

## Has the contractor with whom you are doing business paid his assessments to the CSST?

You could be held responsible as the employer who retained his services ...

By Marie-Claude Perreault and Isabelle Marcoux

*Has the contractor with whom you are doing business paid his assessments to the CSST? If he hasn't, you could be held responsible for payment of these assessments as the employer who retained his services!*

Section 316 of the Act respecting industrial accidents and occupational diseases<sup>1</sup> (the "AIAOD") makes an employer responsible to the CSST for a contractor's (or subcontractor's) unpaid assessments in respect of such contractor's (or subcontractor's) employees:

**"316. The Commission may demand payment of the assessment due by a contractor from the employer who retains his services.**

**"In the case of the first paragraph, the Commission may establish the amount of the assessment according to the proportion of the price agreed upon for the work corresponding to the cost of labour, rather than the wages indicated in the statement made according to section 292.**

**"The employer who has paid the amount of the assessment is entitled to be reimbursed by the contractor concerned and the employer may retain the amount due out of the sums that he owes the contractor".**



### **1. Interpretation of the terms "employer" and "contractor"**

According to the definitions of *employer* and *establishment* set out respectively in Section 2 of the AIAOD and in Section 2 of the Act respecting occupational health and safety<sup>2</sup>, employer status involves two distinct elements:

- 1 - the existence of a contract of employment;**
- 2 - the use of a worker's services for the purposes of his establishment.**

The AIAOD does not define what a contractor is, so it is necessary to rely on the common meaning of this term. According to Article 2098 of the *Civil Code of Québec*<sup>3</sup> (C.C.Q.), a contractor is a person who undertakes to provide a service to another person, the client, for a price which the client binds himself to pay.

For example, in the past, the Commission des lésions professionnelles (the "CLP") has concluded that the fact that a business undertakes to sell and distribute an employer's products within a given territory does not allow the CLP to conclude that a service contract exists. In this case, the contract was for the sale of products between a supplier and a merchant rather than a service contract<sup>4</sup>.

<sup>1</sup> R.S.Q., Ch. A-3.001.

<sup>2</sup> R.S.Q., Ch. S-2.1.

<sup>3</sup> S.Q., 1991, Ch. 64.

<sup>4</sup> *Les brevages Cott ltée*, Commission des lésions professionnelles (C.L.P.), Montréal, 187744-71-0207, 29-01-2003.



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## 2. Jurisprudential interpretation of Section 316 of the AIAOD

The purpose of Section 316 of the AIAOD is to encourage the employer to make sure that his contractor pays the assessments owed to the CSST. Thus, the CSST may apply this section by requiring that the employer settle the unpaid assessments of the contractor toward whom he has undertaken obligations<sup>5</sup>.

Consequently, it is the employer's responsibility to make sure that his contractor has fulfilled his obligations to the CSST, failing which the employer may be obligated to pay the bill once the CSST recognizes the contractor's default. As a preventive measure, the employer can verify whether an amount is owed by requiring that the contractor provide him with a CSST certificate (or attestation) of compliance<sup>6</sup>.

### a) Defences by employers to avoid payment of their contractors' assessments which have been rejected by the CLP

#### • *The contractor has no wage-earning employees*

The fact of doing business with a contractor who has no wage-earning employees but who subcontracts the work has no impact on the employer's obligation to pay unpaid assessments. Indeed, Section 316 of the AIAOD covers all workers performing any work for a firm<sup>7</sup>.

#### • *Absence of a connection between the work performed by the contractor and the employer's principal economic activity*

The fact that the work performed by the contractor is not of the same nature as the employer's principal economic activity has no impact on the employer's obligation to pay unpaid assessments. This does not release him from the obligation stipulated in Section 316 of the AIAOD<sup>8</sup>.

#### • *The CSST's failure to previously obtain a certificate of default against the contractor (Section 320 of the AIAOD)*

The AIAOD does not require that the CSST previously obtain a certificate of default against the delinquent contractor before rendering a decision applying Section 316 of the AIAOD. Instead, the AIAOD provides that an employer who has paid unpaid assessments (including interest and applicable penalties<sup>9</sup>) may claim them from the contractor or retain the amount owed out of the sums he owes to the contractor.

#### • *The contractor's insolvency*

The employer cannot be relieved of his obligation to pay a contractor's unpaid assessments due to the contractor's insolvency or disappearance because, according to the CLP's case law, that would have the effect of rendering Section 316 of the AIAOD inoperative<sup>10</sup>.

Thus, even when it is impossible for the employer to require the contractor to repay him for the assessments, he remains ultimately responsible for settling them with the CSST<sup>11</sup>.

#### • *By acting late, the CSST deprived the employer of the right to retain payment stipulated in the third paragraph of Section 316 of the AIAOD*

This defence was raised by an employer who alleged that he no longer had a business relationship with the contractor at the time the CSST notified him of his obligation to pay the assessments owed by the contractor.

