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Increased Liability of Owners Under the *OHSA*

Key Takeaways

Arguably the most important construction law case to reach the Supreme Court of Canada in years, *R v Greater Sudbury (City)* greatly expands the legal liability of an owner who engages a constructor on a project.[1] The Court's decision establishes that owners who enter into a contract with a "constructor" are "employers" under the Ontario *Occupation Health and Safety Act*, R.S.O. 1990, c. O.1 ("*OHSA*") and, therefore, are liable for all *OHSA* violations that occur throughout the course of the project.

The impact of the Court's decision cannot be overstated. Until now, an owner could, by engaging a contractor to act as its "constructor", transfer responsibility for on-site health and safety from the owner to those with the relevant expertise. Following the Court's decision, however, owners are responsible for ensuring that all health and safety measures are met—irrespective of whether they have control over the work, workers, or workplace to which those measures apply.

To avoid liability, an owner must demonstrate that it exercised due diligence. The Court's reasons, however, provide little to no practical guidance on how an owner's responsibilities are to be carried out such that a due diligence defence can be made out. To the contrary, the Court's reasons suggest both that an owner must "supervise" and "inspect" the work in exercising due diligence, but also that "control" of the work by the owner may impose a higher duty on the owner. There is no clarity whatsoever as to when supervision and inspection become control of the work.

The result creates profound legal uncertainty for owners on construction projects, including everything from large projects to home renovations. The Court's reasons lack regard for the practical reality of owners across the province, and upset decades of settled understanding by Ontarians.

Dismissed on equal division in a 4-3-1 split decision, the result in *R v Greater Sudbury (City)* cries out for legislative intervention. As it stands, the result will lead to higher construction and legal costs as owners and lawyers are left to sort out these complex issues.

Moving forward, owners will need to reevaluate their approach to on-site health and safety. Concrete actions an owner can take include evaluating a constructor's ability to ensure compliance with the *OHSA* before contracting for its services and regularly supervising the constructor's work to ensure compliance with the *OHSA*.

In this respect, owners are well-advised to require constructors to submit evidence of their past *OHSA* performance at the tendering stage, including whether the constructor has been charged with breaching the *OHSA*. Additionally, owners should require constructors to submit monthly *OHSA* reports with each application for payment throughout the course of construction. Owners would further benefit from engaging their own compliance inspectors to make weekly site visits. Just as important, however, will be ensuring proper document control. It will be imperative that owners carefully document each precaution taken to ensure *OHSA* compliance.

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[1] *R v Greater Sudbury (City)*, 2023 SCC 28.

Background

The City of Greater Sudbury ("City") contracted Interpaving to repair a watermain. The construction contract provided that Interpaving would assume control over the entire project, including the role of "constructor" under the *OHSA*. The City also contracted quality control inspectors to ensure the work was performed in accordance with the construction contract.

An Interpaving employee struck and killed a pedestrian. No fence was erected between the project and public intersection and no signaller was on site as required by *Construction Projects,* O. Reg. 213/91 (the "*Regulation*"). The Ministry of the Attorney General charged the City, amongst other things, as an employer under s. 25(1)(c) for failing to ensure that appropriate safety measures were in place.

The City conceded it was an "owner" but denied it was an "employer" under s. 1(1), arguing that it lacked control over the work. The trial judge at the Ontario Court of Justice agreed and the City was acquitted on all charges. The Ministry appealed.

The Superior Court of Justice dismissed the appeal and found that characterizing the City as an employer would substantially alter the allocation of liability under the *OHSA*.

The Ontario Court of Appeal overturned the trial decision. It found that the City was an "employer" under s. 1(1) because it employed quality control inspectors at the workplace and, therefore, was liable for the pedestrian's death unless the City could establish that it acted with due diligence. The Court of Appeal found it unnecessary to determine whether the City was also an employer under s. 1(1) because it engaged Interpaving as a "constructor. The City appealed.

The Question Before the Supreme Court of Canada

The question before the Supreme Court of Canada was whether the City was liable as an "employer" under s. 25(1)(c) for the breach of ss. 65 and 104(3) of the Regulation. Each set of reasons addresses the following questions:

1. Whether the owner is an "employer" under s. 1(1).
2. Whether the owner as an "employer" breached s. 25(1)(c).
3. Whether the owner should nevertheless avoid liability as an "employer" because it exercised due diligence in accordance with s. 66(3)(b).

In addition, each set of reasons is informed by a "belt and braces" approach to health and safety legislation where overlapping responsibilities are used to better ensure the health and safety of workers. The Court was split, however, on what exactly a "belt and braces" interpretation of ss. 1(1), 25(1)(c), and 66(3)(b) means.

Reasons of Wagner CJ and Jamal, Kasirer, and Martin JJ

Justice Martin wrote the reasons on behalf of herself, Chief Justice Wagner and Justices Jamal and Kasirer.

Justice Martin reasoned that an owner is an "employer" under s. 1(1) if the owner: (a) employs workers at a workplace where an alleged breach of s. 25(1)(c) occurs; or (b) contracts for the services of workers at that workplace—including for the services of a constructor. Justice Martin was clear, whether the owner has control of the workers or workplace is immaterial to the analysis under s. 1(1). Considering

the City employed quality control inspectors and also contracted for the services of Interpaving, there could be no doubt the City was an "employer" under s. 1(1).

Justice Martin then reasoned that s. 25(1)(c) is breached where health and safety measures prescribed by regulation are not met. Here, the measures prescribed by ss. 65 and 104(3) of the Regulation were not met; no fence was erected between the project and public intersection and no signaller was on site. As such, the City had breached s. 25(1)(c).

