Court File No. 39754

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

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)

- and -

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA,
RETAIL COUNCIL OF CANADA and
REGIONAL MUNICIPALITY OF YORK, REGIONAL MUNICIPALITY OF PEEL,
REGIONAL MUNICIPALITY OF DURHAM, REGIONAL MUNICIPALITY OF HALTON,
REGIONAL MUNICIPALITY OF WATERLOO and
REGIONAL MUNICIPALITY OF NIAGARA (JOINTLY)

Interveners

FACTUM OF THE INTERVENER
RETAIL COUNCIL OF CANADA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Norton Rose Fulbright Canada LLP
45 O'Connor Street
Suite 1500
Ottawa, Ontario K1P 1A4
Kevin MacNeill
Jean-Simon Schoenholz
Tel: (613) 780-3767/1537
Fax: (613) 230-5459
kevin.macneill@nortonrosefulbright.com
jean-simon.schoenholz@nortonrosefulbright.com

Counsel for the Intervener
Retail Council of Canada

Stringer LLP
20 Queen Street W, Suite 3002
Toronto, ON M5H 3R3

Ryan J. Conlin
Jeremy Schwartz
Tel: (416) 862-2566
Fax: (416) 363-7358
rconlin@stringerllp.com

Counsel for the Appellant

Supreme Law Group
900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira S. Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
mdillon@supremelawgroup.ca

Ottawa Agent for Counsel for the Appellant

Ministry of the Attorney General
Ministry of Labour, Training and Skills Development
400 University Avenue, 11th Floor
Toronto, ON M7A 1T7

David McCaskill
Tel.: (416) 426-1367
Fax: (416) 326-7985
david.McCaskill@ontario.ca

Counsel for the Respondent

Workers' Compensation Board
Law & Policy Department
6951 Westminster Highway
Richmond, BC V7C 1C6

Ben Parkin
Johanna Goosen
Tel: (604) 231-8684
Fax: (604) 279-8116
ben.parkin@worksafebc.com

Counsel for the Intervener, Workers' Compensation Board of British Columbia

Michael J. Sobkin
331 Somerset Street West
Ottawa, Ontario K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896
msobkin@sympatico.ca

Ottawa Agent for Counsel for the Intervener, Workers' Compensation Board of British Columbia

Lax O'Sullivan Lisus Gottlieb LLP
145 King Street West
Suite 2750
Toronto, Ontario M5H 1J8

Jonathan C. Lisus
Zain Naqi
John Carlo Mastrangelo
Tel: (416) 598-1744
Fax: (416) 598-3730
jlisus@lolg.ca

Counsel for the Joint Interveners, Regional Municipality of York, Regional Municipality of Peel, Regional Municipality of Durham, Regional Municipality of Halton, Regional Municipality of Waterloo and Regional Municipality of Niagara

Conway Baxter Wilson LLP
400 – 411 Roosevelt Avenue
Ottawa, Ontario K2A 3X9

Abdalla Barqawi
Tel: (613) 780-2026
Fax: (613) 688-0271
abarqawi@conwaylitigation.ca

Ottawa Agent for Counsel for the Joint Interveners, Regional Municipality of York, Regional Municipality of Peel, Regional Municipality of Durham, Regional Municipality of Halton, Regional Municipality of Waterloo and Regional Municipality of Niagara

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PART I – OVERVIEW

1. The settled law of this Court is that "statutory interpretation cannot be founded on the wording of the legislation alone" and "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[1]

2. Despite this clear injunction, here,[2] the Court of Appeal for Ontario eschewed a contextual analysis of the defined term "employer" under the *Occupational Health and Safety Act*, RSO 1990, c O.1 (**OHSA**) in favor of a strictly textual approach.

3. Indeed, the Court of Appeal's approach was so narrow that it found that the appeal could be resolved based only on what it called "the first branch" of the definition of "employer" (para 10). It found that the simple fact of employing one or more workers at a construction project – even if they do no construction work – is sufficient to saddle a property owner with a legal duty to ensure that the entirety of OHSA's provisions are complied with at the project, including the hundreds of complex and technical provisions under OHSA's regulations (paras 10, 11 & 14). More to the point, the Court of Appeal found that a property owner can be punished as an "employer" even when the immediate cause of a construction fatality is the proven fault of a third party that the property owner hired to do construction work within its area of unique knowledge and control (paras 1-6).

