

**Presentation to
Expert Advisory Panel on Occupational Health and Safety**

**Ontario Construction Secretariat
Tuesday, June 29, 2010**

**Sean Strickland
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Ontario Construction Secretariat**

1. Introductions.
2. The Ontario Construction Secretariat was established in 1993, pursuant to a regulation to the *Labour Relations Act*. Our members are the trades unions and employer organizations that operate in non-residential building construction, which is also referred to as the Industrial, Commercial and Institutional - or ICI - sector of the construction industry. We are financed entirely by contributions that are paid by our union and employer members. Our Board of Directors comprises an equal number of union and employer representatives, along with observers from the Ontario government.
3. The mandate of the Ontario Construction Secretariat is to support dialogue and undertake research to strengthen productivity and improve the work environment in unionized construction in the ICI sector.

4. Our members welcome the appointment of this Expert Advisory Panel. We look forward to your recommendations. We are especially encouraged that you have identified the underground economy as an important challenge to Ontario's occupational injury and disease prevention system.
5. Over the past ten years, the Ontario Construction Secretariat has commissioned a number of studies on the underground economy in the construction industry. These studies endeavour to estimate the magnitude of the underground economy in construction and also discuss strategies for rolling back the underground economy.
6. One of the central conclusions of this research is that, in Ontario, it is a serious mistake to believe that the underground economy is confined to the so-called cash economy and is limited to small-scale renovation projects undertaken for homeowners. Our research shows that the underground economy is much larger than the cash economy and that its foundation is a loop-hole in the current regulatory regime that allows too many construction contractors to style their workers as independent operators when they should be properly classed as employees.
7. Mr. O'Grady will describe for you significant savings on labour costs that result when a worker is styled as an independent operator, rather than as an employee.
8. While it is cost savings that are the driver behind the growth of independent operators, it is important to appreciate that this growth has significant and adverse implications of occupational health and safety in the Ontario's construction industry. Contractors

who style their workers as independent contractors escape, or at least they believe that they escape, the obligations of employers under both the *Occupational Health and Safety Act* and the *Workplace Safety and Insurance Act*.

9. Mr. O'Grady will show you that the practice of styling workers as independent operators is not a marginal phenomenon in Ontario's construction industry. Rather the practice has become a central feature of the industry that affects a significant number of construction workers. The widespread practice of styling workers as independent operators contaminates the competitive environment in the construction industry. Equally importantly, this practice also frustrates attempts to improve health and safety performance in the construction industry.

10. Based on research that we have undertaken, and which I am happy to share with you, our Board of Directors wishes to make four recommendations for your consideration.

11. The first of these recommendations is the government should proceed, as planned, with the implementation of Bill 119. Bill 119 amended the *Workplace Safety and Insurance Act* to make WSIB coverage mandatory for independent operators and executive officers in the construction industry. This coverage will become mandatory in 2012. The Ontario Construction Secretariat believes that Bill 119 is an important initiative and that it will lay the foundation for rolling back the underground economy in Ontario. While Bill 119 is not a complete solution to the problem of the underground economy, Bill 119 is nevertheless an important and essential part of any

strategy to roll back the underground economy. It is essential that the implementation of Bill 119 proceed as announced.

12. The second recommendation that the Ontario Construction Secretariat wants to propose is that in both the *Workplace Safety and Insurance Act* and the *Occupational Health and Safety Act*, every worker who is engaged to do construction work by a construction contractor should be treated as an employee for purposes of those statutes, regardless of whether they were hired as employees or engaged as independent operators. Similarly, the construction contractor who engages these workers should be treated as an employer, regardless of whether that contractor has formally hired the workers as employees or simply engaged them as independent operators. In other words, for purposes of these two key health and safety statutes, it should not matter whether a worker has been hired by a construction contractor as an employee or engaged by that same construction contractor as an independent operator. A worker is a worker... and a contractor is an employer.

