

Impact of R. v. Greater Sudbury (City) on Construction Project Owners and General Contractors

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A landmark legal ruling is reshaping the responsibilities of construction project owners and general contractors. Learn what steps you must take to safeguard your organization from liability under OHSA.



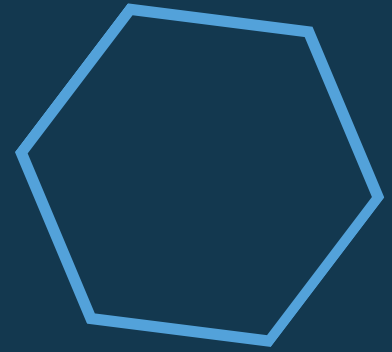


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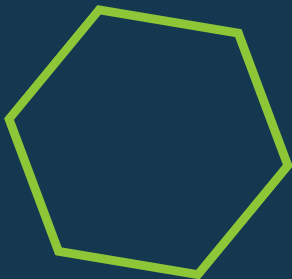
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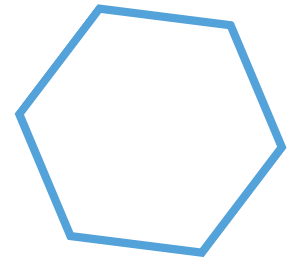
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Introduction



On August 23, 2024, the Ontario Superior Court of Justice (SCJ) released a pivotal decision in *R. v. Greater Sudbury (City)*, upholding the City of Greater Sudbury's (City) acquittal on charges related to a workplace fatality. This decision is important for construction project owners (owners) and general contractors (GCs), affirming that an "owner" of a construction project can be deemed an "employer" under the Occupational Health and Safety Act (OHSA).

The ruling builds on the Supreme Court of Canada's (SCC) earlier decision, which established that owners, even if they do not directly employ workers, have responsibilities and obligations under OHSA. The SCC emphasized that the "employer" definition includes those who contract for services or manage a site, setting a precedent that owners must ensure health, safety, and due diligence, even when daily management is delegated to a general contractor (GC). This decision marks a significant departure from the traditional approach, where owners—such as municipalities—managed OHSA-related risks by delegating control to GCs and limiting their own direct involvement.

The SCJ's recent ruling provides clarity on the scope of these responsibilities, confirming that despite delegating project management to a GC, the City had acted with due diligence. This decision provides valuable guidance for project owners—such as municipalities—on how to meet their OHSA obligations and protect against liability in future projects. It highlights that owners can demonstrate due diligence without directly managing the project, distinguishing their role from that of constructors.



Facts in the Case

The City of Greater Sudbury hired Interpaving Limited (Interpaving), a GC they had worked with before, to handle a road and watermain repair project. Interpaving was responsible for the project as the “constructor” under the Occupational Health and Safety Act (OHSA).

Although the City owned the project and had its own inspectors on site daily to check quality and monitor progress, it did not have any of its own employees doing any of the actual construction work. Interpaving oversaw the project and the site.

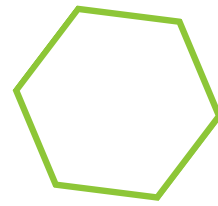
In September 2015, a tragic incident occurred when a pedestrian was struck and killed by a grader operated by an Interpaving employee. At the time, the operator was reversing without a signaler to guide them, and there were no protective measures like fencing or a traffic control officer to keep the public safe from the construction area.

Following the incident, Interpaving plead guilty to OHSA violations and was fined \$195,000 plus a 25% victim surcharge. The Ministry of Labour (MOL) also charged the City with OHSA violations, arguing that the City was an “employer” under OHSA.

The fundamental issues for the trial were:

1. Can the City be considered an “employer” for the project under OHSA?
2. Was the City sufficiently diligent in its role to prevent the OHS incident?

Judicial History



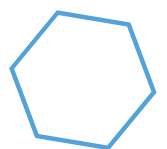
The Ontario Court of Justice (Trial Court) found that the MOL did not prove beyond a reasonable doubt that the City was an “employer” under OHSA. Even if the City were considered an employer, the court decided that the City had acted with appropriate due diligence and reasonable care, so the City was acquitted of all charges.

The MOL did not agree with the Trial Court decision and appealed to the Superior Court. The Superior Court upheld the Trial Court’s decision, agreeing that the City was not an “employer” for the project. The Superior Court did not address the issue of due diligence.

The MOL appealed the Superior Court decision to the Ontario Court of Appeal, arguing that the City should be considered an “employer” under OHSA. The Court of Appeal agreed, ruling that the City was an “employer” because its inspectors were involved in monitoring the project. The case was sent back to the Superior Court by the Court of Appeal to decide if the City had acted with appropriate reasonable care and due diligence to prevent the incident.

