Ontario Superior Court Rules That City Of Sudbury Meets Due Diligence Standard

Last year, the Supreme Court of Canada sent shockwaves through the construction sector when it released its decision in *R v Greater Sudbury (City)*. The remarkable 4 – 4 split decision that threatened to upset decades-long practices of risk management between owners of construction projects and general contractors.

On August 23, 2024, the Ontario Superior Court of Justice released a subsequent decision in this saga, which may give owners, constructors and other stakeholders in the construction sector a measure of clarity as they seek to maintain and achieve compliance with the *Occupational Health and Safety Act (*"OHSA").

Case history

The *Sudbury* case has been moving through the Ontario Court system for most of the past decade. Those who have been tracking this case will recall that the Supreme Court's 2023 decision dealt with a very narrow question: whether the City, as "owner" of a specific project which had delegated control to a General Contractor ("GC"), could be charged as an "employer" for violations of the OHSA.

Our extensive coverage of the Supreme Court's split decision

is linked here. In sum, the Supreme Court determined:

a. The City was an "employer" for the purposes of the OHSA because it sent quality control staff to the project on an occasional basis.
b. Because the City was an "employer," it was responsible for meeting the extensive employer-specific standards for compliance under the OHSA, which include taking "every precaution reasonable under the circumstances" to keep all workers safe at a workplace.
c. Because an unsafe construction site led to a fatality on the project, the Supreme Court ruled that the City had failed to meet the employer-specific standards under the OHSA and was therefore guilty of an offence under the OHSA.
d. Under Ontario's strict liability laws, the only defence available to the City was to argue that it had met the standard of "due diligence" for the purposes of the OHSA.

Notably, the first adjudicator that heard the *Sudbury* decision at the start of this saga was the Ontario Provincial Court of Justice. The Provincial Offences Court trial judge found that if the City was an employer and it had breached its obligations under the OHSA, it had acted with due diligence and therefore ought to be acquitted of all charges.

The provincial offences appeal court (Ontario Superior Court of Justice) and subsequent adjudicators involved in this case (Ontario Court of Appeal, Supreme Court) did not address whether the due diligence standard had been met.

Accordingly, the matter of whether or not the City of Sudbury met the standard of "due diligence" for the purposes of the OHSA, was remitted back to the provincial offences appeals court (the Ontario Superior Court of Justice) for adjudication. Before remitting the case, the Supreme Court listed a number of factors which could inform the lower

Court’s assessment of whether the City met the standard of due diligence under the OHSA:

a. Did the accused exercise a degree of control over the workplace or the workers?
b. Did the accused delegate control to the GC / constructor in an effort to overcome its own lack of skill, knowledge or expertise in accordance with the OHSA?
c. Did the accused take steps to evaluate the GC / constructor’s ability to ensure compliance with the OHSA before deciding to contract for its services?
d. Did the accused effectively monitor and supervise the GC / constructor’s work on the project to ensure that the prescribed compliance requirements under the OHSA were carried out at the workplace?

Superior Court finding: Due diligence standard met

Under Ontario’s OHSA, an employer must, at a minimum, take every reasonable precaution reasonable in the circumstances to protect workers’ health and safety. This “due diligence” standard requires employers to identify potential hazards, provide or ensure the provision of adequate training, ensure proper equipment is used, enforce safety policies, etc. Employers must anticipate risks and act proactively to prevent accidents. If an incident occurs, an employer must demonstrate that all reasonable measures were taken to avoid it, reflecting a strong commitment to maintaining a safe workplace.

Reiterating the submissions it made before the trial judge in August 2018, the Crown argued that the City had “virtually outright control over the workplace and the workers within it.”

In support of this argument, the Crown pointed to the fact that the City maintained a trailer on the site and its staff

attended the site daily, in addition to progress meetings with the contractor from time to time. The Crown also pointed to contractual control the City had in its ability to terminate workers on the Project, compel the GC to cooperate with other contractors, and suspend work on the Project.

Ultimately, drawing largely on the evidence put before the trial judge in 2018, the Superior Court rejected the Crown's arguments, addressing each factor suggested by the Supreme Court:

a. **Control**: While the City did conduct quality control inspections, the Court found such inspections did not constitute control over the workplace and workers on it. The Court accepted, for example, that even if the City inspectors uncovered safety issues with the job site, the issues were reported to the GC by the City, and the GC was exclusively responsible for rectification.
b. **Relative Skill vis-à-vis the GC:** The City did in fact delegate control to the GC to overcome its own lack of skill, common knowledge or expertise to complete the Project, and it paid a premium for this expertise.
c. **Bona fide assessment of GC Capabilities:** The City had properly assessed the capacity of the GC to perform the work safely. The City had used the GC on approximately 40 different projects in the five years prior to the accident, and had required the GC's employees to have specific safety awareness training.
d. **Monitoring:** Finally, the Court accepted that the City did effectively monitor and supervise the GC during the Project, pointing to examples of the City notifying the GC of safety concerns, public complaints and attending periodic progress meetings.

A key factual point that the Superior Court noted is worth quoting:

[35] *If the City had exercised the amount of control over the*

project that was urged by the [Crown], the City would have been a constructor, something that has been rejected at every level of appeal.

The Court conclusively found, therefore, that the trial judge did not make any overriding errors in her original decision regarding "due diligence." The Superior Court confirmed that the City had met the "due diligence" standard under the OHSA and reiterated that the City was acquitted of all charges for the accident.

Key takeaways

At this time, it appears that even if an "owner" is treated in law as an "employer" for the purposes of the OHSA, it may still be able to manage risk of exposure by deploying the due diligence practices adopted by the City – practices that have been industry standard at large projects for several decades:

a. Ceding effective control of a project to a duly appointed and qualified GC.
b. Engaging in a thorough and rigorous assessment process when selecting a duly qualified GC.
c. Monitoring the project and flagging issues for rectification by the GC.

Stay tuned for future developments including further coverage if and when this case is appealed.

Read the original article on GowlingWLG.com

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.

Authors: Sahil Shoor, Tushar Anandasagar, Peter W. Vlaar

Gowling WLG