

June 9, 2008

Via facsimile (416) 326-1449

The Honourable Brad Duguid
Minister of Labour
400 University Avenue, 14th Floor
Toronto, Ontario
M7A 1T7

And To:

Via facsimile (416) 326-7061

Ms. Tracey Mill
Director – Employment Practices Branch
400 University Avenue, 9th Floor
Toronto, Ontario
M7A 1T7

Dear Mr. Duguid and Ms. Mill:

Re: Urgent Action Needed In Respect of Impact Cleaning Services Ltd.

I am legal counsel to the Service Employees International Union Local 2 (“SEIU Local 2” or “the Union”). By way of this correspondence, the Union hereby brings a complaint with the Ministry of Labour (“Ministry”) on behalf of workers at Impact Cleaning Services Ltd. (“Impact”), including persons for whom the Union is the authorized representative.

SEIU Local 2 is currently in the midst of an organizing campaign in respect of certain of Impact’s employees, particularly in the City of Toronto. During the course of the Union’s organizing efforts, we have discovered that many employees are working for less than minimum wage, without the benefits and protections of the *Employment Standards Act, 2000*, *Workplace Safety and Insurance Act, 1997* (“WSIA”), and other relevant legislation, and without any of the benefits flowing from the Employment Insurance program or the Canada Pension Plan, as contributions are not being made on behalf of affected employees.

In our view, the problems experienced by employees at Impact are the product of an elaborate scheme set up by Impact to subcontract work in an effort to avoid its obligations under the law. It is SEIU Local 2’s assertion that under these subcontracting

arrangements, Impact is or ought to be aware that many of its employees do not receive the minimum wage or other statutorily mandated benefits and protections.

Needless to say, such circumstances have the potential to create serious consequences for employees, but also, it places those competitors of Impact that do not structure their employment relations in such a manner at a significant competitive disadvantage. Indeed, to the extent that Impact continues to be able to structure its affairs in such a fashion, it creates downward pressure on employment standards in the contract cleaning industry and provides a clear incentive for Impact's competitors to engage in a similar structuring of their operations. To the extent that such employment practices are permitted, the various rights afforded to workers in the ESA are rendered impotent.

In addition, as a matter of public interest, SEIU Local 2 believes that in structuring a portion of its operations in the manner that it has, Impact has created a scheme that has resulted in a loss of government revenue and contributions to various important social programs, which is a concern not only of SEIU Local 2, but also, of all citizens in general.

Accordingly, SEIU Local 2 is requesting that the Ministry of Labour investigate the employment practices of Impact, its related entities, and those that contracts with in order to ensure compliance with the ESA and to provide the necessary redress to those persons whose rights have been affected as a result of Impact's employment practices.

Impact's Subcontracting Scheme - How the subcontracting arrangements are structured

In the course of its organizing drive and the research related thereto, the Union has observed certain circumstances in which Impact purports to contract with another entity, whether a person, group of persons, or a corporation, to perform cleaning work on behalf of Impact as a purported subcontractor to Impact. In one situation, Impact contracted with another entity ("subcontractor") to perform work in two buildings in the City of Toronto. In exchange for the cleaning services provided by the purported employees of the subcontractor, Impact paid \$9 per hour to the subcontractor for the hours worked by those persons. In turn, the subcontractor paid its purported employees, in cash, at the rate of \$8 per hour.

Accordingly, this type of situation raises a series of "red flags". First, and perhaps most obvious, the affected employees are not paid the minimum wage prescribed by the ESA. Beyond that, however, given that the minimum wage rate is \$8.75 per hour and Impact pays \$9 per hour to the subcontractor, it is clear that the \$0.25 differential is not enough to provide for the payment of vacation pay mandated by the ESA, as well as various premiums, taxes, and levies required by different legislation, for example, WSIB premiums and the Employer Health Tax.

