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Most Negative Treatment: Distinguished

Most Recent Distinguished: [R. v. Greater Sudbury \(City\)](#) | 2024 ONSC 3959, 2024 CarswellOnt 13375 | (Ont. S.C.J., Aug 23, 2024)

1993 CarswellOnt 5401

Ontario Occupational Health and Safety Adjudicator

Imperial Oil Ltd. v. Ontario (Ministry of Labour)

1993 CarswellOnt 5401, [1993] O.O.H.S.A.D. No. 8, 10 C.O.H.S.C. 210

In the Matter of an Appeal to the Occupational Health and Safety Adjudicator Under Section 61 of the Occupational Health and Safety Act, R.S.O. 1990, Chapter 0.1 By Imperial Oil Limited and B&B Enterprises from Orders Made in Report #096341 Dated September 16, 1992

Imperial Oil Limited and B&B Enterprises and Ministry of Labour

Tanja Wacyk Adj. Adjud.

Heard: January 4, 1993

Judgment: February 22, 1993

Docket: File No. AP 92-104, AP 92-98, Decision No. AP 93-07

Counsel: Robert Murray, for Imperial Oil Ltd.

Lyle Curran, for B & B Enterprises

Jim Fleming, for Ministry of Labour

Subject: Occupational Health and Safety; Employment; Public

Related Abridgment Classifications

Labour and employment law

[IV Occupational health and safety legislation](#)

[IV.8 Miscellaneous](#)

Headnote

Labour and employment law --- Occupational health and safety legislation — Miscellaneous

Company B. was the successful bidder for Phase II of a project proceeded with by I Ltd. Construction was to be done in three parts due to its estimated costs. B. then entered into agreements with subcontractors. Although B. selected subcontractors and was responsible for paying them, I Ltd. required that it be advised of the subcontractors. I Ltd. retained significant control over the project through C., its research contract co-ordinator. C. attended the project on a daily basis to inspect the work done and to be available to sort out problems. I Ltd. and B. appealed an order within an inspector's report requiring them to ensure that all vehicles, machinery, tools and equipment be maintained in a condition that did not endanger a worker. Each took the position that the other was the constructor on the project.

Held: I Ltd. was the constructor.

The purpose of requiring a constructor to have separate responsibilities from an employer was to ensure that there was overall control of the safety aspects of a project. B. had no involvement with Phase I. Without some overall control, it was not responsible for any problems arising out of the total project. The level of control exercised by C. on behalf of I Ltd. went beyond that of a prudent owner and reflected the need for overall control of the work done to complete the entire project.

Table of Authorities

Statutes considered:

Occupational Health and Safety Act, R.S.O. 1990, c. O.1

Generally — referred to

s. 1(1) "constructor" — referred to

s. 1(1) "project" — referred to

s. 6(2) — referred to

Words and phrases considered:

CONSTRUCTOR

. . . the purpose of requiring a "constructor" to have separate and distinct responsibilities from those of an "employer" is to ensure that there is overall control of the safety aspects of a project. This is particularly important when elements of a project take place at different times or at different locations . . .

APPEAL from orders issued by Occupational Health and Safety Inspector.

Tanja Wacyk Adjud.:

I

1 At issue in this Appeal are the Orders contained in Report No. 096341. The report was issued by an Occupational Health and Safety Inspector, and orders both Imperial Oil Limited and B&B Enterprises to ensure that:

ALL VEHICLES, MACHINERY, TOOLS AND EQUIPMENT SHALL BE MAINTAINED IN A CONDITION THAT DOES NOT ENDANGER A WORKER. NOTE JLG MODEL 40 F SERIAL NO 731276

2 Both Imperial Oil Limited ("Imperial Oil") and B&B Enterprises ("B&B") appeal the Order on the basis that they are not the Constructor and that the Constructor is the other party.

3 The Ministry took the position that Imperial Oil was the Constructor but indicated that it was also open to me to find that the Constructor was B&B. The Ministry did indicate that it was not of the view that there were two constructors in this matter, but rather that I must determine which of the Appellants was the Constructor.

