File No. 39754

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CORPORATION OF THE CITY OF GREATER SUDBURY

APPELLANT
(Respondent)

-and-

MINISTRY OF THE ATTORNEY GENERAL (ONTARIO MINISTRY OF LABOUR, TRAINING AND SKILLS DEVELOPMENT)

RESPONDENT
(Appellant)

APPELLANT'S FACTUM

FILED BY THE APPELLANT, THE CORPORATION OF THE CITY OF GREATER SUDBURY
PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This case arises out of a tragic accident at which a pedestrian was struck and killed by a reversing road grader at a municipal road-building project in the City of Greater Sudbury, Ontario. The Trial Judge found that the road grader was driven by an employee of Interpaving Ltd., the contractor hired by the City to undertake the Project. Interpaving agreed to act as the "constructor" on the project, the party defined by statute as bearing overall responsibility for health and safety. The only people employed directly by the City on the project were individuals there to ensure quality control and members of the Greater Sudbury Police Service (the latter were present because the Project was on active municipal roads). No one employed by the City undertook any construction work. No one employed by the City controlled or directed the manner in which the construction work was performed.

2. Although the above findings of fact were not in dispute on appeal, the Ontario Court of Appeal ruled that the City was nonetheless an "employer" on the Project because it employed the quality control personnel (the "**Quality Control Inspectors**") on site. Subject to any due diligence defence, the City was found to have been responsible for the specific failures which resulted in the fatality: failing to have a signaler for the reversing grader, and failing to have a fence to prevent pedestrian access to site.

3. Pursuant to the *OHSA*[1] and its *Construction Regulation*[2], "employers" have onerous, non-delegable obligations to ensure many aspects of health and safety in the workplace. The definition of "employer" includes both direct employment of a worker and contracting for the services of a worker. The owner of a construction site (the "**project owner**") is by default also the "**constructor**", defined as the person who undertakes the construction and bears overall responsibility for health and safety. Pursuant to the definition of "constructor" in the *OHSA*, if a project owner retains a third party to be the constructor

[1] *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the "***OHSA***"), s. 1 "employer".
[2] *Ontario Regulation 213/91, Construction Projects* (the "***Construction Regulation***").

and does not itself undertake *all or part* of the construction project, the project owner thereby contracts out of responsibility for health and safety on the project.[3]

4. Both at trial[4] and the first level of appeal[5], the Courts adopted a consistent, purposive approach to the interpretation of the *OSHA*, as directed by this Court. And so, the Appellant was acquitted at trial and on the Crown's first appeal of all charges because the City was not statutorily identified as the "employer" or the "constructor" in respect of the relevant construction work on the Project.

5. Over decades of jurisprudence, jurisdictions across Canada have considered the question of whether project owners *stepped into the shoes* of the constructor (or other defined party with overall responsibility for health and safety of a construction project) by taking an active controlling role on site and in respect of matters of health and safety concern, and so assumed the role of the designated, responsible party.[6] Consistent with these "Constructor Cases", the Trial court found that the City had not stepped into Interpaving's

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[3] Save for limited, express obligations, regarding the state of the site under construction, such as identifying for the constructor the presence of asbestos etc. ***OHSA***, *supra*, s.1 "Constructor"; *R. v Grant Forest Products*, 2001 CarswellOnt 2557 (Ont. Ct. Jus.) ("***Grant Forest***") at para. 32 and at para. 55.

[4] *Ontario (Ministry of Labour) v City of Greater Sudbury*, (unreported, Lische J, August 31, 2018) ("**Trial Decision**").

[5] *R. v. Greater Sudbury (City)*, 2019 ONSC 3285 (Ont. SCJ) (CanLII) ("**SCJ Appeal Decision**"), at paras. 36-37.

[6] For example, see *Director of Occupational Health and Safety v Government of Yukon, et. al.*, 2012 YKSC 47 (YK S.C.) (CanLII) ("***Government of Yukon***"); *R. v. McCarthy's Roofing Limited*, 2016 NSPC 52 (N.S. Prov. Ct.) (CanLII) ("***McCarthy***"); *R. v. Aecon Construction Group Inc.*, 2018 NSPC 22 (N.S. Prov. Ct.) ("***Aecon***"); *R. v. Sheppard Hedges & Green Ltd.*, 1996 CanLII 11559 (NL SC) ("***Sheppard***"); *R v Fire Sand Real Estate Ltd.*, 2019 SKPC 54 (CanLII) (Sask. Prov. Ct.) ("***Fire Sand***"); *R. v J. Stoller Construction Limited*, (unreported, November 28, 1986, Ont. Prov. Ct., Megginson J.) ("***Stoller***"); *R v Stelco Incorporated* (1989), [1989] O.J. No. 3122 (Ont. Prov. Ct.) ("***Stelco***"); *Ontario (Ministry of Labour) v. Reid & Deleye Contractors Ltd.*, 2011 ONCJ 472 (Ont. Ct. Jus.) (CanLII) ("***Reid***"); *R. v. Natsco Mechanical Contractors Inc.*, 2010 ONCJ 445 (Ont. Ct. Jus.) (CanLII) ("***Natsco***") *R. v. Marina Harbour Systems*, 2008 CanLII 64002 (Ont. S.C.J., on appeal) ("***Marina***").

