Fine Line in the Sand – Applying the SCC, R. v. Sudbury, Decision

By Ryan J. Conlin and Jeremy Schwartz

It's important not to draw a line in the sand too close to the shore.

In 2015, when the City of Sudbury (the "City") began a road construction project in its downtown, ***everybody knew*** that as the project "owner", the City was legally permitted to retain a "constructor" to undertake the project, in this case a company called Interpaving Limited ("Interpaving"), and that the City would be legally required to take a hands-off approach – *i.e.*, to leave the safe construction of the road to the experts retained to undertake the work.

It was well established in law that the City was permitted to employ engineers and other persons to ensure quality control without becoming the constructor; but, that if the City took a hands-on approach and undertook any of the work directly or usurped the role of the constructor, it would have been deemed to have assumed that "constructor" role itself.

. Decades of jurisprudence and industry practice supported the view that this aligned with the correct interpretation of the *Occupational Health and Safety Act* (the "OHSA") and the construction regulations thereunder, including the definition of various workplace parties, "project owner", "constructor", and "employer", and the statutory assignment and delegation of responsibilities.

"Constructor," "Employer" and "Owner" under the OHSA

There have been many cases over the years where owners of construction projects who have contracted with third party general contractors have been surprised to find themselves treated as the "constructor" by the Ministry of Labour, generally on the basis that the owner had taken steps to "direct" the project. Section 1(3) of the OHSA states that an "owner" does not become responsible as "constructor", merely by overseeing a project for "quality control" purposes.

The thorny legal question which often arises is where the line is drawn between "quality control" and actually taking over all or part of a project as the "constructor".

There is also the question of to what extent an "owner" is liable for safety on a "project" as an "employer", as an entity can become an "employer" not only by directly employing a worker but also by hiring a subcontractor or independent contractor. It is also common practice for owners to have workers on the project for quality control purposes.

Under the OHSA, project owners have very limited explicit responsibilities, which primarily concern providing a list of designated substances (such as asbestos) present on site to prospective bidders on project.

R. v. City of Greater Sudbury

In September of 2015, a reversing road grader operated by an Interpaving employee, tragically struck and killed a pedestrian. That road grader operator was not directed by a signaler and there was no safety fence or similar barrier preventing pedestrians from traversing the site unsafely.

Interpaving was charged and convicted at the outset of trial (on an agreed statement of facts), of violating the OHSA as an "employer". The City was charged as both the "constructor" and as an "employer", for essentially the same violations.

The City succeeded at trial at the Ontario Court of Justice and on subsequent appeal by the Crown to the Superior Court of Justice, because it was held to have been neither a "constructor" nor "employer" under the OHSA as charged, and thus was not liable for the violations.

The Trial Court found as fact that the City had not directly employed anyone who undertook the construction work, merely quality control inspectors who were regularly on site to ensure contract performance and traffic control officers required by law (because the work took place on and in the vicinity of active roadways). But, critically, the Trial Court found as fact that the City had not exercised direct control over the performance of the construction work itself, that the City had contractually reserved the right to stop work – but when safety issues were identified by the quality control inspectors they notified the constructor to address them, and although these inspectors were regularly on the site, they did not exert direct control over the work's performance.

In our view, these findings and results were entirely consistent with decades of jurisprudence which ***everybody knew*** had interpreted the construction regulations and OHSA in respect of a construction project – perhaps only implicitly – practically in context to mean an "employer" was an entity that employed workers engaged in the actual construction work and not simply those who were present on the site for quality control purposes.

Unfortunately for project owners, the Ontario Court of Appeal ("ONCA"), held that the City was indeed responsible for health and safety on the site as an "employer" under the OHSA, given that it employed the quality control inspectors at the project. Under the ONCA's approach the City's liability was triggered when in contracted with the constructor and was not dependent on having quality control inspectors at the project.

Supreme Court of Canada Weighs in

The City further appealed the matter to the Supreme Court of Canada (the "SCC"). A nine-justice panel heard arguments, but following the unexpected retirement of one justice, only eight justices delivered the SCC decision.

That bench was split 50:50. Four justices favoured the ONCA interpretation (for ease of reference, we'll call them the "Plurality") and the other four justices favoured a return to the interpretation of the Trial Judge and first appeal court. Since a majority at the SCC was required to overturn the ONCA's finding, the City's appeal was dismissed.

Aftermath

The case was remitted back to the Superior Court of Justice to determine whether the City had acted with due diligence. Ther Trial Court had ruled that the City was not an "employer" in respect of the charges, but also rule in the alternative, that if the City had been an "employer" it had established the due diligence defence.