13. The third recommendation that the Ontario Construction Secretariat wishes to propose is an increase in the both degree and the sophistication of on-site enforcement. That means more resources for inspection.

14. Fourth and finally, the Ontario Construction Secretariat urges the Expert Panel to consider recommending a system of mandatory health and safety training in the construction industry. Other jurisdictions already do this, notably Quebec, which has

a mandatory 30-hour training course which must be completed before a worker can commence working in the construction industry.

15. I now want to ask John O’Grady, a partner with Prism Economics and Analysis, to summarize for you some of the highlights of research that he has undertaken into the underground economy. I should also mention that John undertook some of this work in collaboration with Mr. Tim Armstrong, whom many of you will know was a former Deputy Ministry of Labour.

John O’Grady
Prism Economics and Analysis

16. I want to summarize for you the seven key findings of research that was undertaken for Ontario Construction Secretariat.

17. The first finding is that it is a mistake to reduce or equate the underground economy with payment in cash. The cash economy accounts for only 10-15% of the underground economy. The real foundation of the underground economy is the practice of styling workers as independent operators rather than as employees.

18. The second finding pertains to the magnitude of labour cost savings that a construction contractor can achieve by the stratagem of styling workers as independent operators, rather than acknowledging that they are, in reality, employees.

The table which I have provided shows the costs that would be avoided by a contractor, if a worker is classed as an independent operator, rather than as an employee. The savings vary depending on the WSIB rate group. As you can see, taking account only of the formal cost savings, the avoided costs range from roughly 20% to 33%. To these savings can be added other cost savings. Engaging an independent operator is technically a contract for services not an employment contract. Consequently, the engager does not issue an earnings statement – i.e., a T-4 slip – and does not report those earnings to the Canada Revenue Agency. It is widely understood that many independent operators do not report all of their earnings. A consequence of this is that the remuneration that is paid to independent operators is often lower than what would have been paid if their earnings were reported to the Canada Revenue Agency and income tax deductions were withheld at source. Based on interviews which we did in the 1990s, we estimated that this results in remuneration rates – which are often piece rates- that are 13-18% lower than what would have been paid, if everything had been above board. When you take these additional savings into account, the cost savings to contractors from styling workers as independent operators ranges from 33% to as much as 50% of labour costs.

19. This leads us to our third finding. Given the savings in labour costs from styling workers as independent operators, it is not surprising that we have seen an explosion in the number of independent operators. The independent operator phenomenon is not a marginal phenomenon. Rather it is central to an understanding of how the

construction labour market – especially the non-union construction labour market – operates. The graph which I have provided shows that, in 1987, when Statistics Canada began to collect data on the class of worker, independent operators accounted for 10.8% of employment in the construction industry. By 1999, the independent operator share had increased to 24.2% - almost one construction worker in four. The impetus for this explosion was first the introduction of the GST which triggered the growth of the cash economy in construction, mainly in small-scale renovation projects. The second impetus was the weak labour market that prevailed in construction throughout in most of the 1990s and which allowed construction contractors to dictate employment terms, especially in the non-union sector.

20. As you can see from the graph, the independent operator share declined marginally in this decade and then jumped up again last year, when the labour market again weakened. In 2009, the independent operator share stood at 22.2% - , that is to say, just over one construction worker in every five was an independent operator. In the non-union sector, where the phenomenon is more pronounced, about one construction worker in every three was an independent operator.

21. Our fourth finding is that the independent operator phenomenon is not a transitory phenomenon. Rather, it has become embedded in the construction labour market. If you examine the graph, you will see that over the course of the most recent decade, prior to 2009, when there were growing shortages in the labour market, there was a decline in the independent operator share. The reason for this is straight forward:

contractors were less able to impose independent operator conditions on workers. What is important to stress, however, is that the decline in the independent operator share was comparatively modest. The independent operator phenomenon had become embedded in the construction labour market. The incentives to style workers as independent operators, rather than as employees, were too powerful for the phenomenon to be undone even substantially, let alone wholly, by tighter labour market conditions. We believe that you should conclude from this that a social marketing strategy will not solve the problem. A statutory or regulatory initiative is required.

