



# What's New in HR Law

## The Role of Control: Supreme Court Confirms Definition of “Employer” under the *OHS*A

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### Bottom Line

The Supreme Court of Canada has clarified the test for “employer” under the *Occupational Health and Safety Act* (the “*OHS*A”) in *R v Greater Sudbury (City)*, [2023 SCC 28](#). In its decision, released on November 10, 2023, the Court also made important comments on how a company’s control of a worksite will be considered when determining compliance with the *OHS*A and its regulations.

### Background Facts

The Corporation of the City of Greater Sudbury (the “City”) contracted with Interpaving Limited to repair a downtown water main. The contract stated that Interpaving would assume control over the entire site as the “constructor”. The City employed inspectors to oversee Interpaving’s performance of the contract. While at work and operating a road grade, one of Interpaving’s employees struck and killed a pedestrian. In a separate proceeding, Interpaving was found guilty of breaching the duty of employers under section 25(1)(c) of the *OHS*A. In its own proceeding, 6 charges were brought against the City under the *OHS*A; 3 as an employer, and 3 as a constructor.

*This article is for the purposes of only general information and does not constitute legal advice or opinion.*

## Earlier Decisions

At trial, the City was acquitted; the trial judge found the City was neither the constructor nor the employer because, in large part, the City had no direct control over Interpaving's workers. In the alternative, the trial judge found that City had met its due diligence obligations to take every reasonable precaution in the circumstances.

The Crown appealed and argued that because the City had its own employees which were occasionally on-site for quality control purposes, it was an employer under the *OHS*A. This argument was rejected by the Superior Court on appeal.

However, the Court of Appeal unanimously overturned the trial judge's decision and found that section 25(1)(c) applied and the City was an employer because its quality control inspectors were on site monitoring Interpaving's progress. Though the question was raised in the decision granting leave to appeal, the Court of Appeal declined to decide whether "control" over Interpaving's work was required for the City to be an employer under the *OHS*A.

The City appealed the Court of Appeal's decision to the Supreme Court, including to determine what role control plays in determining whether a corporation is an employer and has complied with its duties under section 25(1)(c) of the *OHS*A.

## The Supreme Court Decision

In a split decision, the Supreme Court dismissed the appeal and held that the City was liable as an "employer" under the *OHS*A. Where the Supreme Court diverged was on the role of control in relation to an employer's duty under section 25(1)(c).

### A Role for Control

After discussing the undisputed purpose of the *OHS*A in promoting workplace health and safety, the majority considered the definition of "employer" under the *OHS*A and at common law. The definition for "employer" under the *OHS*A includes a party who "contracts for the services of one or more workers." The majority concluded that, in contrast to the definition under common law, control is not an element in the definition of "employer" under the *OHS*A; the definition did not include any requirement for control, unlike definitions of "employer" or "employee" in common law or in other legislation. The majority concluded that the definition under the *OHS*A specifically covers companies contracting with independent contractors.

The majority also separately agreed with the Court of Appeal that the City was an employer because it employed inspectors on the construction site.

A construction site owner is therefore an "employer" if it (a) employs workers at a workplace, or (b) contracted for the services of a worker, including independent contractors, at that workplace.

The majority also held that control on the part of an accused is not an element of establishing liability under section 25(1)(c). Once a party is an "employer," they can be found guilty of a violation of section 25(1)(c) if they are not enforcing required safety measures in the workplace.

The majority did describe a role for control over a workplace in assessing a due diligence defence. If an employer does not have control of a workplace, then the underlying causes of the offence are more likely to be beyond the employer's control. Additionally, an employer's control over the workplace may limit

what precautions are reasonable for the employer to implement. The majority stated that it would be unnecessarily duplicative to include “control” in the test for 25(1)(c).

According to the majority, other considerations that a court may consider in assessing a due diligence claim defence include, but are not limited to:

- whether the accused delegated control to the constructor because of the constructor’s greater skill, knowledge or expertise to complete the project in compliance with relevant regulations and legislation;
- whether the accused took steps to evaluate the constructor’s ability to ensure compliance; or
- whether the accused effectively monitored and supervised the constructor’s work on the project.

Accordingly, the majority found that the City was an “employer” of the quality control inspectors on the site, and, separately, of Interpaving, for the purposes of section 25(1)(c). As an employer, the City was obligated to ensure safety measures were in place at the construction site. The City failed to do so on the day the accident occurred as it had not erected a fence separating the construction work from the public way in accordance with the *OHSA* regulation, *Construction Project* [O.Reg. 213/91](#). The City was therefore liable for committing an offence under section 25(1)(c).

The Supreme Court sent the matter back to the Superior Court to consider the Crown’s appeal of the trial judge’s ruling that the City had established a successful defence of due diligence.

## Dissenting Opinion

The dissent broadly agreed with the majority’s definition of “employer,” but would have carved out a contract between an owner and a constructor from the meaning of “contract for services.” The dissent looked at the responsibilities which the *OHSA* gives to constructors and owners, and determined that treating owners as employers simply because they contracted with constructors conflicted with the intention to allow the owner to take a “hands-off” approach to overseeing the project relative to the constructor.

The dissent also disagreed with the majority’s interpretation of section 25(1)(c). The dissent stated that the duty to take all reasonable precautions for the protection of a worker requires a nexus to the work that the employer controls and performs through its workers. Without this nexus, an employer who contracted with anyone to perform work would be liable for everything that party did. Placing responsibility on a party with no control over the workers or the workplace would, according to the dissent, create confusion and a lack of coordination on a construction project.

As such, the dissent would have found that the City was the employer of the quality control inspectors, but not of the workers that the constructor hired. The question of whether the City failed to implement the applicable regulatory measures would depend on whether the City controlled the work being performed near the public areas.

## Check the Box

This case is an advisory for corporations who hire constructors or contractors to perform work with minimal supervision. Corporations in these circumstances could be held liable as an employer for any accidents that occur on these sites, even if the accidents are caused by workers who they do not have

direct control over. This case emphasizes the importance of not only ensuring that contractors and constructors have appropriate health and safety policies and systems, but also of maintaining a meaningful level of oversight and supervision of these worksites to ensure that that all health and safety protocols are being followed.

## Need More Information?

For more information or assistance with workplace safety issues, contact [Micah Fysh](mailto:mfysh@filion.on.ca) at <mailto:mfysh@filion.on.ca> or your [regular lawyer](#) at the firm.

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