there should be public accountability that documents the results of industry referrals.

We see no convincing case for simply co-opting industry resources into government. Simply providing more industry resources to government will not change the enforcement model. While incremental improvements in enforcement will occur, these may not be long-lived if government priorities should be drawn away from the problems of the construction industry. We are convinced that the industry role in enforcement must be governed by the industry, subject to the terms of an administrative agreement between an industry body and the government. This degree of industry control carries with it financial obligations. This is especially clear in the financing model of the CCQ.

In our view, the most efficient way of implementing an industry contribution is through the WSIB, either as a surcharge on WSIB premiums or as an operating grant administered in the same manner that the WSIB supports Health and Safety Agencies. If the surcharge route is followed, the amount of the surcharge would be determined *by the industry body*, not by the government or the WSIB. If the operating grant route is followed, the amount of the grant

would be determined by the WSIB, based on submissions of the industry body. As in Quebec, we urge the Ontario Ministry of Finance to augment the site inspection resources of an industry body, based on the expectation of significant tax recoveries. A schedule of increased fines for infractions could make such a grant cost neutral, as in Quebec.

Proposal

1. Through an Administrative Agreement with the Ministry of Labour and with the Ministry of Training, Colleges and Universities, the Ontario government should delegate certain inspection and reporting responsibilities to the Construction Industry Employment Practices Board (CIEPB). This may require an amendment the relevant statutes.

2. The CIEPB will be a non-profit corporation with a Board of Directors composed of:
    - industry representatives, equally divided between labour and management,
    - provincial and federal government representatives and representatives of the WSIB, and
    - persons nominated by the provincial government to represent other public interests.

3. The CIEPB will be funded either through an operating grant provided by the WSIB or through a surcharge on WSIB premiums. If the surcharge route is followed, the amount of the surcharge will be determined by the Board of Directors of the CIEPB. The CIEPB would be empowered to negotiate financial support from the provincial government based on expected increases in tax revenues or income from fines for non-compliance.

4. The CIEPB will employ industry experienced inspectors on such terms as it deems appropriate and focus their inspection activity as per its annual strategic plan. The focus of CIEPB activity will be site inspections, not audits.

5. CIEPB inspectors should have a statutory right of access onto any construction site and will have the right to interview workers, and the power to require production of individual identification, statutory information forms, evidence of WSIB registration, and Certificates of Qualification (where required).

6. CIEPB inspectors will have the statutory right to make relevant inquiries to ascertain whether workers are employees or independent contractors.

7. CIEPB inspectors will have the statutory duty to advise workers of their entitlements under the *Employment Standards Act* and Fair Wage Schedules. CIEPB inspectors may be authorized by workers to file *Employment Standards Act* complaints, Fair Wage complaints, or to request an occupational health and safety inspection.

8. Where a construction employer is not compliant with the *Employment Standards Act* or the *Apprenticeship and Trades Qualification Act*, a CIESB inspector may endeavour to achieve voluntary compliance. In the absence of a compliance agreement (endorsed by the Ministry), the CIEPB will refer the matter to the Ministry of Labour for enforcement.

9. Where a construction employer is believed by a CIEPB inspector to be non-compliant with WSIB and CCRA requirements, the CIEPB will report the case to the WSIB and/or CCRA.

10. The Administrative Services Agreement between the CIEPB and the relevant ministries will provide that CIEPB referrals will be acted on within not more than three business days, where "acting on" means issuing a compliance order or conducting a further investigation with a view to subsequently issuing a compliance order, if appropriate, within not more than three further days.

11. On a quarterly basis, the CIEPB will report its enforcement activities, referrals and the results of referrals. With respect to referrals to CCRA, these may be covered by confidentiality provisions of the *Income Tax Act*. On an annual basis, the CIEPB will report its enforcement activities, referrals and the results of referrals to the Minister of Labour who will convey this report to the Legislature.

12. The Administrative Services Agreement between the CIEPB and the relevant ministries will provide that CIEPB inspectors will be trained to a standard satisfactory to these ministries.

13. Subject to such policies that it may develop, and with the agreement of the relevant Ministries and the WSIB, the CIEPB may enter into an agreement with another body to carry out some or all of the mandate of the CIEPB with respect to a particular trade.

Chapter 7. Employer Registration

This chapter begins by making the important distinction between registration, which establishes requirements to supply basic business information, and licensing which is competency tested. The focus of this report is on registration, *not* on licensing.

This chapter reviews the current requirements for contractor registration and/or contractor licensing in Ontario. The chapter also discusses the recommendations related to contractor certification in the Report of the Building Regulation Reform Advisory Group (BRRAG).[1] Finally, the chapter examines the current provincial requirements for contractor registration under section 5 of Regulation 213/91 (Construction Projects) of the *Occupational Health and Safety Act* and recommends enforcement of that requirement.

Registration vs. Licensing

The terms registration, licensing, and certification are sometimes used interchangeably. There are, however, important differences.