Justice Martin justifies her reasons, in part, by reference to s. 66(3)(b) which provides employers with a defence of due diligence. Nowhere in Justice Martin's reasons, however, is there a detailed analysis of which facts are necessary to demonstrate that "every precaution reasonable in the circumstances was taken".

Justice Martin remitted the analysis of whether the City acted with due diligence back to the trial court, noting that in assessing due diligence relevant considerations include:

1. The accused's degree of knowledge, skill or experience and the gravity and likelihood of harm (i.e., the foreseeability of the accident).
2. Whether the owner had control of the workers or workplace.
3. Whether the owner delegated control to the constructor in an effort to overcome its own lack of skill, knowledge or expertise to complete the project in compliance with the regulations.
4. Whether the owner took steps to evaluate the constructor's ability to ensure compliance with the regulations before deciding to contract for its services (e.g., pre-screening the constructor, whether the constructor has superior expertise, a track record free of prior convictions for breach of the *OHSA*, and the capacity to ensure compliance with the *OHSA* and regulations).
5. Whether after executing the contract the owner informed the constructor of any hazards at the workplace.
6. Whether the owner effectively monitored and supervised the constructor's work to ensure that the safety measures prescribed by regulation were carried out in the workplace.

Justice Martin's reasons, however, provide no real guidance as to how these factors should be weighed and how the due diligence defence is to be made out in practice.

Whether the reasons of Justice Martin are binding on lower courts as those of a clear majority of the Supreme Court of Canada otherwise would be, they will no doubt be highly persuasive.[2]

Reasons of Karakatsanis, O'Bonsawin, and Rowe JJ

Justices O'Bonsawin and Rowe, writing also for Justice Karakatsanis, agreed with Justice Martin that the City satisfied the definition of "employer" under the first branch. They disagreed, however, that the

[2] See *Rider v Snow*, [1891] 20 SCR 12, at para 15 where Justice Taschereau, as he then was, wrote: "as it is the first time the court is called upon to decide whether or not a previous decision upon an equal division of its members is binding as an authority, with the consent of my learned colleagues, I will add that we are of opinion that such a decision is not binding". Affirmed in *Royal Trust Co v Minister of National Revenue*, [1931] SCR 485, at para 5. See also JT Irvine, "The Case of the Evenly Decided Court" (2001) 64 Saskatchewan Law Review.

City satisfied the definition of "employer" under the second branch. While the City "employed" quality control inspectors, it did not "employ" Interpaving.

As Justices O'Bonsawin and Rowe reason, when an owner contracts with a constructor, they are not seeking to subcontract out a particular task to an independent contractor rather than employ workers directly. Instead, they are asking the constructor to assume complete oversight and authority of the project, including with respect to on-site health and safety. Put differently, the owner is contracting for a "constructor", a party separately defined under s. 1(1). For Justices O'Bonsawin and Rowe, the City's relationship with Interpaving was more accurately defined as an owner-constructor relationship—not an employer-worker relationship.

Justices O'Bonsawin and Rowe further reason that simply because an owner is an "employer" under s. 1(1) does not mean that it is an employer of every worker. Rather, s. 25(1)(c) only requires an employer to comply with the health and safety measures that actually apply to it. Certain regulatory measures indicate their subject expressly. For example, s. 21 of the Regulation requires workers to wear protective clothing and provides that the "worker's employer" is responsible for compliance. For these measures, the required link is clear and no further analysis is needed. Most regulatory measures, however, do not indicate their subject expressly. In these cases, the measure applies to an employer only where it relates to work controlled by the employer and performed by its workers.

As the Ministry itself recognized in its "Constructor guideline", the intent of the *OHSA* is to have one person with overall authority for health and safety matters on a project. This person is the constructor. In contrast, the employer is entrusted with particular work on the project; they make an essential contribution to worker health and safety by ensuring that their work complies with the applicable measures.

As Justices O'Bonsawin and Rowe note, it is far from clear that making each employer liable for the acts of every other employer in carrying out regulatory measures meaningfully improves on-site health or safety. The vast majority of an employer's responsibilities under s. 25(1)(c) are likely to be unrelated to their work and, therefore, impossible for them to carry out, but could nevertheless result in them being charged under the *OHSA*. In other words, "*everyone* who employs *anyone* is responsible for *everything* that *anyone* does".

Lastly, focusing on control at the due diligence stage flips the structure of the offence on its head. Every employer is captured by the offence as soon as any regulatory measure is not met. The employer then bears the burden of pulling themselves out of the ambit of the offence and are effectively forced to argue at the defence stage that the offence should not apply to them.

Reasons of Côté J

In separate reasons, Justice Côté largely agreed with Justices O'Bonsawin and Rowe. The main point of difference is that for Justice Côté the City was not an "employer" under the first branch of s. 1(1); namely, because the City was not responsible for any construction work and did not supervise any construction workers.

Conclusion

Following the Supreme Court of Canada's decision, owners are "employers" under the *OHSA* and are therefore responsible for ensuring that all health and safety measures are met – irrespective of whether they have control over the work, workers or workplace to which those measures apply.

Unfortunately, the Court's reasons provide little insight into the steps an owner must take to avoid liability and establish due diligence—leaving the ambit of liability largely undefined.

The Court's reasons disrupt the construction industry and result in uncertainty for owners across the province. Owners are now exposed to potential liability, including both fines (up to $500,000) and jail time (up to one year).

Given the clear split amongst the bench and the opinions of Justices O'Bonsawin and Rowe and Justice Côté that Justice Martin's reasons leads to "absurd outcomes", this decision cries out for a legislative response.

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