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Ontario Court of Appeal Holds “Owner” of a Construction Project Can Be Considered an “Employer” Under OHSA

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A recent decision of the Ontario Court of Appeal has significant implications under the *Occupational Health and Safety Act* (OHSA) for owners and employers responsible for construction projects. In *Ontario (Labour) v. Sudbury (City)*, the Court of Appeal held that an “owner” of a construction project can also be considered an “employer” with obligations to ensure safety on the project, even in circumstances where it does not employ or exercise control over workers performing the construction work on the project.

Events Leading up to the Charges Under OHSA

A “constructor” under OHSA is considered to be the party with overall responsibility for safety on the project. The identity of a “constructor” at a project is determined through a control test. The definition of an “employer” is a person who employs workers and includes a contractor or subcontractor who performs work or undertakes with an owner, constructor, or other contractor to perform work.

The City of Greater Sudbury (City) tendered a construction project for road and water main repair and contracted with a general contractor (General Contractor) to complete the project. The General Contractor undertook the project as the constructor under OHSA.

The City was the owner of the construction project. It did not employ any employees who performed construction work at the project but from time to time sent its employees to the work site to perform inspections, monitor the site for quality control and monitor the progress of work.

In September 2015, a member of the public was tragically struck and fatally injured by a grader operated by an employee of the General Contractor. At the time of the incident, the pedestrian was crossing a street at a traffic light in a construction zone. Absent from the worksite were protective measures such as fencing to separate pedestrians from equipment, a paid duty police officer to direct traffic and a signaller for the grader. The Ministry of Labour charged both the City and the General Contractor with various violations of OHSA. The City was charged as both a “constructor” and an “employer” under OHSA.

The General Contractor plead guilty and was fined $195,000 plus a 25% victim surcharge. The City pleaded not guilty and went to trial before the Ontario Court of Justice.

At the Lower Courts

At the original trial the City was acquitted. The Court found that the City was not the constructor as it had not exercised control over the work and had not instructed the General Contractor's workers. The Court also found that the City was not an employer on the project, as it had not supervised the work on the project and had not provided any direction on the work itself.

The Crown appealed the acquittal to the Ontario Superior Court of Justice, which upheld the decision at trial, using similar reasoning regarding the degree of control exercised by the City over the General Contractor.

The Crown then appealed that decision to the Court of Appeal, arguing that the appeal judge erred in finding that the City was not an "employer" for the purposes of the OHSA.

At the Court of Appeal

The Court of Appeal allowed the appeal, holding that the City was an "employer" for the purposes of OHSA.

It stated that the definition of employer in OHSA "embraces both employing and contracting for the services of workers." Referring to the decision, *R. v. Wyssen*, (often referred to as the "Window Washer" case) the Court interpreted the duties of an employer under OHSA as requiring that an employer act "virtually in the position of an insurer of safety in the workplace prior to work being undertaken by either employees or independent contractors."

The Court used this expansive theory of "employer" to find that the presence of City inspectors (employees who were directly employed by the City) on the project site was significant. It concluded that the City therefore "employed one or more workers at the project site" rendering it an "employer" under OHSA. The issue of the City's due diligence was remitted to the lower appeal court, as a new trial was not necessary.

Going Forward

This Court of Appeal decision fundamentally alters the obligations of an "owner" of a construction project under OHSA, even in those circumstances where the owner has engaged another contractor to perform the work.

Prior to this ruling, it was recognized that OHSA imposed varying health and safety responsibilities on owners, constructors and employers. While there was considerable overlap between constructors and employers, owners have generally been regarded as being less susceptible to this overlap. Practically, this meant that an owner would hire a general contractor to perform the

work and accept the obligation for health and safety of employers and workers on the project. A project owner continued to be required to comply with specific OHSA obligations of an owner (such as providing information), but it was the general contractor and/or other employers with direct responsibility for workers who had the responsibility for health and safety of those workers as a “constructor” and “employer.”

Of interest, the analysis of the Court made no distinction between the minimal inspection work undertaken by the City’s inspectors compared to the construction work in question (road grading) which led to the fatal incident. Instead, it focused simply on the fact that City inspectors were “employed at the project site.”

In light of this ruling, owners of a construction project may now be found to have OHSA obligations beyond the specific function they had responsibility for on the project, based on the circumstances of each case. This decision creates future uncertainty for owners (such as, in this case, a municipality) respecting the scope of their OHSA obligations, particularly in a situation where a general contractor is engaged as a “constructor.”

It is not yet known if the decision will be appealed.