4. For the more detailed reasons set out in the balance of this factum, the Retail Council of Canada (**RCC**) submits that the Court of Appeal erred in its approach and that the term "employer" under OHSA must be interpreted contextually, informed by other provisions of OHSA and its regulations, past jurisprudence interpreting occupational safety legislation and a sense of pragmatism and fairness. More particularly, for a property owner to be held liable as an "employer" on a construction project, the prosecution should bear the onus of proving that the accused had sufficient knowledge and control over the project, or the relevant portion of the project, to enable it to ensure the health and safety of workers there. Punishing property owners who do not, and cannot, meet these criteria as "employers" is an absurdity that does nothing to advance worker safety.

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[1] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21.
[2] *Ontario (Ministry of Labour) v Sudbury (City of)*, 2021 ONCA 252.

5. As an intervener, RCC takes no position on the facts at issue in the dispute giving rise to the Appeal.

PART II - POSITION ON QUESTIONS IN ISSUE

6. This Appeal concerns the correct interpretation of the defined term "employer" under the OHSA, when viewed in proper context. RCC submits that the Court of Appeal incorrectly interpreted this term and that a more nuanced, contextual clarification of the law is required from this Honorable Court.

7. RCC takes no position on the disposition of the Appeal.

PART III – STATEMENT OF ARGUMENT

A. The Court of Appeal's Strictly Textual Interpretation is Irreconcilable with the Modern Approach to Statutory Interpretation

8. The Court of Appeal erred in failing to consider how other provisions of OHSA, and the *Construction Projects*[3] regulation under it, contextualize the definition of "employer" and the scope of an employer's obligations under the OHSA.

9. Section 25(1)(c) of OHSA requires employers to ensure that "the measures and procedures prescribed are carried out in the workplace." Where the workplace is a construction project, this includes the nearly 400 detailed and technical provisions under the Construction Regulations, some of which are discussed further below. Under a strictly textual approach, and without further context, section 25(1)(c) thus appears to be a sort of "overall responsibility clause" for construction site safety, which is engaged solely by virtue of a property owner's employee being present on site.

10. However, OHSA explicitly contemplates that one party — the "constructor" — has overall responsibility for construction project safety. Section 23(1) of OHSA provides as follows:

> **Duties of constructor**
> **23**(1) A constructor shall ensure, on a project undertaken by the constructor that,
> (a) the measures and procedures prescribed by this Act and the regulations are carried out on the project;

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[3] O Reg 213/91 [**Construction Regulations**].

> (b) every employer and every worker performing work on the project complies with this Act and the regulations; and
> (c) the health and safety of workers on the project is protected.
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> [Emphasis added]

11. Section 23(1)(b) explicitly requires constructors to ensure compliance with OHSA and its regulations by "every employer and every worker performing work on the project". This is in addition to the obligation imposed on constructors under section 23(1)(a) to ensure that "the measures and procedures prescribed by this Act and the regulations are carried out on the project".

12. Although, section 25(1)(c) imposes a duty on employers to ensure "the measures and procedures prescribed are carried out in the workplace", section 25(1) does not include any responsibility for "compliance" with OHSA by every employer and working on a project:

> **Duties of employers**
> **25**(1) An employer shall ensure that,
> (a) the equipment, materials and protective devices as prescribed are provided;
> (b) the equipment, materials and protective devices provided by the employer are maintained in good condition;
> (c) the measures and procedures prescribed are carried out in the workplace;
> (d) the equipment, materials and protective devices provided by the employer are used as prescribed; and
> (e) a building, structure, or any part thereof, or any other part of a workplace, whether temporary or permanent, is capable of supporting any loads that may be applied to it,
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> (i) as determined by the applicable design requirements established under the version of the Building Code that was in force at the time of its construction,
> (ii) in accordance with such other requirements as may be prescribed, or
> (iii) in accordance with good engineering practice, if subclauses (i) and (ii) do not apply.

