The **Current** Occupational Health and Safety (OHS) Environment

- Very serious approach to contractor safety and liability for OHS when contracting

- Heavy consequences for corporations and individuals who violate safety standards
Consequences for Violation of *Ontario Health and Safety Act (OHSA)* Obligations

- C$500,000 maximum fine per offence for corporations
- C$25,000 and/or one year imprisonment per offence for individuals
- Fines over C$1,000 are subject to a 25% surcharge
- Dean Panel has recommended more serious and tough enforcement for “serious and willful violations”
Consequences for Violation of Canada Labour Code (CLC) Obligations

- No serious injury/illness or death:
  - **Indictment:** Fine up to C$1 million and/or imprisonment for up to two years per conviction
  - **Summary:** Fine up to C$100,000 per conviction

- Serious injury/illness or death:
  - **Indictment:** Fine up to C$1 million and/or imprisonment for up to two years per conviction
  - **Summary:** Fine up to C$1,000,000 per conviction
Concurrent OHS Responsibility and Potential Liability (Ontario)

- There are three key potential OHSA roles when contracting:
  - “Employer”
  - “Constructor”
  - “Owner”
Concurrent OHS Responsibility and Potential Liability (Ontario)

“Employer” means “a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services…”

OHSA, subsection 1(1), “employer”
Concurrent OHS Responsibility and Potential Liability (Ontario)

- A “Constructor” is a workplace participant who controls a construction project.

- “Constructor” is “a person who undertakes a project for an ‘Owner’ and includes an ‘Owner’ who undertakes all or part of a project by himself or by more than one ‘Employer’”. (Project undertaken by either “Owner” of workplace or general contractor for the “Owner”)

OHSA, subsection 1(1), “constructor”
Concurrent OHS Responsibility and Potential Liability (Ontario)

“Owner” is defined to include “a trustee, receiver, mortgagee in possession, tenant, lessee, or occupier of any lands or premises used or to be used as a workplace, and a person who acts for or on behalf of an “Owner” as agent or delegate”

OHSA, subsection 1(1) “owner”
Concurrent OHS Responsibility and Potential Liability (Federal)

CLC Provisions Applicable to Contracting

- Employer “means a person who employs one or more employees and includes an employer’s organization any person who acts on behalf of an employer…”

CLC, subsection 122(1)
Concurrent OHS Responsibility and Potential Liability (Federal)

CLC Provisions Applicable to Contracting

- Every employer “shall in respect of every workplace controlled by the employer and, in respect of every work activity carried out by an employee in a workplace that is not controlled by the employer, to the extent that the employer controls the activity...”

CLC, subsection 125(1)
Concurrent OHS Responsibility and Potential Liability (Federal)

- For every person granted access to the workplace:
  - By the employer, provide prescribed safety materials, equipment, devices and clothing
  - By the employer, ensure that person is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials, equipment, devices and clothing
  - Ensure that the activities do not endanger the health of employees
  - Other than the employer’s employees, take all reasonable care to ensure informed of every known or foreseeable health and safety hazard to which they are likely to be exposed in the workplace
Contractor Safety when Contracting for Construction Projects
Key Concepts when Contracting for Construction Projects

- The “Constructor” concept
  - You either are or engage the constructor when contracting for a construction project

- “Construction Project” definition and case law
  - The two questions that determine the existence of a construction project

- Identifying the “Constructor”
  - A control test assessing actual, on-site activities is applied

- How and when does due diligence apply?
  - Differs between constructors and owners
Is it a Construction Project?

- Best available analysis of whether the work is construction project is set out in *St. Mary’s Cement Co.*, and involves asking:
  
  1. Are any objects being worked upon within definition of “project”?
  
  1. If so, are any of the activities within definition of “construction”?
Is it a Construction Project?

- **Construction**: “includes erection, alteration, repair, dismantling, demolition, structural maintenance, painting, land clearing, earth moving, grading, excavating, trenching, digging, boring, drilling, blasting or concreting, the installation of any machinery or plant, and any work or undertaking in connection with a project...”

OHSA, subsection 1(1) “construction”
Is it a Construction Project?

- **Project**: “means a construction project, whether public or private, including the construction of a building, bridge, structure, industrial establishment, mining plant, shaft, tunnel, caisson, trench, excavation, highway, railway, street, parking lot, cofferdam, conduit, sewer, water main, service connection, telegraph, telephone or electrical cable, pipeline, duct or well, or any combination thereof [...]”

OHSA, subsection 1(1) “project”
Is it a Construction Project?

- What if it is unclear whether the matter is maintenance or a “construction project”?

- Ontario Ministry of Labour (MOL) policy is to apply regulations which provide the greatest protection to workers.
Who is the Constructor?

