Construction Safety And The Owner: Damned If You Don’t, Probably If You Do.

A recent Ontario Court of Appeal decision suggests that owners of construction projects, even after delegating a General Contractor as the project’s “constructor”, may have reason to worry about attracting *Occupational Health and Safety Act* (‘**OHSA**‘) liability. Though the full impact of the decision cannot yet be assessed with real certainty, it is important for owners to be aware of the Court of Appeal’s reasoning and take appropriate precautions to avoid attracting the potentially significant liability that follows OHSA breaches.

Background

The contractual arrangement in *Ontario (Labour) v Sudbury (City)* was one that will be very familiar to owners and contractors across the province. The City of Sudbury (the ‘**City**‘) tendered a construction project involving road and water main repair. The City then contracted with Interpaving Limited as General Contractor to carry out the repairs. The General Contactor agreed to be the ‘constructor’ for the project, thereby assuming day-to-day management and control of the project. Additionally, as is common for General Contractors, it agreed to be the project’s “constructor” responsible for compliance with the OHSA, and thus had responsibility for health and safety on site.

As a result of the arrangement, the City was not actively involved in the management of the project and merely served a monitoring function. One of the ways the City carried out this function was by employing inspectors at the project site to oversee compliance from time to time.

In September 2015, a pedestrian crossing at a light in the construction zone tragically died after being struck by a road grader, operated by an employee of the General Contractor. The Ministry of Labour conducted an investigation into the accident and subsequently charged both the City and the General Contractor for violations of the OHSA. The City was charged both as a ‘constructor’ and an ’employer’ under the OHSA. An owner’s status as “constructor” or “employer” could have significant consequences; classification as such attracts responsibility to ensure OHSA compliance.

History of the Case

At trial, the Ontario Court of Justice found that the site did not have a signaller assisting the grader operator or a fence separating the worksite from

the public way, as required by OHSA Regulation. However, the City was acquitted on the basis that it was neither a ‘constructor’ nor an ’employer’ and owed no duties under the OHSA. The trial judge added that, in any event, the City had a due diligence defence. The General Contractor was convicted at trial.

On appeal, The Superior Court of Justice judge upheld the Ontario Court of Justice’s holding that the City was neither a ‘constructor’ nor ’employer’ and dismissed the Crown’s appeal. The appeal judge did not consider whether the City would have had a due diligence defence. The Crown further appealed to the Ontario Court of Appeal.

Court of Appeal Decision

Holding

The Ontario Court of Appeal heard the appeal regarding whether the Superior Court of Justice erred in declaring that the City was not an ’employer’ (the determination of the city as a ‘constructor’ was not subject to appeal).

In a preliminary ruling reversing the Superior Court of Justice holding, the Court of Appeal held that the City was an ’employer’ within the meaning of the OHSA and moreover was liable for violating the Regulations, unless it could make out a due diligence defence. The decision was remitted to the Superior Court of Justice to adjudicate the merits of a due diligence defence.

Reasoning

The Court of Appeal noted that the OHSA is “public welfare legislation, and as such should be read liberally and broadly in a manner consistent with its purpose,’ which is the protection of employees’ health and safety.

The Court of Appeal stated that the definition of employer in the OHSA can include “both employing and contracting for the service of workers”. Moreover, the legislation contemplates the possibility of multiple employers in one workplace and that a person or entity might be considered both an owner and an employer or constructor. Applying the definition of “employer” from s 1(1) of the OHSA, the Court of Appeal held that the City was an “employer” because it directly employed inspectors at the project site.

The City’s status as “employer” on the project means that it is responsible for taking all reasonable precautions with regard to ensuring compliance with health and safety regulations. The only way that the City can avoid liability for the breaches of the OHSA is to satisfy the Court that “all reasonable precaution” was taken, otherwise known as a due diligence defence. The question of if the City of Sudbury met this threshold remains to be determined at the Superior Court.

Significant Implications for Owners

The impact of the Court of Appeal’s decision on owners of construction projects is uncertain, worrisome and potentially far-reaching. By placing onerous obligations on owners of construction projects as “employers”, the Court of Appeal’s decision could jeopardize the long established arrangement in which an owner hires a general contractor that agrees to act as the constructor and assumes OHSA compliance obligations. Regardless of whether owners delegate

compliance responsibilities to a constructor, they could also be liable for OHSA breaches if they directly employ inspectors on site.

In the decision, it was not relevant to the Court of Appeal how (in)significant the City inspectors' tasks were to the overall project; the fact that the City sent its employees at all attracted "employer" status. The Court of Appeal also left open the question of whether the degree of "control" exercised by an owner on a project site is relevant to its obligations.

The City has sought leave to appeal the decision to the Supreme Court of Canada. It waits to be seen whether the Supreme Court will hear the appeal or how the City will fare in establishing a due diligence defence at the Superior Court of Justice.

Given the uncertainty surrounding owners' obligations that this decision presents, owners may be left with a difficult choice of whether they will want oversight of health and safety on site. Oversight may expose owners to OHSA obligations, but it may also assist in their due diligence defence. Until further clarification is provided by the Courts, owners must balance these two competing risks.

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