

R V GREATER SUDBURY: COURTS CONSIDER LEVEL OF KNOWLEDGE, SKILL, EXPERTISE, AND CONTROL IN ASSESSING DUE DILIGENCE OF “EMPLOYERS” UNDER OHSA

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Introduction

The Ontario Superior Court of Justice (“**Superior Court**”) has dismissed the Crown’s appeal of the Trial Court’s earlier ruling^[1] in the matter of *R v Greater Sudbury (City)*, confirming that the City of Greater Sudbury (“**Sudbury**”) acted with due diligence, despite the occurrence of a tragic accident at one of its project sites. As a result of this dismissal, Sudbury’s acquittal of several charges under the Ontario *Occupational Health and Safety Act* (“**OHSA**”)^[2] is upheld.

This decision follows the recent and controversial split decision of the Supreme Court of Canada (“**SCC**”) in the same matter, where it was determined that Sudbury was an “employer” under the *OHSA*,^[3] thus introducing the potential for additional liabilities to owners as “employers” for *OHSA* violations on their construction sites.^[4] The Court’s discussion in its decision thus likely provides some comfort to construction project owners who were left uncertain about their obligations as “employers” under the *OHSA* following the SCC’s decision.

This bulletin provides a high-level overview of the matter, its path through the various courts and their decisions, and consideration of the impacts of this most recent Superior Court decision. Click [here](#) to jump right to McMillan LLP’s assessment of the impacts of this latest decision on the construction industry.

Background

Sudbury had engaged general contractor Interpaving Limited (“**Interpaving**”), whom it had prior experience with, to carry out a watermain repair project and to act as the “constructor” under the *OHSA* for the project.^[5] Even though inspectors employed by Sudbury were present on a daily basis and had their own trailer on site, the project site was under Interpaving’s control, and Sudbury’s on-site activities were limited to monitoring quality control and the project’s progress.

During the project, a pedestrian was fatally struck by a grader being operated in reverse through an intersection by one of Interpaving’s employees.^[6] At the time of the accident, the operator of the grader was

navigating through the intersection without a signaler's assistance. In addition, no fence had been erected to protect the public right-of-way from the construction activity.^[7] Following the accident, the Ministry of Labour (the "**Ministry**") charged Sudbury with, among other things, several violations of the *OHS*A as an alleged "employer" as defined under the *OHS*A.

At issue for the trial were:

1. Whether Sudbury was an "employer" on the project pursuant to the *OHS*A; and
2. Whether Sudbury had been duly diligent as "employer" to prevent the accident.

Procedural History

Trial Court: The matter was first heard by the Ontario Court of Justice (the "**Trial Court**").^[8] The Trial Court held that the Ministry failed to prove beyond a reasonable doubt that Sudbury was an "employer" for the project, as defined and intended by the *OHS*A. The Court also held that, even if Sudbury were an employer under the *OHS*A, Sudbury had been duly diligent. As a result, Sudbury was acquitted of all charges.

Appeal to Superior Court: The Ministry appealed the Trial Court's decision to the Superior Court. The Superior Court agreed with the Trial Court that Sudbury was not acting as an "employer" for the project, and dismissed the Ministry's appeal.^[9] However, the Superior Court did not comment on whether Sudbury had been duly diligent.

Appeal to Court of Appeal: The Ministry appealed the Superior Court's decision to the Ontario Court of Appeal (the "**Court of Appeal**"). The Court of Appeal overturned the lower courts' decisions and held that Sudbury was an "employer" for the project under the **OHS**A.^[10] According to the Court of Appeal, anyone "who employs one or more workers" is an "employer" under the *OHS*A. Sudbury was, accordingly, an "employer" for the project because its inspectors performed quality control and monitored progress at the project site.^[11] The Court of Appeal sent the case back to the Superior Court to decide whether Sudbury had been duly diligent to prevent the accident, as the Superior Court did not comment on this issue in its earlier decision.

Appeal to SCC: Before the question of Sudbury's due diligence made its way back to the Superior Court, Sudbury appealed the Court of Appeal's decision regarding "employers" under the *OHS*A to the SCC. The SCC appeal resulted in a rare evenly split 4:4 decision, the outcome of which was the dismissal of Sudbury's appeal. Given the dismissal, the Court of Appeal's decision regarding Sudbury as an "employer" under the *OHS*A stands as law in Canada (as a reminder, this SCC decision was only in the context of the *OHS*A, being Ontario legislation). The SCC also confirmed that the Superior Court must decide whether Sudbury was duly diligent to prevent the accident.

Accordingly, the case regarding Sudbury's due diligence made its way back to the Superior Court.

Sudbury's Due Diligence

In this most recent decision, the Superior Court agreed with the Trial Court that Sudbury, as "employer", had been duly diligent to prevent the accident. In assessing Sudbury's due diligence, the Superior Court considered the following four, non-exhaustive factors, set out in the SCC's decision^[12]:

