# Getting A Grip

## An Overview of Petroleum Contractors' Legal Liabilities and Keys to Managing Risk


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# DISCLAIMER

- The following session is provided as an information service and provides only a brief summary of a few of the key legal issues associated with this topic and is not an in-depth or exhaustive discussion.
- It is not offered or intended to operate as legal advice.
- Participants are cautioned not to act or rely on this presentation and discussion to govern their actions, and are reminded in all cases to seek out specific legal advice from their legal counsel before making decisions in respect of the matters discussed.

# Today's Session

- A little background:
  - Why do these issues matter for petroleum storage system contractors?
- Three "Real Life" Scenarios that discuss:
  - Basic liability arising from contractual arrangements;
  - Understanding the scope of work (including responsibilities that may be implied/taken on under regulatory requirements);
  - What are the developing standards in terms of a "reasonable tank management contractor" that apply if something goes wrong in the provision of service;
- Suggestions and an open discussion for how to prevent bad things from happening to good contractors in this context
- Questions and Answers

# Why Does This Stuff Matter?


- A number of trends are sharpening the focus and increasing the risks of liability resulting from this type of work:
  - Economic downturn means that if something goes wrong parties are much less likely to absorb losses as a cost of doing business and are more likely to sue;
  - Increasing regulatory responsibilities being added to legislation;
  - Enforcement authorities broadening the net of liability and the range of parties facing enforcement action; and
  - Increasing client/customer expectations that specialists conducting work are assuming all risks associated with their work UNLESS otherwise specified.

# Scenario 1: Understanding The Contract--Why Fine Print Matters

- Your sales person gets a call from an existing client to perform some routine maintenance on a tank
- As this is an existing client no one gets a new contract in place before sending personnel out to perform the maintenance
- The on-site personnel note that the tank is a new tank that appears not to be installed properly by the client (or other contractor) but performs the maintenance tasks the client requested when the sales person took the call
- The tank fails and an environmental and safety incident occurs as a result
- Your company gets sued for negligent performance of the maintenance tasks…are YOU LIABLE?

# Scenario 1: Why Fine Print Matters (2)

- To assess your liability the courts are going to ask some key questions about your contractual relationship:
  - What do the parties say in the contract that governs how this work was supposed to be carried out?
    - Do you have a contract at all?
      - Possibly the old contract—what are the terms?
      - Possibly the "new agreement" discussed by the sales person; if so "parole/spoken evidence" rules may be very problematic

# Scenario 1: Why Fine Print Matters (3)

- To assess your liability the courts are going to ask some key questions about your contractual relationship (continued):
  - What are the terms of the "contract" that can be proven?
    - e.g. what if there are no signatures,
    - Are there limitations or acknowledgements of limitations by all the parties
  - Did the on-site parties know what the terms and conditions governing the work were (especially scope of work)
  - And did on-site parties act in a manner that was consistent with the roles and responsibilities laid out in the contract or not?

# Scenario 2: Defining the Scope of Work

- Your company and a new client sign a contract with the following scope:
  - The contractor agrees to perform "routine annual maintenance" on a specific Tank
  - There is no definition of "routine annual maintenance" but later in the contract there is a general term that says:

    *In the provision of all services, it is the responsibility of the contractor to ensure compliance with all applicable environmental, health and safety laws.*
- At the site, the client signs a purchase order for the work that states the contractor will receive payment only for the performance of routine annual maintenance tasks as set out in the contract
- Before performing the tank maintenance, the on-site personnel identify a potential safety risk as it appears to them that the tank is located too close to a permanent building (a violation of the Fire Code)

# Scenario 2: Defining the Scope of Work (2)

- As your company was not responsible for the installation, your personnel consider this issue to be outside the scope of the work to be performed. They do nothing about the potential Code violation and perform the maintenance
- When the tank is subsequently damaged by a third party it catches on fire and damages the adjacent building and causes injury to the workers inside
- Your company gets sued for negligent performance under the contract on the basis that the company failed to identify non-compliance with the Code while providing services…are YOU LIABLE?

# Scenario 2: Defining the Scope of Work (3)

- To assess your liability the courts are going to ask some key questions about the Scope of Work:
  - What is meant by: "routine annual maintenance" (did the parties understand whether it included verification that the tank was in regulatory compliance on an annual basis)?
    - In determining this, when the contract is silent, the courts may look to "extrinsic aids" such as the plain and common meaning of the words, industry standards, regulatory definitions and/or other similar and/or standardized contracts;
  - Even if the normal definition of "routine annual maintenance" would not typically include on-going compliance verification, does the general compliance clause add compliance obligations to the scope of work:

    *In the provision of all services, it is the responsibility of the contractor to ensure compliance with all applicable environmental, health and safety laws.*
  - Does the wording of the Purchase Order limit the scope to only what the contractor is getting paid for?

