

ONTARIO COURT OF JUSTICE

B E T W E E N :

**HER MAJESTY THE QUEEN
(MINISTRY OF LABOUR OF ONTARIO)**

Crown

— AND —

THE CORPORATION OF THE CITY OF GREATER SUDBURY

Defendant

Before Justice K. Lische
Trial heard on March 28, 29, April 3, 4 and 5, 2018
Reasons for Judgment released on August 31, 2018

D. McCaskill	Ministry Of Labour, Crown
S. Woods	Ministry Of Labour, Crown
R. Conlin	Corporation of the City of Greater Sudbury, Defendant
F. Portman	Corporation of the City of Greater Sudbury, Defendant

LISCHE, J.:

[1] The trial in this matter was heard on March 28, 29, April 3, 4 and 5, 2018. As part of the case on behalf of the Ministry of Labour (hereinafter "**MOL**"), the court heard from 10 witnesses namely: Dawn Savignac, the MOL Inspector called to the scene, Benoit St Jean, the grader operator employed by Interpaving Limited, Ivan McGregor, a flag man at the scene employed by Interpaving Limited, Stephanie Leclair, the Program Operations Manager for the Northern Initiative for Social Action (hereinafter **NISA**) at the material time, Adam Peddie, a labour supervisor with Interpaving Limited, Stephane Girouard, a crew supervisor with Interpaving Limited at the material time, Ken Edwards, a Project Manager with Interpaving Limited, Shawn

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Hinton, a Chief Field Inspector with the City of Greater Sudbury, Roberto Rocca, an Engineering Technologist and the Manager of Design Services at the City of Greater Sudbury and John Temelini, the Field Inspector for the City of Greater Sudbury.

[2] As part of the case for the Corporation of the City of Greater Sudbury (hereinafter "**City**"), the court heard from 1 witness, namely: Tony Cecutti, the General Manager of Growth and Infrastructure with the City.

[3] Immediately prior to the commencement of this trial, the co-defendant, Interpaving Limited (hereinafter "**Interpaving**") pleaded not guilty before another judicial officer and was found guilty of count 1 based on the agreed statement of fact before that court. The other charges against Interpaving, counts 2 and 3, were withdrawn by the MOL. Count 1, the charge against Interpaving essentially reads as follows:

"that on or about the 30th day of September, 2015, it failed as an employer, to ensure that the provisions of s.104(3) of Ontario regulation 213/91 were complied with, at a workplace located at Beech St. and Elgin St., contrary to s. 25(1) of the Occupational Health and Safety Act, R.S.O. 1990, c.O. 1, as amended."

[4] At this trial, the defendant City, pleaded not guilty to the following charges:

(count 4) that on or about the 30th day of September, 2015, did commit the offence of failing as a constructor, to ensure that the provisions of s.104(3) of Ontario Regulation 213/91 were complied with, at a workplace located at Beech St. and Elgin St., contrary to s. 23(1)(a) of the Occupational Health and Safety Act, R.S.O. 1990, c.O.1, as amended;

(count 5) that on or about the 30th day of September, 2015, did commit the offence of failing as a constructor, to ensure that the provisions of s. 65 of Ontario Regulation 213/91 were complied with, at a workplace located at Beech St. and Elgin St., contrary to s. 23(1)(a) of the Occupational Health and Safety Act, R.S.O. 1990, c.O.1, as amended;

(count 6) that on or about the 30th day of September, 2015, did commit the offence of failing, as a constructor, to ensure that the provisions of s. 67(4) of Ontario Regulation 213/91 were complied with, at a workplace located at Beech St. and Elgin St., contrary to s. 23(1)(a) of the Occupational Health and Safety Act, R.S.O. 1990, c.O.1, as amended;

(count 7) that on or about the 30th day of September, 2015, did commit

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the offence of failing as a constructor, to ensure that every employer and every worker on a project complied with the OHSA and its regulations, contrary to s.23(1)(b) of Occupational Health and Safety Act, R.S.O. 1990, c.O.1, as amended;

Particulars: The defendant failed to ensure that Interpaving Limited complied with the provisions of Regulation 231/91 of the Occupational Health and Safety Act.

(count 8) that on or about the 30th day of September, 2015, did commit the offence of failing as an employer, to ensure that the provisions of s.104(3) of Ontario Regulation 213/91 were complied with, at a workplace located at Beech St. and Elgin St., contrary to s. 25(1)l of the Occupational Health and Safety Act, R.S.O. 1990, c.O.1, as amended;

(count 9) that on or about the 30th day of September, 2015, did commit the offence of failing as an employer, to ensure that the provisions of s.65 of Ontario Regulation 213/91 were complied with, at a workplace located at Beech St. and Elgin St., contrary to s. 25(1)l of the Occupational Health and Safety Act, R.S.O. 1990, c.O.1, as amended; and

(count 10) that on or about the 30th day of September, 2015, did commit the offence of failing as an employer, to ensure that the provisions of s. 67(4) of Ontario Regulation 213/91 were complied with, at a workplace located at Beech St. and Elgin St., contrary to s. 25(1)l of the Occupational Health and Safety Act, R.S.O. 1990, c.O.1, as amended.

[5] An Order excluding witnesses was made. The court received numerous Exhibits during the course of this trial. In total, 16 Exhibits were filed.