shoes so as to become the "constructor" and was not in control over the relevant work or workers so as to be deemed the relevant "employer" responsible for the delicts.[7]

6. Decades of parallel jurisprudence, focused on the definition and responsibilities of an "employer" in the workplace, henceforth the "Employer Cases," has consistently confirmed that a party which meets the definition of "employer" is "virtually in the position of an insurer" of health and safety in the workplace, and that such an employer cannot contract out of this responsibility.[8]

7. These parallel lines of authority, the "Constructor Cases" and "Employer Cases", could be read so they may rationally co-exist. This was the approach taken by the Trial Court and at the first level of appeal. Unfortunately, the Ontario Court of Appeal[9] applied a purely textual interpretive approach and ignored the express intention of the Ontario Legislature, decades of jurisprudence and established industry practice.

8. Given the broad definition of "employer" in the *OHSA*, which captures both direct employment relationships and "contracting for the services of a worker", the result of this purely textual approach is that every project owner would always be an employer, because it has contracted at a minimum for the services of the constructor's workers. As such, every project owner would always be the virtual insurer of health and safety on the project and would always be legally required to exert a measure of control over the safe performance of the construction work. As such, every project owner would always be the constructor by default.

9. If one were to apply this strict construction then by implication, section 1 of the *OHSA*, which provides that a project owner may contract out the role of "constructor" to a third party, is rendered null. Moreover, section 1(3), which provides that a project owner does not become a constructor by engaging Quality Control Inspectors, is rendered superfluous.

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[7] Trial Decision, *supra* note 4, at paras. 65-67, 83, and 90.
[8] For example, see *R. v. Wyssen*, 1992 CanLII 7598 (ONCA).
[9] *Ontario (Labour) v. Sudbury (City)*, 2021 ONCA 252 (CanLII) ("**ONCA Appeal Decision**").

10. In light of these logical paradoxes, if the Court of Appeal's ruling were to stand and were applied elsewhere, the typical Canadian homeowner, business and other lay project owner would be put in the same position as the City; namely, being held responsible for health and safety compliance in the specialized field of construction, in respect of which field the Legislature has specifically allowed them to contract out responsibility for health and safety compliance.

11. Before this case, the coherent and stable legislative and jurisprudential approach had established an industry practice aligned with the rational co-existence of the Constructor Cases and Employer Cases, under which project owners have been careful to take a *hands-off* approach, and to leave construction work and related health and safety compliance to the experts they retain to undertake the work.[10] Indeed, in the Superior Court Appeal judgment ("**SCJ Appeal Decision**"), Justice Poupore directly addressed this issue when he stated that accepting the Crown's argument "*…would change substantially what has been the practice in Ontario on construction projects.*"[11] Justice Poupore noted that the Crown was unable to cite a single authority which supported the Crown's position.

12. His Honour Brown J.A. of the Court of Appeal recognized the key public interest issue present in the role "control" exerted by project owners plays in the overall legislative scheme of the OHSA and so granted leave to appeal specifically to consider this question.[12] However, the Panel which heard the Crown's appeal on the merits sidestepped this critical issue entirely.[13] In doing so, the Panel ignored but did not distinguish decades of consistent jurisprudence and failed to consider decisions of the Court of Appeal as well as direction from this Court as to the proper method for interpreting health and safety legislation.

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[10] See *City of Greater Sudbury v A Director under the Occupational Health and Safety Act*, 2015 CanLII 86601 (ON LRB) (the "**OLRB Suspension Decision**") at para. 6, discussing the standard industry practice.
[11] SCJ Appeal Decision, *supra* note 5, at para. 34.
[12] *Ontario (Labour) v. Sudbury (City)*, 2019 ONCA 854 (CanLII) ("**ONCA Leave Decision**").
[13] ONCA Appeal Decision, *supra* note 9, at paras. 14-16.

13. This new paradox in the legislative scheme created by the Court of Appeal's decision is not only untenable, but it nullifies entire provisions and creates dangerous absurdities in application which will likely weaken protections for workers and the public. Moreover, this decision would effectively discourage owners from having any oversight over construction, even for quality control of a contractor's work, for fear of assuming the legal responsibility as an employer and so those of the constructor as well.

