

Cassels

Sudbury Saga Finale

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Key Takeaway

As “employers” under the OHSA, project owners may mitigate their liability in the event of a health and safety incident by establishing a “due diligence defence.”

Application to Your Organization

Due diligence pays off.

As we discussed in past CCNs, while an owner of a construction project may delegate the role of “constructor” under the *Occupational Health and Safety Act* (OHSA)¹ to a contractor in its construction contract, owners could still find themselves to be independently liable for ensuring compliance with health and safety legislation as an “employer” under the OHSA. To absolve themselves of liability in the event of a health and safety incident an owner can establish a due diligence defence (i.e., demonstrate that the owner took every reasonable precaution i given its degree of control of the circumstances).

In [CCN No. 2024-01-30](#) & [CCN No. 2024-08-30](#), we set out in detail what owners should consider and document at the outset and throughout a project to satisfy the requirements of a due diligence defence without usurping the role of “constructor.”

What Happened?

Cassels

The *R v. Sudbury* saga has (finally) come to an end.

To quickly recap:

- In 2016, a pedestrian died after being struck by a road grader near a project site in Sudbury. The Ministry of Labour (MOL) charged both the Owner and Construction Co under the OHSA for failing to uphold their respective duties as “employer” and “constructor” at the project site.
- In 2019, the Ontario Superior Court of Justice (ONSC) acquitted the Owner of the charges, finding that the Owner was not an “employer” or a “constructor” under the OHSA, and was therefore not liable for compliance with the health and safety regulations and requirements for the project site.
- In 2021, the Ontario Court of Appeal (ONCA) held that the Owner was an “employer” under the OHSA and, as a result, was liable for the health and safety violations unless it could establish a due diligence defence. ONCA remitted the question of whether the Owner established a due diligence defence to the ONSC.
- In 2023, the Supreme Court of Canada (SCC) determined that the Owner was an “employer” under the OHSA, but left open the question as to whether the Owner had successfully established a due diligence defence to absolve itself of liability.
- In 2024, the ONSC considered the question remitted by the SCC, and confirmed that the Owner successfully established a due diligence defence (the Due Diligence Decision).
- In this latest decision before the ONCA, the MOL sought leave to appeal the ONSC’s Due Diligence Decision.

Question(s) Considered by the Court?

Did the ONSC err in finding that the Owner successfully established a due diligence defence?

What Did the Court Say?

No, the ONSC did not err in finding that the Owner successfully established a due diligence defence.

In denying leave, the ONCA confirmed in its decision that:

1. An owner must show that it acted reasonably and exercised due diligence in respect of the specific violation to establish a due diligence defence. General acts of due diligence (i.e., actions throughout the project for general health and safety) are not sufficient.

2. The factors to be considered to establish a defence of due diligence are not novel and include:

- a. The degree of control that the owner has over the workplace and the workers
- b. Delegation of control to overcome the owner's own lack of expertise to comply with the OHSA;
- c. Steps taken to evaluate the contractor's ability to comply with the OHSA before award; and
- d. Monitoring the contractor's compliance with the prescribed requirements of the OHSA.

3. Complying with contractual requirements, including, for example, the owner attending at the project site to perform quality control inspections, does not constitute "control" over the workplace or the workers at the site.

Learn More

R. v. Greater Sudbury (City), 2025 ONCA (awaiting ONCA's reported decision)

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

¹ [Occupational Health and Safety Act, R.S.O. 1990, c. O.1](#)