

# Why Hiring Constructors May No Longer Get Ontario Site Owners Off The Liability Hook



Compliance gets complicated at construction projects and other sites where workers of more than one employer work. OHS laws allow or require designation of a single employer called a 'prime contractor' or 'constructor' with overall control and responsibility for ensuring the work is carried out safely and compliantly while the project owner and other employers have only residual liability. However, a recent case may throw a monkey wrench into the works, at least in Ontario.

**What Happened:** The City of Greater Sudbury hired a general contractor (GC) to serve as constructor for a road repair project. Other than carrying out occasional quality control inspections, the City pretty much let the GC run the show. Things went horribly wrong when a road grading machine operated by a GC employee ran over and killed a pedestrian.

Although the GC was also charged, the bombshell was the Crown's decision to lay OHS charges against the City, not as an 'owner' but an employer and constructor. 'We're not the constructor, the GC is', the City argued; the court agreed. And, since the GC had control over the work, we can't be charged as an employer, the City argued; the court disagreed. In carrying out inspections at the site, the City/owner assumed the OHS responsibilities of an employer. After two appeals, the Ontario Court of Appeal, the highest in the province, upheld the decision, albeit in only a preliminary ruling.

**Significance:** If the ruling holds, Ontario owners that hire a constructor to perform work on their site may be charged as employers under the OHS laws to the extent they employ their own workers to work on the project. That's what the City did by hiring quality control inspectors to go to the project and monitor the work. Moreover, once the owner's status as employer is established, it can be charged with any OHS violations found at the site [*Ontario (Labour) v. Sudbury (City)*, 2021 ONCA 252 (CanLII), April 23, 2021].

**Impact:** The *Sudbury* ruling goes completely against previous Ontario practice (and the rules in other provinces) under which owners that handed off a project to a constructor were pretty much not on the hook for more onerous 'employer'

duties, even if their workers worked at the project. This creates a major new liability threat against owners that hire constructors and incentivizes those owners to stay completely out of the work.