



SUPREME COURT OF CANADA

CITATION: R. v. Greater Sudbury
(City), 2023 SCC 28

APPEAL HEARD: October 12, 2022

JUDGMENT RENDERED:

November 10, 2023

DOCKET: 39754

BETWEEN:

Corporation of the City of Greater Sudbury

Appellant

and

**Ministry of the Attorney General (Ministry of Labour, Immigration, Training
and Skills Development)**

Respondent

- and -

**Retail Council of Canada, Regional Municipality of York, Regional
Municipality of Peel, Regional Municipality of Durham, Regional
Municipality of Halton, Regional Municipality of Waterloo, Regional
Municipality of Niagara and Workers' Compensation Board of British
Columbia**

Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer,
Jamal and O'Bonsawin JJ.

REASONS: Martin J. (Wagner C.J. and Kasirer and Jamal JJ. concurring)
(paras. 1 to 62)

JOINT DISSENTING Rowe and O'Bonsawin JJ. (Karakatsanis J. concurring)

REASONS:

(paras. 63 to 162)

DISSENTING Côté J.

REASONS:

(paras. 163 to 201)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

* Brown J. did not participate in the final disposition of the judgment.

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2023 SCC 28

File No.: 39754.

2022: October 12; 2023: November 10.

Present: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Provincial offences — Occupational health and safety — Duties of employers — Construction projects — Control over workers and workplace — City contracting with constructor to repair water main — Pedestrian struck and killed by road grader during repairs — City charged with breaching duties of employers under provincial occupational health and safety legislation — Whether city liable as employer for breach of duties — Occupational Health and Safety Act, R.S.O. 1990, c. O.1, ss. 1(1) “employer”, 25(1)(c), 66(3)(b) — Construction Projects, O.Reg. 213/91.

The City of Sudbury contracted with Interpaving Limited to act as constructor to repair a downtown water main. During the repairs, an Interpaving employee struck and killed a pedestrian when driving a road grader, in reverse, through an intersection. The Ministry charged the City under s. 25(1)(c) of Ontario’s *Occupational Health and Safety Act* (“Act”) for failing to ensure that certain safety requirements of the accompanying regulation, *Construction Projects* (“Regulation”), had been met. The City conceded it was the owner of the construction project and acknowledged that it sent its quality control inspectors to the project site to oversee

* Brown J. did not participate in the final disposition of the judgment.

Interpaving's contract compliance, but denied that it was an employer, arguing that it lacked control over the repair work and had delegated control to Interpaving.

The provincial court trial judge acquitted the City because Interpaving, not the City, had direct control over the workers and the intersection and thus the City was not an employer under s. 1(1) of the Act. Alternatively, the trial judge found that even if the City was an employer and breached its obligations, it acted with due diligence. The provincial offences appeal court upheld the trial judge's decision but did not address the finding that the City acted with due diligence. The Court of Appeal set aside the decision of the provincial offences appeal court judge, found the City liable under s. 25(1)(c) as an employer, and remitted the question of the City's due diligence to the provincial offences appeal court.

Held on equal division (Karakatsanis, Côté, Rowe and O'Bonsawin JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Martin**, Kasirer and Jamal JJ.: There is agreement with the Court of Appeal that the City was an employer and breached its duty under s. 25(1)(c) of the Act, and that the issue of the City's due diligence defence should be remitted to the provincial offences appeal court. While control over workers and the workplace may bear on a due diligence defence, nothing in the text, context or purpose of the Act requires the Ministry to establish control over the workers or workplace to prove that the City breached its obligations as an employer under s. 25(1)(c).

The Act seeks to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace and it fulfils its public welfare purpose by allocating various occupational health and safety duties among various classes of workplace actors, including constructors, employers and owners. These duties are often concurrent and overlapping: several different actors may be responsible for the same protective functions and measures — this is known as the “belt and braces” approach to occupational health and safety. Under this approach, where multiple workplace entities fail to safeguard health and safety, they cannot point to others’ failures as an excuse for their own; each workplace participant must ensure that the workplace is safe. Section 66(1)(a) of the Act makes it an offence for a workplace actor to breach one of the Act’s obligations, including s. 25(1)(c), which is a strict liability offence: the Ministry only needs to prove the *actus reus* beyond a reasonable doubt to ground a conviction.