13. This is significant. Where the legislator intended to impose overall responsibility for construction site safety, it has done so expressly and only in the case of those who act as a "constructor" under OHSA. The absence of a similar obligation for employers reflects the

legislator's intention not to hold every employer on a project liable for compliance with all OHSA obligations by every other employer and worker on the project.[4]

14. Indeed, if the employer's duty at section 25(1)(c) to ensure that "the measures and procedures prescribed are carried out in the workplace" is interpreted to mean that a worker's mere presence on a construction site is sufficient to make their employer responsible for ensuring that every other employer working on the construction project complies with all OHSA construction requirements, then the constructor's duty at section 23(1)(b) becomes redundant and devoid of meaning. Such an interpretation is at odds with the presumption that the legislator does not speak in vain and should be avoided.[5] The duty set out at sections 25(1)(c) and 23(1)(a) must have a different meaning than the duty set out at section 23(1)(b).

15. The Court of Appeal's interpretation also ignores that section 23(1)(b), set out above, explicitly defines the scope of those employers and workers falling within the ambit of a construction project. The constructor, who is responsible for health and safety on the entire project, is responsible for only those employers and workers actually "performing work on the project". In other words, a constructor's overarching responsibility for OHSA compliance does not extend to employers with workers on site for purposes other than "performing work on the project". Not only does the Court of Appeal's interpretation make section 23(1)(b) redundant, but, in fact, it makes the duty set out at sections 25(1)(c) and 23(1)(a) more expansive than the duty imposed on constructors at section 23(1)(b).

16. The Court of Appeal also failed to consider how the specifics of the Construction Regulations colour the proper scope to be given to the term "employer". These can assist the Court in discerning the legislator's intent.[6] The Construction Regulations set out hundreds of detailed health and safety

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[4] On the maxim *expressio unius est exclusio alterius* see *R v Ulybel Enterprises Ltd*, 2001 SCC 56 at para 42. See also *Zeitel v Ellscheid*, [1994] 2 SCR 142 at 152; *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19 at para 39.

[5] See e.g. *Canada (AG) v JTI-Macdonald Corp*, 2007 SCC 30 at para 87. See also *Québec (AG) v Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831 at 838.

[6] See e.g. *Monsanto Canada Inc v Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para 35.

requirements for construction projects. They identify with specificity which party on a construction project is responsible for certain measures or procedures.

17. For example, section 67(4) of the Construction Regulations, included in the original charges against the appellant, provides that "[e]very employer shall develop in writing and implement a traffic protection plan for the employers' workers at a project if any of them may be exposed to a hazard from vehicular traffic." If, as the Court of Appeal has concluded, section 25(1)(c) of OHSA makes every employer who has a worker on the construction site responsible for ensuring all other employers comply with all prescribed OHSA measures and procedures, then the specific wording in the Construction Regulations that imposes liability on a specific employer for specific measures is obsolete. Instead, all employers would effectively be made responsible for compliance with all prescribed OHSA measures and procedures by all other employers, no matter what is set out in the Construction Regulations.

18. The absurdity of the Court of Appeal's approach is also plain when one considers the remaining charges in this case. The appellant was found to have failed to ensure compliance with sections 65 and 104(5) of the Construction Regulations. Section 65 requires that "[i]f work on a project may endanger a person using a public way, a sturdy fence at least 1.8 meters in height shall be constructed between the public way and the project." Section 104(5) requires that vehicle operators and signalers shall "jointly establish the procedures by which the signaler assists the operator" and follow those procedures. It could not have been the legislator's intent – and it is contrary to common sense – for each and every employer of a worker on a construction site, whether or not their workers' duties had anything to do with the use of vehicles or work in public ways, to be required to ensure that each of those measures had been put into place. Indeed, apart from the inefficiencies that this would cause, the safety issues that could arise from the confusion of multiple employers each trying to communicate or enforce their own version of an appropriate signaler-operator procedure should not be difficult to imagine.

B. The Court of Appeal's Strictly Textual Approach is at Odds with the Jurisprudence

19. The Court of Appeal's strictly textual interpretation of "employer" is also at odds with relevant case law, which suggests that finding that someone is an "employer" on a construction project under OHSA should require the existence of a reasonable nexus between, on the one hand,

factors such as their knowledge, expertise and control over construction activities and, on the other hand, worker safety. For clarity, RCC agrees that in certain situations a party's safety obligations on a construction site may be multiple and overlapping with those of other parties. However, it was certainly an error for the Court of Appeal to peg employer status and obligations solely to the bare wording of OHSA's "employer" definition, without broader consideration of what the case law has said about the factual rationale behind employer liability.