Registration requires *only* the provision of basic business information, such as business address, name of principal officer, and other business registration numbers such as CCRA business number, GST number, RST number (if applicable), and WSIB registration number. Registration is *not* competency tested. *Nor* is registration dependent on meeting financial tests, e.g., insurability. Registration is solely about the provision of basic business information. Registration is automatic when the required business information is provided.

Licensing confers permission to conduct a business activity. Licensing applicants are tested on the basis of competency and/or financial criteria. Licensing procedures may require information similar to registration procedures described above. However, the defining characteristic of a licensing system is that applicants must qualify for a licence, based on competency and/or financial criteria.

Certification is similar to licensing in that certification procedures require an applicant to qualify, based on competency or other criteria. Under some regimes, certification is mandatory. In other regimes, certification is voluntary. In some regimes, the use of certain titles or designations is restricted to certification holders.

[1] Ontario Ministry of Municipal Affairs and Housing, *Knowledge, Accountability, Streamlining: A Report to the Minister of Municipal Affairs and Housing from the Chair and Vice-Chairs of the Building Regulatory Reform Advisory Group (July 2000)*

In this study, we did *not* examine the competency issues that are relevant to certification or licensing. Mandatory, *competency-based* certification of contractors, for example, was proposed by the BRRAG Report. We have no views on the merits of competency-based licensing or certification. Our focus in this study is on strengthening the requirement of construction employers to provide basic business information, so as to enable co-ordination of enforcement efforts across agencies and governments. Consequently, *this report is focused on registration, not on licensing or certification.* Our interest in examples of licensing and certification is limited to the business information requirements that are part of licensing and certification systems.

Contractor Registration is a Pillar of Effective Enforcement in the ICI Sector

Contractor registration is an important pillar of any comprehensive enforcement strategy in the construction industry. Registration would require a construction employer to file basic business identification information, such as:

a. business information number, as required by the Canada Customs and Revenue Agency (CCRA);
b. GST and, if applicable, RST numbers;
c. corporation registration number under the relevant incorporating Act, or other business registration number, if the entity is not incorporated;
d. WSIB registration number;
e. head office and Ontario office location(s);
f. principal officers;
g. a list of related companies (within the meaning of "associated or related activities or businesses" of s.1(4) of the *Labour Relations Act*);

Registration immediately reveals anomalies that may reflect non-compliance, for example a CCRA business information number, but not a WSIB registration number or the absence of a GST registration. Registration also significantly facilitates enforcement across different authorities, *e.g.*, CCRA, the Ministry of Finance and the WSIB. Registration enables site inspectors to immediately verify whether construction employers have registered with CCRA, WSIB, etc. The absence of registration will trigger prompt requirements to register and to verify compliance with the *Workplace Safety and Insurance Act*, the *Income Tax Act*, and the *Goods and Services Tax Act*. Using wireless communications technology, site inspectors would also be able to verify the status of a construction employer's account with the WSIB. In some circumstances, broad disparities between workforce and covered payroll may also be apparent.

Contractor Licensing in Quebec

In Quebec, both contractors and workers must be licensed. Contractors are required to obtain a licence from the Régie du bâtiment du Québec. Section 46 of the *Building Ac*t provides that:

> No person may act as a building contractor, hold himself out to be such or give cause to believe that he is a building contractor, unless he holds a current licence for that purpose.
>
> No contractor may use, for the carrying out of construction work, the services of another contractor who does not hold a licence for that purpose.

The *Regulation respecting the professional qualification of building contractors and owner-builders* empowers the Régie du bâtiment to set competency-based standards for general and trade contractors as a condition for licensing.

Construction workers are required to hold a mandatory competency certificate issued by the CCQ. Section 123.1 of the *Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry* confers on the CCQ broad powers to establish trade standards and training requirements and to require competency certificates of workers engaged in a trade.

These licensing requirements enable worksite inspectors to require proof of licensure. CCQ officials told us that, in their view, the licensing requirements are fundamental to the CCQ's enforcement strategy.

BRRAG Report Recommendation on Certification and Licensing

The report of the Building Regulatory Reform Advisory Group (BRRAG) recommended a system which involved mandatory certification of site supervisors and licensing general and trade contractors. To be licensed, a contractor would need to employ a certified site supervisor. The focus of the BRRAG Report, it should be noted, was on achieving economical and effective compliance with the *Building Code*. Ensuring that contractors were competent in *Building Code* requirements was seen as one of the keys to achieving cost-effective compliance. BRAGG proposed a system of licensing to enforce this competency requirement. This system would replace existing municipal licensing requirements (which apply to contractors in only some trades.)