Where an owner who contracts for the services of a constructor on a construction project is prosecuted for a breach of s. 25(1)(c), a court must first consider whether the Ministry has proven beyond a reasonable doubt that the Act applied to the accused because the accused was an employer under s. 1(1) of the Act. An owner is an employer if it employed workers at a workplace where an alleged breach of s. 25(1)(c) occurred, or contracted for the services of a worker at that workplace (including for the services of a constructor). The Ministry is not required to prove that the owner had control over the workplace or the workers there. It is clear from the text of the definition of employer that control is not an element that the Ministry must prove to establish that

an accused is subject to the duties of an employer. First, the definition contains no reference to control. A control requirement should therefore not be embedded into the definition of an employer when the legislature deliberately chose not to do so. Second, by referring to a contract for services in the definition of employer, the legislature signalled its intent to capture employer-independent contractor relationships under the employer definition and to remove from the definition the traditional common law control condition that distinguishes employment and independent contractor relationships.

A court must then determine whether the Ministry has proven beyond a reasonable doubt that the accused breached s. 25(1)(c) of the Act. There is a breach of s. 25(1)(c) if the safety measures prescribed by the Regulation are not carried out in the workplace to which the owner/employer is connected by a contractual relationship with employees or an independent contractor. Again, the Ministry is not required to prove that the owner had control over the workplace or the workers there. A review of s. 25(1)(c)'s text, context, and purpose reveals that control on the part of the accused is not an element of this duty. The plain text of s. 25(1)(c) does not limit this duty to workers over which the employer has control. The duty in s. 25(1)(c) must also be understood in the context of the scheme of the Act, the wide definition of employer and the existence of a due diligence defence under s. 66(3)(b) of the Act. Section 25(1)(c) was intentionally drafted broadly so as to focus on the employer's connection to the workplace rather than any particular worker. The breadth of the employer's duties and the broad scope of the definition of "employer" are mutually reinforcing. While the

interpretation of ss. 1(1) and 25(1)(c) raises separate questions, these sections should be read harmoniously as they are nonetheless related. Reading a control requirement into s. 25(1)(c) would narrow the employer's duties and would introduce an internal inconsistency into the Act by pairing a broad definition of "employer" with a narrow interpretation of s. 25(1)(c), rather than finding harmony between these provisions and treating them as mutually reinforcing as the legislature intended. In addition, the existence of the due diligence defence in s. 66(3)(b) is relevant context because it means that employers who breach s. 25(1)(c) will not be subject to penalties under the Act if they can show they took all reasonable steps to avoid the breach. Section 66(3)(b) functions as a safety valve, in which the presence of control may be a factor in assessing due diligence. Reading a control requirement into s. 25(1)(c) would also be inconsistent with the purpose of the Act. The act is a public welfare statute. Its purpose is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. A control requirement could defeat the Act's public welfare purpose of creating overlapping responsibility and would essentially give workplace actors a tool for frustrating regulatory prosecutions at the outset, by arguing that they had no control over a hazard because other parties had greater comparative control over that hazard.

Finally, a court must determine whether the accused has proven on a balance of probabilities that it should avoid liability because it exercised due diligence under s. 66(3)(b) of the Act. Control should only be considered at this stage of the analysis. It is open to an accused to prove that its lack of control suggests that it took

all reasonable steps in the circumstances. Shifting the burden to the employer to establish a due diligence defence incentivizes employers to take all steps within their control to achieve workplace safety and prevent future harm so that they may avail themselves of the defence should harm occur. That an employer's degree of control over the parties in the workplace is relevant to its due diligence defence also answers fairness concerns about imposing liability on an employer for a breach caused by another party. Relevant considerations for the court's determination at this stage may include, but are not limited to: the accused's degree of control over the workplace or the workers; whether the accused delegated control to the constructor in an effort to overcome its own lack of skill, knowledge or expertise to complete the project in accordance with the Regulation; whether the accused took steps to evaluate the constructor's ability to ensure compliance with the Regulation before deciding to contract for its services; and whether the accused effectively monitored and supervised the constructor's work on the project to ensure that the prescriptions in the Regulation were carried out in the workplace.

In the instant case, the City was an employer of the quality control inspectors, whom it employed directly and dispatched to the construction project. The City was also an employer of Interpaving, with whom it contracted to undertake the construction project. As an employer of the inspectors and of Interpaving, the City was required by s. 25(1)(c) of the Act to ensure that the measures and procedures prescribed were carried out in the workplace. On the date of the accident, measures required by the Regulation — a fence between the construction work and the public way as well as

signallers — were not carried out in the workplace. Thus, the City, as employer, committed the offence under s. 25(1)(c).

