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Recent Court Decision Provides Guidance for How Owners Can Act With Due Diligence in the Context of OHSA Charges

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Overview:

A decision that was recently released by the Ontario Superior Court of Justice ("**SCJ**") provides some useful guidance to the construction industry on what it means for construction project owners to act with due diligence in the role of "employer" on a construction project under the Ontario *Occupational Health and Safety Act*[1] ("**OHSA**"). In *R v Greater Sudbury (City)*[2], the SCJ dismissed the Ministry's appeal, confirming that the City of Greater Sudbury (the "**City**") acted with due diligence despite a tragic accident that occurred on a City construction project on September 30, 2015.

The SCJ stated that to assess whether an employer can rely on the due diligence exemption under the OHSA, a court should consider the following non-exhaustive factors:

i. the employer's degree of control over the workplace or the workers there;

ii. whether the employer 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 employer 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 employer 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.

Below is a short description of the facts of the case, the procedural history, and the key takeaways from the SCJ's recent decision.

Facts:

The City and Interpaving Limited ("**Interpaving**") entered into a contract to conduct repairs to a watermain. Under the contract, Interpaving was to assume control over the construction project, including assumption of the role of "constructor" under the OHSA. By contract, Interpaving was therefore responsible for ensuring that the requirements of the OHSA were met. The City, not unusually for a project of this kind, also had quality control inspectors occasionally attending the project site.

On September 30, 2015, a woman was crossing the street at an intersection within the construction zone when she was killed by a

road grader operated by an employee of Interpaving. Following the incident, the Ministry of Labour (the "**Ministry**") charged the City and Interpaving as "employers" and/or "constructors" under the OHSA. Interpaving pled guilty but the case with respect to the charges against the City proceeded to trial.

This was the beginning of a long and complex procedural history to determine whether the City was considered an employer within the meaning of the OHSA and whether it exercised the required due diligence during the project.

Procedural History:

a) Ontario Court of Justice:

The trial judge found that the City did not exercise the level of control required to be considered a constructor and/or an employer on the project. The trial judge further stated that even if the City was considered an employer, the court was satisfied that it exercised the level of due diligence required by the OHSA.

The Ministry appealed this decision.

b) SCJ's First Decision[3]:

In its appeal, the Ministry argued that the trial judge made a legal error in the interpretation of the definitions of constructor and employer under the OHSA. The Ministry further argued that the trial judge misinterpreted the law and binding jurisprudence regarding the due diligence requirement under the OHSA.

In dismissing the appeal, the SCJ agreed with the trial judge's assertion that the City did not exercise enough control to be considered a constructor. Rather, the SCJ stated that the City acted in accordance with the contract, under which Interpaving was to assume the role of constructor and the City was to oversee Interpaving's performance. The SCJ concluded that considering the City as constructor and/or employer under the circumstances "*would change substantially what has been the practice in Ontario on construction projects*."

It is important to note that the SCJ only made findings on whether the City was considered an employer within the meaning of the OHSA, but not on the issue of due diligence.

The Ministry appealed this decision.

c) Ontario Court of Appeal[4]:

The Ontario Court of Appeal ("**ONCA**") concluded that the City was considered an employer within the meaning of the OHSA and, as a result, was liable for the violation under the OHSA that was associated with the accident unless the City could establish a due diligence defence. In its reasoning, the ONCA noted that the OHSA must be interpreted "*generously rather than narrowly*" to achieve its purpose of protecting employees' health and safety. The ONCA found that to be considered an employer it was sufficient for the City to have employed one or more workers at the project site (which it did by virtue of its quality control inspectors). The ONCA also found that the exemption in the OHSA that precludes an owner from becoming a constructor simply by engaging a person to oversee quality control does not preclude owners from becoming employers.

The ONCA did not make a decision on whether the City acted with due diligence as the appeal was solely based on the SCJ's findings on whether the City was an employer under the OHSA.

The City appealed this decision.

d) Supreme Court of Canada[5]:

The City's appeal before the Supreme Court of Canada ("**SCC**") resulted in an uncommon 4:4 split decision, which was released in late 2023. Due to the split decision, the appeal was dismissed and the ONCA's interpretation of an employer within the meaning of the OHSA therefore stood.

The SCC did not rule on the question of whether the City acted with due diligence. This has left project owners, and others in the construction industry, with a fair bit of uncertainty as to how owners should try to manage the risk that is attendant with being classified as an "employer" of a construction project under the OHSA. The SCC directed that the issue of whether the City acted with due diligence was to be decided by the SCJ, which was to hear the Ministry's initial appeal of the trial judge's decision on the issue.

e) SCJ's Second Decision:

In August 2024, the SCJ released its decision on the Ministry's initial appeal of the due diligence question. In dismissing the appeal, the SCJ considered the four factors set out above. The SCJ concluded that the City acted with due diligence for the following reasons:

i. The City's exercise of its overseeing powers as required under the contract, including quality control inspections, did not constitute control over the construction site and the workers.

ii. The City appropriately paid a premium to Interpaving for its expertise knowing that the City had limited knowledge of the role of a constructor and its responsibilities.

iii. The City had properly assessed Interpaving's ability to perform the work by ensuring that Interpaving's employees had the appropriate safety certifications and that Interpaving satisfied the requirements of a constructor under the OHSA.

iv. The City had properly monitored and supervised Interpaving's work. On numerous occasions, the City relayed the public's safety concerns to Interpaving and it attended several progress meetings.

Analysis:

The recent SCJ's decision provides some needed guidance to the industry on what a project owner, in its likely role as an "employer" of its construction project, should be doing to ensure that it is acting with due diligence. Navigating the potential liability established by the *R v Sudbury* line of case law still remains a challenge for parties in the industry, including given the fact that the application of these principles will be a facts-specific exercise in each case. However, it will be prudent for project owners to consider the issues raised by the SCJ and to ensure they have in place the proper procedures and practices to put themselves in the best position possible to make out a due diligence defence. It may be particularly challenging for unsophisticated project owners of smaller projects who may not be familiar with the law on this issue but may nevertheless remain "employers" within the meaning of the OHSA and attract the potential liability that is associated with that role.

Please feel free to contact the authors if you have any questions.

[1] *Occupational Health and Safety Act* R.S.O. 1990 c. 0.1

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

[3] *R v Greater Sudbury (City)*, 2019 ONSC 3285

[4] *Ontario (Labour) v Sudbury (City)*, 2021 ONCA 252

[5] *R v Greater Sudbury (City)*, 2023 SCC 28

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