With respect to the ICI sector, the BRRAG Report commented that:

> " For larger builders, especially in the industrial, commercial and institutional (ICI) sector of the industry, consideration will need to be given to identifying the right person [to certify], but the framework remains essentially the same – license the company, certify the site supervisor who oversees actual on-site construction."[2]

The BRAGG Report recognized that the case for competency-based licensing, as opposed to registration, was weaker in the ICI sector than in residential construction. The Report commented that,

> " In the ICI sector, where there is broad support for *registering* builders and contractors for the purpose of addressing concerns about underground or black market construction activity, support for mandatory provincial *licensing* was less clear."[3]

Nevertheless, the BRAGG Report came down on the side of licensing, rather than simply registration. Specifically, the BRAGG Report recommended:

> " … that the *Building Code Act* be amended to require that residential and ICI builders/general contractors and renovators employ qualified site supervisors (who would be required to demonstrate this qualification through certification.) This would require that the Province develop regulations under the Ontario Building Commission (OBC) to establish the rules for a licensing and certification process for residential and ICI builders and renovators (who do work that requires a building permit and has construction value in excess of $10,000.) "
> Recommendation A.1.iii p 11

The merits of competency-based licensing are beyond the mandate of this study. However, the BRRAG Report's endorsement of licensing increases our own commitment to the concept of contractor registration. We note especially that the BRRAG Report saw a connection between contractor registration and combating the underground economy. We also note that the consultations that preceded the BRRAG Report showed support among legitimate ICI contractors for a system of contractor registration (if not for contractor licensing).

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[2] *ibid*. p 17

[3] *ibid.* p 20. In summing up its consultations, the Report comments that "ICI contractors [are] more resistant to licensing, but strongly support [the] concept of 'registration' in order to ascertain adequate insurance, WSIB coverage, remittance of taxes, etc." Appendix 3: p 8

Contractor and Worker Registration with Ontario's Jobs Protection Office (JPO)

In Ontario, the *Fairness is a Two Way Street Act (Construction Labour Mobility), 1999* requires that the Quebec-based workers and contractors register with the Jobs Protection Office (JPO). Section 2 of the Act states that:

> " No person resident in a designated jurisdiction shall enter into or submit a bid for a construction contract for work in a designated area without first registering with the Office."[4]

Similarly section 10 states that:

> " Every individual who is a person resident in a designated jurisdiction and who is or will be doing construction work in a designated area shall register with the Office."

Section 10(3) also empowers the Director of the JPO to require that workers seeking registration also show an accepted certificate of qualification in their trade if either Ontario requires such a certificate for an Ontario tradespersons *or* such a certificate is required in the designated jursidiction, *i.e.* Quebec.

These registration requirements are meant to replicate the requirements imposed by Quebec on Ontario workers and contractors working on construction projects in Quebec. The obligation to register facilitates the JPO's enforcement through job site inspections. Quebec workers and contractors must either produce evidence of registration with the JPO or leave the construction site.

Contractor Licensing at the Municipal Level

Section 150 of the Municipal Act provides that:

(1) "Subject to the *Theatres Act* and the *Retail Business Holidays Act*, a local municipality may license, regulate and govern any business wholly or partly carried on within the municipality even if the business is being carried on from a location outside the municipality.

(2) "Except as otherwise provided, a municipality may only exercise its licensing powers under this section, including imposing conditions, for one or more of the following purposes:

[4] Note that "person" under the *Act* can mean an individual, company or partnership. Only Quebec is a "designated jurisdiction" under the *Act*.

1. Health and safety.
2. Nuisance control.
3. Consumer protection.

(10) "Businesses that may be licensed, regulated and governed under subsection (1) include:

(a) trades and occupations…"

Many municipalities have relied on these powers to license construction contractors and to require a Master's certification in certain trades. The licensing requirement is not universal in Ontario. We were advised that approximately 60 municipalities have mandatory licensing for contractors in at least some trades. Most commonly, the licensing requirement applies to electrical and mechanical contractors who must also employ a Master Electrician or Master Plumber, as the case may be. To be licensed as a Master, an individual must demonstrate knowledge of the *Building Code* and employers' legal obligations. To be licensed as a contractor, a company or partnership usually must show evidence of registration with the WSIB, CCRA and such other business registrations as may be required.

Registration and Licensing under the *Electrical Safety Act* and the *Technical Safety and Standards Act*

Under the *Electrical Act* (now the *Electrical Safety Act*), electrical work must comply with the *Electrical Code*. Enforcement of the *Electrical Code* is vested in the Electrical Safety Authority. Currently the ESA offers a streamlined system of permits and compliance through its "Authorized Contractor Program." This is a system of voluntary certification based on completion of courses, a record of past compliance with the *Electrical Code*, and proof of liability insurance. With industry support, the ESA has proposed to the province that it take over responsibility from municipalities for licensing electrical contractors. Licensure would be mandatory and province-wide. (See discussion of the ESA in Chapter Six).

The Technical Standards and Safety Authority licenses contractors and workers in certain areas of its enforcement ambit, notably oil and gas fuel systems installation for furnaces and pressure vessel installation and operation. (See discussion of the TSSA in Chapter Six).

Contractor Registration under the *Occupational Health and Safety Act*

Section 5 of the Regulation 213/91 (Construction Projects) provides as follows:

> (1) Before beginning work at a project, each constructor and employer engaged in construction shall complete an approved registration form.
> (2) The constructor shall ensure that,
>
> > (a) each employer at the project provides to the constructor a completed approved registration form; and
> >
> > (b) a copy of the employer's completed form is kept at the project while the employer is working there.

