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Civil Litigation

Tied SCC rules city liable as 'employer' for workplace safety breaches at site of Ontario fatality

By **Cristin Schmitz**

(November 10, 2023, 5:01 PM EST) -- In a rare tie judgment, the Supreme Court of Canada has 4-4 rejected a bid to narrow the number of business and other entities exposed to liability as "employers" for workplace safety violations under s. 25(1)(c) of Ontario's *Occupational Health and Safety Act* (OHSA).

In what was evidently a close-fought battle among the judges, the court reserved judgment for 13 months before splintering Nov. 10 in three opinions, with votes of 4-3-1: the controlling decision of the Supreme Court by Justice Sheilah Martin (backed by Chief Justice Richard Wagner and Justices Nicholas Kasirer and Mahmud Jamal); a jointly written dissent by Justices Malcolm Rowe and Michelle O'Bonsawin (endorsed by Justice Andromache Karakatsanis); and a lone dissent by Justice Suzanne Côté. The tie became possible because Justice Russell Brown stepped down from the court last June, after having heard the appeal Oct. 12, 2022: *R. v. Greater Sudbury (City)*, 2023 SCC 28.

By operation of the equal division rule requiring a majority vote if the court is to overturn the decision of the court below, the Supreme Court dismissed the City of Sudbury's appeal from a unanimous Ontario Court of Appeal judgment two-and-a-half years ago which held that the city was an "employer" under s. 1(1) of the OHSA, and responsible for workplace safety violations under s. 25(1)(c) of the OHSA, unless the city could establish due diligence, which defence the Court of Appeal remitted to the provincial offences Appeal Court below for determination: *Ontario (Labour) v. Sudbury (City)*, 2021 ONCA 252.

Justice Sheilah Martin

The Appeal Court's broad interpretation of "employer" was seen by some as boosting health and safety protection for workers, but also raised concern on the part of those who contract out their construction work to third parties

The case arose in 2015 after the Corporation of the City of Greater Sudbury contracted with Interpaving Ltd. for the latter to carry out routine road repair and maintenance. The city also kept some of its own employees on the project site to check for quality control and contract compliance.

Tragically, a pedestrian died at a downtown Sudbury intersection after she was struck by a road grader that was being backed up by an employee of Interpaving, the "constructor" working on repairing a water main. The work was being done without the requisite fencing between the public area and the work site and without a signaller there to help the grader operator. Both the city and the contractor (Interpaving was later convicted) were charged with violating Construction Projects, O. Reg. 213/91, contrary to s. 25(1)(c) of the OHSA which imposes a duty on employers to "ensure that ... the measures and procedures prescribed are carried out in the workplace." The city was charged on the basis that it was both a "constructor" and an "employer" within the meaning of the Act.

In response to being charged and prosecuted by the respondent Ontario Ministry of the Attorney General (Ministry of Labour, Immigration, Training and Skills Development) under s. 25(1)(c), the city conceded it was the owner of the construction project and acknowledged that it sent quality control inspectors to the project, but denied that it was an employer, arguing that it lacked control over the repair work and had delegated control to Interpaving.

In its appeal, the City asked the Supreme Court to determine what role "control" plays in regulatory prosecutions against employers under s. 25(1)(c) of the Act (a provision with counterparts in other provinces' occupational health and safety laws).

For the Supreme Court of Canada, Justice Martin wrote "the short answer is that while control over workers and the workplace may bear on a due diligence defence, nothing in the text, context or purpose of the Act requires the Ministry to establish control over the workers or the workplace to prove that the City breached its obligations as an employer under s. 25(1)(c)."

Justice Martin noted that s. 1(1) of the OHSA defines "employer" broadly — without any reference to control — and requires all employers to uphold several statutory duties.

"There is simply no reason to embed a control requirement into the definition of an 'employer' or graft a control requirement onto s. 25(1)(c) when the legislature deliberately chose not to do so," Justice Martin said.

Moreover, by referring to a contract for services in the definition of "employer," the legislature "signalled its intent to capture employer-independent contractor relationships under the employer definition and to remove from the definition the traditional common law control condition that distinguishes employment and independent contractor relationships," Justice Martin held for the court.

"Indeed, diminishing an employer's duties by reading in a control requirement under either or both provisions would thwart the purpose of this remedial public welfare legislation," she reasoned. "This Act is specifically designed to expand historically narrow safeguards and seeks to promote and maintain workplace health and safety by expressly imposing concurrent, overlapping, broad, strict, and non-delegable duties on multiple workplace participants in what is known as the 'belt and braces' strategy," Justice Martin explained. "The interpretation advanced by the City not only defeats this intention, but would also create undesirable and unnecessary uncertainty and jeopardize efficient administration of the Act's strict liability offences. Instead, control is properly considered in deciding whether an employer who has breached the Act can nevertheless defend on the basis that it acted with due diligence. It is open to an accused to prove that its lack of control suggests that it took all reasonable steps in the circumstances."

One of the issues raised by the City's appeal to the Supreme Court was: are owners of construction projects, who contract out to third-party contractors who act as the constructor, liable for occupational health and safety violations on their construction sites?

The intervener Ontario municipalities of York, Peel, Durham, Halton, Waterloo and Niagara argued that the Court of Appeal's decision marked "a sea change in the regime governing occupational health and safety on construction projects in Ontario."

The municipalities argued "the OHSA long recognized a fair, commercially reasonable allocation of risks and responsibilities on construction sites. It allows project owners to delegate responsibility for occupational health and safety compliance to a 'constructor', usually the general contractor, who is expert in such matters and who accepts full control over the project. There is no precedent for extending those far-reaching obligations to an owner who engages in the limited practice of progress-monitoring and quality control."

