



Defining roles on the jobsite

A recent Supreme Court of Canada decision means owners may also be employers under the *Occupational Health and Safety Act*.

Construction project owners may now be legally responsible to act as both an owner and an employer.

On November 10, 2023, the Supreme Court of Canada (SCC) upheld an Ontario Court of Appeal ruling that found the City of Greater Sudbury to be liable for an incident caused by the health and safety failures of its contractor.

The result is an increase to construction project owners' legal risk if their jobsites are found to be non-compliant with health and safety legislation.

"This SCC decision is important for owners because it establishes their legal responsibility as employers and puts them at significant legal risk for health and safety enforcement and prosecution in the province for the first time," says Norm Keith, Partner, Employment and Labour Law, at KPMG Law LLP.

"Prior to this case, an owner had very little legal responsibility for general contractors and sub-trades if they contracted with a general contractor or other party that took on the role of the constructor."

What the court looked at

The case, *R. v. Greater Sudbury (City)* (2023 SCC 28), related to the 2015 death of a pedestrian who was struck by an employee of the contractor hired for water main repair by the City of Greater Sudbury. An investigation at the time of the incident determined that the jobsite lacked required safety measures, including a fence separating the site from a nearby public intersection and a signaller to assist the worker driving the road grader.

The contractor was charged and convicted in separate proceedings for failing, as an employer, to ensure that the regulated health and safety measures and procedures were carried out in the workplace—as per section 25(1)(c) of the *Occupational Health and Safety Act* (OHSA).

The City of Greater Sudbury was also charged under section 25(1)(c) of the Act for failing to observe the same duty as the contractor. The City, as the owner of the construction project, disagreed that it was also an employer because it had given control of the project to the contractor.

This reasoning was initially accepted. However, the Crown took the issue to the Court of Appeal for Ontario, which then reversed the lower court's decision. The appeals court determined that the City of Greater Sudbury was indeed liable as an employer. The City's *subsequent* appeal to the SCC was dismissed.

By upholding the decision, the high court supported the viewpoint that construction project owners also have a legal responsibility to comply with the health and safety duties of an employer. The City of Greater Sudbury will now have the opportunity to prove its due diligence in a provincial offences appeal court.

What the decision means for IHSA members

So what should IHSA members take away from the Supreme Court's ruling? Construction project owners may now be required to act as both an owner and an employer—in compliance with sections 25 and 26 of the OHSA—to fulfill their legal responsibilities on the jobsite.

"The big-picture question is about who is responsible for overall safety at a project," says Keith, adding that in Ontario, Ministry of Labour, Immigration, Training, and Skills Development (MLITSD) inspectors and prosecutors now have the right to target both the constructor and the owner in the role of the employer, should a health and safety-related incident occur.

"The problem is that somebody needs to be in charge when you have the idea of due diligence," Keith says.

Increase your health and safety involvement

Until a legislative amendment or further case law clarifies these roles, Keith recommends that project owners take the following steps to act with due diligence when it comes to fulfilling the legislative obligations of an owner and an employer.

Steps owners can take:



Develop a pre-qualification procedure for evaluating constructors on their ability to competently manage health and safety at construction projects according to OSHA requirements. Owners should select a constructor based on the highest quality in terms of safety rather than the lowest bid on price.



Create a health and safety policy and an occupational health and safety management system (OHSMS) to implement that policy. Safety consultants outside of your organization may be helpful in developing an OHSMS. It may also be advisable to have the OHSMS legally reviewed and approved.



Supervise and inspect the constructor's safety performance continuously throughout the project and ensure health and safety standards and training requirements are fulfilled. Owners may hire staff or a third-party safety consultant to complete these inspections.



Take action immediately upon observing or learning about any occupational health and safety issues at your projects.



Establish consistent methods of accountability for the constructor and sub-trades should safety violations occur on the jobsite. Expectations and consequences should be outlined in the contract and applied in the field at every project.

Assess contracts before signing

Because the SCC's decision may cause owners to make additional demands of constructors, Keith advises constructors to get legal advice before signing contracts for projects. They should also seek legal assistance with making a cost assessment if they take on additional responsibilities on behalf of owners.

"Everyone should be committed to managing a construction project safely from a high level," he says. "Until there is some guidance from the MLITSD on if, when, and how they're going to enforce this new, broader right that they have to [prosecute] owners, we're going to see IHSA members under a great deal of pressure in various forms to indemnify and protect owners and deal with the concerns that owners are going to have about this decision."



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