

Owner's risk expanded by Supreme Court of Canada

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In a decision that may impact all industries, the Supreme Court of Canada recently expanded a project owner's risk with respect to safety violations by its contractor's workers.

In a 4-4 split decision in *R. v. Greater Sudbury (City)* 2023 SCC 28 the Supreme Court found the City of Sudbury ("City"/"Sudbury") liable for a fatal worksite accident caused by a contractor's employee, concluding that it breached its employer obligations under the *Occupational Health and Safety Act* ("OHSA").

The City contracted with Interpaving Limited ("Interpaving") to act as constructor to repair a downtown water main. During the repairs, an Interpaving employee struck and killed a pedestrian when driving a road grader, in reverse, through an intersection. The Ministry charged the City under s. 25(1)(c) of Ontario's OHSA for failing to ensure that certain safety requirements of the accompanying regulation, Construction Projects ("Regulation"), had been met. The City conceded it was the owner of the construction project and acknowledged that it sent its quality control inspectors to the project site to oversee Interpaving's contract compliance, but denied that it was an employer, arguing that it lacked control over the repair work and had delegated control to Interpaving. The agreement between the City and Interpaving stated that Interpaving would assume control and health and safety oversight of the project, and ensure compliance with the "constructor's" obligations under the OHSA.

Nine Justices heard this appeal but only eight contributed to the decision following Justice Brown's resignation. Four Justices upheld the Ontario Court of Appeal decision which concluded that the City was liable as an "employer." Four Justices sought to overturn the Court of Appeal decision. The Court of Appeal decision was therefore upheld as a majority was required to overturn it.

Chief Justice Wagner and Justices Martin, Kasirer, and Jamal agreed that there was nothing in the text, context, or purpose of the OHSA indicating that "control" was necessary to establish liability. The OHSA's objective was to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. The Act's public welfare purpose "is confirmed by its history" (Para. 9). The Act fulfills its public welfare purpose by allocating various occupational health and safety duties among various classes of workplace actors, including constructors, employers, and owners (see ss. 23, 25 and 29, respectively). These duties are often concurrent and overlapping: several different actors may be responsible for the same protective functions and measures. This is known as the "belt and braces" approach to occupational health and safety. Under the "belt and braces" approach, where multiple workplace entities fail to safeguard health and safety, they cannot point to others' failures as an excuse for their own; each workplace participant must ensure that the workplace is safe.

The four Justices that would have acquitted the City, Justices Karakatsanis, Rowe, and O'Bonsawin held that the City was not the employer of Interpaving's workers, only of the inspectors it sent to the site. The Justices noted that, in practice, owners promote safety by transferring responsibility to constructors with relevant expertise, and asserted that shared responsibility could create confusion and unnecessary duplication. Justice Côté went further, asserting that Interpaving was solely responsible for the accident because it had full control over the project.

Will this decision impact other industries? For example, will a transportation company that employs independent contractors (equipment and drivers) now risk a finding that they are responsible for safety in the workplace (vehicles) even though they rely on an independent operator agreement and the provisions that require the independent operator to manage the safety of its vehicles and drivers? It is not a large stretch to find that the transportation company may have a shared responsibility with the independent contractor.

What about a warehouse owner who hires a general contractor to repair a facility. Will the owner now have a shared responsibility under the “belt and braces” approach to employees and/or others in the warehouse for failures by the contractor’s employees? Likely.

The trial judge in the Sudbury decision determined that the City exercised due diligence by taking reasonable precautions. The trial judge acquitted the City. The Court of Appeal found that the City was an employer but failed to assess the due diligence defence. The Supreme Court justices that upheld the Court of Appeal decision commented that the due diligence defence – which does consider degree of control – acts as a safety valve for ensuring fairness. “Supervision and inspection have long been seen as sensible steps to take when considering whether that person can avail themselves of the due diligence defence.” (Para. 59). These justices remitted the matter to the provincial offences appeal court to address the City’s due diligence defence.

In the future, owners seeking to reduce risk may need to assume a more active role in ensuring workplace safety. It may require audits and spot inspections to ensure that contractors meet safety standards. This will be necessary to establish a viable due diligence defence.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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