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Here's the Drill: *R. v. Sudbury* Wrap-Up: Essential Takeaways for Construction Stakeholders

April 21, 2025

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Background

The Ontario Court of Appeal has recently issued what appears to be a final decision in the *R. v. Sudbury* saga; an important line of cases shaping how industry stakeholders understand their health and safety obligations on construction projects in Ontario.[1]

The case arose from a tragic accident on a City of Sudbury (the "City") construction site on September 30, 2016. Both the general contractor, Interpaving (designated "constructor" under the OHSA), and the City were charged with violations of O. Reg. 213/91 (the "Regulation"), contrary to s. 25(1)(c) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("OHSA"). Interpaving pled guilty, while the City was acquitted after trial.

The trial judge found that the City was neither an "employer" nor a "constructor" under OHSA and, in any event, had exercised due diligence. The Crown's appeal to the Provincial Offences Appeal Court (POAC) was dismissed, with the POAC endorsing the finding that the City was not an employer but not addressing the due diligence issue. On further appeal, the Court of Appeal disagreed, finding the City was an "employer" and remitting the due diligence question to the POAC. A split 4–4 decision at the Supreme Court of Canada meant the City's acquittal stood, though the matter was remitted to the POAC.

On August 23, 2024, the POAC judge concluded there was no error in the trial judge's due diligence finding and rejected the Crown's request to reweigh the evidence, something the judge noted was not permitted. The Ministry of Labour sought leave to appeal, which was recently denied by the Court of Appeal, effectively ending the litigation. (*For further detail on the key decisions in this case, see:* "Recent Court Decision Provides Guidance for How Owners Can Act with Due Diligence in the Context of OHSA Charges").

Court of Appeal's Leave Decision: Key Takeaways

The Crown argued that leave should be granted on the basis that the POAC judge misapplied the due diligence defence. Specifically, it asserted:

(1) First, that the trial judge found that acts of general due diligence in the workplace, not acts exclusively directed towards the alleged violations, satisfied the test which was contrary to established jurisprudence; and

(2) Second, the trial judge and the POAC judge failed to properly understand the interplay between the concept of control of the workplace and the necessary elements of the due diligence defence. The Crown submitted that leave should be granted because the proper application of the defence of due diligence was a matter essential to the public interest.[2]

The court dismissed the application for leave, emphasizing the following.

1) The Trial Judge Did Consider Specific Allegations

The trial judge examined the respondent's actions in response to specific site hazards (e.g., notifying Interpaving of knocked-down fencing and insufficient signage). The Court was not persuaded that this analysis was inconsistent with due diligence jurisprudence

2) No Need to Revisit Settled Law.

The Court held that the law requiring due diligence to be tied to specific contraventions, as opposed to general safety efforts, was settled, and no further clarification was warranted.

3) No Misapprehension of "Control".

The POAC judge properly engaged with the Crown's submissions on control. The reasons did not reveal any misunderstanding or misapplication of the burden of proof related to workplace control.

4) No Broader Legal Issue Raised.

The appeal was primarily fact-driven. The Crown's argument, that the City had sufficient control to do more than it did, was found to be a matter of fact or mixed fact and law. Such determinations are not typically grounds for further appeal.

Implications for Industry Stakeholders in Ontario

The decision reinforces that project owners may be liable under OHSA as "employers", even if they have delegated construction to a constructor. While owners have historically viewed their role as limited, the Court has confirmed that s. 25(1)(c) of OHSA imposes a proactive obligation to ensure regulatory compliance, putting them in a position akin to that of an insurer.[3]

If an incident occurs, owners may be charged under OHSA and will need to establish a due diligence defence to avoid liability. The Supreme Court of Canada outlined several non-exhaustive factors to consider in assessing that defence:

- The degree of control the owner/employer had over the workplace or workers;
- Whether the owner delegated health and safety obligations to the constructor due to a lack of expertise;
- Whether the constructor's OHSA compliance capacity was evaluated prior to contracting;
- Whether the owner monitored or supervised the constructor's compliance during the project.

Although *Sudbury* involved a public sector owner, the principles likely apply broadly. Owners, public or private, should take proactive steps to evaluate, monitor, and document how they manage OHSA compliance risks on their projects.

[1] This decision (Ontario Court of Appeal Docket: COA-24-OM-0315) is not yet publicly available.

[2] COA-24-OM-0315 at para 26.

[3] *R. v. Sudbury*, 2023 SCC 28 at para 27.

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