

Proceed With Caution: Obligations Of Construction Owners Under The Ontario Health And Safety Act



After nearly 10 years in the judicial system, the *R v. Greater Sudbury (City)* saga has finally concluded. Though the decision may be a concern for some owners on construction projects, the recent Ontario Superior Court of Justice decision has provided some clarity on the obligations of owners under the *Occupational Health and Safety Act* (the “OHSA”)

Background

In 2015, the City of Sudbury (the “City”) entered into a contract with a general contractor, Interpaving Limited, to perform repairs on a watermain. In September of 2015, a pedestrian was killed in the construction zone by a road grader after Interpaving Limited failed to put up fences to separate the public from the construction zone, contrary to regulations under the OHSA. This tragedy began a decade long legal battle. The issue to be determined? Is the owner of a construction project an “employer”, as defined by the OHSA and if so, did the City meet its obligations under the Act.

The OHSA legislates workplace health and safety in Ontario and places specific obligations on “employers” and “constructors” to ensure construction sites are safe. An “employer” is

defined as “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.” A “constructor” is defined as “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”. Many violations under the *OHSA* are strict liability offences. The only defence to a strict liability offence is that the accused acted with due diligence, meaning they took every precaution reasonable under the circumstances to prevent the violation.

Historically, in an effort to avoid liability, owners have included contractual provisions designating their general contractor as the “constructor” and would often have no involvement in health and safety on site.

Judicial History

1. **Ontario Court of Justice:** The trial judge ruled that the City was neither the employer, nor the constructor under the [OHSA](#). The trial judge noted that even if the City was an employer, they had exercised due diligence. This decision was appealed by the Ministry to the Superior Court of Justice.
2. **Superior Court of Justice:** The decision of the trial judge was upheld. The Ministry appealed this decision to the Ontario Court of Appeal.
3. **Ontario Court of Appeal (“ONCA”):** The decision of the trial judge was overturned and ONCA ruled that the City was an employer under the *OHSA*. The City appealed this decision to the Supreme Court of Canada.
4. **Supreme Court of Canada (“SCC”):** The SCC upheld the ONCA decision and confirmed that the owner of a project is an employer under the *OHSA*, regardless of the level of control the owner has over the site or whether the owner

has employees on site. The case was sent back to the Superior Court of Justice to review the decision of the trial judge as to whether the City had exercised due diligence.

5. **Superior Court of Justice:** Using the framework provided by the SCC, the Superior Court of Justice upheld the decision of the trial judge in determining the City had exercised due diligence and was therefore not guilty.
6. **Ontario Court of Appeal:** On March 31, 2025, the Ontario Court of Appeal denied the Ministries motion for leave to appeal, thereby concluding this case.

Due Diligence

There is no dispute that the decision in *R v Greater Sudbury* places an increased onus on owners to ensure their construction projects are in compliance with the *OHSA*. So what does an owner need to do to successfully meet those requirements? The Supreme Court of Canada noted that factors to be considered by courts in determining [due diligence](#) include but is not limited to:

1. The owner's degree of control over the workers and the workplace;
2. Whether the owner delegated control to the constructor in an effort to overcome its own lack of skill, knowledge or expertise to complete the project in compliance with the Regulation under the *OHSA* (the "Regulation");
3. Whether the owner took steps to evaluate the constructor's ability to ensure compliance with the Regulation before deciding to contract for its services;
4. Whether the owner 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 Superior Court of Justice considered and applied these

factors to ultimately determine that the City had a successful due diligence defence:

1. **Control:** Though the City had performed quality control inspections, the City did not have any control over the worksite nor the contractor's employees on the worksite.
2. **Delegation:** The City did not have knowledge regarding the requirements to be a constructor and provided evidence that they paid a premium to their contractor to act as the constructor due to their expertise.
3. **Evaluation:** The contract provided by the City was developed in coordination with the Ministry of Transportation and included a requirement for the contractor's employees to attend safety awareness training designed by the City for City projects. As such, the City had assessed the capacity of the contractor to perform work safely.
4. **Monitored:** the City monitored and supervised the work. The City attended progress meetings on site, in addition to receiving complaints and communicating said complaints to the contractor.

Takeaways

Owners of [construction projects](#) cannot turn a blind eye to health and safety on site. The Supreme Court of Canada made clear in its decision that owners of construction projects have obligations to ensure the site is safe and will be found liable for offences, should the owner fail to meet said obligations. With that said, the Supreme Court of Canada and the recent decision of the Superior Court of Justice also provide insight into how owners can successfully meet those obligations by demonstrating due diligence.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Author: [Chelsea Packman](#)

Soloway Wright Lawyers