

Ontario, Canada Court Affirms City Lacked Control Of Workplace And Exercised Due Diligence, Upholding Acquittal Of OHSA Charges



In *R. v. Greater Sudbury (City)*, 2024 ONSC 3959, the Ontario Superior Court of Justice (OSCJ) dismissed an appeal of the trial judge's decision in which she acquitted the City of Sudbury (City) of various charges under the *Occupational Health and Safety Act (OHSA)*. The OSCJ affirmed the trial court's finding that the City exercised due diligence, and therefore was not liable under *OHSA* for a traffic accident caused by a general contractor.

Background

In 2015, the City began a construction project. The City was the owner of the project, but a general contractor was hired to be the project's "constructor." None of the City's employees was involved in the construction of the project; however, the City occasionally sent its employees to inspect the project's quality.

Four months after construction began, an employee of the general contractor, while driving a construction vehicle, fatally injured a pedestrian who was crossing the street at a traffic light. No measures were taken at the worksite to protect pedestrians.

The City and general contractor were charged with violations of *OHSA*. The City was charged as a "constructor" and "employer" under *OHSA*.

The general contractor pleaded guilty and was fined; the City pleaded not guilty and the matter went to trial.

Procedural History

Trial

At trial, charges against the City were dropped based on a finding that it was not a "constructor" or "employer." The general contractor was the "constructor" and the City was an "employer" only with respect to its employees who were occasionally sent to inspect the project.

Ontario Superior Court of Justice

An appeal to the OSCJ was dismissed and the decision of the trial judge was upheld.

Court of Appeal for Ontario

The matter was appealed to the Court of Appeal for Ontario (OCA), which concluded that because the City “employed one or more workers at the project site” it was an “employer” under *OHSA*. The court then ordered that the matter be remitted to the OSCJ so that it could decide whether the City acted with due diligence, and if it did not, what its penalty or sentence should be. The City appealed the OCA’s decision to the Supreme Court of Canada (SCC).

Supreme Court of Canada

As the SCC was equally split 4:4, there was no majority decision and the appeal was dismissed. Upon dismissing the appeal, Justice Martin upheld the OCA’s order remitting the question whether the City could establish the due diligence defence to the OSCJ.

A more detailed analysis of the SCC decision can be found [here](#).

OSCJ

The appellant argued that, given the City’s “virtually outright control over the workplace and the workers within it,” it failed to establish that it had exercised due diligence. The court rejected this assessment, finding that:

- The City’s “sweeping powers” had never been exercised.
- Although the City provided and paid for the Greater Sudbury Police Service officers, the general contractor controlled “the need for their assistance and the direction for their duties.”
- Although the City had a process for receiving complaints about the construction project, the general contractor was responsible for responding to these complaints.

The court relied heavily on the SCC’s decision in which Justice Martin emphasized control should be considered at the “due diligence” stage of the analysis and an accused’s lack of control may suggest that it took all reasonable steps in the circumstances. Justice Martin outlined the following four considerations for determining whether due diligence was exercised under s. 66(3)(b) of the *OHSA*:

... (i) the accused’s degree of control over the workplace or the workers there; (ii) 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 the Regulation; (iii) whether the accused took steps to evaluate the constructor’s ability to ensure compliance with the Regulation before deciding to contract for its services; and (iv) whether the accused effectively monitored and supervised the constructor’s work on the project to ensure that the prescriptions in the Regulation were carried out in the workplace.

The court emphasized that the evidence set out below was considered by the trial judge and formed the basis for her conclusion that the City had exercised due diligence:

- The City's "quality control inspections in order to see that the contractual requirements were being satisfied" did not constitute control over the workplace.
- Because the City lacked "skill, common knowledge or expertise to complete the project in compliance with the Regulation," it paid a premium to the general contractor, which had such expertise. Accordingly, the City delegated control to the general contractor to overcome its own lack of skill, knowledge or expertise.
- The City assessed the general contractor's capacity to perform the work safely. In the five years before the accident, the City used the general contractor on 40 different projects, and required the general contractor's employees to have safety awareness training for City Projects.
- The City monitored and supervised the general contractor's work by notifying it about the traffic concerns on September 15, 2015; by taking complaints from the public and making the general contractor aware of them; by raising concerns about signage and insufficient public access to crosswalks; by informing them when concerns were expressed about fencing; and by attending periodic progress meetings.

The court held that, because the trial judge made no palpable or overriding error, it could not interfere with her findings or her conclusions based on them. Accordingly, the court dismissed the appeal.

Bottom Line for "Owner/Employers" of Construction Sector Projects

Although the SCC decision in *R. v. Sudbury* established that the "owner/employer" of a construction sector project can be liable for *OHSA* violations of its contractor, the recent decision of the OSCJ provides that they can still avoid such liability by successfully establishing a due diligence defence under s. 66(3)(b) of *OHSA*.

Accordingly, on a prosecution of an "owner/employer" of a construction sector project for failure to comply with certain provisions of *OHSA* (including s. 25(1)(c)), *i.e.*, failure to ensure that prescribed safety measures and procedures were taken at the site of the construction project), it will be a defence for the accused to prove that every precaution reasonable in the circumstances was taken on the site of the construction sector project to comply with the provision.

"Owner/employers" on construction sites that wish to assert a due diligence defence under s. 66(3)(b) of the *OHSA* are encouraged to rely on the four-consideration framework outlined by the SCC and relied on by the OSCJ.

Finally, the analysis set forth in the SCC framework may have implications for the due diligence defence under the *OHSA* beyond the construction sector. This may be the case, for example, in circumstances where, on a day-to-day basis, the employee is under the supervision of a party other than their employer, *e.g.*, a staffing agency "employee" while they are staffing a third-party client of the staffing agency.

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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