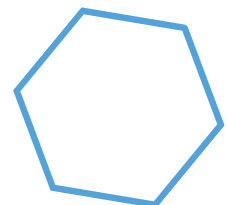
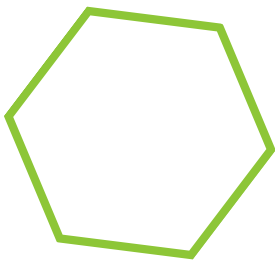
The City, however, appealed the Court of Appeal’s decision to the SCC before it made its way back to the Superior Court. The SCC reached a split 4:4 decision, meaning there was no clear majority opinion, the outcome of which was the dismissal of the City’s appeal. The SCC therefore upheld the Court of Appeal’s ruling that the City was an “employer” under OHSA. As to the City’s claim of due diligence, the SCC pointed to a section of OHSA that allows an “employer” to avoid penalties if they can prove they took “all reasonable steps” to prevent a violation.

The matter of whether the City met the standard of “due diligence” for the purposes of OHSA, was remitted to the SCJ for a decision. Before remittance, the SCC listed several factors which could inform the SCJ’s assessment of whether the City met the standard of due diligence under OHSA.

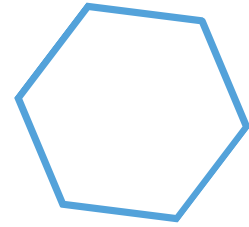


Key Considerations for Assessing Due Diligence Under OHSA:

- a.** The degree of control the accused had over the workplace and workers.
- b.** Delegation of control by the accused to the GC to overcome its own lack of necessary skills, knowledge, or expertise to complete the project safely in accordance with the OHSA.
- c.** Steps taken by the accused to evaluate and assess the GC's ability to ensure compliance with OHSA and delivering the project safely before deciding to contract for its services.
- d.** The accused's effective monitoring and supervising of the GC's or constructor's work on the project to ensure that the prescribed compliance requirements under OHSA were met at the workplace.



The SCJ Decision



The SCJ upheld the Trial Court decision that the City, as “employer”, had been duly diligent to prevent the incident. In assessing the City’s due diligence, the SCJ considered the four factors set out in the SCC’s decision:

Degree of control: The SCJ determined that the City’s use of quality control inspectors to confirm that Interpaving was fulfilling its contractual requirements did not constitute “control” over the workplace and the workers on it and instead, Interpaving had control.

Delegation of control: The SCJ specifically noted that the City had delegated control to a company with the requisite skills, knowledge, and expertise to act as a “constructor” and in so doing, had “paid a premium” for Interpaving’s expertise.

Evaluation/qualification of contractors: The City took adequate steps to ensure Interpaving would satisfy the regulatory requirements of a “constructor.” Given the City’s extensive previous engagements of Interpaving, it was able to accurately assess Interpaving’s ability to adhere to the requirements of the contract, OHSA, and Regulations. The City also required Interpaving employees to have appropriate health and safety awareness training (NORCAT's Greater Sudbury Utilities Contractor Orientation safety awareness training) specifically designed for City projects.

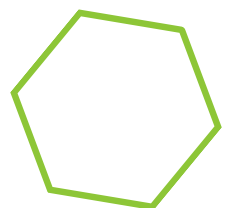
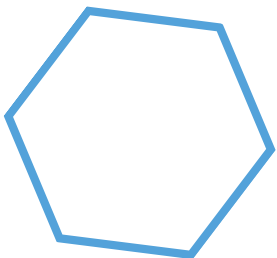
Monitoring & supervision: SCJ found that the City had effectively monitored and supervised Interpaving’s work, including attending periodic progress meetings, and through its process for receiving public complaints and noting signage, public safety, access issues, and making Interpaving aware of these concerns.

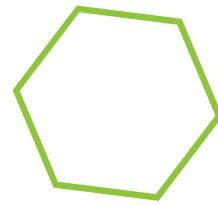
Ultimately, the SCJ upheld the Trial Court decision and determined, based on the above considerations, that the City had adequately exercised its due diligence in its selection of the GC, Interpaving, to perform the work, and in preventing the incident.

Conclusion

Historically, owners like municipalities have managed OHSA-related risks by delegating control to GCs and limiting their own direct involvement. However, the SCC decision has shifted this approach, imposing a legal obligation on owners to act as “employers” under OHSA, even when they delegate day-to-day management.

The SCJ’s decision provides reassurance and clearer guidance to owners on fulfilling their due diligence obligations as “employers” under the OHSA. It emphasizes that owners can demonstrate due diligence without directly managing the project, distinguishing them from constructors. The court further highlights that the analysis of due diligence is fact-specific. When applying the factors outlined by the SCC, the courts will assess not only the owner’s knowledge, skill, and expertise but also the level of control the owner has assumed—both contractually and in practice—and whether that control was actively exercised.





