SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

Luiza Vikhnovich
lvikhnovich@sherrardkuzz.com
416.217.2251

Closing the Book on *R v Sudbury*

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At long last, the Court of Appeal for Ontario has had the final say on whether the City of Sudbury ("City") exercised due diligence under the *Occupational Health and Safety Act* ("OHSA") following the tragic death of a pedestrian.

As you may recall from our December 2024 newsletter, the City was charged as an "employer" under the OHSA when a pedestrian was killed walking by a construction project owned by the City. The City had contracted with a subcontractor to repair a watermain and repave the roads at the project. The pedestrian was struck by a road grader operated by the subcontractor's employee.

The Ontario Superior Court of Justice upheld the City's acquittal from all OHSA charges on the basis the City exercised due diligence. However, the Ministry of Labour, Immigration, Training and Skills Development ("Ministry of Labour") sought leave to appeal the decision to the Court of Appeal for Ontario. Just last week, the Court of Appeal denied leave to appeal, finally closing the book on this case.[1]

This is a significant outcome for the City which disputed (unsuccessfully, all the way to the Supreme Court of Canada) whether it could even be charged as an "employer" under the OHSA. We wrote about this in our January 2024 newsletter.

Why did the Superior Court uphold the City's due diligence defence?

An employer can successfully defend against an OHSA charge by showing it exercised due diligence. As canvassed more thoroughly in our December 2024 newsletter, the court found the City exercised due diligence for several key reasons:

[1] *R v City of Sudbury,* COA-24-OM-0315 (31 March 2025) (Ont CA).

a) **The City had delegated control over the workplace**: The court found the City had no control over the workplace and had delegated control to a subcontractor.

- Although the City employed quality control inspectors on site, this did not constitute control over the workplace and the workers on it.
- The City's subcontractor directed the workers' activities.
- Despite the City retaining contractual authority to fire workers, there was no evidence the City ever exercised this power.
- The City's subcontractor was primarily responsible for responding to complaints received about the project.

b) **The City took adequate steps to evaluate its subcontractor's ability to do the work in compliance with the OHSA:** In particular, the City:

- Contracted out road building regularly and used a contract that included general conditions developed by a group of municipalities in cooperation with the Ministry of Transportation.
- Had used the subcontractor on approximately 40 projects in the preceding five years.
- Required its subcontractor's employees to have specific safety training designed for City projects.

c) **The City monitored and supervised its subcontractor's work:** There were several examples in which the court found the City acted with due diligence. This included that it monitored, notified, and met with its subcontractor regarding safety issues, including complaints from the public, lack of signage, insufficient access to crosswalks and fencing.

The Ministry of Labour's grounds for appeal

The threshold to obtain leave from the Court of Appeal for Ontario is high and the court grants leave sparingly. To obtain leave, a party must establish that the resolution of a question of law is **essential in the public interest or for the due administration of justice.** The Ministry of Labour argued leave should be granted because the proper application of a due diligence defence was a matter essential to the public interest, and that the lower court made two fundamental errors:

1. The court found the City's acts of general due diligence, not acts of due diligence directed toward the alleged violations, satisfied the test for due diligence; and

2. The court failed to properly understand the interplay between the concept of *control* of the workplace and the necessary elements of the due diligence defence.

The Court of Appeal denied leave

The Court of Appeal denied leave to appeal for three principal reasons:

1. While due diligence must be analyzed with respect to the employer's specific actions and not actions taken for general safety, in this case the lower court properly considered evidence of specific acts. The City advised its subcontractor about issues on the project related to insufficient signage and insufficient access to crosswalks for the public after receiving public complaints.

2. Nothing in the lower court's reasoning suggested a failure to understand the interplay between the concept of control in the workplace and the necessary elements of the due diligence defence.

3. The Ministry of Labour's appeal was primarily fact-driven. The finding of the lower court that the City did not have control over the workplace/workers "is a factual finding or, at best, a question of mixed fact and law and not a basis for granting leave."[2]

Ultimately, the Court of Appeal held that although what occurred was tragic, this case did not raise an issue of broad public importance warranting further appeal. Thus, the Court of Appeal denied leave to appeal, closing the book on this saga.

Final thoughts

As we've previously discussed, it remains troubling that an "owner" that does not exercise meaningful control over employees of its subcontractor can nevertheless be an "employer" under the OHSA. However, owners and employers can take solace in knowing a due diligence defence remains available if they can demonstrate they took reasonable measures targeted at preventing a specific workplace accident.

To learn more and for assistance with any health and safety matter, contact the team at Sherrard Kuzz LLP.

Luiza Vikhnovich *is a lawyer with* ***Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing employers****. Luiza can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.*

Chambers Ranked

[2] *Ibid* at para 35.