

A high-angle photograph of a yellow excavator with its bucket raised, dumping a load of brown soil into the bed of a white dump truck. The truck is parked on a paved area, possibly a construction site or a road under renovation. In the background, there are some orange traffic barriers and a paved sidewalk with a grid pattern. The overall scene is brightly lit, suggesting a sunny day.

mcmillan

# ***R v Greater Sudbury (City)* – The Decision and Its Practical Implications**

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# Agenda



## Summary of the Case What Happened

- History of Lower Court Decisions
- Supreme Court Decision

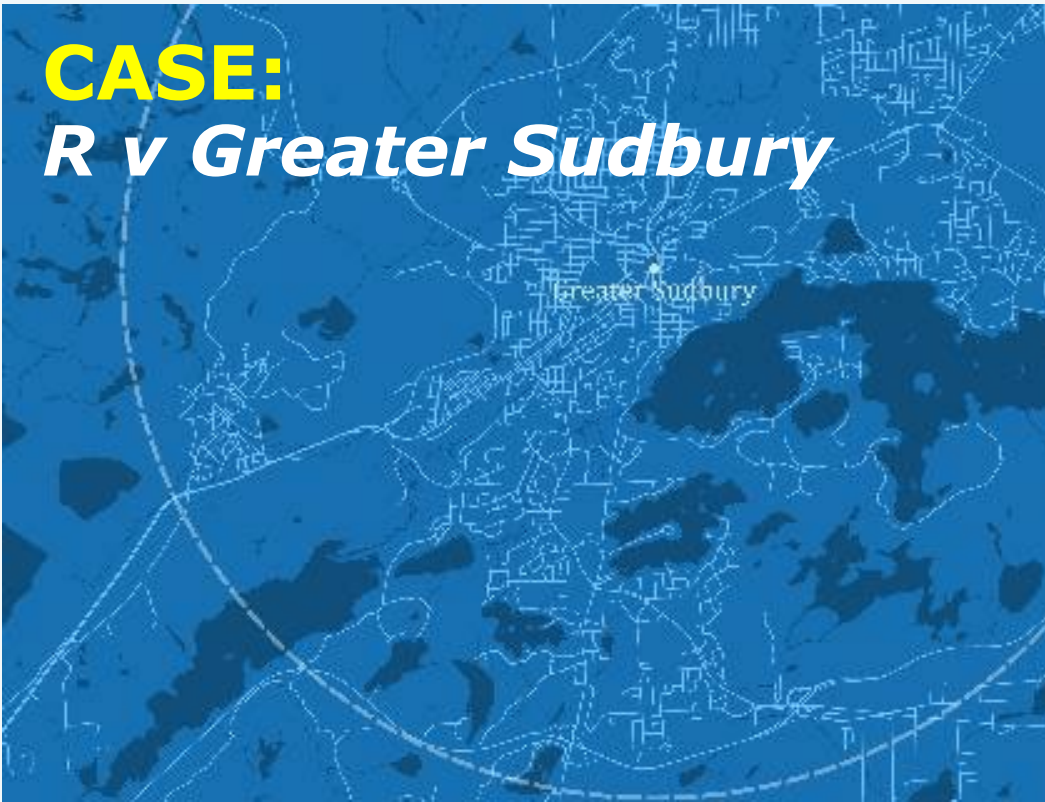
## Practical Implications

- Owners
- General Contractors and Trade Contractors
- Architects, Engineers and Other Consultants

## Contract Implications

- Owners
- General Contractors and Trade Contractors
- Architects, Engineers and Other Consultants

**CASE:**  
***R v Greater Sudbury***



**Summary of the Case**  
**What Happened**

# Ontario's *Occupational Health and Safety Act* (the "Act")

**Purpose:** Maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace

- The Act achieves this purpose by allocating various duties among various classes of workplace actors, including constructors, employers, and owners
- The Act makes it an offence for a workplace actor to breach the Act's obligations

**Prosecution:** Where there is a breach, the Ministry of Labour can investigate the breach and lay regulatory charges against the offender

## **Penalties:**

- Corporation Employer: up to \$2,000,000
- Directors/Officers: up to \$1,500,000 and/or 12 months imprisonment
- Supervisors/Workers: up to \$500,000 and/or 12 months imprisonment

# ***R v. Sudbury: Facts and Charges***

- The City of Sudbury (the “City”) contracted with Interpaving Limited (“Interpaving”) to repair a watermain in the downtown area of the City
- Interpaving assumed control over the entire project as a “constructor” of the project
- Interpaving was responsible for supervising/directing the work and workers
- The City sent its own employees to the site to perform quality control inspection to ensure that the work was properly performed before paying progress payments to Interpaving
- The City employees did not perform any construction work or direct/supervise any workers on the site

