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Employment Update: Construction Safety in Ontario: Is an "Owner" also an "Employer"?

Date: December 15, 2023
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Under Ontario's *Occupational Health and Safety Act* ("*OHSA*"), participants in the construction industry are regulated under the following primary categories, each with a specific set of legal obligations:

- Owner: the actual owner of land to be used as a workplace, or their representative
- Constructor: typically, a general contractor, but this also includes an owner who undertakes a construction project itself or by hiring more than one employer to do so
- Employer: someone who either employs or contracts for the services of a worker, as well as a contractor or subcontractor who performs work or supplies services
- Supervisor: a person who has charge of a workplace or authority over a worker
- Worker: anyone who performs work or supplies services for pay, as well as some unpaid learners

Historically, the duties of an Owner have been quite limited; being required simply to identify and list any designated (i.e. hazardous) substances on site, and to ensure that list is provided to those who will work on their project. The owner's easy ride was offset on the other side of the equation by having the lion's share of responsibility fall on the other workplace parties referred to, with constructors having an overarching responsibility to ensure safety compliance.

And then in 2021, everything changed. To the surprise of many, the Ontario Court of Appeal found that the City of Sudbury, as an owner, could also have a second hat, that it never thought it had put on.[1] Simply by virtue of having its inspectors on a construction job site for quality control and to monitor job progress, the City was found to have been an employer for purposes of the OHSA, which meant that it could be convicted of failing to ensure that the required safety measures and procedures were carried out on the site.

To the surprise of no one, the City appealed.

On November 10, 2023, the Supreme Court of Canada (SCC) released its decision in *R. v. Greater Sudbury (City),* 2023 SCC 28. In a rare 4-4 split decision (one of the original 9 judges

having resigned), the tie vote at the SCC left the Ontario Court of Appeal's decision undisturbed, albeit with somewhat more far-reaching reasons. This ruling, now from our highest court, increases the risk of legal exposure for owners of construction projects, who may be liable for health and safety matters over which they have no practical degree of oversight or control on a day-to-day basis.

Background Facts

The City of Greater Sudbury (the "City") had hired Interpaving Limited ("Interpaving") as a general contractor to carry out a construction project involving road and watermain repairs. As such, Interpaving became the "constructor" and assumed responsibility for *OHSA* compliance over the entire project. The City's ongoing role was simply sending quality control inspectors to the job site to monitor and oversee the progress of Interpaving's work. The City had no employees performing construction work, nor did these employees appear to have any effective authority to direct Interpaving in its application of safety rules at the job site under the *OHSA.*

In September 2015, a pedestrian was struck and killed on this job site by a road grader operated by an employee of Interpaving. The Ministry of Labour investigated and charged both the City and Interpaving with multiple health and safety violations. The City was charged, both as a "constructor" and an "employer" under the *OHSA.* The charges included failing both to have a fence in place to separate pedestrians from the construction equipment and to have a signaller for the grader operator.

Interpaving pled guilty to the charges and was fined $195,000 plus a 25% victim surcharge. In contrast, the City was acquitted at trial on the basis that it was neither a constructor nor an employer and so owed no duties under the *OHSA*. The Crown subsequently appealed that decision up to the Ontario Court of Appeal (the "ONCA").

Court of Appeal Decision

The ONCA ruling under appeal was a rather straightforward one. Based on its 1992 decision in the case of *R. v. Wyssen*[2], the Court confirmed that a party is an "employer" under the *OHSA* if it has workers who are directly employed or engaged by contract. It applied this broad concept of an "employer" to determine that the City's employment of quality control inspectors on site brought it within the definition of "employer". As such, it was responsible for ensuring compliance on the project with the *OHSA* and its regulations.

The ONCA did not decide whether it was necessary to demonstrate that "control" over Interpaving's work was required in order for the City to be an employer on the project; the presence of its employees was sufficient for that. Control, along with "due diligence" (the City's actions to ensure compliance with the *OHSA*), had not been adequately considered in the courts below.