22. Our fifth finding – and one to which I have already alluded – is that the growth in the independent operator share of the construction labour force was driven by contractors taking advantage of weak labour market conditions. To illustrate this, let me quote from an affidavit that was filed in arbitration proceedings under the Labour Relations Act. The affidavit sets out the testimony of a worker who was engaged as an independent operator. We have reproduced this testimony in material provided to the Panel.

23. Let me read a few of the salient statements in the affidavit. The affidavit pertains to a worker hired by a painting contractor as an independent operator:

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.

[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.

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.

[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.

24. Any reasonable person would infer from this description that the individual was an employee for all practical purposes and that the contractor had created a paper trail to make the relationship look like it was a sub-contract relationship rather than an employment relationship.

25. This leads to a sixth conclusion, namely that any attempt to solve the independent operator problem by applying the traditional common law tests will run into huge obstacles and costs. Clearly one cannot rely on the paper trail. Many contractors require their workers to sign statements affirming that they are independent operators. The purpose of the paper trail, in other words, is to create an impression that is the precise opposite of the reality. You cannot rely on the paper trail. To apply the common law test properly, you need to investigate each case individually and take testimony. In 2009, the Labour Force Survey reported that there were more than 90,000 independent operators in Ontario's construction industry. Applying the

common law test to each of these persons and applying it over and over again is administratively impractical.

26. And finally, our seventh conclusion, is that while the independent operator phenomenon is pervasive in the residential construction sector, it is also a significant factor in non-residential construction. We estimate that around 18% of independent operators work in non-residential construction, chiefly in the finishing trades.

27. Let me summarize, then, our seven findings:

First: the practice of styling workers as independent operators, not the practice of paying for construction and repair services in cash, is the real foundation of the underground economy;

Second, the styling workers as independent operators confers a significant, though illegitimate, competitive advantage that amounts to at least 20% of labour costs and can reach 50% of labour costs;

Third, these cost savings have driven an explosion in the number of independent operators such that 22% of the construction work force are now classed by Statistics Canada as independent operators;

Fourth, the practice of styling worker as independent operators is now embedded in the construction labour market;

Fifth, in the main, it is contractors who initiate the relations and dictate its terms;

Sixth, it is administratively impractical to attempt to roll back the independent operator phenomenon by applying the traditional common law tests, and

Seventh, while pervasive in the low-rise residential sector, the independent operator phenomenon is also a significant factor in non-residential construction.

Sean Strickland
Chief Executive Officer
Ontario Construction Secretariat

28. By way of conclusion, I would like to leave you with our most recent study of the underground economy and also copies of earlier studies.

29. The underground economy is a serious problem. While it is primarily driven by the attempt to achieve a labour cost advantage in an intensely competitive industry, the underground economy also has important consequences for occupational health and safety and for prevention strategy.

30. Independent operators are effectively outside the prevention system. Even when Bill 119 is implemented, they will be covered on an individual basis. This means that the WSIB's experience rating system will have little or no leverage.

