MUNICIPAL WORLD
CANADA'S MUNICIPAL MAGAZINE | WE SHARE YOUR STORIES MUNICIPALWORLD.COM

Under the *Ontario Health and Safety Act,* duties to ensure the health and safety of workers are imposed on all participants in a construction project, from owners to constructors to employers and individual workers. *Photo: Adobe Stock*

Has the risk of a municipality's health and safety liability increased?

by Bryan Buttigieg

The decision of the Supreme Court of Canada last fall in a case involving a municipal construction site accident in the City of Sudbury has generated a lot of discussion and, in some sectors, concern that the health and safety obligations of an "owner" under Ontario's *Occupational Health and Safety Act* (OHSA) have been significantly expanded.

While the decision applies to all construction projects in Ontario, it is especially applicable to municipalities involved in the same type of work that gave rise to the accident and subsequent prosecution in this case.

What Happened at the Worksite?

The City of Sudbury contracted with a general contractor to undertake road and watermain repairs. The general contractor agreed to be the "constructor" for the project and to assume control over day-to-day management of the project, including ensuring compliance of all subtrades under its control with the OHSA obligations.

The contract was no different from what most municipalities would consider normal in that it required minimal involvement by the city in the course of the project, although the city would from time to time send its own employees to visit the site to undertake quality control inspections.

A pedestrian was killed by a road grading machine operated by an employee of the general contractor.

Having sent its own employees to undertake quality control inspections, the city was clearly an "employer" with respect to those workers. The question that was most contentious, however, was whether or not the city should be considered an employer of the general contractor.

After an investigation, the ministry of labour issued charges against the general contractor and the city. What was thought to be unusual, however, was that the city was charged as an "employer" under the act as well as a "constructor."

Was the City an Employer and Why Would It Matter?

Under the OHSA, duties to ensure the health and safety of workers are imposed on all participants in a construction project, from owners to constructors to employers and individual workers. There is some limited ability to delegate responsibility through contracts, but some duties may not be delegable.

In this case, charging the city as an "employer" raised the possibility that despite the contract, and despite the (legally proper) delegation of duties to the general contractor, the city would still have some remaining responsibility to ensure the health and safety of all workers on the project as if they were "employees."

The City as Employer in Two Capacities

Having sent its own employees to undertake quality control inspections, the city was clearly an "employer" with respect to those workers. The question that was most contentious, however, was whether or not the city should be considered an employer of the general contractor. If so, the city would be obliged under the act to ensure that the measures prescribed by the act were carried out at the project.

The decision of the court, though not unanimous, is a binding decision on the scope of the OHSA to the effect that the language of the act, and in particular the definition of "employer," does (to the surprise of some) make an owner an employer of a general contractor.

Has This Decision Fundamentally Changed the Law in Ontario?

While the decision has indeed raised a lot of concern among owners in Ontario, a case can be made that, in practice, the decision has not changed the fundamental responsibilities of an owner but instead has mainly clarified a concept that goes back to the first principles of the defence of due diligence so eloquently laid out decades ago by the Supreme Court of Canada in the seminal decision of *R. v The City of Sault Ste. Marie.*

To understand the full implications of the City of Sudbury decision, it is important to note that, in its decision, the Supreme Court of Canada did not make a finding of guilt against the city. Having found the city to be an employer, the case was remitted to trial to, amongst other things, determine whether or not the city could avail itself of the defence of due diligence. The key passage of the court on this point is the following:

It is open to an accused to prove that its lack of control suggests that it took all reasonable steps in the circumstances …

… Relevant considerations for the court's determination at this stage may include, but are not limited to: the accused's degree of control over the workplace or the workers; 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 accordance with the regulation; 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 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.

The above passage appears to be a clear signal from the court that the due diligence that would be required of the city as employer in such a case could well be substantively different and less onerous than the due diligence that would need to be exercised by its general contractor as employer.

MUNICIPAL WORLD
CANADA'S MUNICIPAL MAGAZINE | WE SHARE YOUR STORIES
MUNICIPALWORLD.COM

Municipal Career Stories

start right here …

MUNICIPAL WORLD
JOB BOARD

Find your next career opportunity at
municipalworld.com

While the city is entitled to rely on the delegation of some responsibilities to its contractor (especially one with greater expertise), it cannot simply "contract out" of all its obligations and must always ensure that it properly vetted the general contractor prior to awarding the contract and exercised some degree of supervision over the general contractor while the work was taking place.

This is ultimately not that different from what Justice Brian Dickson said with respect to the duties of the City of Sault Ste. Marie under another "public welfare statute," the *Ontario Water Resources Act*, back in 1978:

It must be recognized, however, that a municipality is in a somewhat different position by virtue of the legislative power which it possesses and which others lack. This is important in the assessment of whether the defendant was in a position to control the activity which it undertook and which caused the pollution. A municipality cannot slough off responsibility by contracting out the work. It is in a position to control those whom it hires to carry out garbage disposal operations, and to supervise the activity, either through the provisions of the contract or by municipal bylaws. It fails to do so at its peril.

Seen in this light, the decision of the Supreme Court in the City of Sudbury decision is perhaps less a fundamental shift in the law and more a stark reminder that owners can never fully contract out of their OHSA responsibilities and must exercise a degree of due diligence that is commensurate with their own knowledge, skill, and powers.

While some owners may be surprised at the new label of "employer," and while every owner should review their due diligence practices with this decision in mind, many may well find that, in practice, assuming they were already applying the long-standing principles of due diligence set out in Sault Ste. Marie, there is not much they will need to change in their day-to-day operations.

Bryan Buttigieg (bbuttigieg@millerthomson.com) practices environmental and occupational health and safety law at Miller Thomson LLP.

as published in MUNICIPAL WORLD
CANADA'S MUNICIPAL MAGAZINE | WE SHARE YOUR STORIES MUNICIPALWORLD.COM

MUNICIPAL WORLD
CANADA'S MUNICIPAL MAGAZINE | WE SHARE YOUR STORIES MUNICIPALWORLD.COM