The Fine Line between "Owner" and "Constructor": Court Comments on the Legal Role of an "Owner" on a Construction Project

By Ryan J. Conlin

One of the most complex issues under Ontario OH&S law relates to determining which party on a construction project is the "constructor" within the meaning of the OHSA. A "constructor" undertakes the construction project for an owner (like a general contractor) and may include an owner who undertakes all or part of the project by himself or by more than one employer (remember that phrase, "all or part," because it sets the stage for inadvertent liability).

Constructors are responsible for ensuring overall safety on the project and for making sure that all workers, supervisors and employers comply with their obligations as well.

"Constructor" and "Owner" under the OHSA

There have been many cases over the years where owners of construction projects who have contracted with third party general contractors have been surprised to find themselves treated as the "constructor" by the Ministry of Labour, generally on the basis that the owner had taken steps to "direct" the project. Section 1(3) of the OHSA states that an "owner" does not become responsible as "constructor" for overseeing a project for "quality control" purposes.

The thorny legal question which often arises is where the line is drawn between "quality control" and actually taking over all or part of a project as the "constructor".

There is also the question of to what extent an "owner" is liable for safety on a "project" as an "employer", as an entity can become an "employer" not only by directly employing a worker but also by hiring a subcontractor or independent contractor. It is also common practice for Owners to have workers on the project for quality control purposes.

Under the OHSA, project owners have very limited responsibilities which primarily concern preparing a list of designated substances (such as asbestos) present on site to prospective bidders on project.

Courts Considers Role of Owner under the OHSA

An Ontario Court recently addressed these issues in the context of a recent prosecution.[1] The case involved a tragic fatality to a member of the public who was struck and killed by a reversing grader on a municipal road building project. The Municipality contracted the project out to a third-party

[1] *R v. Corporation of the City of Greater Sudbury* (unreported, August 31, 2018, Lische J., Ont. Ct. Jus.) Full Disclosure: Ryan Conlin and Frank Portman of our firm were counsel to the Defendant. The Crown has appealed this decision. The Appeal will be argued in May 2019.

contractor who signed a detailed contract and agreed to act as the "constructor" for the project. The grader operator (employed by the third-party contractor) was reversing in a live intersection without the assistance of signalers and without the presence of police officers (as required by law).

The Crown charged the third-party contractor as "employer" and the Municipality as "constructor" and "employer" with a number of OHSA violations arising out of the accident. The third- party contractor was found guilty as an "employer" of failing to ensure that the grader operator was assisted by a signaller and was fined $195,000.[2]

The crux of the Crown's case was that it alleged that the Municipality had taken steps beyond that of a prudent owner and had assumed control over the project as the "constructor". The Crown also alleged that the Municipality was liable for OHSA contraventions as an "employer" on the project.

The Crown primarily relied on the following evidence to prove the Municipality was the "constructor":

- The contract for the project contained provisions which allowed the Municipality to take over the project as "constructor" in certain circumstances (primarily related to breaches by the contractor). The Court held that these contractual provisions did not make the Municipality the "constructor" as there was no evidence the Municipality ever invoked these provisions. The Court determined that an owner reserving the right in a contract to take over a project in specified circumstances does not make an owner the constructor;

- There was a system in place whereby the contractor would contact the municipality to dispatch paid duty police officers to attend at the project where required, and the costs of the paid duty officers were paid directly by the Municipality to the police service. The evidence at trial was that this system was used on all municipal construction projects and no request from the contractor for police officers was ever denied. The Crown argued that the payment system was an indication of municipal control over the project. The Court rejected this argument and concluded that the payment system was a business decision by the Municipality to avoid the confusion, inefficiencies and payment delays which plagued this process when multiple contractors required paid duty officers on different projects;

- The Crown argued that municipal quality control inspectors directed work by taking complaints from the members of the public and businesses, issuing instruction forms and contractor appraisal forms to the contractor, sharing a trailer with the contractor, conducting progress meetings on city property and that city employees sometimes took minutes at project meetings. The Court did not accept the Crown's arguments and found that the City Inspectors were on the site for quality control purposes and none of these issues amounted assuming control over the project.

[2] *R v. Interpaving Limited* (unreported, March 28, 2018, Buttazzoni J., Ont Ct. Jus.)