Statement of Facts and Procedural History

14. The facts and procedural history are not in dispute and are simply stated.

15. The accident occurred on September 30, 2015.

16. On November 6, 2015, the Ministry of Labour issued an order to the City directing it to file a Notice of Project in respect of the Project, the purpose of which order was to identify the City as the constructor (the "**MOL Order**"). The City appealed the MOL Order to the Ontario Labour Relations Board (the "**OLRB**") and concurrently applied for suspension of the MOL Order pending adjudication of its merits.[14] The City pleaded that it had contracted with Interpaving to be the constructor and that, contrary to the Ministry's assertions otherwise, the City had not employed persons who undertook the construction nor exerted control in respect of the Project that would render it the "constructor" by default pursuant to the *OHSA* and *Construction Regulation.* It was not in dispute that the City employed Quality Control Inspectors and contracted for the Police on site.

17. The test for granting a suspension of such an order at the OLRB sets a very high bar. Specifically, the OLRB must be satisfied that:[15]

    a. the suspension of the order would not endanger worker safety;

    b. the balance of prejudice to the parties favours suspension; and

    c. there is a strong *prima facie* case for a successful appeal of the order.

[14] Pursuant to the *OHSA*, *supra* note 1, ss. 61(1) and 61(7).
[15] OLRB Suspension Decision, *supra* note 10, at para. 5.

18. The OLRB found that the City met this high bar and, by decision of December 21, 2015, granted the City's suspension application (the "**OLRB Suspension Decision**").[16]

19. Despite the OLRB Suspension Decision, following its investigation, the Ministry of Labour Inspector swore an Information pursuant the *Provincial Offences Act* (the "***POA***") which charged the City with seven offences contrary to the *OHSA*. Four of those charges alleged that the City was the "constructor" on the Project and had breached the *OHSA* in that capacity. Three charges alleged that the City was an "employer" on the Project and had breached the *OHSA* in that capacity.[17] On the same Information, Interpaving was charged with three alleged breaches of the *OHSA*, all in relation to its role as an "employer" on the Project.

20. Immediately prior to trial, Interpaving pleaded not guilty to the charges against it, but jointly submitted with the Crown an agreed statement of facts that established the essential facts of one of the offences charged and it called no defence. Interpaving was convicted of that charge and fined $195,000 plus the mandatory victim fine surcharge. [18]

21. The Crown proceeded to trial against the City on six charges.[19] After a five-day trial, for reasons released August 31, 2018, Her Honour Lische J of the Ontario Court of Justice (the "**Trial Court**") acquitted the City of all six remaining charges.[20]

22. The City admitted that it was the owner of the Project but denied that it was the "constructor" or the "employer" on the Project named on the Information.[21] The issues before the Trial Court were whether the Crown could establish the City's statutory

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[16] *Ibid*., at paras. 9-14. Note, the MOL Order and OLRB Suspension Decision are part of the factual history but not part of the procedural history of the case on appeal.

[17] Information, Sworn September 19, 2016 ("**Information**").

[18] The remaining charges against Interpaving were withdrawn at the request of the Crown.

[19] One of the charges initially laid against the City as constructor was withdrawn by the Crown following the first day of trial.

[20] Trial Decision, *supra* note 4, at para. 104.

[21] Information, *supra.*

identity beyond a reasonable doubt, and if so, whether the City's actions constituted due diligence in the circumstances.

23. Although the Trial Court found that the specific factual breaches of the *OHSA* occurred (*i.e.*, there was no signaler for the reversing grader, there was no fence to prevent pedestrian access to site, and there was no traffic control plan in place), the Trial Court found that the City was not responsible for those delicts, because the Crown had failed to prove beyond a reasonable doubt a necessary element of the *actus reus* of the alleged offences – the identity of the City as the responsible "constructor" or "employer".[22]

24. The Crown appealed that decision to the Ontario Superior Court of Justice. For reasons released June 6, 2019, His Honour Poupore J (the "**SCJ Appeals Court**") upheld the acquittals and dismissed the Crown's appeal (the "**SCJ Appeal Decision**"). The SCJ Appeals Court found that the Trial Court's decision was correct in all respects.[23]

25. The Crown sought leave to appeal to the Court of Appeal on all acquittals and on the alternative finding that the City had established due diligence. On October 28, 2019, His Honour Brown J.A. denied leave to appeal on the question of whether the City was the "constructor" on the Project but granted leave on the question of whether a municipality falls within the *OHSA* definition of "employer" by reason of the degree of control it exercises over the project.

26. On April 23, 2021, the Court of Appeal issued the ONCA Appeal Decision, in which it found that the City was "an employer" within the meaning of the *OHSA* and the *Construction Regulation* because it had employed persons on site on the Project – the same persons whom the Trial Court held had been employed solely to ensure quality control and had not exceeded that purpose. The Court of Appeal remitted the Crown's appeal back to the Superior Court of Justice for an appeal hearing on the issue of whether the City had established due diligence as an "employer" on the balance of probabilities.[24]

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[22] *Ontario v Brampton Brick Ltd.*, 2004 CanLII 2900 (ON CA), at para. 12; and Trial Decision, *supra* note 4, at paras. 103-04.
[23] SCJ Appeal Decision, *supra* note 5, at paras. 36-37.
[24] ONCA Appeal Decision, *supra* note 9, at paras. 14-16, and 22-23.

