

Due Diligence Deliverance: Court Upholds Due Diligence Defence in R. v. Greater Sudbury

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Key Takeaway

Beyond delegating responsibility for health and safety to a “constructor,” owners (i.e., employers) that undertake construction projects should take additional steps at the outset, and during a project, to ensure that the “due diligence defence” is available in the event of an incident requiring Ministry investigation.

Application to Your Organization

In addition to delegating the role and responsibilities of the project “constructor” (as defined in the OHSA¹) to a single contractor as part of a construction contract, construction owners should implement internal guidelines and processes to ensure that, in the event of a workplace incident on their construction project, the owner can demonstrate that it satisfies the requirements for the defence of due diligence.

To establish a due diligence defence, and without undermining the role of a “constructor,” owners can, for example:

- at the procurement stage, critically evaluate contractors’ experience and their ability to ensure compliance with health and safety regulations given the parameters of the project;
- monitor the contractor’s performance during the project to ensure general health and safety compliance are met; and
- perform general quality control.

What Happened?

The *R. v. Greater Sudbury* story may have finally come to an end.

We previously discussed the Supreme Court of Canada (SCC) decision in *R. v. Greater Sudbury (City)*² confirming that an owner is an “employer” under the OHSA that may be found liable for ensuring compliance with health and safety requirements during a project, even where the contractor has been designated and accepted the role of “constructor” on the project. However, the SCC left open the question about whether the owner could establish a due diligence defence, and sent that issue back to the Ontario Superior Court of Justice. The SCC did, however, identify a non-exhaustive list of factors they may consider in an assessment of whether an owner has exercised due diligence.

For a recap of the facts and a summary of the SCC decision, check out [CCN No. 2024-01-30](#).

Question(s) Considered by the Court?

Did the owner successfully establish a due diligence defence?

What Did the Court Say?

At the original trial,³ the judge determined that the owner established a due diligence defence. The Ontario Superior Court of Justice (ONSC) upheld this finding in its latest decision.

The Ministry of Labour (MOL) asserted that the Owner did not establish a due diligence defence, as it exercised a certain degree of control over the project and through the construction contract to usurp the role of the “constructor.” In support of its position, the MOL referred to key rights of the owner as set out in its construction contract with the contractor, being: 1) the right to terminate incompetent, unfaithful, or disorderly workers and subcontractors of the contractor; 2) the right to compel the contractor to cooperate with other contractors and utility companies; and 3) the right to suspend the project work for any reason.

Despite MOL’s argument, the ONSC found that the owner did not exercise any of these rights during the project, and did not seek or become directly involved in the performance of the work. Accordingly, there was not sufficient evidence that the owner or its employees exercised a degree of control to have usurped the role of “constructor.”

In addition, the ONSC reviewed and considered the factors provided by the SCC and found that the Owner met the due diligence defence. Below are the ONSC’s comments in respect of such factors:

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Factor to be Considered⁴

The owner's degree of control over the workplace or the workers

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 regulations

Whether the owner took steps to evaluate the constructor's ability to ensure compliance with the regulations before deciding to contract for its services

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

ONSC's Comments and Analysis in *R. v. (Greater) Sudbury*

The owner's quality control inspections did not constitute control over the workplace and the workers at the site. The purpose of those inspections was to confirm contractual obligations were complied with.⁵

There was evidence at the trial that the owner was not familiar with the requirements of a "constructor". The owner further did not have the resources or capabilities to meet those requirements, which was the reason it relied on the contractor. The Owner paid a premium to the contractor, which had the health and safety expertise that the owner lacked.⁶

The owner has previously worked with the contractor on approximately 40 projects in the five years prior to the accident and further required the contractor to have safety awareness training for municipal projects. There was ample evidence before the trial judge of the owner's efforts to assess the contractor's ability to perform the project work safely and in accordance with OHSA.⁷

The trial judge found that the owner met this requirement by informing the contractor of issues with traffic, concerns raised by the public, concerns about signage and insufficient access to crosswalks for the public, and fencing. The owner also attended progress meetings on the project.⁸

Learn More

R. v. Greater Sudbury (City), 2024 ONSC 3959

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

[*Ontario \(Labour\) v. Sudbury \(City\)*](#), 2021 ONCA 252

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

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¹ *Occupational Health and Safety Act*, RSO 1190, c O.1 (OHSA).

² *R. v. Greater Sudbury (City)*, 2023 SCC 28.

³ Decision of Justice Lische rendered in the Ontario Court of Justice on August 31, 2018. See also *R. v. Greater Sudbury (City)*, 2024 ONSC 3950 at para. 9.

⁴ *R. v. Greater Sudbury (City)*, 2023 SCC 28 at para. 61.

⁵ *R. v. Greater Sudbury (City)*, 2024 ONSC 3959 at para. 27 (*R. v. Greater Sudbury*).

⁶ *R. v. Greater Sudbury* at paras. 28-29.

⁷ *R. v. Greater Sudbury* at paras 30-31.

⁸ *R. v. Greater Sudbury* at para. 33.

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