



# ***R VS CITY OF GREATER SUDBURY SUPREME COURT DECISION***



**AORS**

PROMOTING KNOWLEDGE. PURSUING EXCELLENCE.



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## R. VS CITY OF GREATER SUDBURY THE IMPACTS OF THE DECISION ON YOUR MUNICIPALITY

### MODERATOR



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Association of Ontario Road  
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### EXPERT PANELISTS



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# AGENDA

- Eric Labelle: Facts of the Case
- Thomas Durcan: Progression Through the Courts
- Jolene Ingribelli: Mitigation Strategies
- Eric Labelle: Next Steps
- Question & Answer Period:  
Please submit questions for the panel in the chat box



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# *THE FACTS...*



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# FACTS

- Tender issued in December 2014 seeking bids for Elgin St. Project
- Project involved reconstruction of underground utilities, road, curbs and sidewalks on Elgin St. in the City's downtown core
- Bidders had to be prequalified
- Successful bidder was Interpaving Limited at a contract cost of approx. \$1.6M
- Contractor had substantial past experience in similar projects
- Detailed contract entered into between City and Contractor

# FACTS

- Agreement required contractor to:
  - Complete all work and furnish all materials in conformance to the plans, specifications and general conditions
  - Be the Constructor for the purposes of the *Occupational Health and Safety Act*
  - *File a Notice of Project with the Ministry of Labour*
- City employed inspectors to monitor quality and compliance with plans and specifications on projects
- Inspectors had no authority over contractor's workers and did not direct the work on site
- When present on the site inspectors required to comply with contractor's policies for health and safety on the project site

# FACTS

- Book 7 requires police officers to control lit (active) intersections during the performance of construction activities
- Contractor would advise the City when paid duty officers for the Greater Sudbury Police Service were required and City would grant and forward such requests to police
- For administrative convenience, City would directly pay police invoices

# FACTS

- On September 30, 2015:
  - Contractor's employee was operating a grader on the construction site in preparation for asphalt within a lit intersection without police being present contrary to Book 7
  - While reversing the grader without a signaller the employee struck and killed a pedestrian attempting to cross the intersection
  - During the investigation the MOL inspector issued numerous orders to the contractor as the constructor and to the City as the owner
  - At one point in the investigation the MOL inspector decided the City was the constructor and issued an order that the City file a notice of project which the City appealed to the Labour Relations Board



# FACTS

- Contractor was convicted and fined \$195,000 as an employer for failing to comply with section 104(3) of the *Construction Projects* regulation
- Trial proceeded on 6 counts against the City:
  - Failing as a constructor to ensure assistance by signallers
  - Failing as a constructor to ensure a sturdy fence is constructed between the public way and the project
  - Failing as a constructor to ensure the contractor complied with provisions of the regulation
  - Failing as an employer to ensure assistance by signallers
  - Failing as an employer to ensure a sturdy fence is constructed between the public way and the project
  - Failing as an employer to develop and implement a traffic protection plan

# *PROGRESSION THROUGH THE COURTS...*



# PROGRESSION THROUGH COURTS

- 2018 Ontario Court of Justice (Lische, J.)
- 2019 Ontario Superior Court of Justice (Poupore, J.)
- 2021 Ontario Court of Appeal (panel of three judges)
- 2023 Supreme Court of Canada (panel of eight judges, not nine)

# 2018 ONTARIO COURT OF JUSTICE

- Decision by Justice Lische.
- Sudbury NOT an employer.
- Even if Sudbury was an employer, which they were not, then they *exercised proper due diligence on a balance of probabilities.*

# 2019 ONTARIO SUPERIOR COURT OF JUSTICE

- Justice Poupore heard the appeal at the Superior Court level.
- Again, Sudbury not deemed an employer.
  - No prior examples of a municipality being an employer in OHS/A context.
  - If Justice Poupore did find Sudbury to be an employer, then it would “substantially change what has been the practice in Ontario on construction projects.”
- Appeal dismissed.

# 2021 ONTARIO COURT OF APPEAL

- ONCA panel grants Ministry's appeal.
- Sudbury deemed an employer.
  - Anyone who employs workers, or anyone who contracts for the services of a worker, should be considered an employer.
- Belts and braces approach.
- Degree of control?
- Due diligence of Sudbury?

