A ROCK AND A HARD PLACE: OWNER, EMPLOYER, AND CONSTRUCTOR LIABILITY UNDER THE OHSA

Posted on December 3, 2021

Categories: Publications sur la COVID-19, Insights, Publications

The decision of the Ontario Court of Appeal in *Ontario (Labour) v Sudbury (City)*[1] interpreted the definition of an "employer" to, arguably, broaden liabilities under the Ontario *Occupational Health and Safety Act* that had primarily been the responsibility of the constructor. While all parties on a construction project – owners, employers, and constructors – have always been collectively responsible for health & safety, the Court of Appeal's decision now implies that an owner, by virtue of having employees on site from time to time to ensure quality control, has equal responsibilities, and corresponding liabilities, as the constructor with whom the owner contracted to oversee project health & safety in the first place.

Background

The Ontario *Occupational Health and Safety Act* ("**OHSA**") is a quasi-criminal statute that delineates specific health and safety requirements for workplaces in Ontario. Generally speaking, the OHSA prohibits employers from contracting out of their workplace health and safety responsibilities.

There is one major exception to this general rule in the construction industry: where an employer or worksite owner contracts with a third party contractor, who takes on the role of "constructor" as defined by the OHSA. A constructor has its own responsibilities, separate and apart from an owner's and an employer's responsibilities, that require it to ensure health & safety policies and protocols are followed by all workers and by all employers who perform work on the project.

Put another way, an owner (as an employer) cannot contract out of its responsibilities for its employees, but an owner can contract the oversight of health & safety for all who are involved in a project to the constructor. While such an arrangement does not absolve the owner of overall responsibility for health & safety on the project, it provides the owner the ability to rely on a due diligence defence and claim that, in contracting with a constructor and ensuring the constructor fulfilled its health & safety obligations, the owner is not liable for breaches of the OHSA.

Courts will carefully consider the level of control, direction, and involvement of the owner to determine whether it or the constructor bears responsibility for a breach of the OHSA. Merely engaging a constructor will

be insufficient for an owner to make out a due diligence defence. If an owner wishes take a "hands-off approach" to the administration of health & safety on a project, the owner must still monitor the constructor and ensure it continues to fulfil its obligations under the OHSA throughout the project. That said, the Court of Appeal's decision in *Sudbury* implies that in executing this monitoring obligation, an owner (as employer) may be deprived of a due diligence defence and may still bear the same liability as a constructor.

***Ontario (Labour) v Sudbury (City)* - Signaling a Change?**

In 2015, the City of Greater Sudbury contracted with Interpaving Ltd. to repair a water main.[2] The contract between Interpaving and the City specified that Interpaving would assume control of the construction project, taking on the role of constructor as defined in the OHSA.[3] However, the City also reserved the ability to inspect Interpaving's work for quality control.[4] The City further retained some authority to direct the work, including authority to resume control over the project.[5]

In September 2015, a pedestrian crossing an intersection in the construction zone died after being struck by a road grader.[6] OHSA regulations required that a fence and police constables be present if work is performed at an intersection.[7] Neither requirement was met. The City was charged as both a "constructor" and an "employer" under the OHSA.[8]

The trial court held that the City was not acting as an employer or a constructor on the project.[9] The Superior Court affirmed the trial court's decision on appeal, holding the City had not taken over the role of constructor by retaining quality control measures on the worksite.[10]

The Ontario Court of Appeal saw the matter differently. The Court of Appeal concluded the City was an "employer" within the meaning of the OHSA because it employed inspectors who attended the project from time to time for quality control purposes.[11] Engaging a constructor did not preclude the City, who was also the owner, from becoming an "employer" on the same project and, in turn, responsible for the health & safety of a person who was not its employee, nor even a worker on the project.[12]

We note that the Court of Appeal did not consider whether the city was also a constructor, as the Crown had not pursued this claim in its appeal. Ultimately, the Court of Appeal remanded the case back to the Superior Court to determine whether the City established a defense of due diligence to shift liability to Interpaving. As such, whether the City is successful in mounting a due diligence defence remains to be seen.

The Court of Appeal's decision leaves the construction industry with an uncertain distinction between "constructors", "owners", and "employers" for the purposes of OHSA liability. The fact that an owner of the project employed workers who attended the worksite from time to time to monitor quality control was sufficient for it to be considered liable for the health & safety of a member of the public crossing an

intersection.[13] This creates a “rock and a hard place”; if an owner exercises minimal control, it may fail to establish sufficient involvement to mount a due diligence defence. On the other hand, an owner retaining too much control of the worksite through its own employees risks attracting liability equal to that of a “constructor” despite its contractual arrangements. Further complicating this conclusion is that the Court of Appeal declined to comment about what constitutes sufficient, or insufficient, “control” where oversight of project health & safety has been contracted to a third party.[14]

It is unclear whether lower courts will follow the Court of Appeal’s decision in concluding that the presence of an owner’s employees on a project, regardless of their function, will incur liability as an employer where a constructor has been contractually engaged. However, the Court of Appeal’s decision has been appealed to the Supreme Court of Canada and appeal submissions & related materials were filed in October, 2021.

Takeaways for Employers

Whether the Court of Appeal’s decision signals an expansion of liability for owners (as employers) who have engaged a third party constructor remains to be seen. It is clear that simply engaging a constructor will not allow an owner to avail itself a due diligence defence for OHSA breaches, but engaging in quality control over the constructor’s work with the owner’s own employees may lead to liability equal to that of the constructor who was supposed to be oversee project health & safety in the first place.

One possible solution to this “rock and a hard place” is for owners is to engage a third party consultant to monitor the constructor and ensure both quality control and adherence to health & safety protocols. With this arrangement, the owner would not have any employees on site, yet will have a resource to fulfil its own responsibility to monitor the constructor and ensure it fulfils its OHSA responsibilities, and thus be able to mount a due diligence defence to any OHSA charges. Of course, owners should ensure that the delineation of these health and safety responsibilities and enforcement mechanisms are clearly defined in the project contracts.

If you have any questions related to the above, please do not hesitate to contact a member of the Employment and Labour Relations Group.

[1][ps2id id='1' target='/] 2021 ONCA 252 [*Ontario (Labour) v Sudbury (City)*].
[2][ps2id id='2' target='/] 2019 ONSC 3285 at para 6 [*R. v Greater Sudbury*].
[3][ps2id id='3' target='/] *Ibid* at para 7.
[4][ps2id id='4' target='/] *Ibid* at para 19.
[5][ps2id id='5' target='/] *Ibid* at para 28.
[6][ps2id id='6' target='/] *Ontario (Labour) v Sudbury (City)* at para 1.
[7][ps2id id='7' target='/] *Ibid* at para 3.

[8][ps2id id='8' target='/] *Ibid* at para 2.
[9][ps2id id='9' target='/] *R. v Greater Sudbury* at para 15.
[10][ps2id id='10' target='/] *Ibid* at para 19, 29.
[11][ps2id id='11' target='/] *Ontario (Labour) v Sudbury (City)* at para 6.
[12][ps2id id='12' target='/] *Ibid* at para 14.
[13][ps2id id='13' target='/] *Ibid* at para 14.
[14][ps2id id='14' target='/] *Ibid* at para 15.

by Patrick Groom

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.