[6] The Exhibits can be described as follows:

Exhibit 1: City of Greater Sudbury Act, 1999;

Exhibit 2: Medical Certificate of Death for Cécile Marie Paquette;

Composite Exhibit 3A): Crown Book of Documents, Volume I;

Composite Exhibit 3B): Crown Book of Documents, Volume II;

Composite Exhibit 3C): Defendant's Book of Documents;

Composite Exhibit 4: Photographs of the scene;

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Composite Exhibit 5: Ergonomics Report and c.v. of Peg Scherzinger;

Exhibit 6: Video from the Eye in the Sky of the scene;

Exhibit 7: Video of the scene from the Violette Law Office;

Exhibit 8: Constructor Guidelines from the MOL website;

Exhibit 9: Field Visit Report October 5 – October 14, 2015;

Exhibit 10: Field Visit Report October 19 – November 6, 2015;

Provisional Exhibit 11: Decision of the Ontario Labour Relations Board, December 21, 2015;

Composite Exhibit 12: Four photographs of grader mirrors;

Exhibit 13: Photograph from cab of grader looking toward Elm Street, from Elgin Street.

Exhibit 14: Driving Record of Benoit St-Jean, date of birth 1962-11-14;

Composite Exhibit 15: Series of e-mails pertaining to NISA; and

Exhibit 16: Summary and Letter dated April 12, 2016 from Steve Vaccaro, Vice President of Interpaving Limited to the City of Greater Sudbury.

[7] On the first day of the trial, counsel for the MOL invited the court to dismiss count 6 against the City as that count was defective on its face. The court dismissed count 6 against the City at the urging of the MOL.

[8] Written submissions were filed by the parties until June 2018. This is the Court's decision on the trial.

FACTS

[9] Based on the evidence as a whole, these are the facts in this case as I find them to be, beyond a reasonable doubt. On February 23, 2015, the City entered into a contract (hereinafter the "**Contract**"), numbered "ENG14-5", with Interpaving to undertake some repairs to the water main, in the area along Elgin St. downtown, Greater Sudbury, Ontario (hereinafter "**Elgin Project**"). Interpaving was the successful bidder after a public tender in December 2014. The improvement area included the portion of Elgin St. between Elm St. and St. Anne's Rd. The particular area of concern for the court's

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purposes is the area North of Elm Street and South of St. Anne's Road, namely the intersection of Beech Street and Elgin Street. The Elgin Project involved the replacement or repair of underground utilities and the repaving of streets, curbs and sidewalks.

[10] By bidding on the Elgin Project, contractors agreed that if successful, they would assume control over the entirety of Elgin Project, including materials, skills and labour. This included the assumption of the role of constructor under the *Occupational Health and Safety Act* (hereinafter the "**OHSA**"), as well as the responsibility for ensuring that the requirements of the OHSA were met. As a result of being the successful bidder, Interpaving also became bound to comply with the City of Greater Sudbury General Conditions (hereinafter the "**Conditions**").

[11] Interpaving began work on the Elgin Project in May 2015.

[12] On September 30, 2015, shortly after 2:00 pm, a pedestrian, Cécile Paquette, age 58, was fatally struck by a Caterpillar grader operating in reverse through the intersection of Beech St. at Elgin St (hereinafter the "**Accident**"). The operator of the grader was Interpaving employee Benoit St Jean. Cécile Paquette was crossing Elgin St. in the intersection of Beech St. and Elgin St. within the construction project in a westerly direction.

[13] The intersection of Beech Street at Elgin Street had functional traffic lights. Elgin Street was closed South of Beech Street and North of Elm Street to regular traffic at the material time. Benoit St Jean was operating the large grader through the live intersection at Beech and Elgin streets working with the traffic lights. Benoit St Jean would proceed back and forth along Elgin Street with the large grader through this intersection when his traffic light was green. At the time of the Accident, no signallers were assisting the operator of the grader.

[14] In addition to the testimony of Benoit St Jean, which the court does not find credible or reliable, the court reviewed Exhibit 7, the video footage of the Accident. Exhibit 7, the video surveillance of the Accident, was helpful to the court in determining the facts.

[15] No sturdy fence at least 1.8 metres in height existed between the public way and the Elgin Project.

[16] The City is the road authority responsible for maintaining the road network, which include the roads involved in the Elgin Project for the purposes of the *Highway Traffic Act*, (hereinafter "**HTA**"). This responsibility

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includes ensuring compliance with the Ontario Traffic Manual, Book 7 (hereinafter "**Book 7**").

[17] Book 7 requires, among other things, that any intersection which is in use by the public and at which traffic lights are active or "lit", must be controlled by police officers if construction work is being performed therein. If police officers are not present, construction work may not be performed in the intersection (hereinafter "**Police Requirement**").

[18] The requirements of Book 7, including the Police Requirement, are incorporated into the Contract and Conditions. To satisfy the Police Requirement, Interpaving used paid duty police officers from the Greater Sudbury Police Service (hereinafter the "**GSPS**") for traffic control at lit intersections.

[19] Historically, when GSPS officers were required by contractors working for the City, the contractors would contact GSPS directly to request officers. The contractor would issue a change order to the City requesting payment for the costs of the officers. Payment on the change order would be made by the City to the contractor on the next progress payment. The contractor was responsible for paying GSPS from that progress payment (hereinafter the "**Change Order Process**").

[20] This Change Order Process was inefficient and there were many problems with it. Payments were delayed, there were miscommunications, confusion as there were several ongoing contracts, there were duplications and at times too many officers were assigned. The City had difficulty tracking the paid duty expenses for the multiple ongoing projects.

[21] Sometime between 2009 and 2012 the Change Order Process stopped being used and was replaced by a new process (hereinafter the "**City Payment System**"). Under the City Payment System, the City acts as a conduit to communicate the requests for police by the contractor to the GSPS. When a contractor determines that GSPS officers are required for upcoming work, the contractor contacts a designated representative for the City to inform them that police officers are required on a specific date, time and location. The City's representative forwards the request to the GSPS, who assigns paid duty officers to the project. The City pays GSPS directly, bypassing the need for the payment to be processed by way of a change order. This, in turn, allows the City to track contractor requests for the GSPS on a per-project basis and ensure timely payment to the GSPS.