Impact is, or ought to be, well aware of the implications of its subcontracting structure. Indeed, subcontractors engaged by Impact are required to submit timesheets to the

appropriate area manager of Impact. It ought to be reasonably clear to Impact and those persons in receipt of the timesheets, that the payments made to the subcontractor are simply not sufficient to provide for the payment of vacation pay or cover premiums required to ensure that employees are covered by such basic protections as the *Workplace Safety and Insurance Act, 1997*. Indeed, it also seems clear that in order for the subcontractor to make any attempt at profit, it must pay its purported employees at a wage rate well below the minimum wage.

Accordingly, SEIU Local 2 submits that Impact cannot escape the protections and benefits of the ESA and other legislation by engaging in a corporate “shell game” that attempts to shift the burdens imposed by that legislation onto another entity and then “wash its hands” of the situation, claiming that the other party bears all responsibility.

As legislation that is remedial in nature, the Ministry ought not allow employers to relieve themselves of their obligations through the use of certain commercial arrangements. To the extent that such actions are permitted the ESA and other relevant legislation are seriously undermined.

Why the Purported Subcontractors are Employees and not Independent Contractors

In addition to the foregoing, SEIU Local 2 submits that the subcontractors engaged by Impact are not true “independent contractors”, but rather, are employees of Impact itself. In determining whether a person is an employee or an independent contractor, the basic question is “whether the person who has been engaged to perform the services is performing them as a person in business on his own account.” (according to the Supreme Court of Canada in *Sagaz* [2001] 2 SCR 983). In making that determination, a number of factors are considered, including the level of control exercised by the employer, whether the worker provides his or her own equipment, and the degree of financial risk taken by the worker, including the risk of loss.

Based on its research, SEIU Local 2 asserts that there are a number of factors that demonstrate that the vast majority of purported subcontractors are, indeed, employees:

- Impact provides the equipment for both hourly employees and the purported subcontractors.
- Impact or the property owner provides the cleaning supplies, not the purported subcontractor.
- Impact provides uniforms and, indeed, even the purported subcontractors typically wear Impact uniforms.
- Impact provides training to both hourly employees and the purported subcontractors.
- For the vast majority of the purported subcontractors, it is clear that they do not demonstrate entrepreneurial activity. For example, the vast majority of such contractors work solely for Impact and do not advertise.

- The vast majority of purported subcontractors also perform the work without hiring others to assist.
- For the vast majority of purported subcontractors, there is essentially no degree of financial risk, as the investment in their business is typically minimal and often only involves the payment of business registration or related fees. There is, therefore, essentially no risk of loss or chance of profit, particularly given that the purported subcontractor does not own any equipment or cleaning supplies.
- The work performed by the purported subcontractors is supervised by Impact – whether by an on-site supervisor or by one of Impact account managers.
- Impact also determines the parameters for the performance of work by the purported subcontractors, including the determination of when the work is to be performed.
- The purported subcontractors perform the exact functions and type of work as is performed by Impact’s hourly employees. Indeed, it can often be the case that the purported subcontractor works directly alongside hourly employees at the same work location. The purported subcontractor is, therefore, working in the core area of Impact’s business.

In light of the foregoing, SEIU Local 2 believes that an independent investigation conducted by the Ministry would confirm our belief that the vast majority, if not all, of the persons working within Impact’s subcontracting scheme are, in fact, employees and not independent contractors. In our view, and having regard to the considerations set out immediately above, it is clear that Impact exercises control over the purported subcontractors, both in terms of setting the parameters of the work as well as the supervision of that work. In addition, it is also clear that the vast majority of these purported subcontractors do not exhibit signs of entrepreneurial activity, as would typically be expected from a person operating a business. Further, it is evident that there is essentially no financial risk or chance of loss, particularly given the fact that the purported subcontractors do not own their own equipment or cleaning supplies.

SEIU Local 2 believes that there certainly is a legal basis for a finding that the vast majority, if not all, of the purported subcontractors are, in fact, employees of Impact. Although SEIU Local 2 believes that Impact intended to structure its operations in order to avoid the various statutory deductions and obligations associated with an employment relationship, it is nonetheless the case that the effect of that structuring of operations has resulted in these workers being deprived of their rights under the ESA.

