



The Supreme Court clarifies what is required for an exclusion clause in a contract of sale to exempt the seller from an implied condition under Ontario’s *Sale of Goods Act*.

This appeal concerned a party’s ability to contract out of an implied condition of sale under Ontario’s *Sale of Goods Act*. Implied conditions are obligations that are automatically incorporated into a contract unless the parties expressly agree otherwise. The Supreme Court clarified what was required to show that the parties expressly agreed to contract out of the implied condition.

Pine Valley Enterprises Inc. was hired by the City of Toronto to work on a municipal project to remediate flooding, which included the removal and replacement of topsoil for drainage. Pine Valley contacted Earthco Soil Mixtures Inc., a topsoil provider, to obtain topsoil with a specified composition. Earthco provided Pine Valley with laboratory reports from different topsoil samples taken about six weeks prior, and warned against purchasing the topsoil without updated test results. However, Pine Valley had already missed project deadlines and urgently wanted delivery of the topsoil to avoid a financial penalty. Pine Valley therefore insisted on immediate delivery. Pine Valley and Earthco agreed to add two exclusion clauses to their contract that stated that Pine Valley had the right to test and approve the material before it was shipped, and that if it waived those rights, Earthco would not be responsible for the quality of the material once it left its facility.

After the topsoil was delivered and placed on the project site, water ponding was noted. New testing revealed that there was substantially more clay in the topsoil than the initial test results had indicated, and Pine Valley had to remove and replace the topsoil. Pine Valley then sued Earthco for damages, alleging that it did not receive topsoil within the range of compositional properties that had been indicated in the initial test results.

The trial judge dismissed Pine Valley’s action. He found that the contract was for a sale of goods by description within the meaning of section 14 of Ontario’s *Sale of Goods Act*, which sets out an implied condition that goods must correspond with their description. He agreed that Pine Valley did not get the topsoil it bargained for, because of the variation between the topsoil that was promised and the topsoil that was delivered. However, the trial judge concluded that the exclusion clauses met the requirements of an “express agreement” according to section 53 of the *Sale of Goods Act*, which allows parties to contract out of the implied condition under section 14. He concluded as such despite the fact that the exclusion clauses did not explicitly mention that they were added to the contract for this purpose.

The Court of Appeal disagreed with the trial judge and found that the wording in the exclusion clauses was insufficient to exempt Earthco from liability under section 14 of the *Sale of Goods Act*. The Court of Appeal allowed the appeal and substituted a judgment requiring Earthco to pay damages. Earthco appealed to the Supreme Court of Canada.

The Supreme Court has allowed the appeal.

The exclusion clauses were an express agreement pursuant to section 53.

Writing for the majority, Justice Martin said that to be sufficient for the purposes of section 53 of the *Sale of Goods Act*, an “express agreement” must be comprised of an agreement to negative or vary a statutorily implied right, duty or liability and such an agreement must be expressly set forth within the parties’ contract. The determination as to what qualifies as an express agreement must also be informed by principles of contractual interpretation and the law concerning exclusion clauses, and the paramount consideration must be the objective intention of the parties.

In the instant case, the trial judge made no error of law with respect to the exclusion clauses at issue. The objective meaning of the parties' express agreement was that Pine Valley accepted the risk that the topsoil would not meet the previously supplied specifications concerning its composition if it failed to test what it knew was an organic and changing substance. For these reasons, Justice Martin allowed the appeal and restored the trial judge's judgment.

Breakdown of the decision: *Majority*. Justice [Martin](#) allowed the appeal (Chief Justice [Wagner](#) and Justices [Rowe](#), [Kasirer](#), [Jamal](#) and [O'Bonsawin](#) agreed) | *Dissenting*: Justice [Côté](#) would have dismissed the appeal.

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