

R V Greater Sudbury (City) Continued: The Due Diligence Defence For Owner-Employers Under OHSA



As readers will recall, the Supreme Court of Canada's decision in *R.v.Greater Sudbury (City)*, 2023 SCC 28 was the subject of significant attention due to the changes it effected to Ontario occupational health and safety law. In particular, the Supreme Court concluded that even where an owner contracts with another party for the latter to act as constructor on a project, the owner nevertheless retains statutory duties as an "employer" to ensure worker health and safety on the project site. On the facts of that case, the Supreme Court also remitted the matter back to the Superior Court to determine whether the City of Greater Sudbury ("**Sudbury**") could succeed on a due diligence defence, leaving industry participants concerned as to the extent to which the Supreme Court had overturned standard practice in the construction industry.

The Superior Court has now ruled on the City's due diligence defence in *R v Greater Sudbury (City)*, [2024 ONSC 3959](#), and found that Sudbury had succeeded in its due diligence defence. Below, we review the Superior Court's decision, including its review of the due diligence defence and its clarifications for how a court will assess the "degree of control" an employer may have over a workplace.

Brief Factual Background

Sudbury contracted with Interpaving Limited (“**Interpaving**”) to repair a watermain. In the course performing the repairs, a road grader being operated by Interpaving personnel struck and killed a pedestrian. In violation of the *Occupational Health and Safety Act* (“**OHS**A”), there were no signallers present to assist the operator of the road grader, nor was there a fence between the public right of way and the street.

As a result, the Ministry of Labour charged Sudbury under s. 25(1)(c) of *OHS*A. In response, Sudbury denied that it was a “constructor” or an “employer” under *OHS*A, and, therefore, could not be held liable under *OHS*A. Alternatively, even if Sudbury was an “employer” and was found to have breached its obligations under *OHS*A, Sudbury argued that it had exercised due diligence under s. 66(3)(b) of *OHS*A, thereby excusing any liability under s. 25(1)(c).

Procedural Summary

The Ontario Court of Justice ruled in favor of Sudbury, finding that it was not an “employer” under the *OHS*A, and had in any event exercised due diligence.^{[1](#)} Upon appeal, the Superior Court affirmed that Sudbury was not an “employer”, but did not address the issue of whether Sudbury exercised due diligence.^{[2](#)}

Upon further appeal, both the Court of Appeal for Ontario and the Supreme Court (the “**SCC**”) reversed the findings of the courts below, and found that the City was an “employer”.^{[3](#)} The Supreme Court reasoned that the term “employer” under *OHS*A was to be interpreted generously to advance public health and safety, thereby justifying the classification of Sudbury as an “employer”. (A more detailed analysis of the SCC’s ruling has been discussed by our firm and can be found [here](#).)

Regarding Sudbury's due diligence defence, the Supreme Court noted that s. 66(3)(b) of *OHSA* allows "employers" who breach s. 25(1) to avoid penalties if they can demonstrate that they took "all reasonable steps in the circumstances" to avoid the breach.⁴ The Court identified the following factors that a court should consider when evaluating the viability of this defence:

(i) the accused's degree of control over the workplace or the workers there;

(ii) 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 compliance with the Regulation;

(iii) 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

(iv) 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.⁵

The Supreme Court then remitted the matter back to the Superior Court for determination of the due diligence defence. Thus, the issue before the Superior Court was whether the trial judge committed a palpable and overriding error in finding that Sudbury had exercised the due diligence required of an "employer".

The Superior Court's decision

The Ministry of Labour argued that Sudbury had failed to exercise reasonable due diligence based on the amount of control Sudbury allegedly had over the repair project. In particular, Sudbury retained the right to suspend work on the

project for any reason whatsoever, could force Interpaving to cooperate with other contractors, and had the contractual authority to fire workers. The Ministry also pointed out that Sudbury was responsible for arranging and scheduling duty officers to direct traffic.