27. Consequently, the Court of Appeal held that the Crown proved the "identity" element of the *actus reus* of the specific alleged offences on the Information because the City had employed Quality Control Inspectors on the jobsite. Moreover, critically, the Court of Appeal held that it was unnecessary to consider the question of "control", upon which issue Brown J.A. had explicitly granted leave, because the facts established that the City was an "employer," by definition.

28. The Crown conceded at the Court of Appeal that the facts found at trial were insufficient to establish the *actus reus* of count 10 on the Information, pertaining to the obligation to prepare a traffic control plan pursuant to section 67(4) of the *OHSA*. The Court of Appeal declined to remit this for a further appeal.[25]

PART II – STATEMENT OF THE QUESTION IN ISSUE

29. There is one question in issue: Is the owner of a construction project, that it was legally required not to control when it has contracted out to a third party to act as the "constructor", nevertheless "the employer" responsible for workplace safety pursuant to section 1(1) of the Ontario *Occupational Health and Safety Act*?

[25] ONCA Appeal Decision, *supra* note 9, at para. 23.

PART III – STATEMENT OF ARGUMENT

i. Standard of Review

30. Pursuant to the section 131 of the *POA*, leave to appeal to the Court of Appeal can only be granted with respect to questions of law.[26] The Court of Appeal has repeatedly confirmed that the standard of review for legal questions for which leave is granted is correctness.[27]

31. As such, this is appeal is confined to a question of statutory interpretation where the facts are not in dispute.

32. There is no question that the standard of review is correctness.

ii. Statutory Interpretation

33. It is a well-established principle of statutory interpretation that the Legislature does not intend to produce absurd results. Both this Court and the Court of Appeal have repeatedly stated that Courts should avoid interpreting workplace safety legislation in a manner that would lead to the adoption of overly broad or absurd interpretations. This Court has adopted the Court of Appeal's findings in *Blue Mountain Resorts Limited v. Ontario (Labour)* ("***Blue Mountain***")[28] with respect to this issue.

34. In *Blue Mountain*, a guest at a resort died in a swimming pool on the property while no workers were present. Section 51(1) of the *OHSA* requires an employer to notify the Ministry of Labour "where a person is killed or critically injured from any cause at a workplace…". It was accepted that "person" refers to more than just workers, and that the swimming pool was a workplace.

35. This Court of Appeal found that, "textually" speaking, at face value, the guest who died in the swimming pool might be seen as someone who died in a workplace. However, it was clear that, from a contextual and purposive perspective, which was the correct way

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[26] *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 131(1).
[27] *Ontario Securities Commission v. Tiffin*, 2020 ONCA 217 (CanLII) paras 24 to 26 and *R. v. Dofasco Inc.*, 2007 ONCA 769 (CanLII) paras 6 to 7.
[28] *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2013 ONCA 75.

to approach the interpretation, the *OHSA* is not engaged unless there is some reasonable nexus between the hazard giving rise to the injury and a realistic risk to worker safety at the pool or the resort. Otherwise, the Province would need to be notified any time a person died anywhere, which would be an absurd result not in line with the purposes of the *OHSA*.

36. In *Canada Post Corp. v Canadian Union of Postal Workers* ("***Canada Post***")[29], this Court approved and expanded on the reasoning in *Blue Mountain*. *Canada Post* stands for the proposition that when interpreting workplace health and safety legislation, the courts must consider the purpose of the provisions and must reflect a practical understanding of how the workplace operates in pursuit of that purpose.

37. In *Canada Post*, as in the instant case, such an interpretation leads to the conclusion that there are some duties that only apply to employers who have control over the conditions of the workplace to which the duties are related.

38. The issue in *Canada Post* was whether s.125(1)(z.12) of the *Canada Labour Code* (the "***Code***"), which required Canada Post as an employer to inspect "every part of the workplace" at least once a year, should be interpreted to require Canada Post to inspect all routes in Canada on which employees delivered mail. If so, this would have included all inhabited roads across the entire country spanning approximately 72 million kilometers. "Workplace" is defined by the *Code* as "*any place where an employee is engaged in work for the employee's employer*". It was accepted that the delivery routes were a "workplace" under the Code, and Canada Post was clearly an employer.

39. This Court upheld the Appeals Officer's ruling that, despite the wording on the face of the statute, the requirement to inspect the workplace did not apply to locations that Canada Post did not control.

40. It was determined that control over the workplace was necessary for the obligation in s.125(1)(z.12) to apply, because the purpose of the workplace inspection obligation is to "permit the identification of hazards and the opportunity to fix them or to have them

[29] *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 ("***Canada Post***"), at para 59.

fixed". The Court found that the Appeals Officer had properly considered the practical implications of the interpretation in light of the purpose of the provision, and agreed with the submissions of Canada Post that "*it would be impractical for an employer to perform [the workplace inspection] obligation in respect of structures it neither owns nor has a right to alter*".[30]

41. This Court held that provisions of health and safety legislation can be given a narrower interpretation to avoid absurdity.[31] Similarly, it is absurd to hold an owner liable for specific health and safety contraventions, when it was legally obliged not to have control over the project (when it is contracted to a "constructor" in accordance with the *OHSA*).

