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# *A New (Final?) Chapter in the R v City of Sudbury Saga ~*
# City acquitted of all OHSA charges because it exercised due diligence

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In what is likely to be the final chapter in the long *R v City of Sudbury* saga, the Ontario Superior Court of Justice upheld the acquittal of the City of Sudbury ("City") from all *Occupational Health and Safety Act* ("OHSA") charges on the basis the City exercised due diligence.[1]

This protracted court battle, which we last discussed in our January 2024 newsletter, has attracted considerable attention and concern because the Supreme Court of Canada found the City, a construction site "owner," was also an "employer" under the OHSA and, in so doing, exposed owners to expanded OHSA liability.

The Supreme Court addressed only whether the City was an employer for purposes of the OHSA. It did not address whether the City was, in fact, liable for the alleged OHSA breaches. The Ontario Superior Court has now answered that question, 'no,' agreeing with the initial trial judge that even if the City was an employer, it should be acquitted of all OHSA charges because it exercised due diligence in the circumstances.

This is welcome relief for construction project owners across the province. So, let's take a closer look at what the City did to meet the test of due diligence.

## What happened?

The City, the owner of a construction project, contracted with a constructor, Interpaving Limited ("Interpaving"), to repair a water main and repave streets. Interpaving was the general contractor on the

[1] *R v Greater Sudbury (City),* 2024 ONSC 3959.

project and provided its own employees to perform the work. The City sent two quality control inspectors to inspect the project.

During construction, an Interpaving employee tragically struck and killed a pedestrian with a road grader. A Ministry[2] investigation concluded that, contrary to the requirements of the OHSA's Construction Projects Regulation, there was no fence to separate the construction work from the public and no signaller present. The Ministry charged both Interpaving and the City as "employers" under the OHSA. Interpaving pled guilty to the charges before trial.

## Earlier debate about whether the City was an "employer"

The trial judge found the City was an owner of the project but not an employer, essentially because it would be unreasonable to require an owner (the City) to be responsible for workers, hired by a constructor (Interpaving), when the City has no control over those workers.

The Crown successfully appealed that issue to the Court of Appeal for Ontario which found the City to be an employer. The Supreme Court of Canada upheld the decision of the Court of Appeal applying a "belt and braces" approach.[3] Specifically, that in order to protect health and safety in the workplace the OHSA places overlapping responsibility on various workplace actors. As such, a project owner will be an employer for the purpose of the OHSA if it employs workers on a site or contracts for the service of workers on the site, regardless of 'control' over the workers.

This interpretation is consistent with the plain language definition of employer under the OHSA, which does not import a requirement of control. That said, the degree of control may be relevant to a due diligence defence.[4] Within this context, four judges of the Supreme Court identified the following non-exhaustive considerations regarding whether an owner/employer exercised due diligence:

> Relevant considerations may include, but are not limited to, (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.

## New decision on liability

Fast forward and the question of whether the City was, in fact, duly diligent, wound its way back to court. Assessing the factors identified by the Supreme Court, the Superior Court agreed with the trial judge that the City had been duly diligent and, as such, was not guilty of any offence under the OHSA.

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[2] Ministry of Labour, Immigration and Skills Development
[3] 2023 SCC 28.
[4] For an in-depth review of this issue, see our January 2024 newsletter.

***Control over the workplace and delegation***: The Crown argued the City had "control" over the workplace in a variety of ways. The court disagreed and found the City did not have control over the workplace and had delegated control to Interpaving.

First, the Crown argued the City had inspectors onsite, overseeing the project. The court found that although the City did conduct quality control inspections to see that contractual requirements were being satisfied, its inspections did not constitute control over the workplace and the workers on it.

The Crown noted the City was responsible for arranging for paid duty police officers to direct traffic. The court rejected that argument on the basis the officers were present at Interpaving's request, and Interpaving directed their activities. The City simply arranged for and paid the officers.

The Crown noted the City retained contractual authority to fire workers found to be incompetent, and to suspend work on the project for any reason. The court found that while the City had this power there was no evidence it had ever been exercised.

Finally, the Crown pointed to the fact the City had a process in place to receive complaints about the project. However, the evidence showed it was the responsibility of Interpaving to respond to those complaints, which it did.

All told, the court found the City had delegated control to Interpaving to overcome the City's own lack of construction skill, knowledge or expertise and had paid a premium to do so. A City employee testified at the trial:

> …we are not familiar with what it means to be a constructor. We don't have the resources or the capacity or the capabilities. It's very important to us that our general contractors understand what it means to be the constructor and take responsibility for those activities. It's not a situation to be taken lightly, we understand that. We understand that there's a premium because they have the resources and the capability and the understanding of what it means to be the constructor.

***Whether the City took adequate steps to evaluate Interpaving's ability to do the work in compliance with OHSA:*** The evidence was that the City had taken such steps. In particular, the City:

- Contracts out road building and uses a contract that included general conditions developed by a group of municipalities in cooperation with the Ministry of Transportation.
- Had used Interpaving on approximately 40 projects in the preceding five years.
- Required Interpaving employees to have specific safety training designed for City projects.

***Whether the City monitored and supervised Interpaving's work:*** The court pointed to several examples in which the City monitored, notified, and met with Interpaving, regarding safety issues, including complaints from the public, and regarding signage and fencing. All of this, the court found, indicated the City had acted with due diligence.

Perhaps most tellingly, the court agreed with the initial trial judge that the Ministry had "*attempted to put the 'project under a microscope' in order to bring about its objective*." The Crown has 30 days in which to seek leave to appeal to the Court of Appeal for Ontario.

## Takeaway for employers

For a construction project owner, it remains troubling that an owner can be considered an "employer" under OHSA, even in the absence of control over workers. However, this new Superior Court decision provides some guidance to owners regarding their liability under OHSA.

A project owner must balance two considerations. On one hand, the owner must exercise the appropriate level of due diligence over a project. On the other hand, taking too much control *may* tip the balance such that a court may find an owner has actual control of the workplace, beyond merely delegating, supervising and monitoring the constructor. This is a delicate balance.

If an owner/employer does not control the project and has instead delegated that control to a constructor, the due diligence analysis will consider the employer's diligence in selecting, evaluating, supervising and monitoring the constructor. This is a case-specific analysis. At the very least, a project owner should carefully consider and maintain records of the following:

- The reason(s) a constructor was selected for a job, including:
  - its skill, knowledge, expertise and qualifications
  - its health and safety training and supervision protocols
  - its health and safety record
  - any prior experience with the owner

- The expectation, understood to all parties, that all health and safety concerns or deficiencies will be directed to the constructor to be addressed, and that the constructor will be accountable for complying with OHSA

- Any contractual documents that set out control of the project and the powers and responsibilities of each party.

**To learn more and for assistance assessing liability at any time prior to or during a construction project, or if an OHSA charge is laid, contact the health and safety lawyers at Sherrard Kuzz LLP.**

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