For its part, the Ontario Ministry of Labour urged in its factum that "contrary to claims otherwise by the appellant, the broad and purposive approach taken by the ONCA does not ignore the intention of the Legislature. The practical reality of a workplace such as a construction project involves multiple workplace parties, be it workers, employers, or other contractors. From a worker safety perspective, the imposition of responsibility to enforce the minimum protections afforded by the OHSA on such multiple parties in an overlapping manner makes sense, as it increases the overall emphasis on worker safety. From a worker safety perspective, it matters not if an entity, operating at the workplace, confronting workplace hazards, is an owner, employer or constructor; each should have a duty to ensure compliance."

Justice Martin said where an owner who contracts for the services of a constructor on a construction project is prosecuted for a breach of s. 25(1)(c), a court must first consider whether the Ministry has proven beyond a reasonable doubt that the Act applied to the accused because the accused was an employer under s. 1(1) of the Act. An owner is an employer if it employed workers at a workplace where an alleged breach of s. 25(1)(c) occurred, or contracted for the services of a worker at that workplace (including for the services of a constructor). The Ministry is not required to prove that the owner had control over the workplace or the workers there.

Then a court must determine whether the Ministry has proven beyond a reasonable doubt that the accused breached s. 25(1)(c) of the Act, i.e. if the safety measures prescribed by the Regulation were not carried out in the workplace to which the owner/employer is connected by a contractual relationship with employees or an independent contractor. "Again, the Ministry is not required to prove that the owner had control over the workplace or the workers there," Justice Martin stipulated. "A review of s. 25(1)(c)'s text, context, and purpose reveals that control on the part of the accused is not an element of this duty."

Finally, a court must determine whether the accused has proven on a balance of probabilities that it should avoid liability because it exercised due diligence under s. 66(3)(b) of the Act. "Control should only be considered at this stage of the analysis," Justice Martin explained. "It is open to an accused to prove that its lack of control suggests that it took all reasonable steps in the circumstances. Shifting the burden to the employer to establish a due diligence defence incentivizes employers to take all steps within their control to achieve workplace safety and prevent future harm so that they may avail themselves of the defence should harm occur."

Justice Martin added "that an employer's degree of control over the parties in the workplace is relevant to its due diligence defence also answers fairness concerns about imposing liability on an employer for a breach caused by another party. Relevant considerations for the court's determination at this stage may include, but are not limited to: the accused's degree of control over the workplace or the workers; whether the accused delegated control to the constructor in an effort to overcome its own lack of skill, knowledge or expertise to complete the project in accordance with the Regulation; whether the accused took steps to evaluate the constructor's ability to ensure compliance with the Regulation before deciding to contract for its services; and whether the accused effectively monitored and supervised the constructor's work on the project to ensure that the prescriptions in the Regulation were carried out in the workplace."

Justice Malcolm Rowe

In this case, the City was an employer of the quality control inspectors, who were sent to the construction project. The City was also an employer of Interpaving, with whom it contracted to undertake the road repairs. "As an employer of the inspectors and of Interpaving, the City was required by s. 25(1)(c) of the Act to ensure that the measures and procedures prescribed were carried out in the workplace," Justice Martin said.

However, when the accident happened, neither the safety fence or the signallers required by the Regulation were present. The City, as employer, committed an offence under s. 25(1)(c), Justice Martin concluded.

In dissent, Justices Rowe and O'Bonsawin would have allowed the City's appeal and sent the matter back to the first instance court, the Ontario Court of Justice, which had acquitted the City.

"The City is the employer of its quality control inspectors; therefore, the scope of its duties under s. 25(1)(c) of the Act must be examined," the judges said. "Properly interpreted, s. 25(1)(c) holds employers liable for breaching the regulatory measures which apply to them. Where certain measures in the Regulation do not specify to whom they apply, these measures apply to an employer when they relate to the work that the employer controlled and performed through their workers. As the courts below did not properly analyze whether the offence was made out, the matter should be remitted for reconsideration by the provincial court to consider the applicability of the regulatory measures."

In a separate dissent, Justice Côté would have allowed the City's appeal and restored the acquittals at trial. "Properly interpreted, the obligations prescribed by the Regulation were the responsibility of the constructor and/or the employers who performed the relevant construction work," she said. "The City had no involvement in or control over that work and was therefore not an employer at the construction project."

Justice Suzanne Côté

Justice Côté agreed with her fellow dissenters that the definition of employer in s. 1(1) of the Act does not capture the construction-specific relationship between a project owner and its general contractor. She also expressed "substantial agreement" with their interpretation of the duties of employers under s. 25(1)(c) of the Act, which she said "must be read in context and together with the applicable Regulation. It would be absurd to interpret s. 2 5(1)(c) literally to require each employer on a construction project to ensure compliance with all applicable regulations. On a construction project, while each employer is responsible for the health and safety of its own workers, the constructor is responsible for health and safety across the project."

Justice Côté argued that "the belt and braces approach to occupational health and safety is not without reasonable limits and should not be interpreted in a manner that extends the reach of the Act beyond what was intended by the legislature. To impose duties on employers that they cannot possibly fulfil does not further the aim and purpose of the Act, which is to promote worker safety."

The OHSA states "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 ... . "

The Ontario Court of Appeal held in 1992 in *R. v. Wyssen*, 10 O.R. (3d) 193 that this definition of employer embraces both employing and contracting for the services of workers

Photo of Justice Sheilah Martin: Supreme Court of Canada Collection

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