
Health & Safety Legal Developments: Increased Fines, R v Sudbury & Due Diligence

Canadian Farm Builders Association: April 23, 2024



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Agenda

- Recent trends for charges laid under the OHSA
- Defining the various roles under the OHSA
- *R v Sudbury* – what happened and what implications does this have for an “owner” of a construction project
- Re-visiting due diligence and best practices

Increased OSHA Fines



OHSA Fines – Summary

- Significant changes since 2017
- \$2,000,000* for a corporation (as of October 26, 2023)
- \$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 plus additional mandatory victim fine surcharge*

Increased OHSA Fines – Case Study

- **April 5, 2024** – Ontario Court of Justice (Ottawa) accepted a guilty plea and joint submission on penalty of \$850,000 against Company and Owner/Director
- **What happened?**
 - January 2022 – Workplace explosion that tragically killed six workers and left a seventh with catastrophic injuries
 - Flammable vapours near a newly built tank truck ignited and exploded while a “wet test” was underway

Increased OHS A Fines – Case Study

■ What happened?

- A “wet test” is a standard procedure used to ensure the integrity of a tank prior to operation by flushing the tank compartments with diesel fuel
- Ministry investigation found multiple breaches of OHS A
 - Including failure to ensure that diesel fuel to be used for the wet testing of trucks was not contaminated with gasoline or any other flammable liquid or substance

Increased OHS A Fines – Case Study

■ What happened?

❑ Eastway Tank, Pump & Meter pled guilty to two counts (\$600,000) and its owner/director to one count (\$80,000).

❑ At the time of the incident the maximum penalty for a corporation under the OHS A was \$1.5 million, and for an individual for a single charge was \$100,000 and/or up to one year in jail

■ Significant fines even for first offence are increasingly a risk

R v Sudbury, 2023 SCC 28



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 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 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: 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 and sent its employees for quality control
- City disputed it was an employer
 - Not in control of how Interpaving workers performed work
- Trial judge agreed with City
 - City an owner but neither constructor nor 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



Best Practices: Due Diligence

- Level of control may still be a relevant factor when demonstrating due diligence
- Consider a due diligence “Checklist”
 - Many steps an employer can take now to minimize the risk of workplace health and safety issues

Best Practices: Due Diligence

■ Hazard/Risk Assessments

- Industry specific hazards (*e.g.*, excavation)

 - *Ontario (Ministry of Labour) v Cramer Dairy Farms Inc, 2009 ONCJ 118*

- The types equipment frequently used during construction

- Pre-screening measures for subcontracted work: (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

Best Practices: Due Diligence

■ Consider the following:

■ **Education:**

- Is your organization, at all levels, sufficiently informed and educated on health and safety legal requirements and best practices?
- What training is in place for directors and officers; site or frontline managers; workers?
- How often is training reviewed and updated?

Best Practices: Due Diligence

■ **Delegation:**

- Does your organization subcontract all or some of its work?
- If so, does the subcontracted organization have sufficient knowledge, adequate training, and proper certifications in place, if necessary? Do you know?

Best Practices: Due Diligence

■ Systems:

- ❑ Does your organization have a meaningful health and safety management system to both identify and address workplace risks, gaps, and hazards?
- ❑ Are audits conducted; by an internal or external body; how often?
- ❑ How and by whom are the results reviewed and addressed?

Best Practices: Due Diligence

■ **Reporting:**

- ❑ Who, within your organization, receives regular updates regarding health and safety compliance?
- ❑ In what circumstances does health and safety information move up the corporate chain of command? To whom?
- ❑ If you are at the board level, what questions should you be asking?

Best Practices: Due Diligence

■ **Supervision:**

- Are your workers appropriately supervised?

■ **Record keeping:**

- Is all of the above sufficiently and properly documented?

■ **Review and revisit:**

- How often is all the above reviewed and revisited? By whom?

Best Practices: Due Diligence

- **Professional assistance:** Health and safety is serious business and, in some cases, taking “reasonable care” includes seeking professional help

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

Questions?





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