What is the effect of treating workers as independent contractors?

The misclassification of workers as independent contractors has a series of negative consequences, including but not limited to:

- Potential loss of employment insurance benefits on cessation of employment.
- Non-contribution to Canada Pension Plan and its effect on benefits payable on retirement.

- Loss of benefits under the *Workplace Insurance and Safety Act, 1997*, for injuries arising out of the course of employment.
- Potential liability in respect of income taxes.
- Loss of the ability to sue for wrongful dismissal.
- Loss of various protections under the ESA, including but not limited to:
 - Termination/Severance Pay
 - Overtime Pay
 - Hours of Work
 - Maternity/Parental Leave
 - Vacation Pay
 - Minimum Wage (for example, in situations where the amount paid to the purported subcontractor divided by the hours worked in performing the work amounted to less, per hour, than the minimum wage).

Clearly, by treating workers as subcontractors, Impact has placed such workers in a vulnerable position, working without some of the most fundamental protections and statutory benefits.

How does this affect the industry?

The contract cleaning industry, particularly in and around the City of Toronto, is one in which there is intense competition among a number of different businesses. The industry operates on the basis of competitive bidding. Further, labour costs represent a significant proportion of a company's overall costs.

Accordingly, to the extent that Impact is able to operate by engaging in these types of subcontracting arrangements, there is a corresponding cost advantage that they are able to achieve vis-à-vis those competitors that do not structure their operations in such a manner. The result, at the most basic level, is to create downward pressure on employment standards in the industry, including downward pressure on wages. In addition, it creates an incentive for others to adopt similar subcontracting schemes, which would simply create an even larger pool of vulnerable workers and a further downward spiral in employment standards in the industry. Perhaps the most unfortunate result is that such downward pressure would further harm those workers that are already among the lowest paid service workers.

How does this affect the public interest?

By, in SEIU Local 2's view, engaging in its subcontracting scheme(s), one clear effect of Impact's actions is to deprive the government of valuable revenues and contributions to various social programs.

In addition, the potential loss of revenues affects a number of important social programs and government revenues. For example, by engaging in its subcontracting scheme(s), Impact and those entities that it has engaged to carry out its work would not have remitted amounts owing in respect of income taxes and employer health tax, as well as

the premiums and contributions associated with WSIB, Employment Insurance, and Canada Pension Plan.

That being said, SEIU Local 2 appreciates that it is not part of the Ministry of Labour's to enforce non-labour statutes. However, clearly, the Ministry does have a significant interest in ensuring that remedial legislation providing a basic set of employment standards is adhered to. That is, there is a public interest in strictly enforcing the rights afforded to workers in the ESA. That is particularly the case when dealing with those most vulnerable workers in our society, such as those employed in the contract cleaning industry.

Conclusion and Remedies Sought

Accordingly, in light of the foregoing, it is SEIU Local 2's view that the subcontracting scheme being employed by Impact hurts not only the workers involved, but also, the industry and the public interest.

Therefore, Mr. Minister, as the person that is ultimately responsible for the administration of the ESA, SEIU Local 2 respectfully requests that you, in conjunction with the Director of Employment Standards, assign an employment standards officer to conduct a full investigation and audit of Impact's employment practices.

SEIU Local 2 further requests that following such an investigation, the affected workers be made whole and compensated for any losses suffered as a result of Impact's employment practices, including but not limited to payment of any wages owing, as well as statutory deductions and contributions that ought to have been made on employees' behalf. SEIU Local 2 also requests that a declaration be issued, indicating that Impact violated the ESA and that they be ordered to cease and desist from engaging in such practices in the future.

SEIU Local 2 would be interested in cooperating with the Ministry in the conduct of any investigation, including but not limited to providing documents within the Union's possession which may assist in such investigation.

Thank you for your time and consideration of this matter. Please feel free to contact the undersigned directly.

Yours truly,

Bruce Price
Legal Counsel
SEIU Local 2.on, BGPWU

cc: Impact Cleaning Services Ltd., via fax to (416) 253-6179