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Whatâ€™s Control Got to Do With It: Construction Owners are Employers Under the OHSA

On November 10, 2023, when the Supreme Court of Canada (“SCC”) released their decision in *R v Greater Sudbury (City)*, the internet responded with widespread panic because, for the first time, the Court has confirmed that a project owner is an employer under Ontario’s *Occupational Health and Safety Act* (“OHSA” or the “Act”).

While, on its face, this appears to be a substantial change, based on the Court’s decision it is unclear what practical impact this shift will have.

Facts

The Corporation of the City of Greater Sudbury (the “City”) contracted with Interpaving Limited (“Interpaving”) to repair a water main and repave streets (the “Project”). In the course of the Project, a pedestrian was killed after an Interpaving employee reversed through an intersection on a road grader.

Contrary to the relevant regulations under the OHSA, no fence had been placed between the Project and the public intersection, and no signaller was assisting the Interpaving worker.

Both Interpaving, as constructor, and the City, as owner, were charged with breaching the duty of employers under section 25(1)(c) of the Act.

At trial, the City was acquitted on the basis that it was Interpaving who had direct control over the Project, and the City was therefore not an employer under the Act, or in the alternative, it acted with sufficient due diligence. The provincial offences appeal court confirmed the finding that the City was not an employer, but the Court of Appeal of Ontario, allowed the appeal, finding the City was an employer within the meaning of the Act.

The Court of Appeal made this finding, however, on the unique factual circumstances of this case: the City had sent inspectors to the Project site who monitored the job site for quality control and progress purposes. The Court of Appeal found it was unnecessary to resolve the question of whether there was a control requirement in such cases. The question of due diligence was remitted back to the provincial offences appeal

court.

The City appealed to the SCC on the question of whether it was an employer under the Act.

Decision

The SCC found that the City was an employer under the OHSA, but not because of the factual circumstances where, by sending inspectors to the worksite, the City had employed one or more workers on site, but because the Court found there was no requirement of control in the definition of employer under the OHSA.

The Court found that a lack of control over a workplace is only relevant to a due diligence defence.

The Court went on to affirm the 1992 Ontario Court of Appeal decision of *R v Wyssen*, which found an “employer” encompasses two types of relationships: (1) where a person employs workers and (2) where a person contracts for the services of workers. The SCC found that “contracting for the services of workers” captures an owner contracting with constructors.

Practically, this means that an owner of a construction project who contracts with a general contractor is still an employer under the OHSA, and with that, assumes the health and safety obligations required of it under the Act.

The Court set out a three-part test to consider when an owner who contracts with a constructor is prosecuted for breach of s. 25(1)(c):

- Has the Ministry proven that the Act applied to the owner because the owner was an employer under the Act? Without a control element to consider, the answer to this question will invariably always be yes.
- Has the Ministry proven that the owner breached s. 25(1)(c) of the OHSA?
- 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?

Practical Considerations

While the Court’s decision means an owner of a project shares the health and safety obligations required of an employer under the OHSA, the changes to a prosecution of an offence under s. 25(1)(c) are less substantial.

Owners will still be able to argue they lacked sufficient control over the project worksite to be found liable for any breaches of safety measures, but this assessment will now be considered only at the due diligence defence stage.

As no one wants to find themselves in breach of an OHSA offence, owners and contractors should aim to work together: the goal should be satisfaction that every project worksite has adequate health and safety plans and practices in place.