# *R v. Sudbury*: Facts and Charges

- An Interpaving employee (not the City's own employee) was reversing a Caterpillar grader at the project site
- There was no fencing or road signaler present at the site as required by O Reg 213/91
- A pedestrian who was attempting to cross the street within the site was fatally struck by the reversing grader



# | ***R v. Sudbury: Facts and Charges***

The Ministry of Labour (the “Ministry”) investigated and charged the City as an employer of the project

## **Relevant charges include:**

- failing as an employer, to provide a signaler in assisting the grader operator (required by s. s. 104(2) of O Reg 213/91)
- failing as an employer, to ensure that a fence was erected between the public way and the work site (required by s. 65 of O Reg 213/91)



# Definitions of “Owner”, “Constructor”, and “Employer”

## Owner

“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

## Constructor

“constructor” means a person who undertakes a project for an owner

## Employer

“employer” means a person who employs one or more workers or contracts for the services of one or more workers



# Issues in Dispute for *R v. Sudbury*

## Issues *Not* in Dispute:



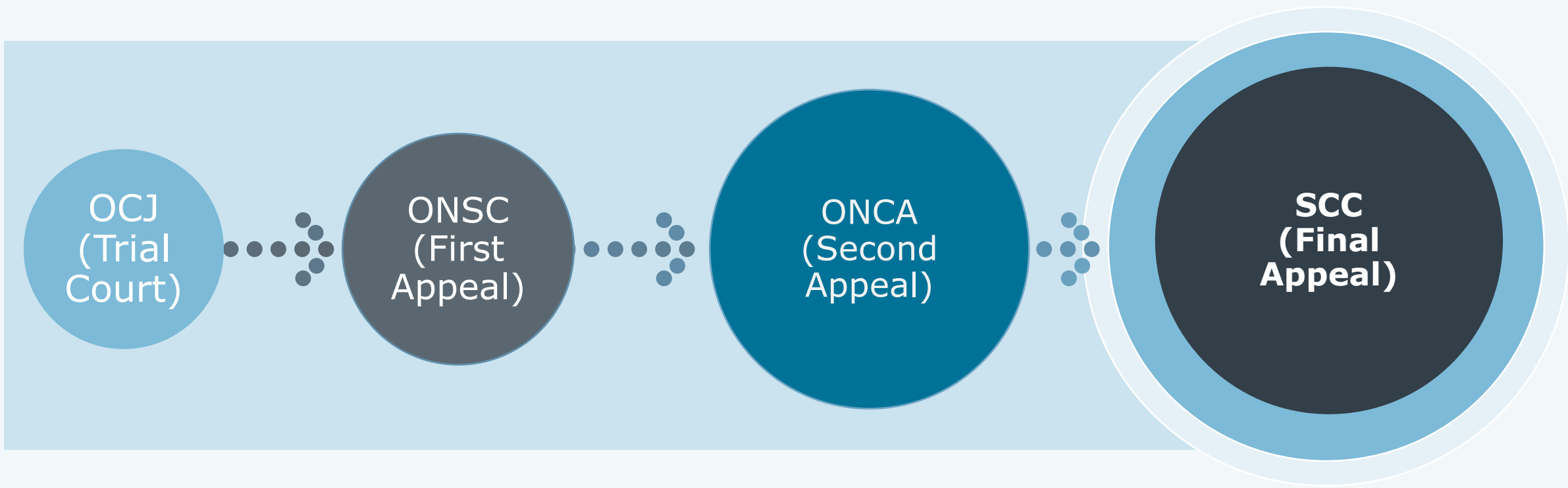
- The City was an “owner” of the lands where the project was ongoing
- Interpaving was a “constructor” who undertook the project for the City

## Issues in Dispute:



- Is the City an “employer”?
- Did the City breach its duties as an employer (by failing to ensure that a fence was erected and signalers were present)?
- If the City breached its duties as an employer, did it act with due diligence?

# ***R v. Sudbury: Case History***



# ***R v. Sudbury: Ontario Court of Justice Decision (Trial Court)***



## **Is the City an “employer”?**

- **No:** the City did not have direct control over the workers or the site. Interpaving had control over the workers and the site

## **Did the City breach its duties as an employer?**

- **No:** since the City was not an employer, these duties did not apply to the City

## **If the City breached its duties as an employer, did it act with due diligence?**

- **Yes:** Even if the City breached its duties as an employer, it acted with due diligence and took every precaution reasonable in the circumstances

# ***R v. Sudbury: Ontario Superior Court of Justice (First Appeal Court)***



The Ministry appealed the OCJ decision, taking a position that the City was an employer on the site because it had its own quality control inspectors on the site

## **Is the City an “employer”?**

- **No:** the fact that the City had its own employees on the site does not make the City an “employer” on the site
- The City did not exercise significant control over workers on the site

## **Did the City breach its duties as an employer?**

- **No:** since the City was not an employer, these duties did not apply to the City.