Key Tips and Takeaways

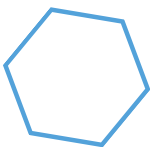
Applicability Across Canada: Though the case is based in Ontario, the principles are relevant to other provinces where the term "prime contractor" is used, including Alberta and BC. The steps outlined below for delegating control, prequalifying contractors, and maintaining oversight apply universally. For both owners and GCs, adopting a due diligence-focused approach helps mitigate OHS-related risks and ensures project safety while protecting against liability.

Owners can be actively involved in quality control and progress inspections without assuming control of the project.

Due diligence requires owners to delegate project control to a competent "constructor". This is particularly important if the owner lacks the expertise to ensure compliance with OHSA.

Ensure that the project contract at a minimum includes:

- a. A clear description of the scope of work
- b. Outlines duties and responsibilities of all parties
- c. Alignment with the owners' policies and procedures
- d. Include insurance requirements, naming the project owner as an additional insured
- e. Incorporate an indemnification clause to protect against liabilities
- f. Ensure contractual language accurately reflects the nature of the work
- g. **Recommendation:** Review the contract with legal counsel, insurance providers, or relevant experts, particularly for complex construction projects, to avoid potential risks and liabilities



In selecting a constructor to delegate control to, the project owner needs to qualify the constructor's ability to comply with OSHA regulations against clear established pre-qualification standards. This may include assessing their:

- a.** Knowledge, expertise, and qualifications
- b.** Occupational health and safety policies, procedures, safety history, and citations (including good standing with Workers' Compensation Boards)
- c.** Health and safety training and supervision protocols
- d.** Relevant references
- e.** Past performance on similar projects
- f.** Procurement and contractor assessment practices

Owners have a responsibility to report hazards and safety concerns to the "constructor". However, they should avoid taking direct remedial action, as this could blur the lines of responsibility and imply the project owner is assuming some of the "constructor's" duties.

Effective monitoring and supervision of the constructor's work are crucial for owners to fulfill their due diligence obligations. This includes:

- a.** Attending progress meetings
- b.** Conducting regular site inspections
- c.** Monitoring contractual compliance and performance
- d.** Addressing public complaints
- e.** Holding pre-start training sessions with contractors
- f.** Implementing an occurrence reporting system

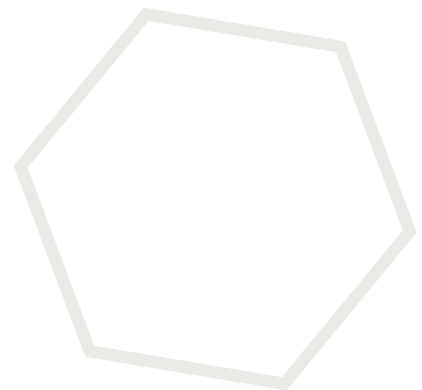
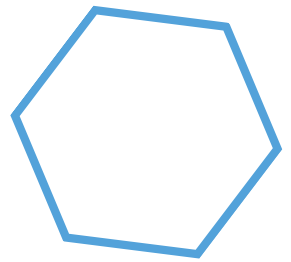
By actively engaging in these activities, owners can help ensure that regulatory requirements are met while maintaining oversight without assuming the constructor's responsibilities.

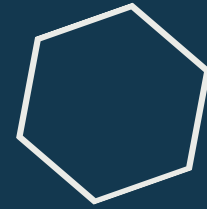
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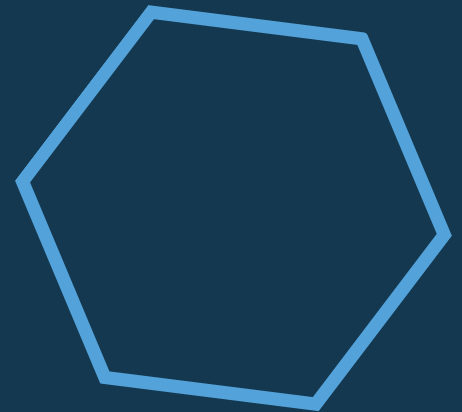
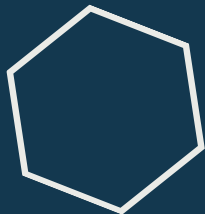
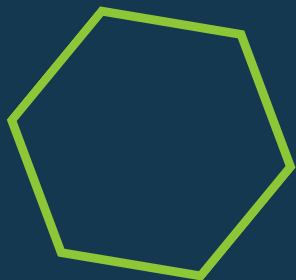
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