# 2023 SUPREME COURT OF CANADA

- Eight judge panel as opposed to nine (Justice Brown resigned in June, 2023).
- Split decision, i.e. four judges agree, four judges do not.
- Role of intervenors.
- Dissent – Absurd! Absurd!
  - Example of an electrical issue.
- ONCA decision therefore binding.
- A court must consider three questions where an owner who contracts for the services of a constructor on a construction project is prosecuted for a breach of s.25(1)(c):
  - Ministry proven beyond a reasonable doubt that OHSA applies?
  - Ministry proved beyond a reasonable doubt that there is a breach of s.25(1)(c)?
  - If yes to the above, then due diligence...

# DUE DILIGENCE DEFENCE

- See paragraphs 57-58 of SCC decision:
  - 1. *Delegate control of the project to a more experienced constructor.*
  - 2. *Screen the constructor before hiring (expertise/convictions/capacity).*
  - 3. *Owner's relative inexperience with workplace safety?*
  - 4. *Inform the constructor of any hazards at the workplace and monitor quality of work.*
  - 5. *Enforce contract and by-laws.*



# *MITIGATION STRATEGIES...*



# CONTRACT DOCUMENTS

**At a minimum your contract documents need to:**

- Clearly describe the work
- Outline duties and responsibilities
- Follow your municipality's set policies and procedures
- Include insurance requirements, municipality added as an additional insured, indemnification clause
- Contractual language matches the work

**Recommend:**

- Review with legal counsel, insurance provider etc. especially for complex construction projects

# VENDOR MANAGEMENT

## **Before Award:**

- Establish pre-qualification standards
- References, experience
- Health & safety plans, safety history
- Consider past performance on municipal projects

## **After Award:**

- Monitor contractual compliance, performance
- Pre-start training sessions with contractors
- Occurrence reporting system

# TRAINING

- Internal training is critical to a due diligence defence
- Identify certain hazards on the job site, to document violations or breaches of safety rules, concerns etc.
- Internal communication, vendor communication
- Documentation
- Review contract requirements
- Occurrence reporting, contractor claims process

**Departments must work together and know each other's responsibilities**

# DOCUMENTATION

## Documentation confirms your Municipality has:

- Fulfilled your duty of care in a reasonable manner.
- Taken all reasonable precautions to protect the health and safety of workers and the public.
- Policies and procedures in place that establish acceptable standards.
- Your employees are well trained and carried out their duties according to the operational guidelines established by your Municipality.

## All documentation:

- Needs to be clearly written
- Include date and time
- Factual

## Consider:

- Record retention
- What records will be needed?
  - contract documents
  - internal policies, procedures, training records
  - vendor occurrence reporting, incident reports, photos, emails, inspectors notes, checklists, correspondence, communication with vendor, with public

***NEXT STEPS...***



# NEXT STEPS

- Motion has been made to the Supreme Court of Canada requesting a rehearing of the matter given the 4-4 tied decision
- Rehearing would provide a majority decision and additional clarity one way or the other
- Hearing on the issue of the City's due diligence will be held before the Superior Court of Justice likely in the Fall of 2024 with a decision to follow
- If the City is found to have acted with due diligence, it will be acquitted of the charges against it.

# NEXT STEPS

- Council for the City has passed a motion advocating for change to the OHSA
  - NOW THEREFORE BE IT RESOLVED THAT the Council for the City of Greater Sudbury requests that the province amend the Occupational Health and Safety Act to clarify the definition of “employer” to exclude owners that have contracted with a constructor for a project;
  - AND BE IT FURTHER RESOLVED THAT this motion be provided to the Honourable Doug Ford, Premier of Ontario, the Honourable David Piccini, Minister of Labour, Immigration, Training and Skills Development, the Honourable Paul Calandra, Minister of Municipal Affairs and Housing, France Gelin, MPP for Nickel Belt, Jamie West, MPP for Sudbury, the Association of Municipalities of Ontario, the Federation of Northern Ontario Municipalities, Ontario’s Big City Mayors, Mayors and Regional Chairs of Ontario, Northern Ontario Large Urban Mayors, the Council of Ontario Construction Associations, the Ontario Chamber of Commerce and all Ontario municipalities.





# Questions and Answers

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# THANK YOU TO OUR PANELISTS



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