Per Karakatsanis, **Rowe** and **O’Bonsawin JJ.** (dissenting): The appeal should be allowed. The City is the employer of its quality control inspectors; therefore, the scope of its duties under s. 25(1)(c) of the Act must be examined. Properly interpreted, s. 25(1)(c) holds employers liable for breaching the regulatory measures which apply to them. Where certain measures in the Regulation do not specify to whom they apply, these measures apply to an employer when they relate to the work that the employer controlled and performed through their workers. As the courts below did not properly analyze whether the offence was made out, the matter should be remitted for reconsideration by the provincial court to consider the applicability of the regulatory measures.

The definition of employer in s. 1(1) of the Act covers two broad relationships. The first branch of the definition is satisfied if the person employs one or more workers. It focuses on the employment contract and reflects the traditional conception of a direct employer-employee relationship. However, the fact that a party is an employer does not mean that they are an employer to all workers at a workplace or project, which may affect the scope of their responsibilities. The text of the definition of “employer” is expressly focused on a party’s relationship to workers and it is inappropriate to narrow it by considering that party’s relationship to a workplace. The latter relationship only becomes relevant at the stage of determining an employer’s

duties. Accordingly, the first branch of the definition is satisfied where a traditional employment relationship exists.

The second branch of the definition involves a person who contracts for the services of one or more workers. The second branch prevents parties from removing themselves from the application of the Act where they subcontract out work, rather than directly hiring workers through an employment contract. It ensures that the substance of the employer-worker relationship is not determined by the manner in which it is described in the contract. When an owner contracts with a constructor, they are not seeking to subcontract out particular tasks to any independent contractor instead of hiring workers directly through an employment contract; rather, they are asking an entity to assume plenary oversight and authority to undertake the entire project. This relationship reflects the practical reality of the construction industry, where owners promote safety by transferring responsibility to constructors with relevant expertise. The owner-constructor relationship does not generally fall within the second branch of the employer definition in s. 1(1). The Act is specifically designed so that an owner can take a hands-off approach to overseeing the project relative to the constructor. A constructor undertakes the project, which indicates that overall authority for the project, including the coordination of health and safety, falls to the constructor. Treating an owner as automatically being an employer of the workers hired or contracted for by the constructor under the second branch of the employer definition would undermine the design of the scheme. It would mean that by virtue of engaging a constructor to oversee a project, project owners would be assigned responsibilities that would require them to

play an active role across the project — a role that the Act sought to avoid by enabling them to contract with a constructor in the first place. Treating the owner-constructor relationship as an employer-worker relationship detracts from the legislation's effectiveness because it ignores the practical differences between these relationships and undercuts the distinct mechanisms by which they promote worker safety. In sum, the second branch of the employer definition is broad, but it does not turn an owner into the employer of workers hired or contracted for by a constructor.

Proceeding on the assumption that once a party meets the definition of employer, they are strictly liable for the breach of any regulatory provision through the operation of s. 25(1)(c) and must rely on the due diligence defence conflates the definition of employer with the determination of the scope of an employer's duties. On a proper construction of the scheme, it is essential to examine both the definition of the workplace parties and the duties that actually apply to them. An offence cannot be founded on the breach of a duty that does not apply to the accused. Once a workplace party is found to satisfy the relevant definition set out in s. 1(1) of the Act, it is necessary to then consider which duties actually applied to the party at the time of the alleged offence. The Act separately sets out the duties for each workplace party.

Section 25(1)(c) requires an employer to ensure compliance with all applicable regulatory measures. Where the Regulation expressly states to whom its measures apply, there will be no question as to whether they fall within the employer's duty under s. 25(1)(c). Where however, a particular measure is silent concerning to whom it applies, the measure applies when it relates to work that the employer

controlled and performed through their workers. This relationship is established when the employer has authority over the performance of a task, usually because it is the portion of the work within the larger project that, whether alone or with other parties, they have been entrusted with performing through the workers they have employed or contracted for. To be sure, multiple parties can be jointly entrusted with a task, since different employers will often collaborate, and thus multiple employers can have an overlapping responsibility to fulfill the same measures. A regulatory measure can apply to the work of multiple employers so long as it relates to each employer. The core question is: What work is an employer responsible for undertaking on the construction project? The Ministry should know whether the measure is actually related to the employer's work before making the decision to charge that employer. Therefore, the regulatory measures apply when they present a nexus to the work which is under the employer's control and performed through their workers. Establishing this nexus between the measure and the employer is a binary, threshold question: either the measure applies because it is related to work which the employer has undertaken, or the measure does not apply because such a link is absent.

