

Construction

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What was the most interesting development of 2023, and why?

The Supreme Court of Canada's decision in [R v. Greater Sudbury \(City\)](#), was perhaps the most interesting legal development this year, in particular the Court's ruling that an owner could also be an employer under the *Occupational Health and Safety Act* ("OHSA"). This ruling changes the long held view that for health and safety purposes, an owner who hires a "constructor" (general contractor or construction manager) does not have extensive health and safety obligations since they have effectively delegated overall responsibility for health and safety.

The Supreme Court's decision was split 4-4 with two very strong dissenting opinions. As a result, the decision of the Ontario Court of Appeal overturning the acquittal of the City of Sudbury at trial stands. A plurality of the SCC held that an owner will also

be an employer by virtue only of retaining a general contractor. While an owner may lack control over a construction project, a lack of control does not absolve an owner from their obligations as an employer. Issues of control are only relevant in considering an owner/employer's due diligence defence, which requires a determination that they took every reasonable precaution in the circumstances.

Practically, this decision imposes the health and safety obligations of an employer under the OHSA on project owners, simply by virtue of them having contracted with a general contractor. This is true regardless of the level of control the owner has over the actual work site. The plurality of the Supreme Court provided some guidance on how an owner's degree of control should be assessed as part of the due diligence defence. However, they returned the matter to the trial court to determine whether the project owner, the City of Greater Sudbury, had established a due diligence defence.

This is a significant change in onus for project owners who will bear the evidentiary burden of proving on a balance of probabilities that they took every reasonable precaution in the circumstances. Owners must also grapple with whether they should try to exert more control over their projects to ensure overall health and safety to establish a due diligence defence. At the same time, such efforts simultaneously could enhance the scope of their obligations for construction safety and expand the scope of what reasonable precautions the owner/ employer could have taken to avoid an accident. The full impact of this decision, in particular its impact on how the Ministry of Labour prosecutes owners and how trial courts interpret the new due diligence

guidance from the Supreme Court, remain to be seen and will be closely watched by the construction bar.

What's the primary takeaway for businesses from the past year?

The rising interest rates of 2022 and 2023 significantly impacted the construction and development industry and the risk allocation across projects that were commenced when interest rates were lower and relatively stable.

Such interest rate increases can significantly impact the ability to advance projects, as well as the risk distribution on projects that are governed by fix priced contracts in which one party has accepted the risk associated with a significant change in financing costs. In addition, damages for delay or interest owed on unpaid accounts can become a significant portion of an overall claim when compared with the size of such claims in the interest rate environment of the past two decades.

What's one trend you are expecting in 2024?

Across Canada we are increasingly seeing large P3 infrastructure projects reach completion or service commencement. As these projects conclude, we will see whether and how parties choose to litigate claims that arose and were tolled during the build phase. While we may continue to see parties turn to alternative dispute resolutions, like mediation and arbitration, as projects with large sums of money and interconnected networks of contractual parties and stakeholders are involved with disputes, we expect to see parties turn to more traditional adjudication methods, and may see some of these disputes litigated in court.



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