[22] The City Payment System was in place for the Elgin Project. It is clear from the evidence at trial that the City did not determine when GSPS

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officers would be requested or required or otherwise direct their assignment. The City did not coordinate with GSPS officers on site. If Interpaving requested paid duty officers, that request was communicated without exception. The City did not question or deny any requests from Interpaving for GSPS officers. The City was simply a conduit of information to streamline the process, rendering it more manageable and efficient for everyone involved. The City's responsibilities under the OHSA did not change as a result of the implementation of the City Payment System.

[23] As part of its mandate to ensure the quality of work and to protect public funds, the City employs inspectors (hereinafter "**Inspector(s)**") to monitor job sites for quality assurance purposes. The Inspectors monitor the progress of the work and confirm that the value of the work the City is receiving accords with the money they are paying the Contractor. The City pays for and does quality assurance but the Contractor does the quality control testing. The City sometimes obtains an independent testing agency to ensure quality assurance.

[24] The primary Inspector for the Elgin Project was John Temelini. He often attended the worksite. He reported to Shawn Hinton, the Chief Field Inspector for the City. The role of the Inspector was to ensure that the work being performed by Interpaving was consistent with the Contract. This included the quality of workmanship, materials and compliance with the Contract's terms, including the Police Requirement.

[25] The Inspectors were responsible for ensuring that requests for progress payments to contractors were supported by the nature and quality of work completed. The Inspectors also dealt with the public.

[26] The Inspectors were not responsible for the completion of any construction work. The Inspectors did not direct any workers on the Elgin Project. The Inspectors were required to comply with Interpaving's policies, including health and safety and personal protective equipment.

[27] On September 15, 2015, approximately two weeks before the Accident, Inspector John Temelini noted that the Interpaving employees were using an excavator in the intersection of Beech Street and Elm Street while pedestrians and vehicles were also using the lit intersection. Flagmen from Interpaving were attempting to direct traffic. There had not been a request by Interpaving as per the Contract or the Police Requirement for GSPS officer(s).

[28] Inspector Temelini expressed his observations to an Interpaving supervisor who took no action. Inspector Temelini then advised Inspector Shawn Hinton. Inspector Hinton arrived at the site and agreed with Inspector Temelini that the situation did not reflect compliance with the Contract and Book 7. Inspector Hinton contacted Ken Edwards from Interpaving who came to the site and correct the default, as it was not being corrected by the Interpaving personnel on site.

[29] Ken Edwards, management at Interpaving stopped the work in the intersection. Inspector Temelini issued an Instruction Form which set out that work not be performed at a lit intersection until police were present, per the Contract and Book 7.

[30] On the day of the Accident, September 30, 2015, Interpaving's for-man on site was Adam Peddie and Interpaving's operator on site was Benoit St Jean. Benoit St Jean was using a grader to grade granular along Elgin Street in preparation for asphalt to be laid down. Benoit St Jean worked through the intersection in contravention of the Police Requirement, the Contract and Book 7. Interpaving did not make a request for police on the day of the Accident as per the terms of the Contract or the Police Requirement or Book 7.

[31] Immediately following the Accident, the Traffic Protection and Control Plan at tab 6 of Exhibit 3A was prepared by someone at Interpaving. The onsite Interpaving supervisor on September 30, 2015 was Adam Peddie. Adam Peddie testified that he did not complete the document. The court finds that it is very unlikely that Adam Peddie completed this document and misspelled his own name. The court is very concerned about the credibility and reliability of the following witnesses who were employed with Interpaving.

[32] Adam Peddie testified with his back to the court and admitted to lying to the MOL Inspector Dawn Savignac during the aftermath of the Accident. Adam Peddie initially told MOL Inspector Savignac that he had prepared the document at Tab 6 of Exhibit 3A prior to the Accident. When it was pointed out to him that his name was misspelled on the document, he changed his story to the Inspector but insisted it was prepared prior to the Accident. At trial, Adam Peddie admitted that he did not prepare the document and that it was prepared, to the best of his knowledge, after the Accident and submitted as though it had been prepared before. Adam Peddie testified that he believes that Stephane Girouard falsified the document and submitted it to the MOL after the Accident.

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[33] Benoit St Jean testified without issue in direct examination. He reviewed photos and answered questions without the assistance of eye glasses when the MOL was questioning him. During cross-examination on the same day, Benoit St Jean testified that he could not identify the driving record shown to him as he did not bring his eye glasses. When the City's counsel took him to the numerous entries on the record, reading them aloud to him, Benoit St Jean testified that he could not recall whether or not the multiple violations were his. He testified that he could not recall the conviction in July 2015, just a few months prior to the Accident. The court does not accept the evidence of Benoit St Jean.

[34] Stephane Girouard, when asked if he falsified the Traffic Protection and Control Plan at tab 6 of Exhibit 3A, testified that he could not recall. He had to be asked repeatedly by counsel for the City and eventually provided an answer that he did not falsify a record to be provided to the MOL after the Accident. This court has very little confidence in his answers. He repeatedly indicated that he could not recall if he falsified the document. The Traffic Protection and Control Plan at tab 6 of Exhibit 3A existed at the time it was submitted to the MOL but beyond that, the court is unable to find as a fact other details relating to this document beyond a reasonable doubt. It would be unsafe for the court to rely on the testimony of Adam Peddie, Benoit St Jean and Stephane Girouard. Their evidence was unreliable and they lacked credibility.

[35] The same is not the case for the City employed witnesses. They testified in a forthright manner and were not shaken on cross-examination. Their responses to the questions appeared appropriate and were, to a great extent, corroborated by the documentation filed within the Exhibits.

