THE END OF A SAGA: APPLICATION OF DUE DILIGENCE ASSESSMENT CRITERIA FOR "EMPLOYERS" IN R V. SUDBURY UPHELD

Posted on April 9, 2025

Categories: Insights, Publications

Introduction

On March 31, 2025, the Ontario Court of Appeal (the "**Court of Appeal**") issued its long-awaited and highly anticipated decision, denying the request by the Ministry of Labour, Immigration, Training and Skills Development's (the "**Ministry**") for leave to appeal[1] the 2024 Ontario Superior Court of Justice's ("**Superior Court**") decision in *R v Greater Sudbury*[2].

As previously considered in our 2024 bulletin available here, the Superior Court held that the City of Greater Sudbury ("**Sudbury**"), as an employer under the Ontario *Occupational Health and Safety Act*[3] (the "***OHSA***"), acted with due diligence, despite the fatal accident that occurred at one of its project sites.

As a result of the Court of Appeal's denial of the Ministry's leave to appeal, the Superior Court's findings and the resulting acquittal of several charges against Sudbury under the *OHSA* have been upheld, which should provide useful guidance for the owners, constructors, and employers in the construction industry together with improved certainty.

Background

Sudbury contracted with a general contractor, Interpaving Limited ("**Interpaving**"), to carry out a watermain repair project (the "**Project**"), with Interpaving acting as the "constructor" under the *OHSA*. Following a fatal accident with a pedestrian and a grader operated by an Interpaving employee, the Ministry charged Sudbury with multiple *OHSA* violations, arguing that Sudbury was considered an "employer" under the OHSA. Sudbury had inspectors on-site to oversee the project's progress and quality but did not control the Project site. Interpaving controlled the Project site.

The aftermath of six years of litigation led to the following findings from the Superior Court and Court of Appeal:

1. Sudbury was an "employer" for the Project under the OHSA because, among other things, it contracted with Interpaving for performance of construction work at the Project site and it employed inspectors who performed quality control and monitored progress at the Project site;[4]
2. Sudbury, as an "employer", exercised the due diligence required of a project owner with "employer obligations".[5] In agreeing with the Ontario Court of Justice's findings, the Superior Court reviewed the four non-exhaustive factors outlined in the Supreme Court of Canada's decision[6]:

   Sudbury's degree of control over the workplace and workers,

   - whether Sudbury delegated control to Interpaving in an effort to overcome its own lack of skill, knowledge or expertise to complete the Project in compliance with the *OHSA*,
   - whether Sudbury took steps to evaluate Interpaving's capacity for complying with the *OHSA*, and
   - whether Sudbury effectively monitored and supervised Interpaving's work on the Project to ensure that the prescribed actions in the *OHSA* were carried out in the workplace.

Our bulletin discussing the Superior Court's analysis of each of the above factors and their implications to owners and other employers is available here .

Leave to Appeal

The Ministry appealed the Superior Court's findings to the Court of Appeal. The Court of Appeal rejected the Ministry's request for leave to appeal, stating that while the victim's situation was tragic, this was not one the exceptional cases presenting issues of broad public importance that would justify further appeal.

Key Takeaways for Employers

Construction project owners must be aware that they will likely be considered "employers" under the *OHSA* and must demonstrate due diligence without exercising "hands on" control that would effectively result in the owner adopting the role of "constructor" under the *OHSA*. Whether or not a project owner has been diligent as an employer, however, still remains a fact-specific, case-by-case assessment.

When owners exercise reasonable care and due diligence, they are less likely to be found liable for the actions or failures of the "constructor", other contractors and subcontractors, and their respective employees or other parties over whom the project owners exercise no control.

Owners or other stakeholders that may be considered "employers" under the *OHSA* can take comfort in knowing that the 2024 Superior Court decision was upheld, as that decision, along with the series of related decisions issued over the past six years, provides valuable guidance on how to successfully exercise due diligence for health and safety on a construction project. Specifically, the four factors considered by the

Supreme Court of Canada and later applied by the Superior Court, while not exhaustive, provide helpful insights on what could be evaluated in each case-by-case assessment of an owner's employer obligations and how the project owners should arrange their projects to best protect themselves from regulatory charges and prosecution.

If you have any questions relating to the above, please do not hesitate to contact a member of the Employment & Labour Relations Group.

[1] His Majesty the King in Right of Ontario (Ministry of Labour, Immigration, Training and Skills Development) and The Corporation of The City of Greater Sudbury; the unpublished decision can be found here.
[2] *R v Greater Sudbury (City)*, 2024 ONSC 3959 [*2024 Superior Court Appeal*].
[3] *Occupational Health and Safety Act* R.S.O. 1990 c. 0.1 [*OHSA*].
[4] *Ontario (Labour) v Sudbury (City)*, 2021 ONCA 252 at paras 10 and 13 [*ONCA Decision*]; Appeal dismissed in *R v Greater Sudbury (City)*, 2023 SCC 28 [*SCC Decision*].
[5] *2024 Superior Court Appeal* at para 34.
[6] *SCC Decision* at para 61.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.