R v Greater Sudbury (City) – A Warning To Construction Project Owners

The Ontario Occupational Health and Safety Act (the "Act") stands as a cornerstone of health and safety legislation in Ontario. The Act protects the well-being of workers across various industries by establishing clear guidelines and responsibilities for employers, contractors, and other workplace entities.

However, in the modern landscape of increasingly complex construction projects and multi-level contractual arrangements, it can be difficult to determine which party holds responsibility for ensuring worker safety under the Act.

The assumption that liability rests solely with the entity that has the most immediate, direct control over the workplace conditions has been rebuked by the Supreme Court of Canada in the recent decision *R. v. Greater Sudbury (City)*, which sheds new light on the complex issue of overlapping duties between employers and contractors under the Act.

THE FACTS & LEGISLATIVE HISTORY

The City of Sudbury (the "City") had hired the contractor, Interpaving Limited ("Interpaving"), to repair a water main in downtown Sudbury. In a tragic incident, an Interpaving employee, while reversing in a road grader, accidentally struck and killed a pedestrian. Several required safety procedures were absent from the site, including a fence between the construction project and the public intersection, and a signaller to assist the employee in reversing the vehicle safely.

Interpaving was tried and convicted for breaching the duty of an employer under sections 25(1)(c) and 66(1)(a) of the Act:

Section 25(1)(c): *An employer shall ensure that … the measures and procedures prescribed are carried out in the workplace.*

Section 66(1)(a): *Every person who contravenes or fails to comply with … a provision of this Act or the regulations … is guilty of an offence and on conviction is liable to a fine of not more than $500,000 or to imprisonment for a term of not more than twelve months, or to both.*

However, the subject matter of the Supreme Court decision involved the potential liability of the City itself, which was prosecuted under similar charges for failing, as an employer, to ensure compliance with the safety measures. The City acknowledged that it was the owner of the project and had sent its quality control inspectors to the site to oversee Interpaving's contractual compliance. However, it argued that it could not be the "employer" under the Act due to a lack of direct, immediate control over the repair work and workplace conditions. After all, it had delegated that control to Interpaving as the contractor.

The trial judge agreed with the City, stating that the duties of the employer properly rested with Interpaving as the entity with direct control over the work and workers. However, the Ontario Court of Appeal overturned this decision, ruling that the City fulfilled the definition of an 'employer' and remitting the question of due diligence back to the lower court.

THE DECISION

The Supreme Court's decision was split 4-4, effectively upholding the Court of Appeal's ruling. Under Section 1(1) of the Act, the definition of "employer" includes an entity that "contracts for the services of one or more workers". In other words, hiring workers through an intermediary contractor does not change the status of an entity as an employer.

The Supreme Court decided that the lack of any "control" requirement in the definition of "employer" was purposeful on the Legislature's part. Rather than determining which entity (e.g., owners, contractors, supervisors, etc.) had the most responsibility over a worker's safety, the Act instead distributes the safety duties among all qualifying entities. This "belt and braces" approach of concurrent, overlapping duties aims to eliminate the defense of blaming another entity for safety failures, and instead ensure that multiple parties are responsible for safety.

Where any prescribed measures and procedures under the Act or its regulations are not followed, every "employer" under the Act has breached section 25(1)(c) and is therefore liable under section 66(1)(a), unless a "due diligence" defence can be established as per section 66(3)(b):

Section 66(3)(b): *On a prosecution for a failure to comply with … clause 25(1)(b), (c), or (d)… it shall be a defence for the accused to prove that every precaution reasonable in the circumstances was taken.*

The Supreme Court held that the proper time to consider control is in analysing the due diligence. Rather than requiring the prosecutor to establish the employer's control over the work and workers, it is on the employer to show that a lack of control affected which reasonable steps could be taken in the circumstances.

In this case, the City acknowledged that it directly employed both Interpaving itself and the quality control inspectors who had visited the site. As such, the Supreme Court held that it met the definition of "employer". The lack of necessary safety measures meant that the City breached section 25(1)(c), and the Supreme Court remitted the question of whether the City had exercised the proper due diligence back to the lower courts.

KEY TAKEAWAYS

This landmark decision has a number of key takeaways for project owners.

The definition of “employer” under the Act is broad and not dependent on the common law notions of control. Any owner that retains a contractor to complete work is likely to fall within the definition of “employer”. This will almost certainly result in more prosecutions against project owners by the Ministry.

From a regulatory risk perspective, the Supreme Court’s decision placed many projects into unchartered waters. While a due diligence defence is available to project owners and the Supreme Court offered some commentary on how this defence would apply to project owners, there is still a lack of clarity and limited precedent as to what project owners need to do to prove that they acted with due diligence.

Project owners should be assessing their own policies and practices to ensure that they are doing whatever possible to ensure that safety standards are met on projects. At the same time, construction contracts need to clearly place responsibility and control for health and safety matters with the contractor and language that allows owners to seek indemnification for prosecutions of this nature are advisable.

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.

by Christophe Shammas
Loopstra Nixon LLP