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OHS & Workers' Compensation

M A N A G E M E N T U P D A T E

THE IMPORTANCE OF CONTROL: ONTARIO COURT COMMENTS ON DETERMINING THE “CONSTRUCTOR” OVER A CONSTRUCTION PROJECT

Under the Ontario *Occupational Health and Safety Act* (OHSA) constructors must ensure that all employers and workers on a construction project comply with the OHSA and Regulations, including the *Regulations for Construction Projects*. Constructors are held to a very high standard in discharging their OHS obligations. The word “ensure” has been interpreted to mean “make certain” meaning a constructor is virtually in the position of an insurer of health and safety on a construction project. In light of this, organizations involved in contracting for construction projects must exercise care to avoid unintentionally becoming the constructor of the project and, thereby, assuming greater responsibilities and liabilities than intended. Such care is often exercised through detailed contractual and site arrangements establishing the roles and responsibilities of various parties on the construction project. Sometimes it is not entirely clear from these arrangements just who is the constructor over a particular project.

A recent appellate decision by the Ontario Court of Justice serves as a strong reminder that the contractual arrangements between parties will not always be treated as determinative of each party’s OHSA role and obligations. In *R. v. Reid & DeLeye Contractors Ltd.*¹, the court upheld a trial court decision which found that Reid & DeLeye was the constructor of a project rather than the construction manager it had contracted to be.



The Construction Management Contract

In June 2005, Reid & DeLeye contracted with a hotel owner for the construction of a new 138 unit hotel in Cambridge, Ontario. Reid & DeLeye contracted to be the construction manager responsible for carrying out certain roles during the pre-construction, construction and post-construction phases. Notably, the contract said:

Under this type of construction management arrangement, the traditional roles and relationship of owner/generalcontractor disappear. The Owner engages the trade contractors directly and thereby assumes much of the role and responsibility of the traditional general or prime contractor. [...] The Construction Manager serves as the Owner's advisor and agent, providing site management, administrative and technical services solely for the benefit of the Owner and the furtherance of the Owner's interest.²

During the preconstruction phase, according to the contract, Reid & DeLeye was to:

- prepare a preliminary master time schedule and project budget;
- plan and arrange for temporary services and site facilities;
- assist in obtaining all required approvals, permits and licenses;
- at the direction of the hotel, arrange for contracts between the hotel and various contractors; and
- review drawings and specifications.

During active construction, Reid & DeLeye agreed to:

- inspect the work of the various trades;
- establish system for alterations in the work and payments to the contracted trades; and
- review the safety programs of each trade contractor and make recommendations to the owner.

The hotel was to communicate with the trades solely through Reid & DeLeye. After construction had finished, Reid & DeLeye were to ensure a smooth transition to the hotel's operating staff and to assist the hotel with the administration of warranties provided by the contractors.

Reid & DeLeye Found To Be The "Constructor"

In March, 2006, while the hotel was under construction, a worker employed by a forming contractor suffered a broken right arm and elbow after falling between 3 and 4 feet from the second rung of a scaffold frame. At the time of the fall, the worker was working from the rung adjusting the height of a form-support scaffold. The Ministry of Labour investigated. Reid & DeLeye was charged with failing, as a constructor, to ensure that a scaffold or other work platform was the required width. The forming contractor and its supervisor were also charged and all pursued the matter to trial.

At trial, Reid & DeLeye argued, among other things, that it was not the constructor of the project. Reid & DeLeye noted that it was the hotel owner that had contracted with all of the trades on the project – including the forming contractor – and, therefore, Reid & DeLeye had not undertaken the project. On this basis, it was argued, the hotel owner was the constructor of the project because it had contracted with each of the trades on the project. In making this argument, Reid & DeLeye relied on the specific definition of "constructor" in section 1 of the OHSA. In that section a constructor is defined as "a person [which includes a corporation] who undertakes a project for an owner and includes an owner who undertakes all or part of the project by himself or by more than one employer". It was Reid & DeLeye's position that, by contracting with all of the trades, the hotel, as owner of the project, had undertaken the project by more than one employer.

Reid & DeLeye's defence was not accepted at trial. The trial court found Reid & DeLeye was the constructor based upon the fact that it had:

- conducted site safety inspections on the project using a site safety checklist;
- enforced its safety violation disciplinary policy against the trades (including against the forming contractor);
- appointed its own employee as project supervisor;
- coordinated payment of the forming contractor; and
- filed the Notice of Project (NOP) declaring itself to be the constructor.

Further, the court found that based on the contract between the hotel and the forming contractor, Reid & DeLeye assumed overall responsibility for establishing and coordinating safety precautions and programs on the project.

The trial court's findings on the filing of the NOP are of particular note. Reid & DeLeye asserted that it had filed the NOP by mistake because it did not contract with the trades and did not get paid



for the trade's work and then pay the trade. The trial court found that the NOP was an admission by Reid & DeLeye that it was the constructor of the project. After considering the contractual documents and all of the functions that Reid & DeLeye carried out on the project, the trial court rejected the assertion that the NOP had been filed by mistake. Further, Reid & DeLeye did not appeal a post-accident order from the Ministry of Labour issued to it as the constructor. This created a presumption that Reid & DeLeye was the constructor and Reid & DeLeye had failed to rebut that presumption.

Ultimately, it was concluded that Reid & DeLeye exercised the highest degree of control over the project, generally, and, in particular, in respect of health and safety. The trial court also noted that, from a policy perspective, it would be inappropriate to find that the hotel was the constructor of the project.

The trial court convicted Reid & DeLeye, the forming contractor and its supervisor. A fine of \$50,000 was imposed against Reid & DeLeye.