42. The British Columbia Court of Appeal has also emphasized the need to consider the entire scheme of the legislation when interpreting workplace safety legislation. In *British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia* ("***B.C. Hydro***")[32], the issue was whether there was as a legal obligation for a site owner to report an injury as an "employer" of a worker of a sub-contractor. B.C. Hydro sought judicial review of a decision that it should be treated as the "employer" of the worker of the sub-contractor for accident reporting purposes.

43. The Workers' Compensation Board made essentially the same error as the Court of Appeal in this matter. The Court in *B.C. Hydro* held that the Workers' Compensation Board erred when it analyzed the reporting obligation without considering the entire context of the legislative scheme. The Court found that the Legislature has chosen to expressly differentiate the general responsibilities under the statute for owners, employers, and other entities that are commonly in the workplace and that an overly broad interpretation of the reporting obligation did not fit with the scheme of the legislation as a whole.[33]

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[30] *Ibid.*, at para. 55.
[31] *Ibid.*, at para. 59.
[32] *British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia*, 2014 BCCA 353 ("***B.C. Hydro***").
[33] *Ibid.* at para. 45.

iii. Distinct Legal Approach to Construction Contracting

44. The Court of Appeal decision ignores the specific legal context set out in the *OHSA* for contracting for construction. For decades, the *OHSA* has established two separate and distinct legal structures to protect workers where an entity retains a third-party contractor. In most circumstances, an employer in Ontario is treated as the "virtual insurer" of the workers employed by subcontractors.

45. The Legislature has carved out a single specific exception to the general rule, applicable only in situations where a project owner is contracting out to a contractor who has agreed to assume the role of the "constructor" as defined by the *OHSA*. Specifically, section 1(1) of the *OHSA* defines "constructor" as,

> a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer.

46. The legislative exception to the "virtual insurer" concept for owners is well known to the Courts in Ontario. In *R. v Grant Forest Products*[34], the Court heard a constitutional challenge to the definition of "employer" in section 1(1) of the *OHSA*.

47. The defendant argued the definition of "employer" was unconstitutional due to the failure of the Legislature to permit an "employer" to contract with a third party to be responsible for *OHSA* compliance for subcontractors in the non-construction context. The defendant's constitutional challenge was predicated on the argument that it was unconstitutionally overbroad to treat construction and non-construction contracting differently.

48. The Court confirmed how the legal framework for contracting under the *OHSA* functions at paragraph 32:

> Generally speaking, the scheme of the legislation is that contracting out of liability for workplace safety is not available to employers but available to a work site owner who contracts a construction project to a constructor.[35]

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[34] *Grant Forest*, *supra* note 3.
[35] *Ibid.*, at para. 32.

49. The Court ultimately rejected the defendant's argument that the definition of "employer" was unconstitutional. However, the Court cited with approval the following passage from a legal *OHSA* text about the distinction between contracting for construction and contracting for other services:

> A corporation falling under the extended definition of 'employer' can never properly take a "hands-off" approach by either ignoring the situation or crafting contractual terms, making the subcontractor responsible for performing the work in compliance with *OHSA* and the Regulations. The only situation in which contracting away is potentially available is a situation where work is 'construction' as opposed to work generally regarded as non-construction services, and where an owner is seeking to contract away responsibility to a general contractor as a 'constructor' for the work...The matter of contracting for construction projects involves separate and entirely opposite legal concepts....[36]

50. The "separate and entirely opposite" legal structure prescribed by the Legislature for construction contracting would be eliminated if an owner that properly contracted with a third party to act as the "constructor" were treated as the "virtual insurer" and required to take specific due diligence measures as the Crown has argued in this case.

51. The role of a "constructor" is well described in this oft cited passage from para. 24 of *R. v. J. Stroller Construction*[37]*:*

> …the person who enjoys and can exercise the greatest degree of control over the entire project and all working upon it, in relation to ensuring compliance with prescribed safety methods and procedures. He plans and organizes the entire project. He has control over what contractors and subcontractors will be permitted to work and continue working upon the project. He controls the ultimate "purse strings" of payment for work upon the project. In planning the project and deciding whether he will undertake it, and how it will be organized, he can consider the dimensions and logistics of the project and, drawing upon his own expertise and knowledge ... he can make a reasonable assessment of what would be requisite to ensure compliance with the Occupational Health and Safety Act and regulations upon the project.

52. The Ontario Legislature has recognized the reality in construction that project owners typically have representatives at the project for quality control. The Legislature has specifically chosen to ensure that engaging a "quality control" representative to be present

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[36] *Ibid.*, at para. 55.

