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 RESPONSE TO INTERVENERS

FILED BY THE APPELLANT, THE CORPORATION OF THE CITY OF GREATER SUDBURY

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I. Introduction and Overview

1. The following is the Response of the City of Greater Sudbury ("**Appellant**") to the Factum filed by the Intervener the Workers' Compensation Board of British Columbia ("**WCBBC**"). The Appellant will not be providing a Response to the Factums filed by the Retail Council of Canada and by the joint interveners, the Regional Municipalities of York, Peel, Durham, Halton, Waterloo and Niagara.

2. The WCBBC asserts that both the Appellant and the Respondent Ontario Ministry of Labour, Training and Skills Development ("**Respondent**") have incorrectly approached the framing of the issue in dispute at trial and at two separate appeal hearings.[1] It proposes that the various Courts that heard this matter should have engaged in a detailed analysis to determine whether the specific counts set out in the Information applied to the Appellant.

3. This WCBBC's legal analysis is fundamentally flawed as it ignores that the issue before the Court involves multiple defined terms in the *Occupational Heath and Safety Act,* R.S.O. 1990, c. O-1 ("**OHSA**") and a limitation of liability clause. It is a legal error to suggest that the term "employer" can be interpreted in isolation in the context of an "owner" contracting to a third party to act as the "constructor" on a "project".

II. The Definition of "Employer" Cannot be Interpreted in Isolation

4. The WCBBC has argued that the correct approach to interpreting workplace safety legislation is to follow a strictly textual interpretation of the definition of "employer" and then determine whether the contraventions charged in the Information are applicable to the defendant.[2]

5. This approach is fundamentally flawed from the outset, as it is crystal clear that the dispute in this case is centered on how the definition of "employer" interacts with the OHSA section 1(1) definitions of "constructor", "owner" and the limitation of liability for project owners set out in section 1(3) of the OHSA.[3]

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[1] WCBBC Factum, page 3, paras 12-13
[2] WCBBC Factum, page 1-2, para 4 and page 4, paras 23-25
[3] OHSA Section 1(1), "employer", OHSA Section 1(3), "Limitation".

6. Pursuant to the *OHSA*[4] and *Construction Regulation*[5], "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 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.[6]

7. The WCBBC has suggested that the issue of the Appellant's liability as an "employer" for contracting for the services of workers is not an issue in this matter.[7] That assertion is clearly inaccurate, as the evidence established that the Appellant contracted with Interpaving to provide workers to perform construction work (expressly as the constructor).[8]

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 urged by the WCBCC 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. The "constructor" provision and "quality control" limitation of liability in section 1(3) would serve no purpose.

9. This reality exposes the inherent flaw in the logic of the WCBBC's position. WCBBC argues that a simple textual analysis is all that is required to determine whether the Crown can prove beyond a reasonable doubt that a defendant meets the legal definition of "employer".

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[4] *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the "***OHSA***"), s. 1 "employer".
[5] *Ontario Regulation 213/91, Construction Projects* (the "***Construction Regulation***").
[6] 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.
[7] WCBBC Factum, page 2, footnote 3
[8] Trial Decision, Record, page 4, paragraph 9

10. The WCBBC's position is untenable when the definition of "employer" must be interpreted in light of the entire legislative scheme which is predicated on the notion that a single party acting as the "constructor" is the entity responsible for worker safety on construction projects. The jurisprudence has made it clear that owners who usurp (all or part of) the role of the general contractor and take a "hands on" approach to safety issues will become liable for safety violations as the "constructor".[9] It is absurd to suggest that the definition of "employer" should be interpreted in this context without regard for this critical determining factor.

III. Statutory Interpretation

11. The WCBBC identified what is argues are three interpretive principles[10] applicable to workplace safety legislation arising from this Court's decision in *West Fraser Mills v. British Columbia (Workers' Compensation Board).*[11] However, the WCBBC omitted reference to the most important principle emerging from *West Fraser Mills* at paragraph 41,

> 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: see *e.g.*, *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 61.[12]

12. This Court cited this passage from *West Fraser Mills* with approval in the subsequent decision of *Canada Post Corp. v. Canadian Union of Postal Workers*.[13] Contrary to the submission of the WCBBC, the proper approach to interpreting legislation in this context is to first examine how the entire legislative scheme operates on the ground and the real world

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[9] *Ontario (Ministry of Labour) v. Reid & Deleye Contractors Ltd.*, 2011 ONCJ 472 (Ont. Ct. Jus.) (CanLII); *R. v. Natsco Mechanical Contractors Inc.*, 2010 ONCJ 445 (Ont. Ct. Jus.) (CanLII); *R. v. Marina Harbour Systems*, 2008 CanLII 64002 (Ont. S.C.J., on appeal).
Trial Decision, *supra*, at paras. 65-67, 83, and 90.
[10] WCBBC Factum page 6, para 24
[11] 2018 SCC 22, see especially para 41.
[12] *West Fraser Mills, supra* at para 41
[13] 2019 SCC 67 (CanLII) at paragraph 43

consequences of interpreting a statutory provision in particular ways. Individual statutory provisions cannot be properly interpreted in a vacuum.

13. Following this approach, the Court is left to decide how workplace safety legislation ought to be interpreted, with a view to best protecting workers on construction projects. Should the Court favour a purely textual interpretation that is inconsistent with decades of jurisprudence and well-established industry practice, and which would result in project safety being ultimately directed by a party that is not positioned to meet the onerous regulatory obligations imposed on employers and constructors?

14. Or, should the Court favour an interpretation that is consistent with well-established industry practice and takes the entire legislative scheme and practical context into account, and which results in the vesting of workplace safety responsibility in a specialist employer who is familiar with the hundreds of regulatory provisions applicable to construction projects and who has sufficient experience, competence and resources to be the virtual insurer of workplace safety?

15. The answer is obvious – the Court should favour the latter approach. Workplace safety is best preserved by following the system established by the Legislature for the specific challenges associated with the construction industry.

RESPECTFULLY SUBMITTED this 13th day of June, 2022.

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