

Town of Whitby

Staff Report

whitby.ca/CouncilCalendar



Report Title: *R. v. City of Greater Sudbury* – Staff Comments concerning Recent Supreme Court of Canada Decision

Report to: Committee of the Whole

Date of meeting: March 4, 2024

Report Number: LS 05-24

Department(s) Responsible:

Legal and Enforcement Services
Financial Services Department

Submitted by:

Francesco Santaguida, Commissioner of
Legal and Enforcement Services/Town
Solicitor

Fuwing Wong, Commissioner of
Financial Services and Treasurer

**Acknowledged by M. Gaskell,
Chief Administrative Officer**

For additional information, contact:

Fuwing Wong, Commissioner of
Financial Services and Treasurer

Brent Harasym, Associate Solicitor

Derrick Stein, Senior Health, and Safety
Specialist

1. Recommendation:

1. That Report LS 05-24 be received for information.

2. Highlights:

- The Supreme Court of Canada (the “**Supreme Court**”) recently released a decision related to a question as to whether an “Owner” under the *Occupational*

Health and Safety Act (the “**OHSA**”) would also be considered an “employer” under the OHSA.

- The Court found that the City of Greater Sudbury (“**Sudbury**”) was liable as an “employer” for a workplace fatality involving a constructor on a construction contract.
- The Supreme Court’s decision has broad and far-reaching consequences for municipalities.
- While the effects are still being determined at this time, the Supreme Court’s decision will
 - Require the Town to change its procurement practices;
 - Require the Town to change its construction management practices for infrastructure projects; and
 - Increase the costs associated with new projects for the Town going forward.

3. Background:

The Supreme Court has interpreted the meaning of an “employer” under the OHSA to include entities like the Town

On November 10, 2023, the Supreme Court released its decision in *R. v. Greater Sudbury (City)* (the “Decision”). The full text of the Decision can be found at <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/20150/index.do>. In a split decision, the Supreme Court found that by employing inspectors that and conducted quality assurance tasks on the job site, Sudbury was considered an “employer” under the OHSA.

This is a departure from the previous interpretation of the OHSA where an owner would retain a “constructor” who would then be responsible for the overall safety of the project. Owners will now share that responsibility as employers and can no longer pass along responsibility to a constructor.

Facts leading to the Decision: Sudbury hired a contractor to undertake a watermain repair, during which there was a fatality

Sudbury had hired and entered into a contract with Interpaving Limited (“Interpaving”) as the constructor to repair a watermain in its downtown. Interpaving assumed control of the site as the constructor in accordance with the OHSA. In September 2015, a pedestrian was crossing the street and was struck and killed by a grader which was operated by an employee of Interpaving. The Ministry of Labour investigated and charged Sudbury as an employer and constructor for failing to ensure that certain safety requirements under the OHSA were met. Interpaving was also charged under the OHSA, plead guilty and was sentenced.

Sudbury was initially acquitted at trial. The Ministry of Labour appealed the trial decision to determine whether Sudbury could be considered an “employer” for the purpose of the OHSA, and whether it could be liable as an employer. The case made its way to the Ontario Court of Appeal (the “**Court of Appeal**”), which determined that Sudbury could

be considered an employer under the OHSA, as it had hired inspectors who had attended the Interpaving workplace. Sudbury appealed the Court of Appeal's decision to the Supreme Court. Durham Region, as well as the other Greater Toronto Regional Municipalities, were granted intervenor status at the Supreme Court and provided the Supreme Court with the impacts that the Decision could have on municipalities.

The Supreme Court confirmed that the municipality could be liable as an employer under the OHSA

The Supreme Court dismissed Sudbury's appeal, confirming the decision of the Court of Appeal. The Supreme Court agreed with the Court of Appeal that Sudbury was an "employer" by virtue of hiring inspectors. The Supreme Court found that control over the workplace did not need to be considered for the purpose of determining whether Sudbury was an employer. Four of the Justices also found that Sudbury met the definition of "employer" since they had retained a constructor for the project. Effectively, they found that Sudbury was the employer of Interpaving and therefore assumed the responsibilities of an employer under the OHSA.

