FTR Now

“Owners” of Construction Projects Are Employers Under Ontario’s *OHSA*: More on a Recent Ruling of the Supreme Court of Canada

Date: November 14, 2023

On November 9, 2023, the Supreme Court of Canada (Supreme Court) issued a split decision in *R. v. Greater Sudbury (City)*. The plurality of the Supreme Court upheld a decision of the Ontario Court of Appeal 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 workers performing the actual construction work on the project. The Supreme Court’s long-awaited decision carries widespread and significant implications under the *Occupational Health and Safety Act* (*OHSA*) for owners and employers involved with construction projects.

Background

As we wrote in our *FTR Now* on the Court of Appeal decision, 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 or contracts for the services of 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 worksite 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 pleaded guilty and was fined $195,000 plus a 25% victim surcharge. The City pleaded not guilty and the matter went to trial.

Before a trial judge, the City was acquitted. That acquittal was upheld by the Ontario Superior Court of Justice.

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 *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 of Appeal 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 of Appeal 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 Supreme Court Decision

A plurality of the Supreme Court, on equal division, confirmed the ruling of the Ontario Court of Appeal that the City was an employer and had breached its duty under s. 25(1)(c) of *OHSA*. It remitted the issue of the City’s due diligence defence to the provincial offences appeal court.

Because the Supreme Court was split 4:4 in its reasons, the appeal was dismissed as there was no majority decision.

Reasons of the Plurality

Martin J., writing on behalf of the plurality, noted that *OHSA* was specifically designed to promote and maintain workplace health and safety by expressly imposing “concurrent, overlapping, broad, strict and non-delegable duties on multiple workplace participants” through what is colloquially known as the “belt and braces” approach to occupational health and safety.

In line with this purpose, the plurality summarized the approach a court must take where a site owner who contracts for the services of a constructor on a construction project is prosecuted for a breach of s. 25(1)(c) (at para. 61):

1. First, has the Ministry proven beyond a reasonable doubt that the Act applied to the accused because the accused was an employer under s. 1(1) of the Act? An owner is an employer if it (i) employed workers at a workplace where an alleged breach of s. 25(1)(c) occurred; or (ii) contracted for the services of a worker at that workplace (including for the services of a constructor). *The Ministry is not required to prove that the owner had control over the workplace or the workers there.* [emphasis added]

2. Second, has the Ministry proven beyond a reasonable doubt that the accused breached s. 25(1)(c) of the Act? There is a breach of s. 25(1)(c) if the safety measures prescribed by the Regulation are not carried out in the workplace to which the owner/employer is connected by a contractual relationship with employees or an independent contractor. Further, the Ministry is not required to prove that the owner had control over the workplace or the workers there.

3. Third, if the Ministry proves the above, has the accused proven on a balance of probabilities that it should avoid liability because it exercised due diligence under s. 66(3)(b) of the Act? [. . .]

Applying these principles, the plurality found that the City was an employer of the quality control inspectors, as well as the General Contractor, and therefore breached *OHSA*.

Dissenting Reasons

The dissenting four justices wrote two sets of reasons as to why they would have allowed the appeal.

In the first dissent, three justices concurred. They stated that establishing the distinct meaning and scope of the definition of employers and owners was critical to preserving the integrity of the overall scheme of *OHSA.* They noted that the statutory scheme in *OHSA* was expressly designed to ensure that the various roles on a construction project were defined and

structured and that various sections of *OHSA* were drafted to confirm this (such as separate and distinct duties imposed on project owners, constructors and employers). To treat an owner as automatically being an employer of the workers hired by the constructor would undermine the design of the statutory scheme itself.

Further, the three dissenting justices reasoned that holding employers who have no control over a contractor's workers liable would not do anything to advance worker safety—the stated purpose of *OHSA*. They further noted that the Court of Appeal's interpretation would result in absurdities and they provided a number of examples to demonstrate their point. In conclusion, they stated that the proper approach was to remit the matter to the trial court to consider whether certain sections of *OHSA*'s Construction Projects Regulation applied to the City given that it was the employer of quality control inspectors.

In a separate dissent, Côté J. primarily agreed with the three dissenting justices but disagreed that the matter should be remitted to the trial court. She noted that the trial judge had previously heard extensive evidence and specifically found that the City's inspectors had not exercised control over any construction work at the project and would therefore not be subject to the sections at issue in the Construction Projects Regulation.

Implications Going Forward

Given this decision, owners of construction projects remain potentially liable for any workplace safety violations on the site by a contractor engaged by them, subject to a due diligence defence.

Prior to the ruling of the Court of Appeal, 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 act as the constructor 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."

This is no longer the case. The Supreme Court's equal division ruling has the effect of upholding the decision of the Court of Appeal. This means that owners of a construction project may 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 will be disappointing to site owners and to the occupational health and safety community. Many have been waiting for clear instruction from the Supreme Court with respect to the roles and obligations of owners, constructors and employers under *OHSA*. Dismissal of the appeal on equal division means the Court of Appeal's decision remains the precedential decision, while the decision of the Supreme Court is highly persuasive.

Accordingly, going forward site owners must be aware that they may be held liable for health and safety matters for the entire project (subject to a due diligence defence).

If you have any questions regarding this topic, please do not hesitate to contact Allison MacIsaac, Nadine Zacks, David Bannon or your regular Hicks Morley lawyer.