It should be noted that section 5 does not require a contractor to file a registration form with a central registry. Rather, a contractor is only required to have a completed registration form available at the project.

As matter of public policy, therefore, Ontario already has a regulation requiring contractor registration. The prescribed form (known as Form 1000) requires:

- identification of the business
- contact information
- names of up to two directors or principal officers
- average number of employees on the project
- Master Business Licence Number (not yet applicable)
- Retail Sales Tax Number
- WSIB Number
- WSIB Rate Code

It would be useful to broader enforcement efforts if the Form 1000 also required CCRA registration number and GST number. The registration system envisioned in section 5 of the regulations pre-dated advances in information technology which would now allow a contractor to register over the Internet. Similarly, using wireless technology, if there were a central registry, site inspectors could verify registration while conducting a site inspection.

We were advised that enforcement of the section 5 requirement has been uneven. For example, there is no reference to Form 1000 on the Ministry's web site. *We believe that the uneven enforcement of section 5 is a serious deficiency in Ontario's current enforcement strategy.*

Recommendations

We recommend that:

1. with due notice to the industry, registration requirements under section 5 of Regulation 213/91 (Construction Projects) of the *Occupational Health and Safety Act* be should be strictly and comprehensively enforced.

2. consideration be given to augmenting or replacing site-based proof of registration with a system of web-based registration,

Chapter 8. Enforcement Issues

In the previous chapters, we set out our core proposals for a new approach to enforcement. These consist of:

- wall-to-wall coverage of *all* construction workers by the WSIB and introduction of the concept of "responsibility of the engager" for payment of WSIB premiums,
- an Ontario Construction Fair Wages System,
- the Construction Industry Employment Practices Board,
- a system of contractor registration.

In this chapter we address enforcement issues related to:

- worker registration,
- the *Trades Qualifications and Apprenticeship Act (TQAA*),
- penalties and liabilities,
- information sharing across enforcement agencies,
- co-ordination of Notices of Project (NOP's) and Building Permits,
- pro-active site inspections,
- entitlement information under the *Employment Standards Act*, and
- contract reporting under CCRA's Contract Payment Reporting System.

Worker Registration

In Chapter Seven, we described examples of registration and licensing, chiefly in relation to construction employers. However, there are also notable examples in which registration or licensing requirements are applied to construction workers. The TSSA, for example, certifies certain types of workers, notably fuel technicians and related occupations, operating engineers for pressure vessels, and mechanics for elevating devices. Certification is required to work in these occupations. Under the regulations to the *Apprenticeship and Trades Qualification Act*, workers in the mechanical and electrical trades and crane operators are required to hold a Certificate of Qualification or be registered as apprentices in their respective trade. Lastly, under the *Fairness is a Two-Way Street Act*, the JPO requires all Quebec-based construction workers to register.

In light of the scale of the underground economy problem, a strong case can be made for introducing a system of registering construction workers. The WSIB would be the obvious

body to implement such a system of registration, especially if our earlier recommendations for wall-to-wall coverage are adopted.

There are also arguments for registering (or certifying) construction workers as a means to strengthening occupational health and safety. Quebec, for example, requires construction labourers to complete training in basic health and safety prior to working on a construction site. Health and safety issues are beyond the mandate of this report and we cannot claim to have studied the efficacy of worker registration and certification with respect to health and safety goals. However, we believe that the Ministry of Labour should consult with the industry and with the Construction Safety Association of Ontario on the potential contribution to improved health and safety performance of a system of worker registration, perhaps in association with mandatory health and safety training.

We note that in 1999, the Council of Ontario Construction Associations (COCA) proposed to the Ministry of Finance that Ontario adopt a system of mandatory registration of *all* construction workers and contractors.[1] COCA's focus was on curtailing underground economy activity.

Designing an efficient and effective system of worker registration could pose significant administrative challenges. Except in Quebec, there is no system for registering *all* construction workers that can be used as a model. A system of worker registration would need to deal with a number of practical issues, including: application procedures, renewal requirements, consequences of non-registration, costs, and linkages, if any, to other systems of registration. The scope of this study did not extend to exploring the feasibility and practical dimensions of a system of worker registration. We believe, however, that there would be significant merit in a system of worker registration and we urge, therefore, that this question be given serious consideration by the Ministry of Labour.

Enforcement of the Trades Qualifications and Apprenticeship Act:

Violations of the *Trades Qualifications and Apprenticeship Act (TQAA)* potentially make the offender liable to a fine of up to $2,000. However, there is no history of these penalties being applied.

Prior to reviewing enforcement under the *TQAA*, it is important to recognize the distinction between the mandatory trades and the voluntary trades. The mandatory trades are: electrician, plumber, pipefitter, sheet metal worker, refrigeration and air conditioning mechanic, and crane operator. To perform work covered in the regulations for these trades, a worker must hold the appropriate trade Certificate of Qualification (C of Q). A worker without a C of Q who is performing work covered by one of these trade regulations may be ordered off the job. In all other trades a C of Q is voluntary (though some employers may require a C of Q).