[36] Following the Accident, several orders were issued to Interpaving and to the City by the MOL Inspector Dawn Savignac. The orders issued to Interpaving were issued to them in their capacity as Constructor.

[37] Prior to November 6, 2015, all orders issued to the City in respect of the Elgin Project were in its capacity as Owner.

[38] At some point after that, the MOL became of the opinion that the City Payment Process rendered the City the constructor. Dawn Savignac issued an order to the City requiring that they file a Notice of Project for the Elgin Project as Owner. In the normal course, the constructor is responsible for filing a Notice of Project.

[39] The City appealed that order to the Ontario Labour Relations Board.

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On December 21, 2015, the operation of the order was suspended. Interpaving was willing and able to continue to work in the role of Constructor.

[40] On October 3, 2016, the City's appeal of the constructor order was adjourned pending the outcome of this trial.

[41] After the Accident, Interpaving was debarred from working on projects for the City. Tony Ceccutti received a letter from Interpaving dated April 12, 2016 and signed by Interpaving Vice President Steve A. Vaccaro filed as Exhibit 16. In the document at Exhibit 16, Interpaving continues to maintain it had signed a declaration that it was the Constructor on the Elgin Project and that Interpaving will not support the MOL's position that the City was the Constructor on the Elgin Project.

ISSUES

[42] There are several issues in this case. One issue is whether the City was a 'Constructor' for the purposes of the OHSA and the Regulation on the Elgin Project at the time of the Accident.

[43] Another issue is whether or not the City, was an 'Employer' for the purposes of the OHSA and the Regulation on the Elgin Project at the time of the Accident.

[44] If the City was an 'Employer' and / or a 'Constructor' for the purposes of the OHSA on the Elgin Project at the time of the Accident, did the City exercise due diligence to avoid the breaches with which it is accused?

Position of the MOL

[45] The MOL argues that the City was an Employer as defined in the OHSA. Furthermore, if the court finds that the City was an Employer, the MOL asks the court to find that the City did not establish due diligence.

[46] In addition to being an Employer, the MOL argues that the City was also a constructor as the City did not rescind sufficient control to the general contractor such that the general contractor became the Constructor. The MOL purports that the City retained overall control of the project and remained responsible as the constructor for health and safety. Similarly, the MOL asks the court to find that the City did not establish due diligence, in the even the court finds that the City was a Constructor.

Position of the City

[47] The City maintains that they are the project Owner and contracted

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out the contract to a third party contractor, namely Interpaving. They insist they were involved with quality assurance, but they were not the Constructor at any time. The City had Inspectors to ensure compliance with the Contract and they had regular interaction with the public. Interpaving and the City maintain that Interpaving was the Constructor at all times and not the City. Interpaving filed the Notice of Project. Interpaving maintains that it is the constructor, despite the change in the position of the MOL months after the Accident.

[48] The City maintains that it was not an employer on the Elgin Project for the purposes of the OHSA.

[49] If the court finds that the City was an Employer under the OHSA, the City met the required threshold of due diligence by contracting an experienced contractor that warranted that it was able to meet the requirements of a constructor and ensure health and safety on the Elgin Project.

LEGISLATION

[50] Attached to this decision, at 'Appendix A', is a copy of the relevant sections of legislation for this case.

[51] A review of the OHSA and some of the cases relating to it reveals the following. A 'Constructor' means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer.

[52] However, an owner does not become a constructor by virtue only of the fact that the owner has engaged an architect, professional engineer or other person solely to oversee quality control at a project.

[53] A constructor shall ensure, on a project undertaken by the constructor that, the measures and procedures prescribed by the OHSA and the regulations are carried out on the project, every employer and every worker performing work on the project complies with the OHSA and the regulations and the health and safety of workers on the project is protected.

[54] The term 'Employer' is defined by the OHSA as a person who employs one or more workers or contract for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services.

[55] The term 'Worker' is defined for this case as a person who performs

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work or supplies services for monetary compensation. This definition is broadly worded and includes employees as well and independent contractors according to *R. v. Wyssen*, [1992] OJ No 1917 (CA), at para 12.

[56] According to *R. v. Timminco Ltd.*, [2001] OJ No 1443 (CA), at para 22, "The OHSA is a public welfare statute. The broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. It should be interpreted in a manner consistent with its broad purpose."

[57] In accordance with the case of *R. v. Sault Ste Marie*, [1978] 2 SCR 1299 the offences contrary to the OHSA are strict liability offences. The Crown must prove the *actus reus* beyond a reasonable doubt. There is no *mens rea* component. The onus then shifts to the defendant to advance a defence of due diligence on a balance of probabilities. To establish due diligence, the defendant must prove that it took all reasonable steps to avoid the contravention or was reasonably mistaken as to the facts.

[58] Liability under the OHSA is overlapping with a redundancy intended to safeguard workers and improve workplace safety as in *Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc.*, 2010 ONSC 2013 at para 24.

[59] I agree there should be a liberal interpretation of the OHSA in order to guarantee a minimum level of protection for the health and safety of workers.

[60] The defence of due diligence has been interpreted as placing a heavy burden on employers to take every reasonable precaution to ensure the protection of workers. The onus of due diligence is on the Defendant, on a balance of probabilities.

[61] An employer cannot contract out of liability for workplace safety, see *Grant v. Forest Products Inc*, 2002 Carswell Ont 2557 (ONCJ).

ANALYSIS

Did the City act as a Constructor?

[62] It is clear that all of the documentation filed in this matter has the City as the Owner and Interpaving as the Constructor.

[63] The court finds that the City was not a Constructor at the time of the Accident. The Contract clearly identifies Interpaving as the constructor of the Elgin Project. The court has reviewed the exhibits at trial, the evidence

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of the witnesses and the court is not satisfied beyond a reasonable doubt that the City acted as a Constructor on the Elgin Project.