# Scenario 2: Defining the Scope of Work (4)

- To assess your liability the courts are going to ask some key questions about the Scope of Work (continued):
  - Was there any mechanism for the contractor/client to modify or change the scope of work in the field when the contractor identified that there may be a compliance issue?
  - Did the contractor have any affirmative regulatory or professional obligation to report the non-compliance to regulators that added to the expected contractual scope (e.g. legislative requirement to report situations of non-compliance that could cause a risk to environment, health and safety)?
  - When on-site did personnel agree to take on any additional scope? (e.g. "While you're looking at the Tank, can you tell us if there 'any problems' with it?")

# Scenario 3: Developing Industry / "Reasonable Contractors" Standards

- Your company and a new client sign a contract with the following scope:
  - The contractor agrees to perform "petroleum storage tank removal services" on a specific Tank
  - There is no breakdown of specific tasks associated with removal in the contract, but there is a general provision as follows

    *The contractor agrees to perform all services under this contract in accordance with the highest industry standards and best practices.*
- While performing the tank removal, the contractor notes that the tank is in very poor condition and 'dirty looking' water pours out of the tank via holes that have corroded in the tank
- The contractor's personnel do a quick "sniff test" and it seems that there is only a faint smell of gasoline, so they draw the conclusion that the tank was most probably filled with water and that the water mostly likely contains dirt and rust and not hydrocarbons

# Scenario 3: Developing Industry / "Reasonable Contractors" Standards (2)

- When the tank is finally removed and taken for disposal off-site, the contractor is behind schedule, so the contractor does not identify the potential for contamination (as this would delay the work while confirmatory testing is undertaken) fills in the hole and regrades the site
- A couple of years later when a Phase 2 Site Assessment is conducted in the area of the tank there is a high level of hydrocarbons noted
- Your company gets sued for negligent performance under the contract and Alberta Environment and Parks conducts an investigation into your failure to report an unauthorized release…are YOU LIABLE?
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# Scenario 3: Developing Industry/ "Reasonable Contractors" Standards (3)

- To assess your liability the courts are going to ask some key questions about industry standards and whether or not your actions are reasonable in the circumstances:
  - Is there an "industry standard" in terms of the expected standard of conduct during this kind of activity?
    - Who can/will speak to the prevailing standard?
    - Are there any regulatory actions that might establish the minimum standard (e.g. the Ontario Liquid Fuels attestation being required to be executed by all registered fuels contractors—setting the minimum standards of "compliance with the applicable regulation")?
    - NOTE: an industry standard that does not ensure compliance with regulatory standards will NOT generally be accepted by the courts as an acceptable industry standard

# Scenario 3: Developing Industry/ "Reasonable Contractors" Standards (4)

- Does the contract provision that states the contractor ascribes to the "highest industry standards" and "best practices" elevate the standards applicable to the contractor in this case?

  *The contractor agrees to perform all services under this contract in accordance with the highest industry standards and best practices.*

- Did the contractor take all "reasonable care" to comply with their obligations to report?
  - Remember "reasonable care" is not perfection, it is what is reasonable in the circumstances, taking into consideration factors such as:
    - the likelihood, extent and foreseeability of harm that could result if a contractor's reasonable care system fails
    - the feasibility of taking measures to prevent harm from occurring

# So What Are Some Key Risk Management Strategies To Address the Risks

- Contracts
  - Having signed contracts that clearly address:
    - Scope of Work
      - Including defined terms and scope limitations
      - And how changes to scope will be dealt with (change orders, addendum, purchase order modifications, etc.)
    - Standards of Performance
    - Payment Terms
    - Notice to each party
    - Default/Breach

# So What Are Some Key Risk Management Strategies To Address these Risks (2)

- Put into place work processes and practices that define for all personnel:
  - What tasks are/are not performed when the company is providing services under various scopes of work?
  - What level of the organization can add to or delete from these standard work tasks to reflect client needs/site conditions, etc.?
  - What are the regulatory requirements that might be applicable to the fulfillment of their work tasks?
  - What are the most common liability scenarios your personnel may face and what are your internal best management practices for dealing with those issues?

# So What Are Some Key Risk Management Strategies To Address these Risks (3)

- Other Measures
  - Seeking out appropriate insurance coverage and then managing any claims
  - Identifying any potential liability situations as they arise and at the earliest opportunity (avoiding the "ostrich approach" to risk management)
  - When you don't know what to do, "phone a friend" (insurance broker, lawyer, regulator, colleague)

# FINAL THOUGHTS

- Effectively managing these risks doesn't require perfection; it requires contractors to take reasonable measures
- Experience suggests that ignoring potential claims and potential risks is not likely to be effective and can very well make things worse (missed claims periods, missed limitation periods, etc.)