CITATION: R. v. Greater Sudbury (City), 2024 ONSC 3959
COURT FILE NO.: CR-21-195-AP
DATE: 2024-08-23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HIS MAJESTY THE KING IN RIGHT OF ONTARIO (Ministry of Labour, Immigration, Training and Skills Development)	)	David McCaskill, for the Crown/Appellant
	)	
Crown/Appellant	)	
– and –	)	
	)	
Corporation of the City of Greater Sudbury	)	Ryan Conlin, for the Defendant/Respondent
	)	
Defendant/Respondent	)	
	)	**HEARD:** July 2, 2024

DECISION ON APPEAL

CORNELL, J.

Introduction

[1] The Crown appeals from the decision rendered in the Ontario Court of Justice on August 31, 2018. In that decision, Lische J. (as she then was) acquitted the respondent of various charges under the *Occupational Health and Safety Act*, R.S.O. 1990 c. O.1.

[2] In accordance with the reasons that follow, the appeal is dismissed.

Background

[3] On September 30, 2016, Cécile Paquette died while attempting to cross a street in the City of Greater Sudbury that was under construction. The Ministry of Labour, Immigration, Training and Skills Development ("MOL") charged the Corporation of the City of Greater Sudbury (the "City") and Interpaving Limited ("Interpaving") under the *Occupational Health and Safety Act* (the "OHSA"). Interpaving plead guilty before trial.

[4] The City entered into a contract with Interpaving to do some repairs to a water main in the centre of the City.

[5] The contract stipulated that Interpaving would assume control over the entire project, including the assumption of the role of "constructor" under the OHSA as well as the responsibility of ensuring that the requirements of the OHSA were met.

[6] The intersection had a functional traffic light.

[7] An employee of Interpaving was operating a road grader through the intersection when his traffic light was green. No signallers were present to assist the grader operator as required.

[8] A sturdy fence of at least 1.8 metres in height was supposed to be present between the public right of way and the street. It was not.

[9] The trial judge found that the appellant did not prove that the City acted as an employer and/or as a constructor on the project. She went on to find that should she be found to be wrong in finding the City was not an employer, the court was satisfied on a balance of probabilities that the City had exercised due diligence.

[10] This court upheld the trial judge's decision but did not address the finding that the City acted with due diligence. The Ontario Court of Appeal set aside the decision of this court and found the City liable under s. 25(1)(c) of the OHSA as an employer.

[11] In a four-to-three decision, the Supreme Court of Canada upheld the decision of the Ontario Court of Appeal and remitted the matter to this court to consider the trial judge's finding that the City had acted with due diligence.

Issue

[12] Did the trial judge commit a palpable and overriding error that affected the result by finding that the City was entitled to an acquittal on all charges as a result of having exercised the due diligence required of a project owner with "employer obligations"?

Position of the Parties

The Appellant

[13] The trial judge found that the City was not an employer. The trial judge went on to say that in the alternative, the City was not guilty as it had exercised due diligence.

[14] The appellant takes issue with this and says that the trial judge made overriding and palpable errors sufficient to warrant a finding by this court that the City had not exercised due diligence.

The Respondent

[15] It is the position of the City that the City exercised due diligence and that there was no overriding or palpable error by the trial judge that would warrant this appeal being granted.

Analysis

[16] The appellant's argument focused on the amount of control that the City had over the project and submitted that given the control exercised by the City, it failed to establish that it had exercised due diligence. The trial judge found to the contrary.

[17] The appellant submits that "The City exercised virtually outright control over the workplace and the workers within it". In support of this proposition, it was pointed out that the City maintained a trailer at the Elgin Street project, City employees were present at the project on a daily basis, and progress meetings with the contractor were held from time to time.

[18] Beyond this, the appellant also pointed to a situation that developed on September 15, 2016, described as "chaos in the intersection". A City employee identified a concern about traffic control at the intersection. A senior manager at Interpaving responded to the concern. Although the appellant characterizes this as control, the City responds by saying that it was an example of the City's due diligence as it was the contractor that took the steps to ultimately address the situation and not the City.

[19] The appellant also pointed to contractual authority that the City retained including the right to fire workers on the project, including workers employed by subcontractors if their work was found to be incompetent, unfaithful or disorderly. The City reserved the right to compel the contractor to cooperate with other contractors and utility companies. The City retained the right to suspend work on the project and could suspend work for any reason whatsoever.

[20] Although in this case the City had sweeping powers, there was no evidence that such powers had ever been exercised.