[64] The MOL alleges that the Contract wording contained provisions that could enable the City to assume the role of Constructor. In reviewing the evidence, there is no suggestion that any contractual provision was invoked on the Elgin Project which would make the City the Constructor. The court finds that the City did not undertake the role of Constructor in its actions. The court finds that the City was interested and involved with the monitoring of quality and progress of the work completed by Interpaving. It is clear that the City, in the Contract, reserved the right to assume control over some aspects of the Elgin Project in the case of a breach by Interpaving of its contractual obligations. The fact remains that in actuality, the City did not undertake control of the Elgin Project.

[65] Interpaving had actual, factual control and direction of the Elgin Project.

[66] Although the MOL alleges that the City Payment System makes the City a Constructor under the OHSA, the court disagrees. The City Payment System was put in place years ago, to alleviate several problems such as confusion, inefficiencies, payment delays, payments being applied incorrectly, duplication and other errors. There is no evidence that the elimination of the Change Order and the corresponding cost saving to the City was a factor in the change to the City Payment System.

[67] It is crystal clear, according to the evidence at trial, the Owner was the City and the Constructor was Interpaving. This is not a case where the City is attempting to evade its statutory duty. This court finds that the MOL has failed to show that the City assumed the role of constructor or assumed control over the Elgin Project.

[68] Moreover, it is clear according to the evidence, that Interpaving assumed the role of the constructor of the Elgin Project. The court is not satisfied beyond a reasonable doubt that the evidence indicates otherwise.

[69] The tender process, the signed Contract and the Conditions all set out clearly defined roles. The court is not satisfied that the evidence establishes that the City assumed the role of constructor at any time during the Elgin Project. The documented and testimonial evidence at the trial shows that not only was the City clearly the Owner, Interpaving was clearly the Constructor. Furthermore, according to the evidence, the City acted as Owner and Interpaving acted as Constructor throughout the Elgin Project.

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[70] Interpaving filed the Notice of Project and did not detract from it, even in the face of litigation.

[71] The City did not control the Elgin Project. Interpaving, the constructor, was responsible for health and safety. The City did not exercise control over the site to the point where they became the constructor. The City did not direct Interpaving employees. The City's Inspectors were primarily focused on the quality of the work being performed by Interpaving. The Inspectors assessed the quality of the materials on the Elgin Project and ensured that the work was properly performed prior to Interpaving receiving progress payments.

[72] The Inspectors also dealt with the public questions, comments and complaints. This is not surprising as the Elgin Project is in the busy, densely populated downtown where there is a lot of pedestrian and motor vehicle traffic. There are also many businesses nearby.

[73] The City did act as a conduit for the Constructor when they required the assistance of the GSPS, but the undisputed evidence is that they did not exercise control over the process. The Inspectors did not instruct the Interpaving workers. The court finds that the City did not undertake the Elgin Project by way of the GSPS.

[74] The court does not find that the NORCAT training module was reflective of the City being responsible for health and safety. In the court's view, the City's obligation as an Owner, is to ensure that workers are aware of the specific hazards that they may encounter on the Elgin Project. Here, the City insisted on extra training above and beyond what the OHSA requires. This is not undertaking a project.

[75] The issuance by the City of Instruction Forms and Contractor Appraisal Forms are a means for the City to evaluate the contractor and provide feedback to Interpaving on its performance. The forms did not provide any instruction to Interpaving. This does not constitute control over the Elgin Project. Throughout, it was Interpaving, the Constructor, who decided how to accomplish or undertake the Elgin Project. An Owner is able to inform the Contractor of how the City views the contractor's compliance with the Contract without undertaking the Elgin Project. Moreover, the Instruction Form relates to compliance with Book 7 and the Contract and not the OHSA.

[76] It is not surprising or uncommon for the Owner to hold the purse strings over a project. The Owner is the one who pays the Constructor for

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the work performed. There is nothing here that makes the City the Constructor for the Elgin Project.

[77] The court is not concerned that the City shared the use of a trailer with Interpaving at the Elgin Project. The court is not concerned that the City attended progress meetings, chaired some of these meetings and that these meetings were held in different locations, including on City property. The court is not concerned that a City employee sometimes took the minutes of these meetings.

[78] The court is not concerned that the City modified the scope of the Elgin Project once it was underway. The City as Owner, is entitled to do so. Changes to the scope of work are processed through change orders through Interpaving. The City did not direct Interpaving on how to perform the work.

[79] When the Inspectors for the City advised Interpaving of their view that they were breaching Book 7 and the Contract on September 15, 2015, this did not involve them taking on the role as Constructor. The court finds that the City acted appropriately by making Interpaving aware of the violation. Ken Edwards of Interpaving stopped the work through the intersection. That was the Constructor, Interpaving's decision. Moreover, if this act by the City were to constitute taking over the role as Constructor, it may dissuade the City from bringing the breach to the attention of the Constructor, for fear that it would assume the role of the Constructor and all that it entails.

[80] The City should be commended and not condemned for its behaviour on September 15, 2015. It was an issue of public safety.

[81] The court does not agree with the MOL's argument that the City's knowledge and review of the traffic flow measures on the Elgin Project supports their position. The City has a responsibility under the HTA to deal with Traffic Flow Plans. This dealt with partial street closures, access for the public to facilities and traffic flow. This was the evidence at the trial. The Traffic Flow Plans are different from Traffic Protection Plans, which were also testified to at the trial. The Traffic Protection Plans are related to workplace safety and were Interpaving's sole responsibility as the Constructor. The City was not involved in the creation, enforcement or implementation of these plans. The City's actions reflected its concern to ensure that Interpaving met the needs of the public accessing the roadway, rather than any direction or control over the way the work was being performed.