## **If the City breached its duties as an employer, did it act with due diligence?**

- This issue was not addressed by the ONSC.



# ***R v. Sudbury: Ontario Court of Appeal (Second Appeal Court)***



The Ministry appealed the ONSC decision, maintaining a position that the City was an employer on the site because it had its own quality control inspectors on the site

## **Is the City an “employer”?**

- **Yes:**
  - The City can be an employer by: (1) employing a worker on the site, and (2) by entering into a contract for the services of a worker
  - Because the City employed quality control inspectors as workers on the site, it was an “employer” on the site

## **Did the City breach its duties as an employer?**

- **Yes**, the City was liable as an employer for failing to erect the fence and having signalers present

## **If the City breached its duties as an employer, did it act with due diligence?**

- **TBD:** The ONCA sent the case back to the ONSC and directed the ONSC to address the City’s due diligence

# ***R v. Sudbury: SCC (Final Appeal Court)***



- The City appealed the ONCA's decision to the SCC
- SCC is made up of 9 judges, and all 9 judges heard the City's appeal
- 1 of the judges retired after hearing the appeal, so only 8 remaining judges issued decisions
- This resulted in a 4:4 equal division:
  - 4 dismissing the City's appeal
  - 4 allowing the City's appeal

# **R v. Sudbury: SCC (4 Judges Dismissing the City's Appeal)**

## **Is the City an "employer"?**

- **Yes:** the City was an employer by: (1) employing inspectors on the site, and (2) by entering into a contract for the services of workers (including for the services of Interpaving's workers)
- The Ministry is not required to prove that the owner had control over the workplace or the workers to charge the owner as an employer

## **Did the City breach its duties as an employer?**

- **Yes:** City breached its duties as an employer by failing to erect the fence and have signalers present
- The City's degree of control over the workplace or the workers is not relevant to this finding

## **If the City breached its duties as an employer, did it act with due diligence?**

- **TBD:** This issue was sent back to the ONSC to be determined
- The City's degree of control over the workplace or the workers is relevant for determining whether the City exercised due diligence

# ***R v. Sudbury: SCC (3 Judges Allowing the City's Appeal)***

## **Is the City an “employer”?**

- **Yes:** because the City had hired inspectors through a contract of employment, it is an “employer”
- This does not mean that the City is the employer of all workers on the project
- By contracting with Interpaving, it did not become the employer of the workers that Interpaving hired. The City did not control Interpaving’s workers

## **Did the City breach its duties as an employer?**

- **No:** the regulatory measures apply when they present a nexus to the work which is under the employer’s control and performed through their workers
- The City’s employee did not operate the grader and the City had no control over that work

## **If the City breached its duties as an employer, did it act with due diligence?**

- This issue was not addressed extensively



# ***R v. Sudbury: SCC (1 Judge Allowing the City's Appeal)***

## **Is the City an “employer”?**

- **No:** the City was not involved in construction work and had no control over it

## **Did the City breach its duties as an employer?**

- **No:** the City had health and safety obligations over its own inspectors, but had no obligations over the fencing and providing signalers

## **If the City breached its duties as an employer, did it act with due diligence?**

- **Yes:** the City's inspectors brought their safety concerns to Interpaving's attention and escalated to the City's Chief Inspector
- The City took every precaution reasonable in the circumstances to ensure safety at the project

# ***R v. Sudbury: What Now?***

Since this was an evenly split decision, the City's appeal of the ONCA decision was dismissed

## **The ONCA decision stands:**

- Is the City an "employer"?: **Yes**
- Did the City breach its duties as an employer?: **Yes**
- If the City breached its duties as an employer, did it act with due diligence?:  
**To be determined by the ONSC**

The case will be sent back to the ONSC, and the ONSC will decide whether the City acted with due diligence

SCC decisions are not binding (they are evenly split decision), but they will be highly persuasive across Canada

The ONCA decision is currently binding in Ontario (and only in Ontario)...