II

4 The following facts are not at issue.

5 In the spring of 1991, plans for the SPARC EHT Revamp Project were approved by Imperial Oil. The plans were drawn up by a firm referred to in the hearing as "Tescar Engineering". Due to the estimated cost of the project, which was \$425,000.00, Imperial Oil decided to proceed with the project in three phases.

6 The first phase, at a cost of \$250,000.00, was completed in the summer of 1991 by "Tornado Insulation" and "Christopher Electric".

7 As Phase II of the project was estimated by Imperial Oil to be less than \$50,000.00, no "Notice of Project" was filed pursuant to [subsections 6\(1\)\(a\) & 6\(2\) of the *Occupational Health and Safety Act*](#). Those subsections require that a constructor file such a notice if the cost of a project is expected to exceed \$50,000.00.

8 In May of 1992, the bid package for Phase II of the project was sent out to potential bidders. B&B was the successful bidder and subsequently entered into subcontracting agreements with "VTC Industrial Coating" and "Tornado Insulation", to work on the project.

9 The project involved the removal of existing pipe insulation and heat tracing cables, the sanding and painting of the pipes, and the installation of new heat tracing cables and insulation.

10 Richard Brander, an electrician with B&B, commenced work on the project on August 17, 1992. He was joined on the site the next day by Gary Swart, an employee of Tornado Insulation. Mr. Swart and Mr. Brander were subsequently joined on the site by other workers who assisted with the work.

11 On September 16, 1992 Mr. Swart was asphyxiated when he was pinned between the basket of a "manlift" and overhead piping. An investigation revealed that the "dead man" pedal of the manlift had been tied down.

12 Phase II of the project was fully completed by October 9, 1992. Phase III of the project may or may not proceed next year.

III

13 There was some evidence to support Imperial Oil's argument that B&B was the Constructor and was responsible, in that capacity, for the activities which took place on the SPARC Phase II project site.

14 For example, B&B was responsible for supplying all the tools and safety equipment for the job. Also, it was B&B that selected the subcontractors and was responsible for paying them. However, Imperial Oil required that it be advised of the subcontractors and this information was to be indicated on the "General Work Contract" entered into by the Parties.

15 Imperial Oil issued a daily work permit for all the work which would be done on its premises on any particular day. The evidence showed that with regard to the SPARC project, only one permit was issued per day and that was to B&B.

16 Also, with regard to health and safety matters, the scope document describing the project (exhibit 7), dealt with "Potential Work Hazards" on page 4. It stated that it was the contractor's responsibility to ensure that all workers on the project complied with the requirements of the *Occupational Health and Safety Act* and be trained in Imperial Oil's own safety program. This program bore the acronym of "STUD" which stands for "Safety Training UpDate".

17 I find, however, that the evidence also showed that Imperial Oil retained a significant degree of control over the project.

18 Much of the control was exercised on behalf of Imperial Oil by Charlie Cole. Mr. Cole is the Research contract Coordinator for Imperial Oil and is trained as an electrician.

19 The evidence showed that before the project started, Mr. Cole had the pipelines to be worked on identified with red paint. It was Mr. Cole's evidence that he then met with Mr. Brander on August 17, 1992 and reviewed the scope of the work, the location of the lines, and the storage areas for the contractors' materials etc. They also reviewed the safety procedures to be observed and the safety equipment to be provided on site.

20 It was also established at that time that B&B would receive a work permit from Mr. Cole each morning and the subcontractors would work under the permit issued to B&B. These work permits were issued by Imperial Oil and every contractor coming on site was required to have one. This meant that every morning Mr. Brander would be required to advise Mr. Cole of the nature of the work they were performing that day, and Mr. Cole would approve it and issue a permit.

21 Mr. Cole also testified that on August 19, 1992 he attended at the site and noted that Mr. Swart was not wearing safety glasses. Mr. Cole brought this to Mr. Brander's attention and indicated that Mr. Swart would be removed from the site if this continued. Mr. Cole testified that he then monitored Mr. Swart's compliance over the next few days.

22 Mr. Cole's and Mr. Brander's evidence with regard to the nature and frequency of Mr. Cole's involvement with the project was consistent and indicated the following.

