MARGIE STRUB
CONSTRUCTION LAW

2001-2300 Yonge Street
Mailbox 2331
Toronto, Ontario M4P 1E4

T: 647.792.0010
F: 855.940.4101

Acting with Due Diligence as an Owner under the OHSA

Key Takeaways

The Ontario Superior Court of Justice recently provided insight into what steps an owner must take to establish a defence of due diligence and avoid liability under the Ontario *Occupation Health and Safety Act,* R.S.O. 1990, c. O.1 ("***OHSA***").[1]

Last year, the Supreme Court of Canada greatly expanded the legal liability of owners who engage a constructor on their project in the decision of *R v Greater Sudbury (City)*.[2] In short, the Supreme Court ruled that owners who engage a "constructor" are "employers" under the *OHSA* and, therefore, are liable for all health and safety violations that occur throughout the course of a project. You can find our previous article about the Supreme Court's decision here.

The Supreme Court held that owners could avoid liability under the *OHSA* by demonstrating due diligence. While the Supreme Court identified principles for lower courts to apply as part of the due diligence analysis, the Court ultimately remitted to the Ontario Superior Court of Justice the question of whether the City of Greater Sudbury ("**City**") acted with due diligence.

The Superior Court's recent decision, which applies the principles identified by the Supreme Court, provides important insight as to how courts in Ontario will assess whether an owner has acted with due diligence under the *OHSA*. Discussed below, the Superior Court confirmed the trial decision of the Ontario Court of Justice that the City acted with due diligence.[3]

Background

The City contracted Interpaving Limited ("**Interpaving**") to repair a watermain. The contract provided that Interpaving would assume control over the entire project, including the role of "constructor" under the *OHSA*.

A pedestrian was struck and killed while attempting to cross the street. No fence was erected between the project and public intersection and no signaller was on site as required by Construction Projects, O. Reg. 213/91 (the "***Regulation***"). The Ministry of the Attorney General ("**MAG**") charged the City with, amongst other things, being an employer under s. 25(1)(c) for failing to ensure that appropriate safety measures were in place.

As discussed in our previous article, the Supreme Court found that the City was an "employer" under s. 1(1) of the *Regulation* for various reasons. After finding that the City had breached certain health and safety measures prescribed by the Regulation, the Court remitted the matter back to the Superior Court to determine whether the City had nonetheless acted with due diligence.

In remitting the matter back to the Superior Court, the Supreme Court identified that relevant considerations may include, but are not limited to:

---

[1] *R v Greater Sudbury (City)*, 2024 ONSC 3959.
[2] *R v Greater Sudbury (City)*, 2023 SCC 28.
[3] *R v Greater Sudbury (City)*, 2024 ONSC 3959.

1. the accused's degree of control over the workplace or the workers there;
2. 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;
3. 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
4. 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.

Analysis of the Due Diligence Defence

As described below, the Superior Court, applying the principles identified by the Supreme Court, concluded that the trial judge made no palpable or overriding error in finding that the City had acted with due diligence.

1. The City's Degree of Control over the Workplace and Workers

The Superior Court rejected MAG's arguments that the City had "outright control" over the workplace.

MAG pointed to a traffic control concern the City had raised with Interpaving; a concern which was subsequently addressed by Interpaving. Ultimately, the Superior Court agreed with the City that as it was Interpaving who took steps to address the situation this was an example of the City's due diligence.

MAG also pointed to the City's "sweeping" contractual powers – including the right to fire workers or to suspend work. However, the Court noted that there was no evidence that the City had ever exercised these powers. Likewise, although the City had arranged for paid-duty police officers, it was done at the request of Interpaving who directed the police officers. Additionally, while the City had a process for receiving project-related complaints, it was Interpaving's responsibility to respond to them.

Lastly, the Court commented that while the City conducted quality control inspections, such inspections did constitute control over the workplace.

The Superior Court distinguished the City's actions from those discussed in another lawsuit, *Imperial Oil (Re:),* [11936] O.O.H.S.A.D. No. 8, where the owner was directly involved in monitoring safety and compliance, issued notices of contravention, threatened to remove workers from site, directed the performance of technical aspects of the role, and exercised a level of control that usurped the role of the constructor.

2. *The City's Skill, Knowledge, Expertise, and Delegation of Control to Interpaving*

The Superior Court accepted that the City did not have the skill, knowledge or expertise to complete the project in compliance with the Regulation, and that the City had paid a premium to Interpaving as Interpaving had the expertise that the City lacked.

While not explicit, the Court's conclusion on this point is that the City delegated control to overcome its own lack of skill, knowledge and expertise.

3. *The City's Evaluation of whether Interpaving had the Capacity to Perform the Work and Enforce Compliance with the Regulation*

The Superior Court accepted that the City had assessed the capacity of Interpaving to perform the work safely. The evidence at trial showed that the City had used Interpaving on approximately 40 different projects in the five years prior to the accident. Further, the City required Interpaving employees to complete safety training designed for City projects.

4. *The City's Monitoring and Supervision of Interpaving's Work*

The Superior Court accepted that the City had monitored and supervised Interpaving's work. It did so by notifying Interpaving of the traffic control concern, including raising concerns about signage and insufficient sidewalk access; taking complaints from the public and advising Interpaving of same; and attending periodic progress meetings.

Conclusion

While the relevant considerations listed by the Supreme Court of Canada and analyzed by the Superior Court are not exhaustive, and the relative weight of each factor is unknown, the Superior Court's consideration of the facts in *R v Greater Sudbury (City)* provide further insight into the actions an owner can take to establish due diligence and avoid liability under the *OHSA*.

Jay Nathwani, Partner
T. 289-815-5013
jnathwani@margiestrub.com

Sharon Sam, Partner
T. 437-747-4550
ssam@margiestrub.com

Jacob Lokash, Associate
T. 289-805-0851
jlokash@margiestrub.com