

A Sign Of Relief For Owner-Employers?



ONSC upholds City of Sudbury's due diligence defence

In *R v Greater Sudbury (City)*, 2024 ONSC 3959, the Ontario Superior Court of Justice ("ONSC") dismissed an appeal by the Ministry of Labour, Immigration, Training, and Skills Development (the "Ministry") of a prior decision in 2018 acquitting the Corporation of the City of Greater Sudbury of various charges under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the "OHSA"). The decision is yet another, and possibly final, step in a six-year long legal saga that led to a split decision from the Supreme Court of Canada ("SCC") that worried owners, employers, and constructors of construction projects who feared the court had up-ended the industry's historical practice and understanding of the law.

In its recent decision, the ONSC reviewed the trial level decision through the lens of the factors articulated by the SCC as relevant to assessing due diligence, finding the City had made out a due diligence defence.

Background

On September 30, 2016, a pedestrian was struck while attempting to cross a street in Sudbury, Ontario. The City had entered into a contract with Interpaving Limited ("Interpaving") to repair a water main near the City centre. The contract stipulated that Interpaving would exercise control over the entire project and would be the project's "constructor". An Interpaving worker operating a road grader struck the pedestrian while she was crossing an intersection adjacent to the construction site. The worker was operating without signalers or police control, and without fencing in place intended to barricade the construction site from the public right of way.

Interpaving and the City of Sudbury were charged with violations of the OHSA. Interpaving pleaded guilty and the City proceeded to trial. The trial judge found that the City had not acted as employer and/or constructor on the project and further found in the alternative that if the City was an employer and/or constructor, it had exercised due diligence.

The court's finding on the City's status as employer and/or constructor was appealed and upheld by the ONSC, but set aside by the Ontario Court of Appeal ("ONCA") (discussed in our blog [here](#)). In a split decision, the SCC upheld the ONCA decision and remitted the matter to ONSC to consider the trial judge's finding that the City had acted with due diligence (discussed in our blog [here](#)). The SCC decision had significant ramifications as it held that a project owner (the City) retained

overlapping duties as an “employer” to ensure worker health and safety in the workplace, despite the owner having contracted with a third party to act as the project’s constructor.

Court’s Analysis

The ONSC reviewed the trial judge’s decision and reasoning and concluded that she had made no palpable and overriding error in finding that the City had acted diligently. The appeal judge’s review analysis was guided by the SCC’s comments at paragraph 61 of its decision, where it listed some of the relevant considerations when assessing due diligence, including¹:

1. the accused’s degree of control over the workplace or the workers there;
2. whether the accused delegated control to the constructor in an effort to overcome its own lack of skill, knowledge or expertise to complete the project in compliance with health and safety legislation;
3. whether the accused took steps to evaluate the constructor’s ability to ensure compliance with health and safety legislation before deciding to contract for its services; and
4. whether the accused effectively monitored and supervised the constructor’s work on the project to ensure that the prescriptions in health and safety legislation were carried out in the workplace.

The ONSC considered the trial judge’s analysis and concluded that the City:

1. Did not exercise control over the workplace. While City inspectors would attend the workplace from time to time, their role was limited to quality assurance and to ensuring the work was being performed by the constructor (Interpaving) in accordance with its contract.²
2. Overcame its own lack of skill, knowledge, or expertise by paying Interpaving to act as constructor for the project – a service it paid a premium for.³
3. Prior to entering the contract, evaluated whether Interpaving would be able to perform the work and enforce compliance with the health and safety legislation.⁴ Among other things, there was evidence that the City had previously worked with Interpaving on approximately 40 prior projects. Further, the City required any successful bidder on the project to ensure its workers completed NORCAT safety training.⁵
4. The City appropriately monitored and supervised the constructor’s work. For example, the City advised Interpaving of public complaints, identified signage and access issues, pointed out fencing deficiencies, and attended progress meetings.⁶

The ONSC expressly noted that the City had not, by its conduct, become a constructor on the project.⁷ This conclusion was consistent with the trial decision⁸ and the first appeal decision.⁹ The Court went on to highlight its agreement with the first appeal judge that the Ministry had “put the project under a microscope” in order to find some instances where the City may have overstepped its role and stepped into the shoes of the constructor.¹⁰

This result may come as a relief to many owners given the uncertainty created by the ONCA and the SCC decisions. However, whether or not a workplace party has made out due diligence remains a very fact-specific exercise. Despite the recent ONSC decision, it remains the case that an owner who has employees on a project for whatever purpose, will be considered to be an “employer” and in the event of charges under the OHSA, will bear the onus of demonstrating due diligence.

Footnotes

1. *R v Greater Sudbury (City)*, 2023 SCC 28 para 61 ("SCC Decision")
2. *R v Greater Sudbury (City)*, 2024 ONSC 395 para 27 ("Second ONSC Appeal"); *R v Greater Sudbury (City)*, Lische, J, August 31, 2018, Court File No. 4011-16-5534-02 para 89 (ONCJ) ("Trial Decision")
3. *Second ONSC Appeal*, para 29; *Trial Decision*, para 92.
4. *Second ONSC Appeal*, para 30;
5. *Trial Decision*, para 92, 98.
6. *Second ONSC Appeal*, para 31.
7. *Second ONSC Appeal*, para 35;
8. *Trial Decision*, para 103
9. *R v Greater Sudbury (City)*, 2019 ONSC 3285 para 29 ("Initial Appeal").
10. *Second ONSC Appeal*, para 35; *Initial Appeal*, para 31.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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