The SCC Plurality decision, though not technically binding but obviously persuasive guidance, suggested that the following factors could be relevant to assessing whether an owner-employer who properly contracted out to a constructor had acted with due diligence:

- The owner's degree of knowledge, skill, or experience and the gravity and likelihood of harm (i.e., the "foreseeability of the accident");
- The owner's degree of control over the workplace or the workers there;
- Whether the owner delegated control to the constructor to overcome its lack of skill, knowledge, or expertise to complete the project in compliance with the OHSA's regulations;
- Whether the owner took steps to evaluate the constructor's ability to ensure compliance with the OHSA and its regulations before deciding to contract for its services; and,
- Whether the accused effectively monitored and supervised the constructor's work on the project to ensure requirements of the OHSA and its regulations were carried out in the workplace.

The Superior Court of Justice (to avoid confusion, we'll refer to this as the "New Appeal Court") recently ruled on the Crown's Appeal[1], and it applied the relevant factors set out by the SCC Plurality. Although the SCC said these factors were not the only ones that could be considered, the New Appeal Court applied the SCC's criteria to the facts as found by the Trial Court, and found that the City, as an owner-employer, had exercised due diligence and so was not guilty of the offences charged. The New Appeal Court rejected the Crown's argument that the trial court fell into palpable and overriding error with respect to numerous findings of fact.

Owner's Degree of Knowledge

The New Appeal Court had little trouble accepting the findings of fact at trial that the City was not in the road-building business and paid a premium to a professional road builder to perform the work. As a practical matter, most owners can satisfy this criterion when contracting for construction.

[1] *R v. City of Greater Sudbury*, 2024 ONSC 3959

Control by the Owner

Much attention was paid to this in the argument of the appeal. The Crown asserted that the City had exercised considerable control over the project and cited numerous examples (which had been argued at trial as well). The New Appeal Court held that the Crown tried to put the project "*under a microscope*" to point out a few isolated examples of the City controlling aspects of work. It was determined that the City had proven at trial that it did not control the construction work on the project.

Most importantly for owners, having representatives at the project to monitor for quality control was held not to automatically mean the owner has taken over control of the project. Further, having contract language that gives the owner vast powers to take over the job or remove workers from the project is irrelevant unless these powers are exercised.

These findings are consistent with the case law on the identity of the constructor, where courts primarily focus on the reality of what is happening on the ground as opposed to contractual language.

Pre-Qualification

The New Appeal Court cited evidence that the City had worked with the constructor on 40 occasions in the five years before the project. The City had satisfied itself that Interpaving could do the work safely.

Obviously, many employers will not have worked with a constructor previously. We suggest employers engage in a robust pre-qualification process to determine whether a contractor can do the work safely. Further case law will determine what courts expect in this regard.

Monitoring

The New Appeal Court found that the City had monitored the project by pointing out a serious safety concern and communicating complaints from members of the public to the constructor for resolution.

This is a very positive decision for owners, which brings the caselaw back closer to what it was when owners were perceived not to have employer obligations for projects. That being said, employers now have clear obligations around the pre-qualification of potential constructors and are required to have some level of monitoring of the project.

It is essential to appreciate that the factors discussed here are not exhaustive. For example, due diligence likely requires an owner as an "employer" to communicate any specific hazards it is aware of on the project to the constructor (even beyond the specific obligation in the Regulation applicable to owners).

Where Do We Go from Here??

As we consider the impact of the SCC Plurality decision, we can't help but acknowledge that, although we disagree with the SCC Plurality, the decision and SCC criteria for evaluating appropriate and sufficient owner-employer due diligence may have threaded a very fine needle.

If the New Appeal Court had found that owner-employer due diligence required owners to exercise the same hands-on and specific due diligence required of construction employers engaged in the actual construction work, there would have been virtually no way for owners to avoid taking on the mantle of "constructor". In our view, this would have nullified entire provisions of the OHSA and regulations.

However, by listing steps an owner-employer could take to establish due diligence that do not require such a hands-on approach, the SCC may have found the sole path by which owner-employers may be responsible for due diligence within their control, without deeming every owner-employer a "constructor" responsible for all health and safety compliance on the project.

The Crown is seeking leave to appeal the decision of the New Appeal Court to the ONCA. The Crown's Notice of Motion makes clear that the Ministry continues to disagree with the trial decision.

We anticipate that the leave motion will be argued this Fall.

For more information contact: Ryan J. Conlin or Jeremy D. Schwartz

UPDATE is an electronic publication of Stringer LLP
20 Queen St. W, Suite 3002, Toronto, Ontario M5H 3R3
T: 416-862-1616 Toll Free: 1-866-821-7306
E: info@stringerllp.com I: https://www.stringerllp.com