



The Supreme Court dismisses the City of Greater Sudbury’s appeal in an occupational health and safety case.

This case arises from a fatal accident and concerns the proper interpretation of Ontario’s *Occupational Health and Safety Act* (the *Act*). In September 2015, a pedestrian was struck and killed in Sudbury, Ontario, by an employee of Interpaving Limited who was driving a road grader, in reverse, through an intersection. The Corporation of the City of Greater Sudbury had contracted with Interpaving to act as a constructor to repair a downtown water main. Contrary to a provincial regulation on construction projects (the Regulation), no fence was placed between the construction project workplace and the public intersection, and no signaller was assisting the Interpaving worker. In separate proceedings, Interpaving was convicted of breaching its duty as an employer under section 25(1)(c) of the Act to “ensure that...the measures and procedures prescribed [in the Regulation] are carried out in the workplace”.

The issue in this appeal was whether the City was liable as an employer for breaching the same duty. The City was charged by the Ontario Ministry of the Attorney General (Ministry of Labour, Immigration, Training and Skills Development) under section 25(1)(c). Section 1(1) of the Act defines an employer as a person who employs or contracts for the services of one or more workers. The City agreed it was the owner of the construction project, but denied that it was an employer because it lacked control of the repair work and had delegated control to Interpaving.

The trial judge acquitted the City. In her view, Interpaving, not the City, had direct control over the workers and the intersection, meaning the City was not an employer under section 1(1) of the Act. In the alternative, she determined even if the City had breached its obligations as an employer, she accepted its defence that it had taken every precaution reasonable in the circumstances, known as the due diligence defence. The Crown appealed to the provincial offences appeal court, who upheld the City’s acquittal but did not address the trial judge’s conclusion on the City’s due diligence defence.

The Court of Appeal for Ontario unanimously allowed the appeal and set aside the decision of the provincial offences appeal court judge. It applied the definition of “employer” established in an earlier decision from the Court of Appeal for Ontario – which excluded the control requirement – to find the City liable under section 25(1)(c) of the Act. It returned the question of the City’s due diligence defence to the provincial offences appeal court for determination. The City appealed to the Supreme Court of Canada.

The Supreme Court of Canada has dismissed the appeal.

The City was liable as an employer for breaching its obligations under section 25(1)(c) of the Act.

Justice Martin held that the City was an employer of Interpaving and breached its duty under section 25(1)(c) of the Act. She determined that nothing in the text, context or purpose of the Act requires the Crown to establish control over the workers or workplace to prove that the City breached its obligations as an employer under section 25(1)(c). As she stated, “diminishing an employer’s duties by reading in a control requirement... would thwart the purpose of this remedial public welfare legislation”.

However, Justice Martin said control is properly considered in deciding whether an employer who has breached its obligations in the Act can nevertheless defend itself on the basis that it acted with due diligence. It is open to an accused – in this case, the City – to prove that its lack of control suggests it took all reasonable steps in the circumstances. For these reasons, Justice Martin dismissed the appeal and upheld the Court of Appeal’s order returning the issue of the City’s due diligence defence to the provincial offences appeal court for determination.

Breakdown of the decision: Justice [Martin](#) dismissed the appeal and affirmed the Court of Appeal’s order to remit the matter of the City’s due diligence defence to the provincial offences appeal court (Chief Justice [Wagner](#) and Justices [Kasirer](#) and [Jamaal](#) agreed) | **Dissenting:** Justices [Rowe](#) and [O’Bonsawin](#) would have allowed the

appeal and remitted the matter to the Ontario Court of Justice (Justice [Karakatsanis](#) agreed) | ***Dissenting:*** Justice [Côté](#) would have allowed the appeal and restored the City's acquittals entered by the trial judge.

More information: [Decision](#) | [Case information](#) | [Webcast of hearing](#)

Lower court rulings: [Decision](#) (Ontario Court of Justice - unreported) | [First appeal](#) (Ontario Superior Court of Justice) | [Second appeal](#) (Court of Appeal for Ontario)