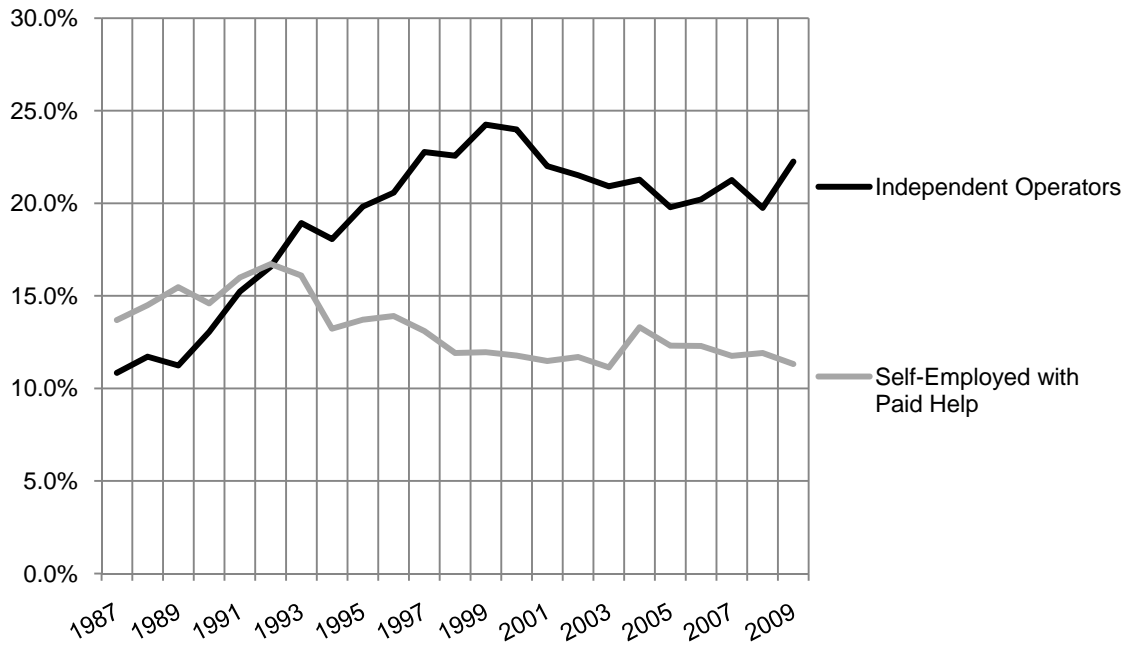
31. Contractor accreditation schemes, which provide a contractor with an accreditation based on health and safety performance and prevention strategies, effectively apply only to the recognized work force, that is to say to a contractor's employees, not to the army of independent operators who augment this work force.
32. It might be argued that legally a contractor does not escape its obligations as an employer under the *Occupational Health and Safety Act* by styling workers as independent operators. However, the fact is that the vast majority of contractors who style their workers as independent operators believe they have escaped those obligations and act on that premise. In particular, that means they do not provide training, even when that training is required under the construction regulation to the *Occupational Health and Safety Act*.
33. Equally importantly, the widespread use of independent operators contaminates the competitive environment. Contractors – whether union or non-union – who care about occupational health and safety and want to upgrade their prevention programs may incur higher operating costs. This only widens the labour cost gap between these contractors and those who use independent operators. The result is that an ever greater share of the construction market falls under the sway of contractors who operate in a manner that is diametrically opposed to the objectives of both the *Workplaces Safety and Insurance Act* and the *Occupational Health and Safety Act*.

34. It is essential that we tackle this problem. It is essential that your recommendations deal with this problem.

Estimate of Labour Cost Savings to a Construction Contractor
 From Styling Workers as Independent Operators
 rather than acknowledging that they are Employees

	Electrician	Inside Finishing	Masonry	Roofer	Form Work / Demolition
Statutory Contributions:					
• WSIB premiums	3.25%	6.75%	11.15%	13.30%	16.50%
• CPP - employer contributions	4.95%	4.95%	4.95%	4.95%	4.95%
• EI - employer contributions	2.42%	2.42%	2.42%	2.42%	2.42%
• 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	20.03%	23.53%	27.93%	30.08%	33.28%
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%	36-41%	41-48%	43-48%	46%-51%

Share of Construction Employment of
Independent Operators and Self-Employed Persons with Paid Help
Ontario, 1987-2009
Statistics Canada, CANSIM 282-0012



Extract from Sworn Affidavit

The following is an extract from a sworn affidavit that was submitted as evidence in arbitration proceedings under the *Labour Relations Act*. The affidavit describes the actual terms and conditions of employment of an individual who was styled as an 'independent operator' by his employer. The affidavit pertains to work undertaken by a painting contractor working 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.
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)