Strong Safety Program Protects Constructor Despite Subcontractor's Guilty Plea

Constructors, including many owners who directly hire and oversee contractors on their properties, must have strong and meaningful safety programs in place. In a recent Ontario court decision, the existence of such a program shielded the contractor from liability.

In R v Bay Grenville Properties, the Ministry of Labour charged several corporations and individuals for violations of the**Occupational Health and Safety Act** (Act) after a workplace fatality on the construction site of a condominium building. While a subcontractor was preparing a hoist of materials, a piece of pipe rolled off the edge of a platform and struck the injured worker in the head, many storeys below. Three companies were charged, including the company responsible for hoisting and the constructor. The hoisting company pleaded guilty to a violation of the Act before trial.

The trial was concerned with the guilt of the other parties, including the constructor, one of its subcontractors, and certain individual employees. The constructor was charged with several offences relating to alleged failures to ensure that its subcontractors followed safety precautions, including overhead protection and safe storage of construction materials.

Of particular importance to the Court's analysis was its finding that a proper due diligence analysis for a constructor must take into account the size and nature of a construction project. In this case, the $96 million dollar project, with often 20 or 30 subcontractors working, was of significant enough size to alter the analysis. Because of the size of the project, the Court was much more concerned with the general safety measures and high-level supervision of health and safety matters, which it found were adequate.

The Court spoke highly of the safety-consciousness of the constructor, noting in particular provisions in its contracts requiring compliance with health and safety law, the creation and distribution of safety manuals to workers on the site, and that the constructor required subcontractor site superintendents to make declarations stating that they had received and read the safety manual.

In addition, the Court indicated that at the time of the accident the employees of the hoisting company had departed in a “bizarre” fashion from standard practice, during what was a fairly commonplace operation. The Court suggested that on a project of this scale, it was unnecessary and impractical for a supervisor to direct such tasks, and that the constructor was entitled to rely on others to perform their jobs safely.

The Court found that the Crown’s case was much stronger on the charge that the constructor had not properly ensured signage was affixed to warn workers about the potential hazard from falling objects in the area in which the worker was killed. After all, there were no signs in place when the inspector visited the site following the accident.

The constructor pointed to its safety program, which mandated signage for similar hazards. The Court also examined previous inspectors’ reports, which never mentioned signage as being an issue on the site. Finally, the possibility that the signs had come down during the confusion and chaos following the accident led the Court to find that there was a reasonable doubt.

For some other charges, once the subcontractor had been acquitted of the offence the Court found it impossible to impute liability to the constructor. Those charges, too, were dismissed.

The Court acquitted the defendants of all charges.

Constructors are subject to broad and significant responsibilities under the Act. The decision underscores the importance of having a well-constructed, consistent, and effective safety program. Such a strong program may be invaluable for defending against charges for violations committed by subcontractors without the constructor’s knowledge.

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Article by Stringer LLP

Stringer LLP