[1] *Daily Commercial News*, "COCA brief urges registration of all workers and contractors," March 12, 1999

Site inspection to monitor Certificates of Qualification and apprenticeship registration in the mandatory trades is undertaken by the Ministry of Labour's health and safety inspectors under an agreement between the Ministry of Labour and the Ministry of Training Colleges and Universities (MCTU), mandated by an Order-in-Council. MTCU remains responsible for compliance with journeyperson/apprentice ratios, but acts only on a complaint basis.

Enforcement of the Certificate of Qualification (C of Q) requirement is modest, at best. For the mandatory trades, the Ministry of Labour can issue stop work orders when violations are detected. This is rarely done, with the exception of crane operators. The most common enforcement procedure is to issue an order giving the non-compliant person 21 days to produce the required C of Q. In many of the smaller projects, the work will have been completed before the 21 days expires. As well, s.9(2) of the *TQAA* permits persons without certification to file their contracts of apprenticeship within three months. This effectively permits them to work without an apprenticeship contract for 90 days. This is an additional problem on projects of short duration. These lengthy compliance periods need to be substantially abridged.

The Ministry of Training, Colleges and Universities can refuse to allow an employer who is non-compliant in respect of journeyperson/apprentice ratios to register additional apprentices. In a mandatory trade, this could compel that employer to employ crews composed only of journeypersons and thereby incur a higher crew cost than an employer using a crew composed of journeypersons and apprentices. In a voluntary trade, the employer would simply employ "helpers" in place of apprentices and thereby escape any effective penalty. As a practical matter, given the province's goal of doubling the number of apprentices, it is highly unlikely that a willing employer would be barred from registering apprentices.

The current enforcement regime is clearly inadequate. *In the voluntary trades, no enforcement is possible.* In the mandatory trades, the problem is the infrequency of job site enforcement and the relative insignificance of the penalty (*i.e.*, being forced off the job, at least while the inspector is present.)

We believe that the recommendations we have made elsewhere will address part of the problem of enforcement. The proposed Construction Fair Wage System would strengthen the requirement for C of Q's (or apprenticeship registrations) for tradespersons in mandatory trades working on public sector jobs. This would have the government of Ontario support in practice the policy goals that it espouses. The proposed Construction Industry Employment Practices Board (CIEPB) would significantly increase site inspections. In the electrical contracting sector, we are aware of proposals to assign responsibility for enforcing the TQAA to the Electrical Safety Authority. In our view, this proposal has considerable merit. The Electrical Safety Authority already employs over 200 inspectors. As well, in new construction, the Electrical Safety Authority has considerable leverage over both owner-developers and contractors, since the Authority's authorization is required before electrical power can be connected by the local utility.

The measures that we have proposed, however, cannot change the fact that enforcement will always be hampered *in the voluntary trades by the absence of a requirement to hold a C of Q or to be a registered apprentice. It is this policy that needs to be reconsidered.* An analysis of where to draw the line between voluntary and mandatory certification is beyond the mandate of this study. However, it is important to the construction industry that such a review takes place. This review may find that certification should be mandatory in other trades where it is currently voluntary. The review may also find that the ICI sector should be treated differently in respect of requirements for mandatory certification in currently voluntary trades.

Penalties and Liabilities

In general, the current penalty and liability regime under the *Workplace Safety and Insurance Act* and under the *Employment Standards Act* is appropriate. In the case of the WSIB, employers are liable for back premiums from the date at which they commenced to employ workers. In practice the WSIB tends to limit its back premium assessments to two years. CCRA requires businesses to maintain financial records for six years, though CCRA also usually limits assessments to a period of two prior years, unless circumstances suggest that a more extended assessment would be appropriate.

An increase in penalties and back premium liabilities might increase compliance. However, our inclination is not to put emphasis on increased penalties. Rather, we believe that it is more important to having prosecutions for underground economy offences dealt with by the Ontario Superior Court of Justice, rather than by Justices of the Peace. Under existing law, the courts have the authority to impose substantial deterrent penalties for violations. For example, section 66 of the *Occupational Health and Safety Act* provides that every person who contravenes the *Act* or its Regulations is guilty of an offence and on conviction is liable to a fine of up to $25,000 or to imprisonment for up to12 months, or to both. In the case of a corporation, the maximum fine is $500,000. If prosecutors make strong arguments about the pernicious effect of violations of the law which enable the underground economy to flourish, it is likely that the judiciary could be persuaded to impose penalties at the high end of the existing scale. This would have a more telling deterrent effect that simply increasing the scale of potential penalties.

Information Sharing

Amendments to the *Income Tax Act* allow the Canada Customs and Revenue Agency to enter into information sharing agreements with other governments and with workers' compensation boards. Memoranda of Understanding (MOU) governing such information sharing are in place or under negotiation in most provinces. In Ontario, the WSIB and CCRA are negotiating an MOU. Information sharing between CCRA and the WSIB will reveal discrepancies whereby a company is registered as an employer with CCRA, and making source deductions, but not with the WSIB. Conversely, with the new determination

of status procedure that we propose, discrepancies will be revealed between covered payroll reported to the WSIB and gross payroll reported to CCRA for source deductions.