Appeal Court Confirms “Control Test” Determines Who Is The “Constructor”

The appeal court dismissed the appeal after finding that the decision of the trial court, on the “constructor” determination, was one that was available on the evidence and reasonable. The appeal court determined the identity of the

constructor by following virtually identical reasoning as was applied by the trial court. It reviewed the contracts between Reid & DeLeye and the hotel owner and between the hotel owner and the forming contractor. It also considered Reid & DeLeye's on-site conduct as indicative of how the duties and obligations in the contracts were to be interpreted and applied to the parties. In so doing, the appeal court found that Reid & DeLeye was to oversee that safety programs were established and that safe work measures and procedures were implemented by the trades. Reid & DeLeye was to manage the use of scaffolds by the trades and to provide inspection and training with regard to safety issues involving scaffolds. As a result, the appeal court found that Reid & DeLeye had assumed responsibility for safety issues on the project.

In regard to the spirit and purpose of this remedial legislation, it would seem inappropriate to have as a constructor, and the only constructor, an owner [the hotel] who is not sufficiently present and in a position to properly deal with the health and safety of the workers.³

The appeal court also rejected Reid & DeLeye's argument that the trial court ignored the definition of “constructor” in the OHSA because it overlooked that the hotel had contracted with more than one employer. In the appeal court's view, considering all of its responsibilities under the contract with the hotel owner and its activities on site, Reid & DeLeye fell clearly within the definition of “constructor” under the OHSA.

The appeal court endorsed the “control test” applied in the past for determining, amongst several parties, who is the constructor for a particular project. The control test arises from the definition of “constructor” under the OHSA because the definition contains the phrase “undertakes a project”, which suggests “commitment to and control of the project”, said the court.⁴ Notably, the appeal court reasoned that the “more control a company exerts, the more likely that it is the Constructor”.⁵

Lessons From The Decision

There is little case law on the question of how a tribunal or court will determine who, as between a project owner, general contractor, or other parties (such as a construction manager), is the “constructor” with the greatest degree of OHS responsibility over a project. Only a few tribunals and courts have commented on this issue to date. Reid & DeLeye confirms that the courts will apply a “control test” to identify the party who has the greatest degree of control over the project and has, therefore, undertaken the project as the constructor.

The decision also shows that the courts will not identify the constructor by mechanically applying the definition of “constructor” in the OHSA. In finding that Reid & DeLeye was the constructor of the project, the courts ignored the fact that the hotel owner had contracted with, and was paying, more than one employer. In that regard, the decision establishes that the control test will, in given circumstances, be used to contextually assess the plain wording of the OHSA. The case helpfully confirms that the matter of who is paying the contractors is not determinative of constructor status.



The case serves as a reminder that after a serious workplace issue or incident, the Ministry of Labour will, if necessary, engage in a very detailed review of the circumstances surrounding a project to assess constructor status and responsibility. This will include analyzing contractual documents, financial arrangements, and the actual functions and responsibilities carried out by the parties on the project. If a project owner is exercising a large degree of control (directing safety on the site, issuing permits, or correcting safety infractions, for example), the owner could be found in control of the construction project and thus the constructor. Similarly, if a third party construction manager is found to be exercising significant control, or the greatest degree of control at the project, they may be found to be the constructor. The case serves as a reminder that parties may get more than they bargained for as the contractual agreements between the parties can be displaced by the actual conduct of the parties on the project.

[T]he legislation and case law is clear that some entity is to have the role of oversight safety issues as the Constructor, and it cannot simply be placed in the hands of the sub-trades on a large project. Clearly, the Owner had given that responsibility to Reid & DeLeye in the contracts.⁶

Does that mean that a construction manager will always be the constructor? Not necessarily. However, the Reid & DeLeye decision does indicate that any party seeking to act as a construction manager must be careful about the amount of control exercised on the project. Steps should be taken to ensure that the services provided, in respect of a project, remain advisory or consultative in nature and do not stray into areas of responsibility belonging to the constructor.

For any party engaging in contracting for a construction project (including an owner, general contractor, contractor, or construction manager) several key considerations ought to be taken into account before embarking upon the project. All of the parties should ensure that:

- the contractual documents specifically indicate who the constructor of the project is (the property owner or another party);
- the party agreeing to take on the constructor role should file the NOP;
- the contractual documents between the owner, any construction manager, and constructor detail the specific services that will be provided by any construction manager and those that will not;
- the contractual documents between the constructor and others performing work on the project accurately reflect the responsibilities undertaken for safety at the project;

- the party identified as constructor takes the lead role in organizing, scheduling and coordinating the project, and in the administration and enforcement of health and safety on the project;
- the constructor is present or available on-site to address health and safety issues; and
- all notices, registrations and records given to or received from the Ministry accurately reflect the identity of the constructor.

In light of this decision, confirming that the more control exerted by a party over a project, the more likely the party is the constructor, organizations should carefully review contractual documents before contracting for construction projects, and have in place contractor management programs to enable them to assess who is the constructor, and ensure ongoing control by a constructor, when contracting for construction projects. ■

¹ (unreported, January 21, 2011, Ont. C.J., Kitchener, Nicklas J.) ("Appeal Decision")

² Ibid, at p. 3.

³ R. v. Reid & DeLeye et al. (unreported, April 9, 2009, Ont. C.J., Kitchener, Child J.P.); Appeal Decision, supra, note 1, at p. 16.

⁴ Appeal Decision, supra, note 1, at p. 16.

⁵ Appeal Decision, supra, note 1, at p. 16.

⁶ Appeal Decision, supra, note 1, at pp. 15-16.



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