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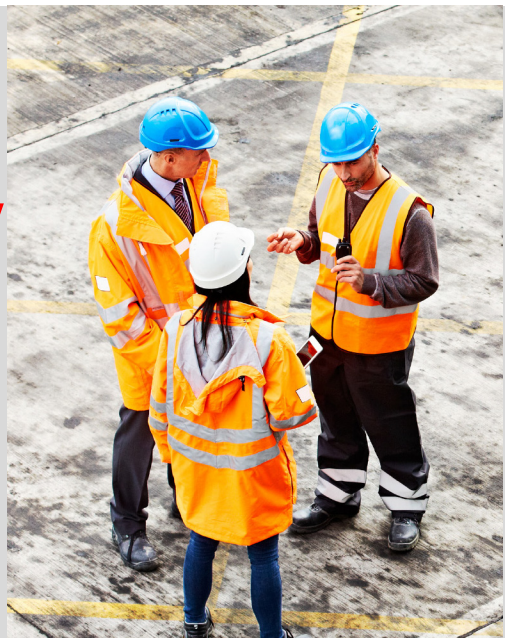
OHS & Workers' Compensation Advisor

Construction Upheaval: Potentially Landscape-Altering OHS Case



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A potentially landscape - altering case, considering whether a construction project owner, that engaged a constructor to complete the project, retains OHS obligations as an "employer" at the project, is winding its way through the Ontario court system. On October 28, 2019, the Ontario Court of Appeal granted leave to the Crown in ***Ontario (Labour) v. Sudbury (City)***, to consider whether an "owner" of a construction project can also be an "employer", with obligations to ensure safety on the project, based on the degree of control exercised by the owner. Should the Court of Appeal conclude that an "employer" on a construction project has obligations to ensure compliance with the *Occupational Health and Safety Act* ("OHSA") in circumstances not involving its workers, this would fundamentally alter OHSA obligations when contracting on a construction project. This *Advisor* discusses the case and its potential implications.

What This Case is About

The Corporation of the City of Greater Sudbury (the "City") tendered a typical construction project that included road and water main repair. The City contracted with a general contractor for completion of the project. The general contractor undertook the project as its "constructor". Under the OHSA, the "constructor" is the party with overall responsibility for health and safety on the project. There were standard contractual provisions and arrangements in the agreement between the City and constructor. The agreement required the constructor to control the entirety of the project for the City, ensure compliance with the OHSA , and file a Notice of Project, with the Ministry of Labour ("MOL"), thereby confirming its role as constructor. As the owner, the City monitored project quality and contract compliance through quality control inspectors that it sent to the project. The City did not direct the work of the project or control the project.

Tragically, in September 2015, a member of the public was struck and killed by a grader operated by an employee of the Constructor. At the time, the pedestrian was crossing a street at a traffic light in a construction zone. A signaller for the involved equipment, fencing to separate pedestrians from equipment, and a paid duty police officer to direct traffic and vehicles, would have provided protective measures but were absent at the time of the accident. The MOL investigated and, eventually, the City and the constructor were both charged with various violations of the OHSA. The City was charged both as a "constructor" and an "employer". The "constructor" charges were, essentially, identical to the "employer" charges laid against the City.

The Traditional Approach to OHSA Responsibilities on Construction Projects

Before discussion the rulings in this case (and their implications), it would be prudent to set out how OHSA obligations have, traditionally, applied on a construction project. Historically, it has been recognized that workplace parties on construction projects have varying degrees of health and safety

responsibilities under the OHSA. It's common and advisable that, in considering and controlling risk, owners, constructors, and employers, consider their unique safety obligations under the legislation. Where possible, an owner may choose to hire a constructor (e.g. a general contractor) to undertake the project and accept the legal risk associated with having health and safety responsibility for all employers and all workers on the project. The owner will be required to carry out any OHSA owner obligations (which, mainly, deal with providing information about designated substances on the project). In addition, if the owner were to send its own workers or a contractor into the project, it would be expected to ensure, as an employer, OHSA requirements are met in respect of those workers. Traditionally, it was this functional lens that determined the scope of employer responsibilities under the OHSA. If the health and safety issue involved the work of the employer's workers, OHSA responsibility may follow. If not, the employer would not have OHSA responsibility. It is this functional analysis that may be altered by the case pending before the Court of Appeal.

Application of Traditional Approach: City Not Guilty

As mentioned above, the City was charged both as an employer and as a constructor. It defended the charges at trial. The City was acquitted of all OHSA charges at trial and those acquittals were upheld at the Crown's first appeal.