20. The Ontario Court of Justice, which regularly hears cases pertaining to alleged OHSA violations, has recognized that employers will only be liable for OHSA obligations on a construction project where they occupy the project's "continuous sphere of operation".[7] In *R v Stelco Inc*, the Court found that responsibility rests with constructors and employers "in authority".[8] Where an employer's workers do not actually perform work on a project, they cannot be said to have "authority" or "sufficient or any control on the conduct of the workplace".[9] This sensible approach, which reflects the relevant statutory context set out above, was entirely disregarded by the Court of Appeal.

21. A strictly textual approach to the interpretation of occupational safety legislation has been rejected by the Ontario Court of Appeal itself in *Blue Mountain Resorts Ltd v Ontario (Ministry of Labour)* and *Ontario (Ministry of Labour) v Sheehan's Truck Centre Inc.*[10] Recently, this Court in *Canada Post Corp v Canadian Union of Postal Workers*[11] applied a similar approach.

22. In *Blue Mountain*, the Court of Appeal cautioned against precisely the type of interpretation adopted in the present case:

> [26] This generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions, however.

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[7] See e.g. *Ontario (Ministry of Labour) v Nor Eng Construction & Engineering Inc et al*, 2008 ONCJ 296 at para 88 [***Nor Eng***]; *R v EFCO Canada Co*, 2010 ONCJ 421 at paras 59–60 [***EFCO***].
[8] *R v Stelco Inc*, [1989] OJ No 3122 at para 28.
[9] *Nor Eng*, *supra* note 7 at para 89. See also *EFCO*, *supra* note 7 at para 60.
[10] *Blue Mountain Resorts Ltd v Ontario (Ministry of Labour)*, 2013 ONCA 75 [***Blue Mountain***]; *Ontario (Ministry of Labour) v Sheehan's Truck Centre Inc*, 2011 ONCA 645 [***Sheehan's Truck***].
[11] *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [***Canada Post***].

> [27] One of the problems with what is otherwise an understandable approach to the interpretation of public welfare legislation is that broad language, taken at face value, can sometimes lead to the adoption of overly broad definitions. This can extend the reach of the legislation far beyond what was intended by the legislature and afford the regulating ministry a greatly expanded mandate far beyond what is needed to give effect to the purposes of the legislation.[12]

23. In *Blue Mountain*, the Ontario Court of Appeal rejected a strict textual analysis in favor of a more contextual approach, under which it considered how the various provisions of OHSA worked together,[13] how hypothetical outcomes from a strictly textual reading of OHSA could lead to absurd results that were incompatible with the objects of OHSA, and how this would carry the "the potential to give the ministry and its inspectors significantly intrusive powers far beyond what is reasonably required to accomplish its purpose of preserving and promoting worker safety in the workplace".[14] After reviewing the modern approach to statutory interpretation – which the Court of Appeal has ignored here – the Court of Appeal in *Blue Mountain* found that "a generous approach to the interpretation of public welfare statutes does not justify a limitless interpretation of their provisions"[15] and that an otherwise broad statutory term could be restricted by properly considering its context, in these terms:

> [48] "Textually" speaking, taking the language of s. 51(1) of the Act at face value, the guest who died in the swimming pool might be seen as someone who died in a workplace. Blue Mountain has approximately 1,750 employees working at its 750-acre complex, and some of them may be in the pool area at some time during the day to perform maintenance services. The language of s. 51(1), read only in its grammatical and ordinary sense, is very broad.
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> [49] "Contextually" and "purposively" speaking, however, s. 51(1) is not engaged unless there is some reasonable nexus between the hazard giving rise to the injury and a realistic risk to worker safety issue at the pool or the resort.[16]

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[12] *Blue Mountain*, *supra* note 10 at paras 26–27 [emphasis added].
[13] *Ibid* at para 36.
[14] *Ibid* at paras 38–44.
[15] *Ibid* at para 46.
[16] *Ibid* at paras 48–49 [emphasis added].