[82] The court does not find that the City supervised the work of subcon-

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tractors. The interaction between the City and any subcontractors to Interpaving reflected an owner interested in quality assurance. The City did not have a contractual relationship with any subcontractor. The City did not direct any subcontractors of Interpaving. The court finds that Steel Controls and Holloway were the sub-contractors of Interpaving.

[83] The MOL has not met its onus. The court is not satisfied, based on all of the evidence that is accepted, that the City was a Constructor for the Elgin Project. Consequently, the charges alleging that the City was a Constructor, namely counts 4, 5 and 7 must be dismissed.

Did the City act as an Employer?

[84] The court is mindful of the very recent decision of *West Fraser Mills Ltd. v. British Columbia*, 2018 SCC 22. This court agrees with the premise that the OHSA's purpose is to promote workplace safety and that it is important that the parties foster cooperative and consultative relationships regarding workplace safety. In its decision, the Supreme Court of Canada found that the decision that it was reviewing was not patently unreasonable where it borders on the absurd. The courts should and do accord the utmost deference to the originating court's decision.

[85] The Supreme Court of Canada, in this decision, does indicate that a party can be both an owner and an employer as defined by the OHSA. This interpretation is more supportive of the goal of promoting workplace health and safety and deterring future accidents. It recognizes the complexity of overlapping and interacting roles on the actual worksite. The general scheme of the OHSA is to hold both owners and employers responsible in an overlapping and cooperative way for ensuring worksite safety. The Supreme Court of Canada, in this decision also looked at the knowledge and control of the party over the worksite.

[86] As I have already indicated, the City did not exercise control over the work at the Elgin Project. The City was clearly an Owner. The Inspector(s) were subject to the Constructor's requirements pertaining to health and safety. The Inspector was focussed on ensuring that the work materials and work product reflected what was set out in the contract and provided feedback with regard to same. The City was clearly not an Employer. The City was not supervising the work. The City was not directing the work. The City hired a third party, Interpaving, because it had the knowledge and resources to complete the work.

[87] There is no credible evidence in this matter that the City had control

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over the workplace. There is no credible evidence in this matter that the City was even aware that the Interpaving employee was grading through a lit intersection without the GSPS, in breach of the Police Requirement, Book 7 and the Contract. Nevertheless, the offences with which the City is charged are strict liability offences and the *mens rea* component is not required. In this case, the City did not have control of the conduct of the workplace to bring it within the obligations intended or created by the OHSA for employers.

[88] In the court's view, the City was not an employer within the meaning of the OHSA. As in the decision of *R. v. EFCP Canada Co*, 2010 ONCJ 421, the OHSA is legislation intended to protect the safety and welfare of workers in their workplace or on their jobsite. The punitive sections of the OHSA are intended to make accountable those who do not comply with the provisions of the OHSA and its Regulation in the "sphere of operation". The reason the City was involved with the Elgin Project was as Owner and for issues of quality assurance as permitted by section 1(3) of the OHSA. This court finds that the City did not have any control over the conduct of the workplace to bring it within the Employer obligations under the OHSA. In fact, if the City were to be found to be an Employer, then in order to conduct its due diligence, it would be placed in a position where it may have to undertake the project and would then have to exercise control over the project and would become the Constructor.

[89] Although Inspectors would attend the Elgin Project from time to time, their role was quality assurance and ensuring that the work being performed by the Constructor was in accordance with the Contract so that progress payments could be made. They also provided feedback to Interpaving on their performance. It was clear from the evidence that the Inspectors had to follow the health and safety guidelines of Interpaving. Interpaving had control over the Inspectors when they were at the Elgin Project worksite.

[90] The court is not satisfied beyond a reasonable doubt that the City was an Employer as defined and intended by the OHSA. Consequently, the charges against the City alleging it was an Employer, namely counts 8, 9 and 10, must be dismissed.

Due Diligence

[91] In the event that the court has erred and the City is an Employer for the purposes of the OHSA, the court is satisfied on a balance of probabilities that the City exercised due diligence. The City took every precaution reasonable in the circumstances to prevent the tragedy that occurred. The City

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tendered the Elgin Project in accordance with the usual practice of municipalities when tendering work. The tendering process involves public notification to contractors to review the drawings and specifications and an invitation to bid on the work. The tender documents sets out all relevant aspects of the project to allow a contractor to assess whether it should bid on the project. Bids are announced to the public and the City evaluates the submissions and decides on who is awarded the contract.

[92] Interpaving was the successful bidder for the Elgin Project and contractually agreed that it had conducted the necessary investigations to ensure that it had a full understanding of the project, its location and the consequences of same. The City had previous dealings with Interpaving as the Constructor on approximately 40 projects for the City in the five years prior to the Elgin Project. The City paid a premium for Interpaving's services.

[93] An Owner does not have the right to control a project and if they do exert control over it, they risk becoming the constructor.

[94] The City displayed due diligence when it notified Interpaving on September 15, 2015 that it was not in compliance with the Contract, the Police Requirement and Book 7. The City displayed due diligence when the Interpaving workers on site did nothing to address the breaches and the City contacted Interpaving management Ken Edwards who came to the Elgin Project site and rectified the situation from a Contract, Police Requirement and Book 7 perspective. The City had knowledge in the areas of the Contract, Police Requirement and Book 7.

[95] The City took complaints from the public and made Interpaving aware of the issues. The City suggested to Interpaving that there was insufficient signage, issues with signage and insufficient access to crosswalks for the public.

[96] The City advised Interpaving that fencing had been knocked down on the Elgin Project.

[97] The City commented to Interpaving about the usage of road signs.

