

### New criminal liability rules



Michael A. van Bodegom

Recent *Criminal Code* amendments now impose a legal duty on any person “directing work” to take reasonable steps to ensure the safety of workers and the public. These amendments, in force since March 31, 2004, have been well publicized but poorly explained and understood.

Strictly speaking, the new *Criminal Code* provision does not create a new criminal offence. Instead, it is designed to “beef up” the existing criminal negligence offences which are based on the breach of a legal duty.

That is, mere breach of the legal duty to take reasonable steps to ensure safety is not, of itself, an offence. To be convicted, a person must have breached this duty with a “wanton and reckless disregard” for the safety of others. The prosecution would need to prove that the action (or failure to take action) constituted a marked and significant departure from the standard expected of a reasonably prudent person.

These amendments do not replace or supersede the existing provisions of the *Occupational Health and Safety Act* (the

“*OHSA*”). Fines and even jail terms may still be imposed under that legislation.

These positive obligations under both the *Criminal Code* and the *OHSA* are largely of a general nature, in that no specific acts or conduct are mandated. Under the *OHSA*, for example, a “constructor” must ensure that “the health and safety of workers on the project is protected,” among many other obligations (of course, there are also many more specific obligations on constructors, employers, supervisors and workers under the *OHSA* as well). Somewhat similarly, any failure to take “reasonable steps” to ensure the safety of any person (not just workers) may breach the new *Criminal Code* duty. However, counterbalancing its broad scope, a charge under the criminal negligence sections of the *Criminal Code* requires that someone be harmed or killed -- criminal negligence “in the air” is not an offence. (...3)

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### “Pay if Paid” clauses

Irwin A. Duncan

Many construction contracts contain what is known as “pay if paid” clauses. These clauses make receipt of payment by one party to the contract a condition to that party’s obligation to pay its subcontractor or material supplier. In the case of such a provision in a prime contract, the general contractor may only be obliged to pay its subcontractor when it is paid by the owner. The impli-

cations arising from the use of these clauses has been the subject of much discussion in recent years.

#### **Why They Are Used**

The purpose of such clauses is to shift all or part of the risk of non-payment from the general contractor to its subcontractors and material suppliers. For obvious reasons, general contractors who are not paid by the

(...2)

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## “Pay-if-Paid” clauses (con’t)

owner face an immediate cash flow predicament if they are obliged to pay the sub-trades working on the project—they end up financing the project out of their own resources. The desire of general contractors to avoid such a result is therefore understandable.

However, it is important for subcontractors to make a conscious decision before they agree to such a term. They must be prepared to face the reality that they may not be paid promptly, or at all, for their work or materials. Material suppliers who contract to supply costly equipment or materials to a project are particularly at risk.

A careful risk/benefit analysis should be part of the subcontractor’s decision to take on the work or supply materials in the face of such a contract provision. The financial implications of “pay if paid” clauses can be very severe.

### **Limitations**

Even if a contract contains a “pay if paid” clause, that does not deprive a party of its right to make a construction lien claim or to assert trust fund rights under the provisions of the *Construction Lien Act*. Similarly, if a labour and material payment bond is posted as security for payment of amounts due on a project, a “pay if paid” clause will not preclude a party from claiming against that bond.

In certain circumstances, a “pay if paid” clause may become unenforceable under the “prevention doctrine”. This doctrine essentially provides that a contract condition will not be enforced if the party seeking to benefit from the condition undertakes actions that prevent or hinder the occurrence of the condition. For example, a general contractor may not be able to rely upon a “pay if paid” clause to avoid paying

one of its subcontractors where the general contractor is at fault in causing the owner of the project to withhold payment.

Similarly, if it can be shown that the party who is relying on a “pay if paid” clause has not taken appropriate steps to obtain payment of the money that it is owed, then its attempts to rely upon the clause will likely fail. Therefore, if an owner fails or refuses to make payment of amounts owing to a general contractor, the general contractor should take reasonable steps to obtain payment of the amount owing, failing which it may not be able to raise the “pay if paid” clause as a defence to a claim against it by a subcontractor.

### **Important Points to Remember**

- A “pay if paid” clause can have very serious financial implications for subcontractors and material suppliers if a project goes bad.
- The absence of a “pay if paid” clause may have very serious financial implications for a general contractor if it is not paid by the owner.
- Parties may not act unreasonably when relying on such clauses.
- A party who is facing a “pay if paid” clause may still have other remedies which should be explored.
- A “pay if paid” clause must be drafted clearly to be effective.
- The existence of project bonding may remove some of the risk associated with the use of such clauses.

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**INFORMATION FORM FOR LIEN CLAIM**

Name of lien claimant	
Address of improvement (and legal description, if known)	
Name and address of owner and any tenants	
Name and address of person to whom the lien claimant supplied services or materials	
Time within which services or materials were supplied	
Short description of the services or materials that have been supplied	
Contract or subcontract price	
Amount claimed as owing in respect of services or materials that have been supplied	
Name and title of person signing Claim for Lien on behalf of lien claimant	

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