[37] *Stoller*, *supra* note 6, referred to in *Government of Yukon*, supra note 6.

at the project does not make the owner responsible for the project as the "constructor". Section 1(3) of the *OHSA* states (the "**Quality Control Exception**"),

> An owner does not become a constructor by virtue only of the fact that the owner has engaged an architect, professional engineer or other person solely to oversee quality control at a project.

53. Clearly, section 1(3) is only needed because it is possible for an owner not to be the constructor, as expressly contemplated in the definition of "constructor" per section 1(1).

iv. Consequences of the Court of Appeal's Approach

54. The fact that the City employed Quality Control Inspectors who were present at the Project was the sole basis for the Court of Appeal's decision to find that the City was both the "employer" on the project and that the Crown had proven the *actus reus* of the alleged contraventions beyond a reasonable doubt. The Court of Appeal found that the Quality Control Exception did not apply to the "employer" on a project, but only to the "constructor," pursuant to the text of section 1(3).

55. The problem with the Court of Appeal's approach is that it is impossible for an entity to be an owner and nothing else. It forces the role of "employer" on all owners who exercise their statutory ability to contract construction projects out to expert third-party constructors. The only other choice is for the owner to act as the constructor itself, in which case it will still become an employer on the project. Either option is undesirable and clearly dangerous where the owner lacks the skill and knowledge to undertake a project safely.

56. As the decades of consistent Constructor Cases[38] bear out, a project owner that takes such a measure of control thereby usurps the role of the constructor it retained, and so the project owner becomes the constructor by default.

57. In other words, on a strictly textual reading of the definition of "employer", every project owner would always be an employer, would always be the virtual insurer of health and

[38] See cases cited at note 6, *supra*.

safety on the project, would always be legally required to exert a measure of control, and so every project owner would always be deemed the constructor by default.

58. Following such a textual approach, s.1(3) of the OHSA, which expressly permits a project owner to engage Quality Control Inspectors without becoming the constructor, is rendered logically null. Moreover, the portion of the definition of "constructor" at section 1(1) of the *OHSA*, which expressly provides that the project owner or the party it contracts to be the constructor is the "constructor", would be redundant and superfluous.

59. Other Courts have relied on the level of control exercised by an entity when assessing whether it was subject to "employer" obligations on construction projects. In both *R v. EFCO Canada* ("**EFCO Canada**")[39] and *Ontario Ministry of Labour v. Nor Eng Construction and Engineering Inc* ("**Nor Eng**")[40], the courts found that the parties at issue were not employers on the projects even though their employees had been present on the sites, because the parties lacked sufficient control of the worksites. In both cases, as in the instant case, other entities were operating as constructors on the worksites and the alleged employers responsible for the delicts had not employed anyone directly who was engaged in the construction work.

60. In the Trial Decision, Lische J. properly relied on *EFCO Canada*, where the Court found as follows regarding the proper interpretation of the "employer" definition under the Act:

> I have the same difficulty fitting EFCO Canada within the definition of "employer" as did Justice Renaud in Nor Eng. It is true that EFCO employed people at the time of the collapse, but the question for me to decide is whether or not EFCO was "an employer" within the meaning of the Ontario Health and Safety Act at the time of the building of the bridge.
>
> In my view, the OHSA is legislation intended to protect the safety and welfare of workers in their workplace or on their jobsite. The punitive sections of the Act are intended to make accountable those who do not comply with the provisions of the OHSA and its Regulations in the "sphere of operation" referred to in Iroquois and Nor Eng, supra. The reasons for this are obvious. Any owner, employer, supplier of services, workman or entity that is involved in a workplace has an obligation to all of those also within that sphere to ensure that what they do in the workplace does not affect the health and safety of others. The reason for this is that, in any

[39] *R v. EFCO Canada Inc.* 2010 ONCJ 421 ("***EFCO Canada***").
[40] *Ontario Ministry of Labour v. Nor Eng Construction and Engineering Inc.*, 2008 ONCJ 296 ("***Nor Eng***").

> job site, there may be a number of entities or companies working or involved at the site and each must be cognizant of the implications of their involvement upon the others.
>
> In my view, EFCO was not an employer in the "sphere of operation" but a supplier of falsework. As in Nor Eng, EFCO was removed "geographically, temporally, (and) contractually from the situation at the workplace." EFCO had no control over the jobsite and the falsework provided by it was installed by GBL Construction under the authority of Allen Hastings. Were it that EFCO installed the falsework, my opinion would be different, but it did not do so and as such "did not have sufficient or any control on the conduct of the workplace to bring it within the obligations intended and created by this legislation.[41]

61. The Court came to a similar conclusion in *Nor Eng* where Justice Renaud stated,

> How can it be said that pursuant to s. 25(1), the defendant corporation could do anything on or about May 7, 2004 to ensure that prescribed measures and procedures were carried out. It is patent and the court finds that on May 7, 2004, there is no evidence suggesting that the defendant, if it be deemed an "employer" within the meaning of the Act, had any control over the workplace in question. In fact, the defendant learned only after the collapse, that the project had not yet been completed. The court concludes that the defendant did not have sufficient or any control on the conduct of the workplace to bring it within the obligations intended and created by this legislation.[42]

62. The Court of Appeal failed to follow the direction of this Court in *Canada Post* and its own decision in *Blue Mountain* with respect to interpreting workplace safety legislation. This Court has made it clear that the interpretation of provisions in health and safety legislation must reflect a practical understanding of how the legislative scheme operates.