23 Mr. Cole would attend at the project on a daily basis to inspect the work done that day and to ensure that clean up was adequately done. On several occasions problems with some of the work were identified by Mr. Cole and subsequently corrected.

24 Mr. Cole would also attend the megger testing which was done on all the pipes prior to the insulation being put on. The test was to establish that all the heat tracers were connected to the power source.

25 In addition, Mr. Cole would be available to sort out any problems which arose and would recommend technical solutions from time to time. For example, when confronted with an unusually short tracer in the SPARC building, Mr. Brander asked Mr. Cole how to deal with it and then followed Mr. Cole's instructions.

26 Mr. Cole also testified that two or three other employees of Imperial Oil would assist him with the "process" questions which would arise and to which he did not know the answer. At one stage of the project, a steam tracer was uncovered in the course of the work, and it was removed by workers from Imperial Oil, as no one working with B&B had the required skills to do so.

27 Mr. Cole and Mr. Brander also testified that Imperial Oil provided the dumpsters for the project. Mr. Cole testified that one of the dumpsters was specifically ordered for B&B for the fiberglass and cardboard materials, and that B&B was authorized to use Imperial Oil's metal bucket.

28 I also heard a significant amount of evidence with regard to a sewer and repaving project which was underway in close proximity to the SPARC project. Most of the evidence, much of it conflicting, focused on whether the area in which work was being performed was isolated through the use of a barrier tape and other sorts of barriers.

29 Having heard a variety of evidence with regard to this issue, I find that a barrier tape was up for at least some of the project but not for all of it. In any event, I find that the project was separate and distinct from that performed by B&B.

30 Mr. Cole also testified that the "controllers" which control the tracers at source were installed as part of Phase I. It was also Mr. Cole who inspected the hook-up of the controllers during Phase I.

31 [Section 1 of the *Occupational Health and Safety Act*](#) defines a constructor as follows:

"constructor" means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer (emphasis mine)

32 A project is defined in [section 1](#) as follows:

"project" means a construction project, whether public or private, including,

(a) the construction of a building, bridge, structure, industrial establishment, mining plant, shaft, tunnel, caisson, trench, excavation, highway, railway, street, runway, parking lot, cofferdam, conduit, sewer watermain, service connection, telegraph, telephone or electrical cable, pipe line, duct or well, or any combination thereof, (emphasis mine)

(b) the moving of a building or structure, and

(c) any work or undertaking, or any lands or appurtenances used in connection with construction.

33 In my view, the purpose of requiring a "constructor" to have separate and distinct responsibilities from those of an "employer" is to ensure there is overall control of the safety aspects of a project. This is particularly important when elements of a project take place at different times or at different locations as I find was the case in this instance. Indeed, Mr. Cole, in cross-examination, agreed that the work could have all been done as one project, and that the work done in Phase I was very similar to the work done in Phase II.

34 However, B&B had no involvement with Phase I - just as Christopher Electric had no involvement with Phase II. Without some overall control, neither could be responsible for any problems arising out of the total project, either during the course of the various phases, or when the entire project is complete - and clearly someone must be responsible for the whole.

35 One clear example of the need for such overall control is the fact that the conductors which were critical to the operation of the heat tracers installed in Phase II were installed in Phase I. In order to ensure smooth follow-through, and to preclude problems in Phase II, Imperial Oil, through Mr. Cole, inspected the conductors and ensured they were operational.

36 I find that the level of control exercised by Mr. Cole on behalf of Imperial Oil goes beyond that of a prudent owner and reflects the need for overall control of the work done to complete the entire SPARC EHT Revamp Project.

37 In light of the above, I find that Imperial Oil Limited was the Constructor who undertook this project by itself and by more than one employer, which included B&B Enterprises and Christopher Electric.

V

38 Accordingly, the Inspector's Order #1 to Imperial Oil Limited, contained in Report No. 096341, is hereby affirmed.

39 Furthermore, the Inspector's Order #1 to B&B Enterprises, contained in Report No. 096341, is hereby rescinded.

Order accordingly.

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