1. Sudbury's Control over the Workplace and Workers: The Ministry argued that Sudbury had "outright control" over the workplace and workers at the project site.^[13] The Superior Court rejected this argument.^[14] The Superior Court held that, while Sudbury conducted quality control inspections to confirm that Interpaving was fulfilling its contractual requirements, this did not constitute control over the workplace or workers.^[15] In upholding the Trial Court's conclusion, the Superior Court noted the following:
 - While Sudbury identified a traffic control concern to Interpaving, it was Interpaving, as "constructor", that ultimately dealt with the concern;^[16]
 - Although Sudbury had a contractual right to dismiss Interpaving's workers if their work was found to be incompetent, unfaithful, or disorderly,^[17] there was no evidence this right had been exercised;^[18]
 - While Sudbury was responsible for arranging and paying for the presence of paid-duty police officers to direct traffic, this was at the request of Interpaving, and Interpaving, as the "constructor", directed the officers at site;^[19]
 - Sudbury had a process for receiving project-related complaints from the public, Interpaving, as the "constructor", was responsible for responding to such complaints.^[20]
2. Sudbury's Skill, Knowledge & Expertise, and its Delegation of Control: The Superior Court referred to testimony before the Trial Court from a Sudbury employee as evidence of Sudbury's lack of "[familiarity] with what it means to be a constructor," and noted that Sudbury had "paid a premium" to Interpaving for its experience, which Sudbury itself lacked, in contracting Interpaving to assume the role of "constructor".^[21]
3. Sudbury's Evaluation of Interpaving's Capacity for Compliance: Sudbury took adequate steps to ensure Interpaving would satisfy the regulatory requirements of a "constructor." Given Sudbury's extensive previous engagements of Interpaving on roughly 40 projects in the preceding five years, Sudbury was well-poised to accurately assess Interpaving's ability to adhere to the requirements of the contract, the *OHSA*, and Regulations.^[22] In addition, Sudbury required Interpaving employees to have

safety awareness training designed for Sudbury projects.^[23]

4. Sudbury's Monitoring & Supervision of Interpaving: The Superior Court determined that Sudbury had effectively monitored and supervised Interpaving's work, including by attending periodic progress meetings, and through its process for receiving public complaints and noting signage, public safety, and access issues then making Interpaving aware of these concerns.^[24]

Conclusion

The Superior Court's assessment of Sudbury's due diligence now provides more practical guidance to project owners respecting their obligations as "employers" under the *OHSA*.

A project owner can be an "employer" and act with due diligence without exercising extensive, "hands-on" control that would require it to effectively adopt the role of "constructor" under the *OHSA*.

The question of whether an owner has been duly diligent as an "employer" on a project will continue to be a very fact-specific analysis in each case - in applying the factors set out by the SCC, the courts will look not only at the level of knowledge, skill, and expertise of the owner, but also to the level of control the owner has assumed contractually and otherwise, and whether that control was in fact exercised. Notably, there may be additional factors that courts will consider in such due diligence analysis, considering the four factors outlined by the SCC and applied by the Superior Court were not an exhaustive list.

Nevertheless, the Superior Court's recent decision provides some reassurance to project owners that they are less likely to be found liable for the actions of their "constructor", subcontractors, and other parties' workers, so long as they exercise reasonable care and due diligence.

Key Takeaways

- Owners can conduct quality control and progress inspections on their construction sites without taking "control" of the project.
- An owner taking on managerial tasks, such as reporting public complaints to a "constructor", arranging for police officers to help manage traffic when requested, or maintaining the right to terminate incompetent workers on the site may not equate to having control of a construction site.
- An owner who lacks the skill and expertise to complete the project in compliance with the *OHSA* should delegate control of the project to a "constructor" as part of its due diligence.
- In choosing a "constructor" to delegate control of the project to, an owner must assess the "constructor"'s ability to ensure compliance with the *OHSA* before engaging them; an owner's history of engagement with a "constructor" is a relevant consideration to this due diligence factor.
- Owners must report hazards and any other safety concerns it may identify to the "constructor", but

should “stay in their lane” and not undertake remedial actions directly, as doing so could indicate that the owner has accepted some of the “constructor”’s responsibilities.

- To successfully exercise due diligence, an owner must effectively monitor and supervise the “constructor”’s work on the project to ensure the regulatory requirements are carried out. Attending progress meetings, performing site inspections, and receiving public complaints are some examples of how an owner can monitor and supervise a “constructor”.

[1] *Ontario (Ministry of Labour) v City of Greater Sudbury*, (OCJ) unreported, Lische J, August 31, 2018 [*Trial Decision*].

[2] *Occupational Health and Safety Act* R.S.O. 1990 c. 0.1 [*OHS Act*].

[3] *R v Greater Sudbury (City)*, [2023 SCC 28](#) [*SCC Decision*].

[4] This is subject to any due diligence defence that could have been established as set out in the *SCC Decision*.

[5] *Trial Decision* at para 92.

[6] *Trial Decision* at para 12.

[7] *Trial Decision* at paras 13 and 15.

[8] *Trial Decision*.

[9] *R v Greater Sudbury (City)*, [2019 ONSC 3285](#) at [para 29](#) [*ONSC Decision 1*].

[10] *Ontario (Labour) v Sudbury (City)*, [2021 ONCA 252](#) at [para 14](#) [*ONCA Decision*].

[11] *ONCA Decision* at [paras 10](#) and [13](#)

[12] *SCC Decision* at [para 61](#).

[13] *R v Greater Sudbury (City)*, 2024 ONSC 3959 at para 17 [*ONSC Decision 2*].

[14] *ONSC Decision 2* at paras 17-27.

[15] *ONSC Decision 2* at para 27.

[16] *ONSC Decision 2* at para 18.

[17] *ONSC Decision 2* at paras 19, 20, and 26.

[18] *ONSC Decision 2* at para 20, referring to para 64 of *Trial Decision*. This point was also affirmed by the first ONSC decision at [paras 28 to 29](#).

[19] *ONSC Decision 2* at paras 22 and 23

[20] *ONSC Decision 2* at paras 24.

[21] *ONSC Decision 2* at paras 28 and 29

[22] *ONSC Decision 2* at para 30.

[23] *ONSC Decision 2* at para 30.

[24] *ONSC Decision 2* at paras 32-33.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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