[21] This was not a case like *Imperial Oil (Re:)*, [1993] O.O.H.S.A.D. No. 8. As set out in the respondent's factum, an employee of the owner directly involved himself in monitoring health and safety compliance and addressed them personally issuing notices of contravention and threatening to remove workers from the site. This same employee of the employer also directed the contractor's workers on how to perform technical aspects of the project. As a result of exercising that level of control, the owner in that case was found to have usurped the role of the constructor to control the work on the project and thus was undertaking all or part of the work making the owner the *constructor* by the statutory definition.

[22] The appellant also points to the fact that the City was responsible for arranging for the presence of paid duty police officers to direct traffic as required. The City paid the police directly and dealt directly with the police to schedule their appearance as requested by Interpaving. The City granted every request made by Interpaving for GSPS officers. This was all done at the request of Interpaving. The need for paid duty officers was determined by Interpaving. Interpaving directed the GSPS officers on site.

[23] Although the City provided GSPS officers and paid them, the need for their assistance and the direction for their duties was controlled by Interpaving, not the City.

[24] Although the City did have a process in place to receive complaints concerning the construction project, it was the responsibility of Interpaving to respond to these complaints once they had been made known by the City.

[25] In *R. v. Greater Sudbury (City)*, 2023 SCC 28, 487 D.L.R. (4th) 387, at para. 61, the Supreme Court said, in part:

> [61] ...[I]f the Ministry proves the above, has the accused proven on a balance of probabilities that it should avoid liability because it exercised due diligence under s. 66(3)(b) of the Act? Relevant considerations may include, but are not limited to, (i) the accused's degree of control over the workplace or the workers there; (ii) 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; (iii) 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 (iv) 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.

Did the City have control over the workplace and the workers on it?

[26] I have reviewed the arguments that were presented by the appellant, the same arguments that were put to the trial judge. The trial judge considered those arguments and rejected them. There was an evidentiary basis to do so as previously outlined.

[27] Although the City did conduct quality control inspections in order to see that the contractual requirements were being satisfied, such inspections did not constitute control over the workplace and the workers on it.

Did the City delegate control to Interpaving to overcome its own lack of skill, knowledge or expertise?

[28] Although not specifically referred to in the trial judge's reasons, there was evidence at trial on this subject. A City employee testified:

> We, we are not familiar with what it means to be a constructor. We don't have the resources or the capacity or the capabilities. It's very important to us that our general contractors understand what it means to be the constructor and take responsibility for those activities. It, it's not a situation to be taken lightly, we understand that. We understand that there's a premium because they have the resources and the capability and the understanding of what it means to be the constructor.

[29] Given the City's lack of skill, common knowledge or expertise to complete the project in compliance with the Regulation, the trial judge found that the City had paid a premium to Interpaving as Interpaving had the expertise that the City lacked.

Did the City evaluate whether the potential constructor had the capacity to perform the work and enforce compliance with the Regulation?

[30] The City contracts out road building and uses a contract that had general conditions that were developed by a group of municipalities in cooperation with the Ministry of Transportation that is commonly used across the province. The trial evidence showed that the City had used Interpaving on approximately 40 different projects in the five years prior to the accident. The City required Interpaving employees to have a NORCAT's Greater Sudbury Utilities Contractor Orientation safety awareness training designed for City Projects.

[31] The trial judge found that the City had assessed the capacity of Interpaving to perform the work safely and there was ample evidence to support that finding.

Did the City monitor and supervise the constructor's work?

[32] The trial judge found that the City did monitor and supervise Interpaving's work.

[33] It did so by notifying Interpaving about the traffic chaos on September 15, 2015. It did so by taking complaints from the public and making Interpaving aware of the concerns. It did so by raising concerns about signage and insufficient access to crosswalks for the public. It did so when concerns about fencing were raised. It did so by attending periodic progress meetings. The trial judge referred to this evidence when she concluded that the City had acted with due diligence.

Conclusion

[34] All of the evidence that I have reviewed was taken into consideration by the trial judge and formed the basis for the trial judge's finding that the City had exercised due diligence.

[35] If the City had exercised the amount of control over the project that was urged by the appellant, the City would have been a constructor, something that has been rejected at every level of appeal. I agree with the observation made by Poupore J. in the initial appeal to this court that the appellant has attempted to put the "project under a microscope" in order to bring about its objective. See *R. v. Greater Sudbury (City)*, 2019 ONSC 3285, at para. 31.

[36] The appellant is really asking this court to look at the evidence and come to a conclusion different from that of the trial judge, something that is not permitted.

[37] It has been well established that an appeal court must show considerable deference to all findings of fact and credibility unless the appellate court is satisfied that a finding is the result of a palpable and overriding error and the error is shown to have affected the result.

[38] The trial judge made no palpable or overriding errors that would permit this court to interfere with her findings or the conclusions that were based upon them. Accordingly, the appeal is dismissed.

The Honourable Mr. Justice R. Dan Cornell

Released: August 23, 2024

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