# ***R v. Sudbury: What Now?***

- **The ONCA decision is currently binding in Ontario...**

## **Hypothetical 1**

Company providing on-site catering services on a large construction projects by employing caterers on the project site. The Ministry finds that a tower crane was erected without including automatic limit switches (s. 160(1) of the O Reg)

## **Hypothetical 2**

Small retailer who contracted with a constructor for a comprehensive renovation over \$50,000 for their retail space, but who engages an external person to verify that the project is proceeding according to architectural design standards. One of the constructor's worker falls from a ladder that does not meet regulatory specification



## Practical Implications



# Practical Implications for Owners



- Although not binding, Owners who engage a Constructor are “Employers” per the Supreme Court of Canada
- Even if the “Owner” is a real estate holding company that does not employ anyone on site
- That ship has sailed

# Practical Implications for Owners



- Greater potential for Ministry of Labour Inspectors to lay charges against Owners as Employers
- Must establish practices and contractual terms to advance a “due diligence” defence if necessary
- What is an Owner’s “Duty of Care”?

# Practical Implications for Owners



- Ensure Constructor implements an effective Occupational Health & Safety Management System (“OHSMS”)
- Owners are not the experts – ensure reliance on Constructor as OH&S expert clearly defined
- Ensure Owner representatives respect and enforce that delineation

# Practical Implications for Owners



- Comprehensive pre-qualification checklist to ensure Constructor competence
- Ensure OHSMS implemented by Constructor
  - Not advising on content of program, but rather monitor & ensure Constructor compliance with contractual obligation to implement OHSMS
  - Ongoing feedback system – regular site reports, establish reporting protocols for injuries (critical and non-critical) & safety training, obtain relevant documents, etc.



# Practical Implications for Owners



- Enforce Constructor accountability
- React immediately to any & all suspected non-compliance in writing
- Make notes of any conversations
- Call Ministry of Labour to report & investigate where Constructor fails to remedy a problem?

# Practical Implications for GCs and Trade Contractors



- Owners may try to download additional responsibilities and liabilities beyond OHSA requirements
- Implement & enforce regular reporting protocols for sub-trades
- React immediately to any & all non-compliance in writing
- Make notes of any conversations
- Ensure reports to Owners are comprehensive – do not cut corners!

# Practical Implications for Constructors



## Hallmarks of an effective OHSMS:

- Identify hazards
- Assess risks of exposure to hazards
- Protocols to minimize risk of exposure
- Communicate hazards and protocols to workers



# Practical Implications for Constructors



## Hallmarks of an effective OHSMS:

- Monitor compliance
- Respond to all non-compliance incidents – nothing “slides”
- Take action when necessary – i.e. remove a worker or trade contractor from project
- **Document, Document, Document!**



# Practical Implications for Consultants



- Consultants are Employers too!
- What is the Consultant's "Duty of Care"?
- Not expected to be OH&S experts
- Delicate balance between reporting and preserving relationships
- Report identified hazards immediately



## Contract Implications



# Contract Implications for Owners



- **Delegate health and safety responsibilities**
  - Clear identification of who is Constructor
  - Require all others to comply with Constructor directions
- **Ensure ability to verify compliance**
  - Require submission of key documents such as Notice of Project, Form 1000s and health and safety plan
- **Clear statement of qualifications and reliance**
  - Add representation from Constructor that it has requisite experience and acknowledgment of Owner's reliance on this expertise
- **Avoid imposing health and safety responsibility on Owner beyond its capability**
  - e.g., does Owner have requisite expertise to declare an emergency, determine work should stop or step into Constructor's shoes?
- **Avoid delegating health and safety responsibility to persons who are not qualified (e.g., consultants)**

# Contract Implications for General Contractors and Trade Contractors



- **Anticipate more stringent contract terms**
  - Expect to see more robust terms delineating health and safety obligations
  - Anticipate greater demand for communication and information sharing
  - Carefully read any representations you are asked to provide
    - Accurate and reasonable?
    - Avoid warranties
  - The need for certifications such as CORE or ISO 45000 may become more prominent
- **Ensure other project contracts support ability to perform and comply**
  - Contract terms should provide Constructor requisite level of control over site, including site access
  - Other project parties should be required to follow Constructor's directions
  - Constructor should have ability to enforce health and safety on site as needed

# Contract Implications for Architects, Engineers and Other Consultants



- **Clear statement that not undertaking role of Constructor**
  - Ideally, include acknowledgment of Consultant's reliance on Constructor's expertise
- **Ensure health and safety obligations are limited to Consultant's own employees and their compliance with Constructor and Owner health and safety directions**
- **Ensure ability to verify compliance**
  - Include ability to receive key documents such as Notice of Project, Form 1000s and health and safety plan
  - Confirm own employees receive requisite information and training
- **Look out for inappropriate or overly onerous health and safety obligations**
  - Obligation to take on role of Constructor
  - Obligation to monitor/supervise/ensure Constructor performance or compliance
  - Representations of health and safety experience or expertise

**Thank You**

Q&A



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If you have any questions about McMillan, or how we may help you with your legal needs, please get in touch with us.