• “in relation to a construction project is the party who exercises the greatest degree of control over the entire project and all working upon it. The “Constructor” plans and organizes the entire project…”

• Determining factor will be on-site activities rather than contracts or even payment of trades

• Owner can become the constructor if too much control is exercised
Keeping Control Over the Project with the “Constructor”

- “Constructor” should select and approve subcontractors

- “Constructor” must train, instruct, provide policies for, meet with, organize and schedule contractors and subcontractors

- “Constructor” must control, monitor, inspect and direct safety aspects of construction project
Contractor Safety when Contracting for Services

(Non-construction Contracting)
The Most Important Concepts

- “Employer” definition
  - Includes traditional employment relationship and contracts of service
- “Constructor” concept and role of “Constructor” is not available
  - Only exists when contracting for a construction project
- Application of due diligence when contracting for services as “Employer”
  - Must exercise “hands on” due diligence
OHS “Due Diligence”
(All Reasonable Care)
OHS Due Diligence: A Summary of the Components of All Reasonable Care

- All reasonable care is composed of stringent court-developed standards:
  - Knowledge of legal obligations
  - Hazard identification and assessment
  - Corrective action based on assessment of hazards
  - Appropriate orientation and training
  - Competent supervisors and trained workers
  - Supervisory monitoring to confirm practices and procedures followed
  - Communication of hazard information to workers
  - Discouragement of safety infractions with discipline
  - Ongoing documented steps
Due Diligence Best Practices when Contracting as Constructor or Employer

- Prequalify contractors
- Prequalification
  - Must be specific assessment of written policies, procedures, training, supervision and other relevant matters specific to the contract
  - Assessment of whether contractor must follow your OHS policies or requires further training
  - Do the contractor's OHS practices apparently meet “due diligence” standards?
Due Diligence Best Practices when Contracting as Constructor or Employer

- Key Contractual Provisions:
  - Detail the OHS roles of the parties
  - Expressly set out contractor’s commitment to comply with OHS laws and standards and, as applicable, the contractor’s representations about safety (e.g., provision of competent supervision, trained workers, well-maintained equipment, etc.)
  - Post-engagement monitoring
  - Right to remove for unsafe work practices and/or to require that contractor improve training or supervisory deficiencies
  - Right to approve and control subcontractors
Responding to Workplace Accidents: Managing the Risks
Current Enforcement Environment
The Context: Age of Increased Enforcement

- Possible criminal prosecution under Bill C-45
  - Amendments to the *Criminal Code* in 2004
  - Anyone who fails to meet this duty and shows “wanton or reckless disregard” for the lives or safety of others can be charged with criminal negligence
  - Union and workers’ groups increasingly pushing for Bill C-45 charges in serious accidents and fatalities
  - 2012 Metron conviction – Police and prosecutors may be more emboldened to lay Bill C-45 charges
- Possible attention from other regulatory bodies
- Negative publicity from OHS convictions
## The Context: Age of Increased Enforcement

### 2004 to 2010: Fines More Than Doubled

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Fines</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>C$6.3 million</td>
</tr>
<tr>
<td>2009/2010</td>
<td>C$12.9 million</td>
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</tbody>
</table>

Advance preparation: the accident response plan
Preparation and Planning are Key

- Continuity of business (production/service to clients)
- Health of workers and labour relations
- Business reputation
- Legal liability
Preparation and Planning are Key

Source: http://www.ccohs.ca/hscanada/contributions/accident_cost_iceberg.pdf
Preparation and Planning are Key

The Accident Pyramid

- Fatalities
- Severe Injuries
- Minor Injuries
- Close calls
- Hazardous conditions

To be Prepared, it is Important to have an Accident Response Plan

- An Accident Response Plan accounts for:
  - What typically happens in the aftermath of an accident
  - Who you will have to deal with
  - What your organization’s (and management’s) legal rights and obligations are
  - Key risk management strategies
To be Prepared, it is Important to have an Accident Response Plan

- Key Accident Response Plan Elements:
  - Immediate steps (medical, preservation of scene, notice to regulator)
  - The need for an accident coordinator
  - Cooperation but not self-incrimination
  - Shadowing the MOL investigation
  - Dealing with warrants
  - Dealing with document and interview requests
  - Retaining experts and outside counsel
  - Dealing with media
  - Responding to orders
Immediate Accident Response Steps

- Legal obligations
- Statutory obligation to preserve scene
- Statutory notification and accident reporting requirements
- Managing accident reporting
- Risk management – point of contact
Managing the Internal and External Processes

- Detailed internal investigation
  - Internal investigation report can be protected by solicitor-client privilege or litigation privilege
- Expert assistance and expert reports
  - Is it required?
- Statements from witness to events
  - Request to monitor interviews
- Statements from supervisors, managers
  - Red flag
Searches

- OHS regulator powers to “inspect” and “investigate”
- OHS regulator searches with and without search warrants
If Regulator Arrives with a Search Warrant

- Managing the process
- Inspect warrant, copy
- Observe and make detailed notes of warrant execution
Dealing with the Media

• Media attention may arise at:
  - Time of serious workplace accident
  - Trial
  - Point of any resolution or finding against organization
  - Inquest
Using Due Diligence Proactively
Using Due Diligence Proactively

- Ensure information about reasonable care is provided

- Consider detailed follow-up letter to confirm due diligence steps

- Don’t wait for a prosecution to think about proving your due diligence!