

WHY TAKE THE LAW INTO YOUR OWN HANDS?

Making a case for legal expense insurance.

Legal Expense Insurance is a relatively new insurance product in Canada but has been utilized in other countries for over 80 years. It provides legal representation for a wide variety of situations before they occur where traditional insurance may not apply. The Canadian contractor now has access to legal expense insurance, to offset the significant cost of legal services it has been exposed to or has self-insured in the past. Now a contractor has extra protection available when faced with an action or even when considering prosecuting another party.

Readers of this paper may recall this headline in 2007:

'Two companies, two supervisors fined a total of \$297,000 after the death of a young worker'.

A young worker was killed in 2007 while clearing snow and ice from a roof canopy under the employment of a roofing company. All involved - two supervisors, the construction company and the roofing company to which it had subcontracted the work, were all charged for violating various sections of the Ontario Health and Safety Act for failing to ensure that all employees complied with the fall protection measures set out. Furthermore, a 25% victim fine surcharge was also implemented in accordance with the ****Provincial Offences Act**.

The above example would **not** be covered by commercial general liability insurance and until now, there has mostly been nowhere to turn to in Canada other than one's own bank account to fund legal costs, fines and penalties. Construction workplace accidents still occur and most recently in 2011 two in the past month in Ontario have been with very tragic outcomes.

There is no question that the Ministry of Labour (Ontario) will be monitoring the construction industry more closely in 2012.

What can one do about situations like the above 2007 example, where a contractor needs costly perhaps specialized legal representation for an action for which general liability insurance does not provide coverage?

What can one do about situations where a contractor wants to pursue an action against someone else (for example to collect payment), but the cost of legal services is preventing it from doing so?

Up until now the contractor has had to defend (or prosecute) these non insured situations out of its own account rendering them “self insured”. This can be at *significant unforeseen* cost, it is not *solely* the legal representation for which the contractor is paying, often there are other costs imposed such as disbursements and court costs: these can be sustained whether the contractor loses *or wins* the case.

Based on 598 Canadian lawsuits (reviewed by **DAS Canada a provider of Legal Expense Insurance):

- ✓ The average cost of a lawyer’s services is **\$360**.
- ✓ The average cost of a two day civil action trial in Canada is **\$26,444.**
- ✓ A one day criminal trial costs approximately **\$5,000.**

No matter how one “dices and slices” it, when faced with a *self-insured* defence or a strong desire to prosecute to protect one’s rights: it’s going to be expensive. Let’s take a closer look at exposures that exist in the construction industry that are not generally attended to by traditional insurance? Some examples include:

| Wrongful Dismissal | Criminal Liability |
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| <p>The contractor followed all required procedures to terminate an employee: warning, disciplining and firing. It receives a Wrongful Dismissal Statement of Claim for thousands of dollars in damages. Potentially it will sustain legal costs to defend and potential fine(s) and penalty(ies) against it. Under today’s ***<i>Bill 168 - An Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters</i> the Employer’s exposure to action under the Occupational Health & Safety Act is <i>even greater</i>.</p> | <p>- as per ****<i>Bill C45 – Amendments to the Criminal Code affecting the Criminal Liability of Organizations</i> the following example:</p> <p>Four employees are killed in a workplace accident. As the employer the construction company is now faced with fines and penalties and must defend itself under Bill C45.</p> |

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| <p style="text-align: center;">Discrimination</p> <p>A work applicant claims the contractor did not hire him because of his race or his religion. He takes the contractor to a Human Rights Tribunal. The contractor faces legal costs for specialty Human Rights knowledgeable counsel and possible fines.</p> | <p style="text-align: center;">Ministry of Labour (MOL) Fines and Penalties</p> <p>Prior to Criminal charges being laid in an employee injury/death situation, the MOL levies a \$100,000 fine against the contractor.</p> |
| <p style="text-align: center;">Contractual Disputes and Debt Recovery</p> <p><u>Contract Dispute:</u> The contractor provides its customer with an estimate for roof repairs and the customer insisted on a higher quality roofing system, the contractor quotes an extra cost. The customer agreed to the cost but now the work is completed, the customer is refusing to pay.</p> | <p style="text-align: center;">Contractual Disputes and Debt Recovery</p> <p><u>Debt Recovery:</u> An accident occurs on the jobsite, the contractor involves its property and general liability insurance as is normal. During this time the Owner holds back full payment due of \$120,000 until the situation is resolved. The damage is finally assessed by all parties at \$40,000. The Owner <i>stretches</i> the law and continues to hold back the full \$120,000 payment, instead of paying the difference until the repairs are put into effect.</p> |
| <p style="text-align: center;">Miscellaneous Situations</p> <ul style="list-style-type: none"> ✓ The contractor is facing a tax audit it didn't expect. It followed all rules and regulations to ensure returns were correct and submitted within statutory timeframes. It's going to cost time and expense to prepare for the audit. ✓ Someone is consistently trespassing through the contractor's yard hopping fences as a shortcut to another destination. Additionally they leave paper waste in the yard which is a fire hazard. The contractor has warned the trespasser to stay off your premises but he continues to disregard all warnings. ✓ The contractor is unclear if it should hire someone as a full time employee or on a contract basis and needs advice. ✓ You want to double check your rights before terminating an employee. | |

Legal Expense Insurance includes coverage for the cost of legal representation for many of the examples cited above. Coverage often includes unlimited access for businesses to **Telephone Legal Advice** from 8AM to Midnight 7 days a week and access to a lawyer in emergencies 24 hours, 7 days a week.

With such high exposures affecting the Ontario contracting industry and with increasingly rigid Regulation, the contractor now has access to an insurance policy that will pay legal expenses for situations similar to some of those described above. Legal Expense Insurance Premiums are reasonably priced and unlike regular insurance it does not pay the damages or fines but covers *legal fees, court costs, disbursements and adverse costs* even if the judge rules in the other party's favour, for example:

| Contractor Gross Annual Payroll | *Basic Coverage cost example | *Add Optional Contract Disputes/Debt Recovery cost example | *Total Combined Cost Example for full coverage. \$200,000 per occurrence & \$1,000,000 aggregate (Tax Audit/ Appeal \$25,000 limit). |
|--|-------------------------------------|---|---|
| Contractor A: \$6,000,000 | \$11,000 approx + tax | \$12,000 approx + tax | \$21,000 Approx. Annual + tax |
| Contractor B: \$ 900,000 | \$ 2,300 approx + tax | \$ 2,400 approx + tax | \$ 4,700 Approx. Annual + Tax |

**Rates vary by company, these are examples only. Policy terms and conditions vary per insurer and not all applicants qualify.*

If you wish more information on Legal Expense Insurance contact:

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Glossary

Globe & Mail Article on Legal Expense Insurance: http://media-das.ca/DAS/media/Documents/Go_ahead_sue_me-I_have_insurance-072011.pdf?ext=.pdf.

2007 Example of Construction Accident: <http://news.ontario.ca/mol/en/2009/04/two-companies-two-supervisors-fined-a-total-of-297000-after-the-death-of-a-young-worker.html>

Provincial Offences Act - (http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p33_e.htm)

Bill 168 - An Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters: (http://www.iapa.ca/Main/Articles/2009_workplace_violence.aspx)

Bill C45 - Amendments to the Criminal Code affecting the Criminal Liability of Organizations (<http://www.justice.gc.ca/eng/dept-min/pub/c45/>)

DAS Canada - (www.das.ca)

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