

[City Of Greater Sudbury Exercised Due Diligence In Construction Site Fatality As Appeal Dismissed By Ontario Superior Court Of Justice](#)



A long-awaited decision from the Ontario Superior Court of Justice (SCJ) was released on August 23, 2024, dismissing an appeal by the Crown who challenged the trial judge's finding that the City of Greater Sudbury exercised due diligence in a workplace fatality. This decision is significant for construction project owners and general contractors, as it upholds the principle that an "owner" of a construction project can also be considered an "employer" with obligations to ensure safety on the project, even where it does not employ workers engaged in construction on the site.

As we wrote in our [FTR Now](#) on the Supreme Court of Canada decision of [R. v. Greater Sudbury \(City\)](#), a "constructor" under the *Occupational Health and Safety Act (OHSA)* is considered to be the party with overall responsibility for safety on the project. The identity of a "constructor" at a project is determined through a control test. The definition of an "employer" is a person who employs or contracts for the services of workers and includes a contractor or subcontractor who performs work or undertakes with an owner, constructor or other contractor to perform work.

Background

The City of Greater Sudbury (the City) tendered a construction project for road and water main repair and contracted with a general contractor (General Contractor) to complete the project. The General Contractor undertook the project as the constructor under *OHSA*.

The City was the owner of the construction project. It did not employ any employees who performed construction work at the project but from time to time sent its employees to the worksite to perform inspections, monitor the site for quality control and monitor the progress of work.

In September 2015, a member of the public was tragically struck and fatally injured by a grader operated by an employee of the General Contractor. At the time of the incident, the pedestrian was crossing a street at a traffic light in a construction zone. Absent from the worksite were protective measures such as fencing to separate pedestrians from equipment, a paid duty police officer to direct traffic and a

signaller for the grader.

Judicial History

The Ministry of Labour charged both the City and the General Contractor with various violations of *OHS*A. The City was charged as both a “constructor” and an “employer” under *OHS*A.

The General Contractor pleaded guilty and was fined \$195,000 plus a 25% victim surcharge. The City pleaded not guilty, and the matter went to trial.

Before a trial judge, the City was acquitted. The Ontario Superior Court of Justice upheld that acquittal.

The Crown then appealed that decision to the Court of Appeal, arguing that the appeal judge erred in finding that the City was not an “employer” for the purposes of *OHS*A. The Court of Appeal allowed the appeal holding that the City was an “employer” for the purposes of *OHS*A. This decision was then appealed to the Supreme Court of Canada.

In a split decision, the Supreme Court confirmed the ruling of the Ontario Court of Appeal that the City was an employer and had breached its duty under s. 25(1)(c) of *OHS*A. It remitted the issue of the City’s due diligence defence to the provincial offences appeal court.

The SCJ Decision

The SCJ upheld the initial decision of the trial judge, who had determined that the City had been duly diligent and therefore should be acquitted of all charges under *OHS*A.

The SCJ relied on the Supreme Court’s guidance in relying on the following considerations when assessing whether an owner was duly diligent:

- the defendant’s degree of control over the workplace or the workers on the site
- whether the defendant 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 *OHS*A
- whether the defendant took steps to evaluate the constructor’s ability to ensure compliance with *OHS*A before deciding to contract for its services
- whether the defendant effectively monitored and supervised the constructor’s work on the project to ensure that the prescriptions in *OHS*A were carried out in the workplace

Considering these factors, the SCJ determined that the City’s use of quality control inspectors did not constitute “control” over the workplace and the workers on it and instead, the General Contractor had control. The SCJ further determined that the City had delegated control to the General Contractor and had adequately determined that the General Contractor had the requisite capacity to perform the work safely.

Additionally, the SCJ specifically noted that the City had delegated control to a company with the requisite expertise to act as a constructor and in so doing, had paid a premium for the General Contractor’s expertise.

Ultimately, the SCJ determined that the above considerations meant that the City had adequately exercised due diligence in its selection of the General Contractor to perform the work.

Implications Going Forward

This decision provides some needed clarity to several questions which remained following the release of the Supreme Court's decision with respect to what an "owner" and/or "employer" of a construction project is required to do when subcontracting work to another party on its site. In particular, the SCJ has confirmed that the following factors will be a focus of the analysis in determining whether an "owner" (and employer) has exercised reasonable care:

- the degree of control over the workplace
- the decision to delegate to a constructor in an effort to overcome the owner's lack of skill, expertise or knowledge
- pre-qualifications of constructors
- the owner's monitoring and supervision of the worksite

Of particular assistance to general contractors and site owners is the recognition that having employees perform quality assurance and monitoring of a worksite does not necessarily translate into taking "control" of a worksite. Notably, the presence of City employees on the site who were there to provide quality control and monitoring duties was a factor specifically used in finding that the City had appropriately monitored and supervised the worksite and exercised due diligence.

This decision suggests that site owners and general contractors who are attentive to the considerations highlighted by the SCJ will be well-positioned for a due diligence defence in the face of *OHS*A charges.

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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