For liability as an employer to be avoided under the OHSA, an employer may show that it had exercised appropriate due diligence in their health and safety practices. The lower Courts and the Supreme Court did not specifically determine whether Sudbury had exercised appropriate due diligence in its supervision of Interpaving. That issue is still to be determined.

The Supreme Court found that the level of control an employer has over a workplace will be a relevant consideration in determining whether an employer has exercised appropriate due diligence with respect to health and safety at a workplace. The Supreme Court indicates several steps that an employer can take that a court will consider in the due diligence analysis. While not an exhaustive list, the steps include:

1. The level of control the employer has on the project. A lower level of control will likely attract a lower level of diligence;
2. The delegation of control, generally through the terms of the contract, to a more experience constructor. The more control delegated to the constructor, the lower the standard for due diligence;
3. Informing the constructor of any known hazards. If the employer is aware of any hazards, they have an obligation to advise the constructor;
4. Pre-selection of constructors and sub-contractors which may be used by the constructor;
5. The degree of experience and sophistication of the owner; and
6. Monitoring the quality of the constructor's work.

4. Discussion:

Town Staff have begun implementing changes to the Town's Procurement, Construction Management and Health and Safety Practices

As the Decision has been recently released, its full impacts are not yet known. It is immediately clear that the Town's legal and financial liabilities have increased because of the Decision.

Staff have begun modifying the Town's procurement and construction documents to account for the decision. In particular, staff have been undertaking changes that would show the Town has undertaken appropriate due diligence in accounting for the workplace health and safety of its constructors. For example, amendments to the Town's Requests for Tender may be introduced to require bidders to show that:

- they have not been convicted of an offence under the OHSA which has resulted in a fatality or catastrophic injury,
- they have not been convicted of an offence for which an officer, director or employee was sentenced to imprisonment, and/or
- they have not been convicted of 3 or more offences under the OHSA in the past 3 years.

Review of the Town's procurement and contract documents is continuing. Legal Services, Purchasing Services, and the Town's Health and Safety group have been working together to update our forms and documents.

Staff are also looking at other programs which the Town could rely on to ensure that only constructors with an acceptable level of health and safety training or certification are eligible to be awarded Town projects. A formal town-led Contractor Safety Management Program or the national Occupational Health and Safety Management System, Certificate of Recognition (COR) program are being looked at as ways the Town can exercise appropriate due diligence in maintaining the health and safety of its projects.

Town Staff are also working with other municipalities to mitigate the impacts of the Decision

Town staff have been communicating with other municipal legal, procurement and health and safety groups in Durham Region and throughout Ontario to review the implications of this Decision. Municipalities have been working together to investigate how the effects of the Decision can be addressed, and to what extent those effects can be mitigated.

This work will likely be ongoing over the next few years as lower courts begin to apply and interpret the Decision in other cases. Staff will continue to work with other Durham and Ontario municipalities to develop and apply best practices as we adapt to a new legal reality.

5. Financial Considerations:

The immediate financial impacts are unknown and will be dependent on the level of certification or training required in order prevent incidents and to mitigate the Town's

risk in the event of a claim or charge under the OHSA. Changes in the construction industry (e.g. potentially additional health and safety certifications, additional resources allocated towards job site health and safety) to meet enhanced eligibility guidelines for municipal projects and changes to how municipalities manage constructors, job sites, constructor safety management programs, to mitigate risk to the Town, will increase the cost of Town-initiated construction projects. This, in turn, will require additional property tax funding to pay for future infrastructure/capital projects.

6. Communication and Public Engagement:

Not Applicable.

7. Input from Departments/Sources:

Legal Services and Financial Services have consulted with the Senior Health and Safety Specialist in Organizational Effectiveness. This matter has also been presented and discussed by the Senior Leadership Team.

8. Strategic Priorities:

The Decision and its implications will affect several priorities in the Community Strategic Plan, including:

- Strategic Pillar 2: Whitby's Natural and Built Environment, Objective 2.3: Invest in Infrastructure and Assets. Increases in the cost of construction could affect the viability and timing of the projects identified under this objective.
- Strategic Pillar 4: Whitby's Government, Objective 4.4: Ensure fiscal accountability and responsibly plan for growth. As the Town continues to build infrastructure to address community needs, the cost of that infrastructure may increase beyond what would be normally expected, which would have larger impacts on the tax base.

9. Attachments:

None.