
H&S Challenges: R v Sudbury, Increased Fines, and Due Diligence

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Agenda

- Bill 79, *Working for Workers Act*, 2023
- *R v Sudbury*
- Best practices: re-visiting due diligence

Increased OHSA Fines



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Bill 79, Working for Workers Act, 2023

- Amends Occupational Health and Safety Act (“OHSA”)
- Effective October 26, 2023, the maximum fine for a corporation for a conviction under the OHSA is increased from \$1,500,000 to \$2,000,000
- Prior amendments to fine amounts under the OHSA in 2017 and 2022

Prior Amendments to OHS A Fines

■ 2017:

- ❑ \$1,500,000 for a corporation (increased from \$500,000)
- ❑ \$100,000 for any individual (increased from \$25,000)

■ 2022:

- ❑ \$1,500,000 for a director or officer of a corporation (increased from \$100,000)
- ❑ \$500,000 for all other individuals (increased from \$100,000)
- ❑ Aggravating Factors
- ❑ Limitation period extended to 2 years

OHSA Fines – Summary

- \$2,000,000* for a corporation
- \$1,500,000* for a director or officer of a corporation
- \$500,000* for all other individuals
- 2-year limitation period
- Aggravating factors considered on sentencing

**Per offence and additional mandatory victim fine surcharge*

R v Sudbury



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R v Sudbury: Background

PART III

DUTIES OF EMPLOYERS AND OTHER PERSONS

<u>23.</u>	Duties of constructor
<u>24.</u>	Duties of licensees
<u>25.</u>	Duties of employers
<u>25.1</u>	Footwear
<u>25.2</u>	Naloxone kits
<u>26.</u>	Additional duties of employers
<u>27.</u>	Duties of supervisor
<u>28.</u>	Duties of workers
<u>29.</u>	Duties of owners
<u>29.1</u>	Duties of owners — washroom access
<u>30.</u>	Duty of project owners
<u>31.</u>	Duties of suppliers
<u>32.</u>	Duties of directors and officers of a corporation

R v Sudbury: Background

- Various roles under the OHSA and corresponding duties
 - “Employer”:
 - means (1) a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and (2) a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services
 - “Constructor”: means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer

R v Sudbury: Background

■ “Owner”:

- ❑ includes a trustee, receiver, mortgagee in possession, tenant, lessee, or occupier of any lands or premises used or to be used as a workplace, and a person who acts for or on behalf of an owner as an agent or delegate

■ Section 1(3) – Limitation

- ❑ An owner does not become a constructor by virtue only of the fact that the owner has engaged an architect, engineer or other person solely to oversee quality control at a project.

R v Sudbury: Background

- An employer must:

- ☐ Ensure that “the measures and procedures prescribed are carried out in the workplace” (s. 25(1)(c))

- A constructor must:

- ☐ Ensure that “every employer and every worker performing work on the project complies with this Act and the regulations” (s. 23(1)(b))

R v Sudbury: What Happened?

- The City contracted with a constructor (Interpaving Ltd.) to repair a water main and repave streets.
- Interpaving was the general contractor on the project and provided its own employees to perform the work.
- The City employed two quality control inspectors to inspect the project.

R v Sudbury: What Happened?

- During construction, an Interpaving employee tragically struck and killed a nearby pedestrian with a road grader
- Ministry investigation concluded:
 - ❑ No fence to separate the construction work from the public; and
 - ❑ No traffic plan in place (no signaller present).
- The Ministry charged both Interpaving and the City as “employers” under the OHSA
- The City was charged as a constructor and as an employer

R v Sudbury: What Happened?

- City conceded it was an owner at the site and sent its employees for quality control
- City disputed it was an “employer”; not in control of how Interpaving workers performed work
- Trial level – court agreed. City is an owner but neither a constructor nor an employer. City lacked requisite control

R v Sudbury: What Happened?

- Decision overturned at Court of Appeal for Ontario
- Key issues:
 - Is the City an employer?
 - Yes. The City employed one or more workers at the project site and thus meets the definition of “Employer” under the OHSA
 - The s. 1(3) exemption does not preclude owners from becoming employers
 - Did the City exercise due diligence?
 - Remitted
 - *Specific* vs general acts – issue to be decided when establishing a due diligence defence
 - Justice of the Peace in Provincial Offences Court made *obiter* comments, noting the City exercised due diligence

R v Sudbury: What Happened?

- SCC – 4:4 Split Decision – Court of Appeal decision stands
- In favour – City *is* an Employer of Interpaving Employees
 - ❑ “Belt and braces” approach – *i.e.*, overlapping obligations
 - ❑ Level of control is not relevant to finding that City is an Employer
- Against – City is *not* an Employer Interpaving Employees
 - ❑ The definition of employer is not intended to cover a situation where a project owner retains another party – such as a constructor – to undertake a project.
 - ❑ “Absurd” to require an owner to be responsible for workers hired by a constructor, when the owner has no control over those workers

Best Practices: Due Diligence



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Best Practices: Due Diligence

- Level of control may still be a relevant factor when demonstrating due diligence
- If *both* a constructor and a construction project owner – consider existing due diligence practices and quality control measures

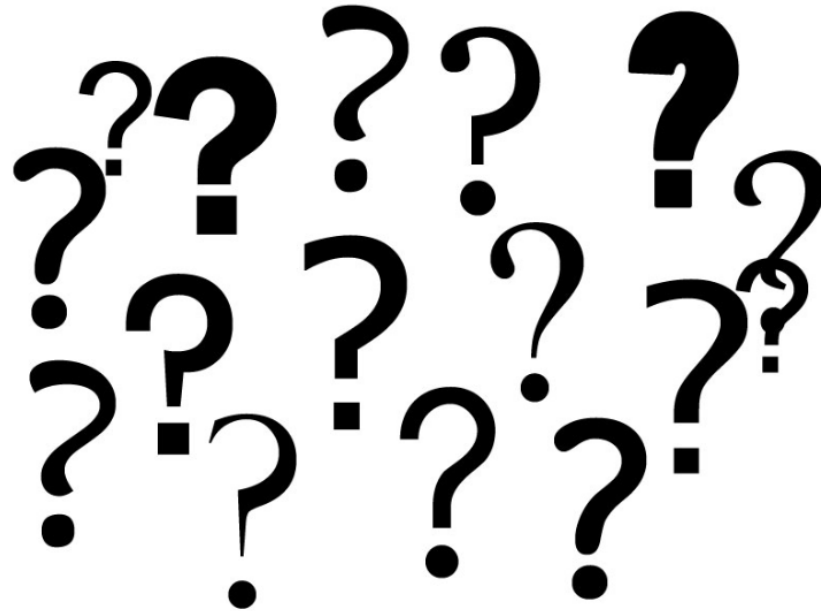
Best Practices: Due Diligence

■ Due Diligence “Checklist”

- ❑ Hazard Assessments
- ❑ Pre-screening (WSIB, H&S Policy, Certifications/Qualifications, Ensure competency with OHSA, Safety Management Systems, *etc.*)
- ❑ Ongoing compliance management
- ❑ Consider how OHSA violations will be addressed and by whom

■ *SK is a recognized leader in OHS. We can assist.*

Questions





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