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A Two-Way Street: Owners May Be Liable for Health & Safety Compliance as "Employers" Under the OHSA

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Key Takeaway

Owners are considered “employers” under the OHSA and therefore, subject to discharging their “due diligence” obligation, may be found liable for ensuring compliance with health and safety requirements during the lifespan of a Project, even if they designate the role of “constructor” to a contractor.

Application to Your Organization

While an owner of a construction project may delegate the role of “constructor” under the *Occupational Health and Safety Act*[1] (OHSA) to a contractor in its construction contract, owners could still find themselves to be independently liable for ensuring compliance with health and safety legislation as an “employer” under the OHSA. Owners may only absolve themselves of liability if they can establish a due diligence defence (i.e., demonstrate that the owner took every precaution reasonable in the circumstances). Owners, therefore, should consider:

1. How they evaluate and assess a prospective contractor’s experience and expertise with respect to health and safety for a project;

2. Whether their construction contract sufficiently allocates risk for health and safety to the “constructor” under the OHSA; and

3. How to mitigate against costs, expenses and other damages that may arise if it is determined that the owner is liable for breaching its duties under the OHSA as an employer, and in particular where

the contractor is the party who has maintained control of the project site.

What Happened?

In a recent Supreme Court of Canada (SCC)[2] split decision, the appellant municipality (Owner) entered into a construction contract with a paving construction company (Construction Co) to repair a downtown watermain. Pursuant to the construction contract, the Owner designated Construction Co as the "constructor" responsible for health and safety during the project.

During construction, an employee of Construction Co struck and killed a pedestrian while operating a road grader in reverse on the project site. At the time of the accident, no fence was placed between the project site and the public intersection, and no signaller was employed to assist Construction Co during the performance of the grading work, contrary to the requirements under the regulations to the OHSA.[3] The Owner did not employ any employees who performed work on the project; however, during the course of the project, the Owner sent its own employees, quality control inspectors, to attend the project site to oversee Construction Co's proper compliance with the construction contract.

The Ministry of Labour (MOL) charged both the Owner and Construction Co under the OHSA for failing to uphold their respective duties as "employer" and "constructor" at the project site. At the trial of the matter, before the Ontario Court of Justice, the trial judge acquitted the Owner of the charges, finding that the Owner was not an "employer" or a "constructor" under the OHSA, and was therefore not liable for compliance with the health and safety regulations and requirements for the project site. The Crown appealed this decision to the Ontario Superior Court of Justice, which upheld the decision of the lower court.[4]

The decision of the lower courts was appealed further, resulting in the Ontario Court of Appeal overturning the decision of the Ontario Superior Court of Justice, finding that the Owner was an "employer" under the definition of the OHSA by virtue of its having employed the quality control inspectors who attended at the project site. The Ontario Court of Appeal decision was then appealed to the SCC, which released a rare 4-4 split decision, leaving the Court of Appeal's reasons as the current state of the law. Notably, the SCC did not (directly) address the question of whether the Owner, in this case, might be absolved of liability through a defence of due diligence. Instead, that issue was remitted back to the Ontario Superior Court of Justice for determination.

Question(s) Considered by the Court?

Is an owner of a construction project considered an "employer" under the OHSA, and liable for failure to comply with the OHSA?

What Did the Court Say?

The SCC concluded that an owner who either: (a) employs workers at a workplace where an OHSA breach occurs, or (b) enters into a contract for the services of a worker at that workplace (including the services of a constructor) is an "employer" under the OHSA and is responsible for any non-compliance with health and safety requirements at the workplace (or project site), regardless of whether the owner has control over the workplace (or project site).

In this case, by both entering into a construction contract with Construction Co and employing its own quality control inspectors who attended at the project site, the Owner met the definition of "employer" under the OHSA and, consequently, was responsible for the corresponding duties and obligations under the OHSA.

The SCC clarified that the "employer" designation under the OHSA does not require an entity, such as an owner, to have control over the workplace. The fact that the Owner's inspectors were not regularly present and did not control the project site did not affect the finding that the Owner was an "employer" under the OHSA.

The SCC did note, however, that if an owner of a construction project is found to be an "employer" under the OHSA, it may be absolved of liability for breaching the *OHSA* by establishing a due diligence defence. The SCC provided that courts may consider the following when assessing whether an owner exercised due diligence:

- the owner's degree of control over the workplace or the workers;
- whether the owner delegated control to the constructor in an effort to overcome its own lack of skill, knowledge or expertise to complete the project in compliance with the regulations;
- whether the owner took steps to evaluate the constructor's ability to ensure compliance with the regulations before deciding to contract for its services; and
- whether the owner effectively monitored and supervised the constructor's work on the project to ensure that the prescriptions in the regulation were carried out in the workplace.[5]

In this case, the question of whether the Owner established the due diligence defence was remitted to the Ontario Superior Court of Justice. As a result, it remains to be seen whether the Owner will be found to have exercised due diligence by delegating control to Construction Co to overcome its own lack of knowledge to complete the project as per the *OHSA*.

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Learn More

- *R v Greater Sudbury (City)*, 2023 SCC 28
- *Ontario (Labour) v Sudbury (City)*, 2021 ONCA 252
- *R. v. Greater Sudbury (City)*, 2019 ONSC 3285

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[1] RSO 1190, c O.1 (OHSA).

[2] *R v Greater Sudbury (City)*, 2023 SCC 28 (*R v. Greater Sudbury*).

[3] O.Reg 213/91.

[4] *R. v. Greater Sudbury (City)*, 2019 ONSC 3285.

[5] *R v. Greater Sudbury* at para 61.

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