63. In the Superior Court Appeal judgment, Justice Poupore directly addressed this issue when he stated that accepting the Crown's argument "…*would change substantially what has been the practice in Ontario on construction projects*."[43] Justice Poupore noted that the Crown was unable to cite a single authority which supported the Crown's position.

64. The Court of Appeal did not consider either the entire legal scheme for construction contracting and the well-established industry practice.[44] It is an absurdity to hold that an

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[41] *EFCO Canada*, *supra* note 39, and Trial Decision at para. 88.
[42] *Nor Eng*, *supra* note 40, at para 89.
[43] SCJ Appeal Decision, *supra* note 5, at para. 34.
[44] *Ibid.*

employer at large becomes legally liable as an employer in respect of a construction project for any violation by any party on the project simply because it exercised the legal right provided under the *OHSA* to hire quality control staff or third-party professionals, particularly where the *OHSA* expressly provides otherwise.

65. The practical consequence of the Court of Appeal's decision is that any owner who employs any worker on any construction project for any purpose is guilty of the *actus reus* of any safety violation which occurs at the project. In this matter, the City followed the system established by the Legislature and contracted out the project to an expert third party contractor.

66. The Trial Court held, and the Superior Court confirmed on appeal, that the City did not become the "constructor" by exercising control over the Project beyond that of a prudent owner. The contraventions at issue in this case were purely operational issues and literally had nothing to do with the City or the City's employees.

67. Notwithstanding this fact, the Court of Appeal found that employing the Quality Control Inspectors made the City liable for the reckless actions of a grader operator employed by the party in control of the Project. There is simply no legal basis for this conclusion.

68. Upholding the Court of Appeal's findings would make the provisions of the *OHSA* permitting owners to designate third parties as constructors, as well as the definition of "constructor" and the Quality Control Exception, internally inconsistent, redundant, and meaningless. Further, contrary to the primary purposes of the *OHSA* to promote workplace health and safety, accepting the Appellant's position would be detrimental to the essential goal of ensuring worker safety by discouraging any quality control oversight by an Owner for fear of legal repercussions.

v. Ministry's Constructor Guideline

69. The Ontario Ministry of Labour (as it was then known) published a *Constructor Guideline* in 2009 which was filed as an exhibit at the trial. The *Constructor Guideline* includes several hypotheticals which are meant to illustrate how Ministry Inspectors will determine the identity of a "constructor".

70. The *Constructor Guideline* included the following hypotheticals,

> 3.9
>
> A homeowner hires Contractor A to do home renovation. Contractor A in turn hires subcontractors to help him/her out. Then the homeowner hires another contractor, Contractor B to do something outside of the scope of work for Contractor A. Both contractors work simultaneously on the house. Who is the constructor? Given that the homeowner is undertaking the project (the home renovation) by more than one employer/contractor, the homeowner would be the constructor, and would have overall responsibility for health and safety on the project.
>
> 3.10
>
> The homeowner in Case Study 3.9 asks Contractor A to assume the role of the constructor on the home renovation project, and to oversee the work being done by Contractor B. Contractor A agrees to this arrangement. Furthermore, the homeowner advises Contractor B that Contractor A is the constructor, and that accordingly Contractor B should follow instructions as given by Contractor A. However, the homeowner will still be paying Contractor B. These arrangements are documented in writing. Who is the constructor? Provided these arrangements are reflected on the project, Contractor A would be the constructor.[45]

71. These hypotheticals make clear that control of the project is a critical factor in determining whether a homeowner is responsible for the project as a "constructor". However, if one were to apply the Court of Appeal's textual approach, then as the definition of "employer" is triggered by the mere contracting for the services of the workers of the constructor and any subcontractors on the project (directly or through the contract with the constructor), the homeowner is liable for every violation at the project in both scenarios. It would not matter whether the homeowner is the "constructor". Much like the City, a homeowner is potentially liable as an "employer" for the exact same contraventions and would face the exact same penalties.