Nova Scotia represents the most interesting model for information sharing. In that province, under an agreement between the province's WCB and CCRA, employers' filings for WCB premiums and for CCRA deductions are accomplished on the same form and administered by CCRA on behalf of the WCB. The Nova Scotia Boards pursues its own delinquencies and investigates suspected instances of under-reporting or non-reporting.

Information sharing between the WSIB and CCRA will aid enforcement under both the *Workplace Safety and Insurance Act* and the *Income Tax Act*. The progress of which we were advised in negotiating a Memorandum of Understanding is welcome news.

Building Permits and Notices of Project:

At present there is no direct relationship between Building Permits that are filed at the municipal level and Notices of Project (NOP) that are filed with the Ministry of Labour, although permit information is reviewed to ascertain if NOP's should have been filed. A Building Permit and a Notice of Project serve different, though related, purposes. A Building Permit is an application for permission to build. Building Permits enable municipal authorities to confirm compliance with their Official Plans regarding land usage and also to inspect construction for compliance with the Building Code. The time lag between approval of a building application and commencement of construction can vary significantly. In some cases, construction plans are deferred for long periods of time. The Bay-Adelaide Project in Toronto is an example. NOP's trigger health and safety inspections and are intended to bear a closer relationship to the actual timing of work than a Building Permit. However, it should be kept in mind that municipal building departments do require (and receive) information on when projects will be constructed so that inspections of the various stages of work can be scheduled. Indeed, in most cases, municipal building departments will have far more detailed information on the scheduling of various stages of construction than will be provided in an NOP.

Ministry of Labour officials believe that the current NOP system works satisfactorily in that NOP's are filed for most projects where one is required and the information contained in these NOP's is sufficient for the Ministry to schedule site inspections. We make no specific proposals for a closer linkage between NOP's and Building Permits. However, we believe that when our proposed Construction Industry Employment Practices Board becomes operational, it will find considerable value in closer co-ordination and information sharing with municipal building departments. We leave the details of this co-operation to future discussions.

Proactive Site Inspections and Off Hours Inspections:

One of the themes of this report is the role that site inspections play in construction industry enforcement. We note that the WSIB has increased significantly both the number of auditors it devotes to the construction industry and the number of site inspections that its separate cadre of revenue recovery specialists undertake. These are important initiatives. Similarly, we note that the Employment Standards Branch of the Ministry of Labour is beginning to undertake pro-active inspections, to the extent that its resources permit. However, at this time, few of the pro-active inspections are focused on the construction industry. The Jobs Protection Branch of the Ministry of Labour has a notable track record in carrying out site inspections. Their efforts have undoubtedly improved compliance conditions in eastern Ontario.

The Commission de la Construction du Québec has found that a significant proportion of violations occur after hours and on weekends. Inspections outside of regular hours are an important component of the CCQ's enforcement strategy, though, at present, these inspections do not yet extend to weekend work.

We strongly support the efforts of the WSIB and the Ministry of Labour to increase their inspections of construction sites. *Under no circumstances should the establishment of our proposed Construction Industry Employment Practices Board be used as a justification for reducing site visits by WSIB auditors, revenue recovery specialists, and other public service inspectors.*

Information on Entitlements under the Employment Standards Act:

Many illegitimate construction employers deny their employees the benefits assured them under the *Employment Standards Act*. In the construction industry, the most important of these benefits are vacation pay and holiday pay. These benefits amount to approximately 7.46% of payroll. We were told that the most common stratagem for avoiding these payments is to style employees as "independent operators" and thereby purport to remove them from the ambit of the *ESA*. Dependent contractors, however, are deemed employees within the meaning of the *ESA*. For the most part, remedy under the *ESA* is triggered by a complaint, although pro-active audits can lead to a compliance order, in the absence of a complaint.

We addressed the problem of *ESA* enforcement in our discussion of the proposed Construction Industry Employment Practices Board (CIEPB). In that discussion, we proposed that CIEPB inspectors should have the statutory duty to advise workers of their entitlements under the *ESA* as well as Fair Wage Schedules. We also proposed that CIEPB inspectors could be authorized by workers to file *ESA* and Fair Wage complaints or to request an occupational health and safety inspection. This is our principal strategy for dealing with enforcing *ESA* entitlements. Beyond this, it would be helpful if the Ministry of Labour

undertook a public information effort to advise construction workers of their entitlements under the *ESA*.