In a very recent decision, the CLP rejected this argument and stated that the principle was rather that the obligation imposed on an employer to pay the assessments owed by a contractor under Section 316 of the AIAOD exists despite the fact that it is impossible for the employer to require reimbursement for these assessments from the contractor<sup>12</sup>.

<sup>5</sup> *Fenclo ltée and CSST*, [1992] C.A.L.P. 795; *Morin Heights Express cie ltée and CSST*, CALP 78026-62-9603, 1997-02-21.

<sup>6</sup> See point b) of this newsletter for more information on certificates of compliance.

<sup>7</sup> *Fenclo ltée and CSST*, op. cit., note 5.

<sup>8</sup> *Aliments F.B.I. inc. and CSST*, [1989] B.R.P. 406.

<sup>9</sup> *Intersan inc. and Transport Samano inc.*, Commission des lésions professionnelles (C.L.P.), Longueuil, 162966-62-0106 and 171292-62-0110.

<sup>10</sup> *Fenclo ltée and CSST*, op. cit., note 5.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Acier Ouellette inc. and Commission de la santé et de la sécurité du travail*, [2006] C.L.P. 1.

- ***The employer may have less rights than the contractor***

The employer is bound to pay the contractor's assessment even if the contractor could claim that he was not bound to pay an assessment to the CSST (for example, if the contractor is a federal firm). The CLP ruled that, as the contractor did not invoke the exemption on his own account, the employer must pay the contractor's assessments<sup>13</sup>. In fact, the contractor could have contested the assessments issued against him but did not do so and thus he was assessed as a provincial firm and an employer must pay unpaid assessments issued to provincial firms.

**b) Defences by employers to avoid payment of their contractors' assessments which have been accepted by the CLP**

- ***The employer obtained a certificate of compliance from the contractor***

The surest way for an employer to avoid the application of Section 316 of the AIAOD is to require the original of his contractor's certificate(s) (or attestation[s]) of compliance from his contractor for the contracts and periods covered by the payment of the assessments owed.

Such a certificate confirms that the contractor has paid all the sums owed to the CSST in respect of a specific contract with a specific employer over a given period.

It is important for the employer to obtain the original of the certificate of compliance. Indeed, in the decision 9074-5399 *Québec inc. (CBM)* and *Commission de la santé et de la sécurité du travail*, the CLP noted the employer's lack of diligence in managing his affairs in such a way as to avoid the application of Section 316 of the AIAOD. The CLP criticized the employer for having relied on a copy of the certificate of compliance (which subsequently turned out to be false), for not having required the contractor to provide the original and for not having contacted the CSST to verify the accuracy of the information provided by the contractor<sup>14</sup>.

For the CLP, the requirements of an original and verification of the information with the CSST appear to be elementary requirements, which do not add an additional delay likely to cause any harm to the employer<sup>15</sup>.

Without such a certificate in hand, the employer will have no grounds to criticize the CSST.

- ***The employer may retain an amount from the contractor***

The employer may also retain a certain amount from the amount he owes under the contract with his contractor so as to benefit from the rights to retain at source stipulated in the second paragraph of Section 316 of the AIAOD<sup>16</sup>.

- ***The employer is not responsible for all of the contractor's debts***

The CLP has acknowledged that an employer cannot be held responsible for all of a contractor's debts to the CSST, but rather only for the debts arising from the contract between them<sup>17</sup>.

## **Conclusion**

In summary, an employer who receives a notice of assessment or a request for information from the CSST regarding a contractor whose services he has retained should always attempt to obtain details from the CSST that will help him prepare his response and evaluate whether it is possible for him to contest the claim. A CSST notice of assessment can create a large hole in an employer's operating budget.

Although the CSST has a duty, under Section 174 of the *Act respecting occupational health and safety*, to ensure the confidentiality of the information in its possession, it must, while preserving the confidentiality of any other information contained in its file on the contractor, provide and disclose the information relevant to its decision making under Section 316 of the AIAOD<sup>18</sup>.

Prudence is therefore essential!

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<sup>13</sup> *Transport Bitumar inc. and CSST*, [1992] C.A.L.P. 1089.

<sup>14</sup> 9074-5399 *Québec inc. (CBM)* and *Commission de la santé et de la sécurité du travail*, Commission des lésions professionnelles (C.L.P.), Lanaudière, 249279-63-0411, 2005-07-25.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Intersan inc. and Transport Samano inc.*, Commission des lésions professionnelles (C.L.P.), Longueuil, 162966-62-0106 et 171292-62-0110, op. cit., note 11.

<sup>17</sup> *Consortium G.A.S. and Commission de la santé et de la sécurité du travail*, Commission des lésions professionnelles (C.L.P.), Laval, 259311-61-0504, 2006-03-31.

<sup>18</sup> *Intersan inc. and Transport Samano inc.*, op. cit., note 11.

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