Both the trial and appeal courts found that the City was neither constructor nor employer because of the following:

- The City had a clear contract with the general contractor that identified the GC as the constructor and the City as owner;
- The City hired that particular constructor because it had the knowledge and resources to complete the work of the project, which the City did not;
- The City did not exercise control and direction over activities at the project site;
- The City's quality control inspectors attended from time to time for quality assurance purposes only and to ensure work being performed was in accordance with the contract only, so the City could make progress payments to the constructor. When attending on site quality control inspectors followed the health and safety guidelines of the constructor. This did not amount to control; and
- Even where the City quality control inspectors found the constructor in breach of contractual requirements for safety, the City acted appropriately by stopping work and making the constructor aware of the violation to correct it. This did not cause the City to take over the role of constructor and was commendable.

Finding that the City was not the constructor or an employer with responsibility for the incident was consistent with the traditional approach to OHSA duties on a construction project. However, in the trial and appeal, the Crown took a novel and surprising legal position respecting the City's OHSA obligations at the project. The Crown arguments were that the following factors were indicative of control and rendered the City a constructor and/or employer with responsibility for preventing the accident:

- The City paid police officers assigned for paid duty to assist at the construction project directly (it was administratively easier for the City to be this conduit than for constructor to pay and charge back the City);
- The City could require the Constructor to fire incompetent employees on site;
- The City issued forms and appraisals to evaluate quality of the constructor's work and provide feedback as part of contractor management processes;
- The City insisted on a particular level of training for the constructor over and above what was required under the OHSA;
- City representatives attended progress meetings with the constructor at different locations including City property and sometimes took meeting minutes;
- The contract between the City and constructor permitted the City to take back control of the project or direct work (a matter that did not occur during the project, despite certain violations by the constructor); and
- The contract permitted the City to suspend work on the project at its discretion.

It's important to note that none of the above matters dealt with by the courts or argued by the Crown have previously been found to be "control" sufficient to render an owner that has contracted with a constructor, the constructor. Courts have repeatedly confirmed that the identity of the constructor at a project is determined through a "control" test. While OHSA

definitions and roles of workplace parties are somewhat broad and imprecise, the OHSA definition of constructor permits an owner to select a constructor to undertake a project for it. Another provision of the OHSA, section 1(3), states that the owner does not become constructor by virtue of hiring a third party solely to oversee quality control at a project. The MOL *Constructor Guidelines* in Ontario also confirm the acceptability of the control test, and many of the above general factors as indicative of control which, if exercised by a GC, render it the "constructor" rather than the owner.

Interestingly, in its appeal case, the Crown also argued that the employer definition and role under the OHSA does not contain the same limitation as the constructor role, (i.e. the limitation in section 1(3) OHSA does not apply to the definition of employer). It was argued that an owner who undertakes quality control at a project is responsible, as an employer, not only for OHSA compliance by its own workers (such as quality inspectors), but also for compliance by all workers on the project. The appeal court rejected this argument which, in our view, is appropriate as the Crown's argument flies in the face of longstanding existing MOL guidance to owners and constructors, the provisions of the OHSA, and logic. There would undoubtedly be confusion were an owner to contract a GC to undertake a project as the constructor, engage in quality oversight, but then find that, by virtue of this best practice of quality oversight, it has control as an employer at the project. This approach, effectively, reads out the constructor role because there would be no distinction in the scope of the OHSA obligations of a constructor and the employer. Both would have overall responsibility for health and safety on the project.

The Crown's position is more surprising when considered in the total context of the case. As part of a resolution with the Crown, the general contractor did not contest that it was the constructor of the project. It was convicted and fined for the accident. The Crown's position seeks to extend a very similar, if not identical, level of OHSA responsibility to the City and stands to water down the legal obligations giving the constructor overall responsibility for health and safety on a project.

The Pending Appeal

The Crown renewed its arguments in an Application for Leave to Appeal to the Court of Appeal. Fortunately, the Court of Appeal confirmed the prior finding that the City was not the constructor. It also confirmed that this constructor determination properly involved a "control test". However, what remains concerning is the granting of leave to hear the question of whether the City was an employer under the OHSA, and breached its employer duties in the circumstances. We should note that in *R. v. Wyssen* the Court of Appeal interpreted the duties of an employer under the OHSA, which are very broad, as requiring an employer act as a virtual insurer of safety in the workplace. This creates the possibility that the City, and other construction project owners in the future, could be held to have a residual employer role, not just for their workers on a project, but for the entirety of a project. As well, should the Crown's position prevail, it stands to reason that all employers on a project could see their OHSA obligations expanded beyond the function they carried out on the project. This raises the possibility of significant future uncertainty for municipalities, other project owners and other construction employers, respecting the scope of their OHSA responsibilities when a GC is acting as constructor and is clearly controlling and directing safety at a project for the owner.

The Court of Appeal's decision could fundamentally alter the landscape of OHSA responsibilities on construction projects. We will keep our clients and readers apprised of the ruling when it is released.

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