[98] The City required the successful bidder at tender to have NORCAT safety awareness training specifically designed for City projects.

[99] The City attended periodic progress meetings and sometimes chaired them or took the minutes.

[100] These are all examples of the City demonstrating due diligence, if

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the court had found that they were an Employer under the OHSA, which the court has not done.

[101] As the Owner of the Elgin Project, the City had no positive obligation to ensure that Interpaving and its workers complied with the OHSA. An Owner who does not become a constructor has very limited obligations under the OHSA.

[102] An Owner should not take steps which could be seen as undertaking a project or it will face the risk of being deemed a constructor for the project. The OHSA anticipates that an Owner who has contracted with a third-party constructor will have a quality control role on the project, relating to ensuring compliance with the contract and ensuring that the impact of the project has on-going operations is minimized.

[103] As the Owner of the Elgin Project, the City had no positive obligation to ensure that Interpaving and its workers complied with the OHSA. This court has not found that they were a Constructor. This court has not found that they were an Employer.

CONCLUSION

[104] Given the court has found that the MOL has not satisfied the court that the City was a Constructor or an Employer beyond a reasonable doubt, the MOL's argument cannot succeed.

[105] The court finds the Corporation of the City of Greater Sudbury NOT GUILTY of all charges.

[106] I would like to thank counsel for their very able presentation of the evidence in this case as well as their cogent submissions.

Released at Sudbury, Ontario: August 31, 2018

Signed: _____


Justice K. L. Lische

[See 'Appendix A' attached]

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APPENDIX 'A'

Legislation

Occupational Health and Safety Act R.S.O. 1990, CHAPTER O.1

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1 (1) In this Act,

"constructor" means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer;

"employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

"project" means a construction project, whether public or private, including,

- (a) the construction of a building, bridge, structure, industrial establishment, mining plant, shaft, tunnel, caisson, trench, excavation, highway, railway, street, runway, parking lot, cofferdam, conduit, sewer, watermain, service connection, telegraph, telephone or electrical cable, pipe line, duct or well, or any combination thereof,

"worker" means any of the following, but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program:

- 1. A person who performs work or supplies services for monetary compensation.

(3) An owner does not become a constructor by virtue only of the fact that the owner has engaged an architect, professional engineer or other person solely to oversee quality control at a project.

23 (1) A constructor shall ensure, on a project undertaken by the constructor that,

- (a) the measures and procedures prescribed by this Act and the regulations are carried out on the project;

- (b) every employer and every worker performing work on the project complies with this Act and the regulations;

25 (1) An employer shall ensure that,

- (c) the measures and procedures prescribed are carried out in the workplace;

30 (1) Before beginning a project, the owner shall determine whether any designated substances are present at the project site and shall prepare a list of all designated substances that are present at the site.

(2) If any work on a project is tendered, the person issuing the tenders shall include, as part of the tendering information, a copy of the list referred to in subsection (1).

(3) An owner shall ensure that a prospective constructor of a project on the owner's property has received a copy of the list referred to in subsection (1) before entering into a binding contract with the constructor.

(5) An owner who fails to comply with this section is liable to the constructor and every contractor and subcontractor who suffers any loss or damages as the result of the subsequent discovery on the project of a designated substance that the owner ought reasonably to have known of but that was not on the list prepared under subsection (1).

O. Reg. 213/91:
CONSTRUCTION PROJECTS

65. If work on a project may endanger a person using a public way, a sturdy fence at least 1.8 metres in height shall be constructed between the public way and the project.

67. (4) Every employer shall develop in writing and implement a traffic protection plan for the employers' workers at a project if any of them may be exposed to a hazard from vehicular traffic.

(5) The traffic protection plan,

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- (a) shall specify the vehicular traffic hazards and the measures described in subsection (2) to be used to protect workers; and
- (b) shall be kept at the project and made available to an inspector or a worker on request.

104. (3) Operators of vehicles, machines and equipment shall be assisted by signallers if either of the following applies:

- 1. The operator's view of the intended path of travel is obstructed.
- 2. A person could be endangered by the vehicle, machine or equipment or by its load.

(5) The operator and the signaller shall,

- (a) jointly establish the procedures by which the signaller assists the operator; and
- (b) follow those procedures.

106. (1) A signaller shall be a competent worker and shall not perform other work while acting as a signaller.

(2) A signaller,

- (a) shall be clear of the intended path of travel of the vehicle, machine or equipment, crane or similar hoisting device, shovel, backhoe or similar excavating machine or its load;
- (b) shall be in full view of the operator of the vehicle, machine or equipment, crane or similar hoisting device, shovel, backhoe or similar excavating machine;
- (c) shall have a clear view of the intended path of travel of the vehicle, machine or equipment, crane or similar hoisting device, shovel, backhoe or similar excavating machine or its load; and
- (d) shall watch the part of the vehicle, machine or equipment or crane or similar hoisting device, shovel, backhoe or similar excavating machine or its load whose path of travel the operator cannot see. O. Reg. 213/91, s. 106 (2).

(3) The signaller shall communicate with the operator by means of a telecommunication system or, where visual signals are clearly visible to the operator, by means of prearranged visual signals.

Legislation

Occupational Health and Safety Act, RSO 1990 c. O.1

Definitions

1 (1) In this Act,

[...]

"constructor" means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer;

[...]

Limitation

(3) An owner does not become a constructor by virtue only of the fact that the owner has engaged an architect, professional engineer or other person solely to oversee quality control at a project.

Duties of constructor

23 (1) A constructor shall ensure, on a project undertaken by the constructor that,

- (a) the measures and procedures prescribed by this Act and the regulations are carried out on the project;
- (b) every employer and every worker performing work on the project complies with this Act and the regulations; and
- (c) the health and safety of workers on the project is protected.