24. In *Ontario (Ministry of Labour) v Sheehan's Truck Centre Inc*, the Ontario Court of Appeal similarly rejected an expansive interpretation of the OHSA's industrial establishment regulations. The "sweeping application" of the regulations urged by the Crown in that case would have imposed requirements "in circumstances far beyond those that are reasonably necessary to protect workers from safety hazards", under which, if the Crown's interpretation had prevailed, the regulatory term "vehicle", viewed out of proper context, would have meant that "the signaller requirement under s. 56 [of the applicable OHSA regulation] would apply to passenger cars operated in reverse in such everyday locations as shopping centres and plazas or many office building parking lots, so long as the driver's view is even partially obscured".[17]

25. This Court took a similar approach in *Canada Post*, restricting the scope of an employer's potential workplace safety inspection obligations when a strictly textual interpretation of the *Canada Labour Code* was at odds with that Act's purpose. In doing so, it relied on *Blue Mountain*, and made the following comments, which are equally apt in the present case:

> [59] An interpretation which imposed on the employer a duty it could not fulfil would do nothing to further the aim of preventing accidents and injury. While the Appeals Officer's interpretation does limit the application of the obligations under s. 125(1), those obligations — and specifically the inspection obligation — cannot be fulfilled by an employer that does not control the work place. A different interpretation of the statute would not change that reality.[18]

26. This Court's guidance in *West Fraser Mills*[19] clarifies when and why someone should properly be held accountable as an "employer" under occupational safety legislation. In that case, the owner of a forestry site employed a person to supervise it. In deciding that the owner was responsible for safety violations that led to the injury of an independent contractor, this Court specifically relied upon the owner having "sufficient knowledge and control over the workplace to enable it to ensure the health and safety of workers at the worksite locations".[20] The Court of Appeal's interpretation in the present case requires no such nexus. In fact, it represents precisely the

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[17] *Sheehan's Truck*, *supra* note 10 at paras 40–41.
[18] *Canada Post*, *supra* note 11 at para 59 [emphasis added].
[19] *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 [*West Fraser Mills*].
[20] *Ibid* at paras 31, 45, 47.

type of "unbounded interpretation" of occupational health and safety legislation the three dissenting judges in *West Fraser Mills* [21], and the Court of Appeal in *Blue Mountain*, cautioned against.

C. The Court of Appeal's Interpretation Will Lead to Absurd Results for Retailers

27. For the above reasons, it cannot be the legislator's intent that retailers – large, small, independent or family-owned – who engage a constructor to do construction work for their business, are then held responsible for any and all breaches of OHSA and its regulations simply because one of their employees attends the project site. A more nuanced and contextual approach is required, and is open to this Court based on the statutory wording and authorities discussed.

28. If the Court of Appeal's interpretation stands, RCC members could be liable for breaches of OHSA and its regulations on construction projects, even where they have engaged construction professionals to complete construction projects on their behalf and have relied on their expertise in matters of compliance with construction-specific OHSA obligations. This would shift responsibility for safety on construction sites onto entities having no expertise in construction, including small independent and family-owned retailers, as well as larger retailers who may be engaged in multiple, simultaneous projects in regions across the province at any given time.

29. Three decades following the Court of Appeal's decision in *Wyssen*[22], it is time that this Court address the pragmatic and fairness concerns expressed by Finlayson J.A. in that case, but which were not dealt with in the present case through a proper contextual analysis. Finlayson J.A. suggested that in construing the definition of "employer" under OHSA, regard should be had to the statutory obligations imposed upon the employer, which he noted were "very detailed and onerous", "that only a true employer could discharge", and which "could only be understood by a person with expertise in the field".[23] Now, this Court has an opportunity to address these concerns with a proper contextual analysis, in line with the case law discussed in this factum.

PART IV – SUBMISSIONS REGARDING COSTS

30. RCC seeks no order as to costs and asks that no costs be ordered against it.

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[21] *Ibid* at paras 104–05.
[22] *R v Wyssen*, [1992] OJ No 1917 [***Wyssen***].
[23] *Ibid* at para 20.

PART V – ORDER SOUGHT

31. RCC takes no position on the disposition of the Appeal.

PART VI – NOT APPLICABLE

All of which is respectfully submitted this 6th day of June, 2022.

Norton Rose Fulbright Canada LLP
Counsel for the Intervener
Retail Council of Canada

PART VII – TABLE OF AUTHORITIES

CASE LAW	CITED AT PARA.
Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27.	1
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