Sub-Contract Reporting:

In Chapter One we discussed CCRA's Contract Payment Reporting System (CPRS). The federal legislation establishing the CPRS does not purport to obligate the Ontario government to participate in the CPRS, even though that system is mandatory for the private sector. The WSIB, it should be noted, requires construction employers to provide, on request, their CPRS records of sub-contracts. We believe that it is in the Ontario government's interest, in terms of revenue recovery alone, to participate in the CPRS. The CPRS is viewed by both CCRA and the WSIB as an important element of stronger enforcement. *We therefore recommend that the Ontario government require that those in charge of its construction projects comply fully with the CPRS reporting requirements.*

Chapter 9. Summary of Recommendations

A. WSIB Coverage

1. In the ICI sector, the independent operator exemption should be repealed.
2. In the ICI sector, executive officers of a business should be allowed to work on a construction site only if they have WSIB coverage, either through their engager or through their own business.
3. In the ICI sector, the responsibility for WSIB premiums should rest with the engager of labour. This responsibility would apply irrespective of whether the engaged workers are employees, dependent contractors, independent operators or crew leaders who engage subordinate workers. An engager of construction labour would only be relieved of responsibility for WSIB premiums if the entity (person, partnership, company) that is engaged is otherwise properly registered with the WSIB and provides a current Certificate of Clearance.
4. Certificates of Clearance should be subject to renewal, but should be valid for no longer than 30 days.
5. The current system of joint and several liability should remain unchanged.

B. Construction Fair Wage System

1. As a first step, the provincial government should re-enact the 1995 Order-in-Council with Fair Wage Schedules established in accordance with the 1995 formula and updated on April 1st of each year thereafter.
2. The *Ontario Construction Fair Wage System* should mandate the publication and updating of schedules for each construction trade on an annual basis. We recommend September 1st of each year, which allows for implementation of negotiated increases which typically occur on May 1st of each year, pursuant to the legislated bargaining cycle in the ICI sector.
3. The *Ontario Construction Fair Wage System* should use the Ontario Labour Relations Board Areas as the applicable wage zones.
4. In addition to the provincial government, the *Ontario Construction Fair Wage System* should apply to any part of the public sector in Ontario that is in receipt of provincial monies or provincial guarantees for loans, including, but not limited to:
    i. provincial government corporations, agencies, authorities, boards, etc.,
    ii. municipalities,
    iii. boards of education,
    iv. colleges and universities,
    v. hospitals,

vi. any company, agency or authority receiving capital funding from the Ontario government.

5. The *Ontario Construction Fair Wage System* should apply to all construction or repair work, regardless of the value of the contract.

6. In the ICI sector[1], Fair Wage Schedules should be based on the following formula: total compensation should mirror the prevailing negotiated wage package for the relevant trade in each Labour Board area. If the applicable negotiated wage package is reduced by local area modification or other procedure for institutional construction, a consequent adjustment should be made in the Fair Wage Schedule for that trade.

7. The Fair Wage Schedules under the *Ontario Construction Fair Wage System* should apply equally to all persons performing construction work on covered work sites, including therefore, wage-paid and piece-rate paid employees, dependent contractors, and independent operators. Where an hourly wage is not the method of remuneration, the effective hourly wage (*i.e.*, gross remuneration divided by total hours) should be equal to or greater than the hourly rate specified in the applicable Fair Wage Schedule, plus the applicable allowance for benefits.

8. The *Ontario Construction Fair Wage System* should provide that construction employers who work in the public sector will be required to register with a Public Sector Construction Registry (PSCR) which would be maintained and administered by Management Board of Cabinet. The PSCR will be administered by an inter-ministerial body of senior public servants. Registration information will be the same as that required under section 5 of Regulation 213/91 (Construction Projects) under the *Occupational Health and Safety Act*, namely:

    i. business information number, as required by the Canada Customs and Revenue Agency (CCRA);
    ii. GST and, if applicable, RST numbers;
    iii. corporation registration number under the relevant incorporating Act, or other business registration number, if the entity is not incorporated;
    iv. WSIB registration number;
    v. head office and Ontario office location(s);
    vi. principal officers;
    vii. a list of related companies (within the meaning of "associated or related activities or businesses" of s.1(4) of the *Labour Relations Act*);

[1] As per the discussion in Chapter One, our recommendations are limited to the ICI sector. The 1995 Order-in Council also applied to other construction sectors, notably civil construction. While it may be appropriate to extend the Fair Wage System to all construction sectors, our formal recommendations are confined to the ICI sector. If applied to other sectors, the principle set out here may require, for example, the Minister of Labour to consult with the OLRB as to the prevailing collective agreement within a particular Board Area. This issue does not arise in the ICI sector where all agreements are provincial, by statutory requirement.

9. The *Ontario Construction Fair Wage System* should provide that prior to commencing any public sector work, a construction employer must file with the entity for whom the work is being performed a statutory declaration that the employer is in compliance with all statutory obligations, including those under the *Income Tax Act*, the *Workplace Safety and Insurance Act*, and the *Employment Standards Act*, together with a statement confirming that on all public sector work, the employer, when engaging employees in mandatory trades, as established under the *Trades Qualification and Apprenticeship Act* (TQAA), will employ only workers who hold Certificates of Qualification or who are properly registered as apprentices under the T*QAA*.

10. The *Ontario Construction Fair Wage System* should provide that on a monthly basis, construction employers working on public sector work will file with the entity for whom the work is being performed a certified statement of payroll setting out by trade the names of the employees, their hours during the previous month, their gross wages and their effective hourly wage, net of overtime. This reporting would be similar to longstanding similar requirements for monthly certified payroll statements under the U.S. *Davis-Bacon Act*.