- The Crown focused on a specific incident which occurred two weeks prior to the accident where a municipal inspector shut down a portion of the project at which the police were not present at a live intersection as required by law. The Crown argued that this was indicia of control. The Court disagreed and found that the municipal inspector contacted a senior representative of the contractor who attended at the site and addressed the issue. The Court specifically found that the municipality should be commended for addressing this issue with the contractor and that finding otherwise would deter the municipality from addressing this issue.

- The Crown argued that the fact that the Municipality had the contractual power to vary the schedule for the work (i.e. road closings etc.) was an indicia of control over the work. The Court rejected this argument and found that the Municipality controlled this issue from the perspective of the public accessing the roadway and the issue did not relate to workplace safety or controlling the project.

- The Court also rejected arguments that the Municipality exercised control over sub-contractors and that requiring site specific training designed by the Municipality made the Municipality the "constructor".

Implications for Owners

This case provides helpful judicial comment on the distinction between "quality control" and "directing work" on a project. It is important to appreciate that the Crown has appealed this decision and thus these findings will be soon be considered by a higher Court.

- **Contracts matter:** There is no question that the "reality on the ground" will always be the most important factor in determining "constructor" status. A party cannot contract out of the OHSA. However, this case shows that where an owner and contractor agree that the contractor shall assume the statutory obligations of "constructor", it makes little sense to challenge that arrangement, unless it can be established that the reality was quite different or the owner was attempting to evade its statutory duty. The Court's approach is similar to that taken by jurists in other jurisdictions;[3]

- **Owners can Reserve Rights to Take Over:** An Owner can insert language into a contract that allows it to assume control of a project and will not be treated as the "constructor" unless these contractual rights are exercised;

- **Owner's Representatives can Address Safety Issues in an Appropriate Manner with the Contractor:** An issue which is often challenging for Owners is how to address safety contraventions with the constructor without assuming control over the project. There have been cases where owner's representatives have proceeded to correct contractors on safety

[3] *Director of Occupational Health and Safety v. Government of Yukon, William R. Cratty and P.S.Sidhu Trucking Ltd.,* 2012 YKSC 47 (CanLII)

issues and even issue discipline to workers on the job. Such actions have led to the owner being the constructor.[4] However, the Court in this case made it unequivocally clear that an Owner is entitled to raise safety concerns with management of the constructor and such actions will not make the Owner the "constructor" if the Constructor is the one to solve the issue. The Court specifically commended the Municipality and pointed out the policy issues with fettering an Owner's actions out of fear of being the Constructor;

- **The Focus of the Analysis is on Substantive Issues:** The Court made it clear that the focus of the determination should be on who is responsible for safety on the job and controlling the project. Minor details such as sharing trailers with the Constructor, the identity of who took meeting minutes and where meetings took place are not highly relevant to the analysis. However, Owners must keep in mind that this issue is determined keeping in mind all of the facts and that optics should always point towards the reality that the contractor is the "constructor".

Is the Owner Responsible for the Project as "Employer"?

The Crown also charged the Municipality with various contraventions as an "Employer". There was no question that the Municipality had its own employees on the project and it had contracted for the services with the contractor. However, the Court found that to establish the Municipality was the "Employer", the Crown had to prove that the Municipality was in the "sphere of operation" of the project. The Court held that the City had no control over the project and thus could not be treated as an "Employer".

The Court further found that even if the Crown were correct that the City was an "Employer", it had exercised due diligence by hiring a constructor and taking the "hands off" approach the law requires. In our view, the Court correctly found that it would make little sense to make an Owner liable as an "Employer" for a project in a legal context where it must allow the "constructor" to control the project without interference. It is our view that if an Owner were treated as an "Employer", the "Constructor" provisions would have no practical purpose.

Moreover, Owners are typically not experts in the construction techniques, materials and equipment employed on a construction project – which is why they retained a general contractor in the first place. In such circumstances, it would likely endanger workers to make such Owners responsible for worker health and safety on the project (certainly beyond retaining a properly vetted, safe contractor to perform the work).

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[4] *Imperial Oil Ltd.* (Re), [1993] O.O.H.S.A.D. No. 8 (Office of Adjudication)

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