The Court summarily dismissed these two arguments. Although Sudbury had “sweeping powers”, the Court opined that “there was no evidence that such powers had ever been exercised.”⁶ Furthermore, although Sudbury hired the officers and had paid for their services, the Court found that Interpaving had controlled their duties and directed their work.⁷

The Court also considered the four factors listed by the Supreme Court and found that:

- Sudbury did not have control over the workplace and the workers based on the aforementioned reasons.⁸ The Court also ruled that, despite Sudbury’s quality control inspections, these inspections did not constitute control over the workplace or its workers. Similarly, the fact that Sudbury maintained a trailer on the project site, and had personnel present on-site on a daily basis, did not amount to control, nor did the fact that it had certain broad powers (including the ability to (1) fire workers on the project, including workers employed by subcontractors, (2) compel Interpaving to cooperate with other contractors and utility companies, and (3) suspend work on the project for any reason whatsoever). In respect of the latter point, the Court observed that the City never exercised any of these rights, meaning they could not have formed the basis for the City actually assuming control over the project.
- Sudbury had delegated control to Interpaving as Sudbury lacked the skill, common knowledge or expertise to

complete the project in compliance with the *OHS Act*.⁹ The Court further discovered that Sudbury paid a premium to Interpaving based on the expertise that Sudbury itself lacked.

- Sudbury had evaluated that Interpaving had the capacity to perform and enforce compliance with the *OHS Act* based on the safety awareness training Interpaving underwent and their previous cooperation on 40 prior projects.¹⁰
- Sudbury did monitor and supervise Interpaving's work by making Interpaving aware of complaints from the public and by attending periodic progress meetings.¹¹

Therefore, the Court ruled that the trial judge did not err in finding that Sudbury exercised due diligence and dismissed the appeal.

Analysis

Based on the Court of Justice's initial ruling in upholding the City's due diligence defence and the fact that such findings were entitled to deference, the 2024 Superior Court decision affirming the same outcome should arguably come as no surprise. Consequently, the most obvious takeaway is the continued availability of the due diligence defence to owner-employers.

In addition to this takeaway, the Superior Court's decision provides valuable insight as to what "control" may entail according to the first factor outlined by the Supreme Court in evaluating the viability of a due diligence defence. In that regard, the Superior Court indicated that a finding of a high degree of "control over the workplace or the workers" is a high threshold to meet, and is largely a fact-specific exercise.

By distinguishing this case from *Imperial Oil Re*¹² – where the project owner exercised a heavy hand in monitoring the

constructor (including by issuing notices of health and safety contraventions, and threatening to have workers removed from site) and instructing the constructor on how to perform technical aspects of the work – the Superior Court noted that “control” must be the equivalent of directly “usurp[ing] the role of the constructor ... and undertaking all or part of the work making the owner the constructor by the statutory definition.”¹³

That being said, the Court’s reasons also suggest that an owner who engages in a broad exercise of their contractual rights to direct the contractor or the project might be found to have assumed control of the project. This is somewhat challenging in practice insofar as it implicitly constrains an owner’s ability to fully exercise the contractual rights for which it bargained – particularly in circumstances where the owner has justifiable concerns as to whether the contractor can adequately satisfy its occupational health and safety obligations. On balance, owners should be mindful of the potential implications when engaging in a broad exercise of their contractually-based health and safety rights, and would be well advised to consult with counsel before doing so.

Footnotes

[1.](#) *R v Greater Sudbury (City)*, [2019 ONSC 3285](#).

[2.](#) *Ibid.*

[3.](#) *Ontario (Labour) v Sudbury (City)* [2021 ONCA 252](#); *R v Greater Sudbury (City)*, [2023 SCC 28](#) [*Sudbury*]; In a split decision, four justices of the SCC concurred while four justices dissented with the Court of Appeal’s ruling that the City was an “employer” and was in contravention of its obligations under s. 25(1)(c) of the *OHS*A. Due to an even split, there was no majority; therefore, the appeal was dismissed.

[4.](#) *Sudbury*, *supra* note 3 at para 5.

[5.](#) *Ibid* at para 61.

[6.](#) *R v Greater Sudbury (City)*, [2024 ONSC 3959](#) at para 20.

[7.](#) *Ibid* at para 24.

[8.](#) *Ibid* at para 26.

[9.](#) *Ibid* at para 29.

[10.](#) *Ibid* at para 30.

[11.](#) *Ibid* at para 33.

[12.](#) [1993] O.O.H.S.A.D. No. 8.

[13.](#) *Ibid* at para 21.

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.

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