11. The *Ontario Construction Fair Wage System* should provide that construction employers found to be in contravention of obligations under the *Ontario Construction Fair Wages Schedules* or any of the statutes referenced by the *Ontario Construction Fair Wages Schedules* would be subject to removal from the PSCR for a period not exceeding two years, in the discretion of Management Board of Cabinet, during which time they would be barred from bidding on, or performing as sub-contractors, any public sector work.

C. Construction Industry Employment Practices Board (CIEPB)

1. Through an Administrative Agreement with the Ministry of Labour and with the Ministry of Training, Colleges and Universities, the Ontario government should delegate certain inspection and reporting responsibilities to the Construction Industry Employment Practices Board (CIEPB). This may require an amendment to the relevant statutes.

2. The CIEPB will be a non-profit corporation with a Board of Directors composed of:
    - industry representatives, equally divided between labour and management,
    - provincial and federal government representatives and representatives of the WSIB, and
    - persons nominated by the provincial government to represent other public interests.

3. The CIEPB will be funded either through an operating grant provided by the WSIB or through a surcharge on WSIB premiums. If the surcharge route is followed, the amount of the surcharge will be determined by the Board of Directors of the CIEPB. The CIEPB would be empowered to negotiate financial support from the provincial government based on expected increases in tax revenues or income from fines for non-compliance.

4. The CIEPB will employ industry experienced inspectors on such terms as it deems appropriate and focus their inspection activity as per its annual strategic plan. The focus of CIEPB activity will be site inspections, not audits.

5. CIEPB inspectors should have a statutory right of access onto any construction site and will have the right to interview workers, and the power to require production of individual identification, statutory information forms, evidence of WSIB registration, and Certificates of Qualification (where required).

6. CIEPB inspectors will have the statutory right to make relevant inquiries to ascertain whether workers are employees or independent contractors.

7. CIEPB inspectors will have the statutory duty to advise workers of their entitlements under the *Employment Standards Act* and Fair Wage Schedules. CIEPB inspectors may be authorized by workers to file *Employment Standards Act* complaints, Fair Wage complaints, or to request an occupational health and safety inspection.

8. Where a construction employer is not compliant with the *Employment Standards Act* or the *Apprenticeship and Trades Qualification Act*, a CIESB inspector may endeavour to achieve voluntary compliance. In the absence of a compliance agreement (endorsed by the Ministry), the CIEPB will refer the matter to the Ministry of Labour for enforcement.

9. Where a construction employer is believed by a CIEPB inspector to be non-compliant with WSIB and CCRA requirements, the CIEPB will report the case to the WSIB and/or CCRA.

10. The Administrative Services Agreement between the CIEPB and the relevant ministries will provide that CIEPB referrals will be acted on within not more than three business days, where "acting on" means issuing a compliance order or conducting a further investigation with a view to subsequently issuing a compliance order, if appropriate, within not more than three further days.

11. On a quarterly basis, the CIEPB will report its enforcement activities, referrals and the results of referrals. With respect to referrals to CCRA, these may be covered by confidentiality provisions of the *Income Tax Act*. On an annual basis, the CIEPB will report its enforcement activities, referrals and the results of referrals to the Minister of Labour who will convey this report to the Legislature.

12. The Administrative Services Agreement between the CIEPB and the relevant ministries will provide that CIEPB inspectors will be trained to a standard satisfactory to these ministries.

13. Subject to such policies that it may develop, and with the agreement of the relevant Ministries and the WSIB, the CIEPB may enter into an agreement with another body to carry out some or all of the mandate of the CIEPB with respect to a particular trade.

D. Contractor Registration

1. With due notice to the industry, registration requirements under section 5 of Regulation 213/91 (Construction Projects) of the *Occupational Health and Safety Act* should be strictly and comprehensively enforced.

2. Evidence of registration should be located on the site at which employers are working, per the current regulation, and should also be filed over the Internet, or otherwise, with the Ministry of Labour as soon as the employer commences work on a project.

E. Enforcement Issues:

1. The Ministry of Labour should explore with the industry the merits and feasibility of a system of mandatory registration of construction workers. The Ministry should also explore with the industry and with the Construction Safety Association of Ontario the possible role of a system worker registration to improved health and safety performance in the construction industry.
2. *Trades Qualifications and Apprenticeship Act*:
    a. In conjunction with the construction industry, the province should undertake a systematic review of voluntary and mandatory trade certification in the construction industry.
    b. All tradespersons working in the mandatory trades should be required to produce Certificates of Qualification, per the TQAA, immediately and upon request. The time permitted for an apprentice to satisfy an inspector that he or she is enrolled in an approved apprenticeship should be significantly reduced from the current three months.
3. Penalties and Liabilities: Prosecutions should be dealt with by the Ontario Superior Court of Justice.
4. *Employment Standards Act:* The Ministry of Labour should undertake a public information effort to advise construction workers of their entitlements under the ESA.
5. Contract Payment Reporting System: The Ontario government and all other public sector and quasi-public sector entities who undertake construction work should, if they are not already doing so, comply with the reporting requirements of CCRA's Contract Payment Reporting System.

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