72. The Court of Appeal's approach opens a potential *pandora's box* of liability for homeowners. The typical Canadian homeowner would be put in the same position as the City, namely being responsible for health and safety compliance in the specialized field

[45] Ministry of Labour, Occupational Health and Safety Branch, March 2009, Constructor Guideline ("***Constructor Guideline***"), Record Volume II, Tab 2.

of construction which the Legislature has specifically chosen to allow contracting out responsibility for health and safety compliance. The Court of Appeal granted leave to appeal on the question of how the degree of control exerted by the project owner plays in the overall legislative scheme and declined to rule on this critical question in the judgment.[46]

73. This Court has repeatedly emphasized that the practical impact of following a particular interpretation must be considered by Courts when reviewing workplace safety legislation. In *West Fraser Mills*, this Court stated,

> Courts reviewing administrative decisions are obliged to consider, not only the text of the law and how its internal provisions fit together, but also the consequences of interpreting a provision one way or the other and the reality of how the statutory scheme operates on the ground.[47]

74. The Ministry's own hypotheticals show that the issue of control is central to determining the identity of the party who is responsible for a project as the "constructor". This is the classic example of how the practical impact of a particular interpretation should be determinative of the case. It makes no sense to have owners work within a statutory system where "control" is essential to the status of "constructor" if the owner is still liable for the same contraventions as an "employer".

vi. How to Best Protect Worker Safety

75. There have been numerous cases in Ontario and across Canada which have considered whether a particular entity has the status of the party who is identified in the legislation as being responsible for a construction project. In virtually all of these cases, the issue is whether the owner has crossed the line from ensuring quality control to exercising control over the project.[48]

76. The approach of the Court of Appeal would have the practical effect of making it impossible for an owner to be present or have an employee present at a project for quality

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[46] *Ontario (Labour) v. Sudbury (City)*, 2021 ONCA 252 (CanLII).
[47] *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 ("***West Fraser Mills***"), at para. 41.
[48] See note 6, *supra*.

control without becoming liable for every safety violation as an "employer", and so obliged to usurp the role of the "constructor" to comply.

77. The caselaw makes it clear that having a quality control representative present at a project is a common practice for owners across Canada.[49] If the Court of Appeal's finding were to be adopted nationally, it could result in owners losing the ability to have quality control representation present at a project unless they were prepared to assume the liability which they have historically had the right to contract to an expert third party. Such an approach would obviously be highly problematic for ensuring construction contract compliance in both the private and public context.

78. Worker safety would clearly suffer if more lay project owners, who lack the expertise to ensure worker safety, were suddenly forced to become responsible for worker safety on construction projects, contrary to well-established industry practice and the express intent of the Legislature.

79. The Court of Appeal decision has set off alarm bells and confusion in the construction industry with respect to this radical change in the law in the absence of any statutory or regulatory changes.[50] Indeed, in the Superior Court Appeal judgment, Justice Poupore found that to follow such a textual approach "*…would change substantially what has been the practice in Ontario on construction projects*."[51]

80. It is submitted that the Legislature clearly did not intend for the Act to create a detailed scheme whereby owners could contract with a third party to be responsible for worker safety as the constructor and yet require an owner to be the "virtual insurer" and exercise

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[49] *Government of Yukon*, *supra* note 6, at para. 114-18; and *Natsco*, *supra* note 6.
[50] John Schofield, *Lawyers Daily*, 10 May 2021, "Appeal Court health and safety decision potentially 'disturbing' for employers" https://www.thelawyersdaily.ca; Aidan MacNab, *Law Times*, 17 May 2021 "Ontario Court of Appeal ruling 'sending alarm bells' through construction industry" https://www.lawtimesnews.com; Andrew C. Murray, Lerners, 19 May 2021, "Ontario (Labour) v Sudbury (City): Who is the Employer under the Occupational Health and Safety Act?" https://www.lerners.ca; Norm Keith, *Daily Commercial News*, 14 June 2021, "Industry Perspectives Op-Ed: Court of Appeal decision in Sudbury".
[51] SCJ Appeal Decision, *supra* note 5, at para. 34 (emphasis added).

a level of control which the jurisprudence has made clear an owner is not permitted to undertake without being treated as the constructor.

81. Interpreting health and safety legislation must be about due diligence and ensuring reasonable precautions are taken to avoid accidents – it is demonstrably not about finding defendants guilty on purely textual interpretations in hindsight.

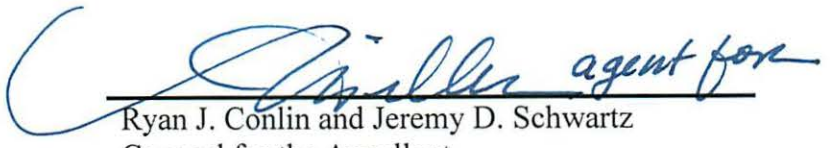
PART IV – COSTS

82. The Appellant asks for its costs in this appeal, to be awarded in accordance with this Court's usual practice.

PART V – ORDERS SOUGHT

83. The Appellant asks that the decision of the Court of Appeal for Ontario be set aside, the decision of the Trial Court and the acquittals of the Appellant on counts 8, 9, and 10 on the Information be restored, with costs.

RESPECTFULLY SUBMITTED THIS 2nd DAY OF MARCH 2022.



Ryan J. Conlin and Jeremy D. Schwartz
Counsel for the Appellant

PART VI – TABLE OF AUTHORITIES

Secondary Authorities

Statutory Provisions