Supreme Court of Canada Decision

The SCC's reasons that upheld the ONCA decision pointed out that the *OHSA* "is specifically designed to expand historically narrow safeguards and seeks to promote and maintain

workplace health and safety by expressly imposing concurrent, overlapping, broad, strict and non-delegable duties on multiple workplace participants." More simply, workplace safety is the responsibility of all involved.

With this in mind, the SCC concluded that a construction site "owner" will be considered an "employer" under the *OHSA* if it either employs workers at a workplace, or contracts for the services of a worker, including a contractor, at that workplace. As a result, for *OHSA* purposes, the City was legally the employer, not only of the quality control inspectors, but also of Interpaving, the company that it had contracted to do the work.

Section 25(1)(c) of the *OHSA* requires that an employer ensure that all measures and procedures prescribed for the workplace under the regulations be carried out. Since, among other things, there had been no fence in place as required under Ontario Regulations[3], the SCC's prevailing reasons found that the City had breached its obligations under that section.

The SCC also found that a "control test" is not required to establish an employer's responsibilities under the *OHSA*. Rather, level of control could be a significant factor in determining whether that employer had taken every precaution reasonable in the circumstances, something commonly referred to as the "due diligence" defence.

On this question of due diligence, the SCC also provided guidance on some important factors that can be considered in situations like this, including: (a) whether the employer delegated control to the constructor because of the constructor's greater skill, knowledge or expertise to complete the project in compliance with relevant regulations and legislation, (b) whether the employer took steps to evaluate the constructor's ability to ensure compliance, and (c) whether the employer effectively monitored and supervised the constructor's work on the project.

Appeal courts, including the SCC, hesitate to make rulings on issues that were not properly or fully considered in the courts below. Since neither due diligence nor control had been considered in the lower courts, the case has now returned to the lower court for a determination of the City's due diligence defence, and control will likely be an element of that defence. Only then will we learn whether the City's appointment of Interpaving (who had specialized expertise and knowledge) as the constructor of the project could be sufficient to support a due diligence defence, of proving "that every precaution reasonable in the circumstances was taken".

Takeaways

The SCC's ruling carries significant implications for the workplace parties on construction projects.

1. Of necessity, any owner of a construction project either employs the workers, is the constructor, or has retained a constructor. That makes it an employer, with employer responsibilities. No longer can an owner simply hire a general contractor and assume that these responsibilities have been met.

2. Owners therefore need to consider – directly – how to ensure that they perform all of their duties as employers.

3. While experience with this new reality will no doubt teach lessons, the SCC was good enough to provide a starting point:

    a. Develop contracts that expressly rely upon the constructor's greater skill, knowledge and expertise in matters of the *OHSA* and *OHSA* compliance as a major basis upon which it is retained, and which state that the constructor assumes ultimate responsibility to complete the project in full compliance with the legislation and the applicable regulations.

    b. Prior to retaining a contractor to execute upon that contract, document the steps taken in order to evaluate the contractor's ability, as a constructor, to ensure that compliance.

    c. Implement measures, appropriate under the circumstances, to ensure that the constructor is living up to its safety obligations in all respects.

4. All workplace parties, not just owners, might want to address the question of due diligence more broadly. Due diligence is a question, not just of acting to take all reasonable precautions, but of being able to prove that they were taken. How will you show that you took every precaution reasonable in the circumstances?

5. Employers with peripheral roles on the job site might wish to take this opportunity to evaluate their own *OHSA* compliance. For example, an employer engaged for site security might wish to ensure that its own role in safety compliance is clearly documented and that there are no misconceptions in place as to who is to ensure that the public is properly excluded from the work site. Companies that employ site inspectors may need to develop an enhanced understanding with the owners whom they serve of how, when, and by whom, identified risk factors are to be swiftly resolved.

If you have any questions regarding this topic, or for specifically tailored advice, please reach out to a member of the Blaneys' Labour and Employment Group.

[1] Ontario (Labour) v. Sudbury (City), 2021 ONCA 252 (CanLII)

[2] 1992 CanLII 7598

[3] O. Reg 213/91