Notice of project

(2) Where so prescribed, a constructor shall, before commencing any work on a project, give to a Director notice in writing of the project containing such information as may be prescribed.

Duties of owners

29 (1) The owner of a workplace that is not a project shall,

- (a) ensure that,

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- (i) such facilities as are prescribed are provided,
 - (ii) any facilities prescribed to be provided are maintained as prescribed,
 - (iii) the workplace complies with the regulations, and
 - (iv) no workplace is constructed, developed, reconstructed, altered or added to except in compliance with this Act and the regulations; and
- (b) where so prescribed, furnish to a Director any drawings, plans or specifications of any workplace as prescribed.

Mine plans

- (2) The owner of a mine shall cause drawings, plans or specifications to be maintained and kept up to date not more than six months last past on such scale and showing such matters or things as may be prescribed.

Plans of workplaces

- (3) Where so prescribed, an owner or employer shall,
- (a) not begin any construction, development, reconstruction, alteration, addition or installation to or in a workplace until the drawings, layout and specifications thereof and any alterations thereto have been filed with the Ministry for review by an engineer of the Ministry for compliance with this Act and the regulations; and
 - (b) keep a copy of the drawings as reviewed in a convenient location at or near the workplace and such drawings shall be produced by the owner or employer upon the request of an inspector for his or her examination and inspection.

Additional information

- (4) An engineer of the Ministry may require the drawings, layout and specifications to be supplemented by the owner or employer with additional information.

Fees

- (5) Fees as prescribed for the filing and review of drawings, layout or specifications shall become due and payable by the owner or employer upon filing.

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Duty of project owners

30 (1) Before beginning a project, the owner shall determine whether any designated substances are present at the project site and shall prepare a list of all designated substances that are present at the site.

Tenders

(2) If any work on a project is tendered, the person issuing the tenders shall include, as part of the tendering information, a copy of the list referred to in subsection (1).

Idem

(3) An owner shall ensure that a prospective constructor of a project on the owner's property has received a copy of the list referred to in subsection (1) before entering into a binding contract with the constructor.

Duty of constructors

(4) The constructor for a project shall ensure that each prospective contractor and subcontractor for the project has received a copy of the list referred to in subsection (1) before the prospective contractor or subcontractor enters into a binding contract for the supply of work on the project.

Liability

(5) An owner who fails to comply with this section is liable to the constructor and every contractor and subcontractor who suffers any loss or damages as the result of the subsequent discovery on the project of a designated substance that the owner ought reasonably to have known of but that was not on the list prepared under subsection (1).

Idem

(6) A constructor who fails to comply with this section is liable to every contractor and subcontractor who suffers any loss or damages as the result of the subsequent discovery on the project of a designated substance that was on the list prepared under subsection (1).

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O/Reg 213/91: Construction projects

Registration and Notices

5. (1) Before beginning work at a project, each constructor and employer engaged in construction shall complete an approved registration form.

(2) The constructor shall ensure that,

(a) each employer at the project provides to the constructor a completed approved registration form; and

(b) a copy of the employer's completed form is kept at the project while the employer is working there.

6. (1) This section applies with respect to a project if,

(a) the total cost of labour and materials for the project is expected to exceed \$50,000;

(b) the work is the erection or structural alteration of a building more than two storeys or more than 7.5 metres high;

(c) the work is the demolition of a building at least four metres high with a floor area of at least thirty square metres;

(d) the work is the erection, structural alteration or structural repair of a bridge, an earth-retaining structure or a water-retaining structure more than three metres high or of a silo, chimney or a similar structure more than 7.5 metres high;

(e) work in compressed air is to be done at the project;

(f) a tunnel, caisson, cofferdam or well into which a person may enter is to be constructed at the project;

(g) a trench into which a person may enter is to be excavated at the project and the trench is more than 300 metres long or more than 1.2 metres deep and over thirty metres long;

(g.1) the work is the construction, over frozen water, slush or wetlands, of an ice road for vehicles, machinery or equipment; or

(h) a part of the permanent or temporary work is required by this Regulation to be designed by a professional engineer.

(2) The constructor shall comply with subsection (3) or (4) before beginning work at the project.
O. Reg. 145/00, s. 4.

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(3) The constructor shall complete an approved notification form and file it at the Ministry office located nearest to the project or submit it electronically on a website of the government of Ontario. O. Reg. 145/00, s. 4; O. Reg. 242/16, s. 3.

(4) If the constructor believes that the work at the project will not take more than 14 days, the constructor may provide the relevant information to an inspector at the Ministry office located nearest to the project,

(a) by faxing the completed form to the inspector; or

(b) by providing the information that would be required to complete the form to the inspector by telephone.

(5) Despite subsection (2), the constructor may begin work at a project before complying with subsection (3) or (4) if the following conditions are met:

1. It is necessary to do the work immediately to prevent injury to people or damage to property.

2. Before beginning the work, the constructor gives an inspector notice of the information required in the form by telephone or fax.

(6) The constructor shall keep the completed notification form posted in a conspicuous place at the project or available at the project for review by an inspector.

Public Way Protection

65. If work on a project may endanger a person using a public way, a sturdy fence at least 1.8 metres in height shall be constructed between the public way and the project.

67(4) Every employer shall develop in writing and implement a traffic protection plan for the employers' workers at a project if any of them may be exposed to a hazard from vehicular traffic.

Equipment, General

104(3) Operators of vehicles, machines and equipment shall be assisted by signallers if either of the following applies:

1. The operator's view of the intended path of travel is obstructed.

2. A person could be endangered by the vehicle, machine or equipment or by its load.

Occupational Health and Safety Act, RSY 2002

Interpretation

1. In this Act,

[...]

"constructor"

means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by themselves or by more than one employer;

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