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Lawyer digs into due diligence on Sudbury decision after all the ‘commotion’

Angela Gismondi January 22, 2024

The decision in the City of Sudbury, Ont. Supreme Court of Canada case came as a surprise to most builders in the construction industry, but it also calls into question what is required in terms of due diligence to ensure worksite safety and who should be responsible.

In a recent webinar hosted by the Residential Construction Council of Ontario billed What the Sudbury Case, Increased Fines and Due Diligence Best Practices Mean for Your Workplace, Luiza Vikhnovich of Sherrard Kuzz said the decision dealt with several offences under the Occupational Health and Safety Act (OHSA).

“The decision came out in November and it caused commotion in the construction industry in particular, and specifically what this means from a liability perspective going forward,” said Vikhnovich.

In 2015, the City of Sudbury contracted for Interpaving to act as the GC onsite.

“Interpaving used its own employees to perform the work but the key fact in this decision is that the city still hired two individuals to act as quality control inspectors that would attend and regularly surveille the construction project and report back specifically as to the status of the project and of course as to the quality of the work being performed,” Vikhnovich explained.

A couple of months after the project had started in September 2015 a 60-year-old woman was crossing the intersection and an Interpaving employee who was operating a road grader in reverse struck and killed her.

One of the big issues was whether or not the city should be considered an employer. In a 4-4 split decision the Supreme Court upheld the decision of the Court of Appeal which found the city was an employer for the purposes of the OHSA.

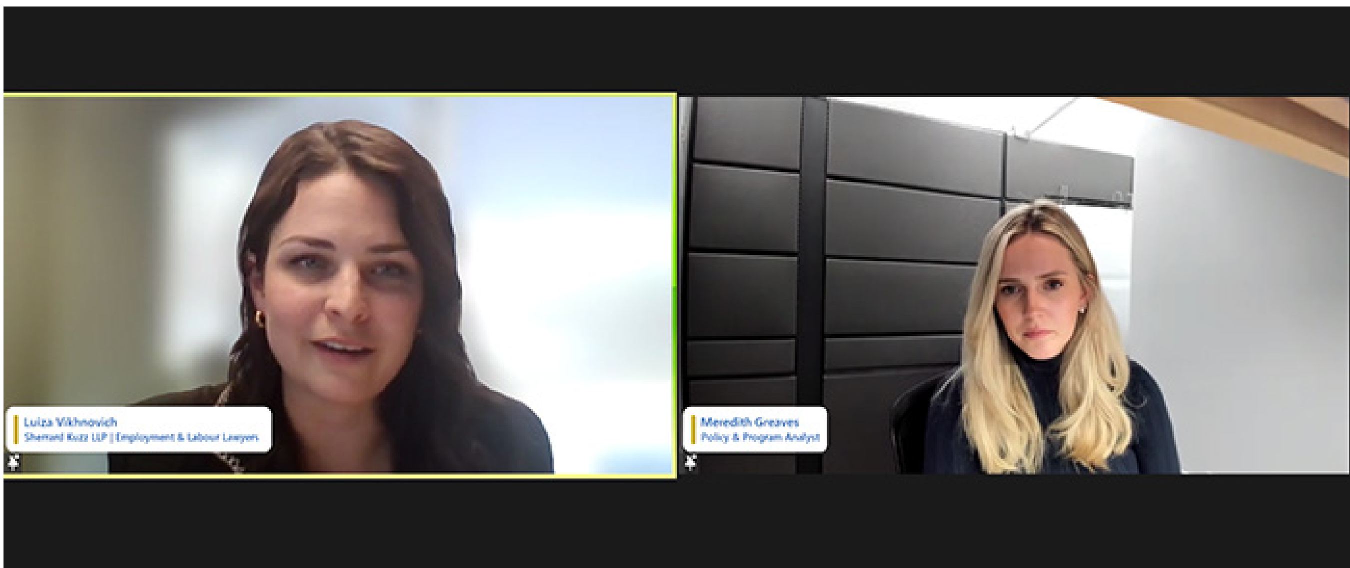
Due to the split decision the case will be remitted to the lower court to determine outstanding issues such as the due diligence defence.

“We don’t actually have an answer on whether or not the city exercised due diligence and had a due diligence defence available to excuse itself from the offence,” said Vikhnovich. “There is an open and live issue as to what is sufficient to amount as due diligence from the city’s perspective.”

The city had taken the position that before it hired Interpaving it did its original pre-screening and that was sufficient to amount to due diligence, Vikhnovich explained. The crown took the position that it’s not enough and what you should be looking for when establishing a due diligence defence are specific acts of due diligence. That decision is expected at some point.

“We’re concerned, we’re wondering, ‘Well what does this mean? How am I going to be found an employer versus not found an employer? Does this is mean that I don’t want to, as an owner, maybe hire folks to do quality control onsite or to do any kind of measures onsite?” she asked.

“When we have so much uncertainty the one thing that we do have control over is revisiting what practices we currently have in place.”



SCREENSHOT – The Residential Construction Council of Ontario held a health and safety challenges webinar focused on the Sudbury decision that shocked the construction industry late last year.

She said it could be an opportunity for companies to audit where they are in their lifecycles with existing safety and management systems.

“Level of control, as I mentioned, is still a relevant factor when demonstrating due diligence,” said Vikhnovich. “I think that’s what we’re left with even when we look at the Supreme Court of Canada commentary. As an owner, I might not be expected to go to the level of due diligence as the direct employer of a subtrade who is involved in performing that work.”

In terms of a checklist, she said a good starting point is a hazard assessment.

“Consider who you’re going to need to hire as an owner to perform the work and then think about the constructors that you’re hiring, their contractors, their employees,” said Vikhnovich. “What qualifications do they have? What can they demonstrate to you at the outset to show you that they are fit to perform the work?”

As an owner, if you’re working with a GC for the first time, consider the financial viability of the company.

“That’s usually one indicator,” she said. “Are they tracking KPIs? Do they have WSIB in place? Are they able to give you the insurance, the clearance certificate, all of that? Are they able to talk to you about their compliance efforts? Do they have safety management systems in place? How are they auditing and tracking their internal performance? These are all the things you want to turn your mind to as a pre-screening metric.”

Once the parties have been retained the issue becomes how much control do you want to have over the project, she added.

“I don’t think there is a clear line there about when you will or won’t be found to be an employer for the purposes of the act,” Vikhnovich said.

“From the perspective of due diligence and making sure you are putting your best foot forward to avoid liability, I think you do want to turn your mind to are you monitoring when issues are coming up onsite and how they are being addressed. Are you putting it back to the constructor and asking them to go back

and fix any compliance issues or are you intervening?

“These are all things that can lead in the future to potentially you having employees onsite and therefore meeting the definition of employer, but I think when you are looking at that balance, it’s better to err on the side of caution to keep your due diligence efforts and to perhaps revisit and revamp them.”