

# Which Company Is Liable, as an Employer, for Excavation Gas Pipe Explosion? – Quiz



An employer's OHS duty to protect may extend to the workers it doesn't actually employ.

Canadian OHS laws require 'employers' to take measures to protect the health and safety of their workers. In a famous 1992 case, an Ontario court ruled that an 'employer's' duty under OHS laws applies not only to a company's own employees but also to workers employed by others doing work under the company's control. In other words, the definition of 'employer' is based not on an employment relationship but control over work [*R. v. Wyssen*, [1992] O.J. No. 1917, Sept. 17, 1992]. The so-called 'Wyssen' approach of defining 'employer' broadly to hold companies responsible for safety of work they control is followed throughout Canada. The following scenario, which is based on an actual Ontario case, illustrates how this allocation of responsibilities plays out when workers of multiple employers perform work at a construction site.

## OHS PROVISION AT ISSUE

Section 228 of the Ontario OHS *Construction Project Regulation*, entitled 'Excavations,' provides that:

228. (1) Before an excavation is begun,

(a) Gas, electrical and other services in and near the area to be excavated shall be accurately located and marked; and

(b) If a service may pose a hazard, the service shall be shut off and disconnected.

(2) The **employer who is responsible for the excavation** shall request the owner of the service to locate and mark the service (emphasis added).

## SITUATION

A metropolitan agency in Toronto wants to carry out a road and paving contractor to perform excavation work for a highway rehabilitation project. It hires a

local gas utility to locate and mark underground gas pipelines at the site and a contractor to perform the actual excavation work. While operating a backhoe, one of the contractor's workers hits an underground gas line, setting off an explosion that kills 7 people. The prosecution charges the agency, utility and contractor for violating their duty, as an 'employer' to locate the pipeline under Section 228(2).

## QUESTION

**Which, if any, of the defendants is/are liable as an 'employer'?**

1. The agency
2. The utility
3. The excavation contractor
4. None of the above
5. All of the above

## ANSWER

1. **The Ontario Superior Court of Justice found all 3 defendants liable as 'employers.'**

## EXPLANATION

There are certain guiding principles courts follow when interpreting the OHS laws. As the court explained, 'the OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. . . [and should] be generously interpreted' so as to promote this purpose.

The court then applied that approach to determine whether each defendant counted as an 'employer' responsible for taking the excavation safety measures required by the Regulation. The starting point: Section 1 of the OHSA, which defines an employer as 'a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services.' After looking at the 'ordinary meaning of the words in the definition,' the court concluded that all 3 defendants fit the definition. So, E is the right answer.

### **A. Why the Agency Was Liable as an Employer**

As the agency's defence lawyer emphasized, the backhoe operator that caused the explosion was employed by the excavation contractor, not the agency; nor did the agency directly hire the contractor. But the court brushed these arguments aside, finding that the agency was liable as an 'employer' because it contracted for the services of one or more workers on the worksite. Courts should avoid 'narrow or technical interpretations that would interfere with or frustrate' the purpose of the OHS laws, it concluded.

## **B. Why the Utility Was Liable as an Employer**

Like the agency, the utility contracted for the services of one or more workers on the worksite, including the excavation contractor. The utility also supplied services and, significantly, its employee was the 'locator' assigned to perform the identification of the underground gas lines.

## **C. Why the Utility Was Liable as an Employer**

The excavation contractor was clearly liable as an employer not only because it employed the backhoe operator but because as the company carrying out the actual work, it had to ensure that the work met the applicable OHS 'employer' requirements. The key point is that the other defendants did, too.

1. *v. Enbridge Gas Distribution Inc.*, 2010 ONSC 2013 (CanLII)

## **Takeaway**

The moral of the *Enbridge Gas* case is that OHS employer liability isn't parcelled out based on who performs which function or hires which worker. 'Employer' is interpreted broadly as including any person that contracts for or supplies services to the work. And being liable for an employer means not just worrying about your own work and workers but ensuring that required safety measures are carried out and all 'precautions reasonable in the circumstances for the protection of the worker' are taken. As such, employer liability overlaps and may extend to multiple companies, rather than just the company that performed the operation or hired the worker in question.