It would be absurd to interpret s. 25(1)(c) and the Regulation as obligating every employer at a construction project to ensure compliance with all measures contained within the Regulation. This would effectively mean that everyone who employs anyone is responsible for everything that anyone does. Protecting worker safety is of critical importance and it is far from clear that making every employer liable for the acts of all other employers in carrying out all regulatory obligations

meaningfully improves worker safety. A measured and practical approach gives effect to the concept of overlapping responsibilities. Since the workers' activities under each employer's control frequently overlap on complex construction projects, so too will the measures which apply to them under s. 25(1)(c). A measured and practical approach also fully operationalizes the belt and braces approach which aims to create meaningful protection in practice. Yet, if there is no relationship between the measure and the employer's work, the employer cannot serve as an effective brace. Imposing measures contained in the Regulation onto employers bearing no relationship to the work at hand adds an indefinite number of illusory braces: they provide a false sense of added safety but, in reality, only increase the legal jeopardy of unrelated workplace parties who could not have ensured compliance with those measures. Holding employers with no control liable does nothing to increase worker safety — it is this very lack of control which makes them unable to carry out the regulatory measures in the first place. Additionally, limitless responsibilities lead to confusion and a lack of coordination on a construction project. If every employer is liable for everything and has duties towards unrelated parties, an individual employer's sphere of responsibility becomes unclear. Safety issues could arise if multiple employers with no relationship to the duty or expertise in the area seek to enforce their own version of a particular safety procedure on other workers. Alternatively, unlimited duties can lead to neglect if each employer assumes that duties owed by all employers will have been fulfilled by someone else.

Prosecutorial discretion will not limit the potential for absurdity to occur. This effectively gives prosecutors unbounded discretion to define the proper scope of

each employer's duties by deciding who to charge, rendering the ultimate delineation of duties in the Act unpredictable and uneven from the accused's perspective. Reliance on a promise that prosecutors would not charge employers for breaches of regulatory measures over which they had no control emphasizes this absurdity. The availability of the due diligence defence at s. 66(3) also initially presents itself as an appealing solution, but there are multiple flaws with adopting an approach that pushes most of the analysis concerning an employer's responsibility to the due diligence stage. From a methodological perspective, the offence and the defence should not be conflated. Judges should not abdicate the responsibility of arriving at a reasonable interpretation of a duty merely because a defence exists or because doing so would improve administrative efficiency. A focus on the due diligence defence flips the structure of offences on its head: every employer is captured by the offence as soon as any regulatory measure is not met, and the accused must bear the burden of pulling themselves out of the ambit of the offence. Shifting much of the analysis on the contents of the duty and the nature of the employer's work to the due diligence stage increases uncertainty in practice and ignores the reality of how the scheme operates on the ground. If most of the employer's obligations are outside of their control, they have no ability to even know whether the measures are being complied with or what they could be charged with at any moment. In contrast, requiring that a measure relates to an employer's work provides employers with a greater understanding of their responsibilities and encourages them to take initiative to protect workers.

In the instant case, because the City had hired quality control inspectors through a contract of employment, it satisfied the definition of employer under the first branch. The City owes duties as the employer of these workers under the Act. However, by contracting with a constructor, it did not become the employer of the workers that the constructor retained. The owner-constructor contract reflects a distinct relationship contemplated in the Act that does not generally fall within the second branch of the employer definition in s. 1(1). Consequently, the City is only the employer of its quality control inspectors. In light of the conclusion that the City is an employer to the quality control inspectors, the applicability of the regulatory measures depends on whether the City controlled work being performed near public ways or controlled the operation of vehicles, machines and equipment. The trial judge however did not consider the applicability of the regulatory measures, nor did the provincial offences appeal court or the Court of Appeal. Accordingly, the proper approach is to remit the matter to the provincial court to determine whether the relevant provisions of the Regulation related to the City and thereby fell within its duty under s. 25(1)(c) of the Act.

Per Côté J. (dissenting): The appeal should be allowed and the acquittals entered by the trial judge should be restored. Properly interpreted, the obligations prescribed by the Regulation were the responsibility of the constructor and/or the employers who performed the relevant construction work. The City had no involvement in or control over that work and was therefore not an employer at the construction project.

There is agreement with Rowe and O'Bonsawin JJ. that the definition of employer in s. 1(1) of the Act does not capture the construction-specific relationship between a project owner and its general contractor. A project owner who hires a constructor is not the employer of the constructor itself or its workers. An employer cannot evade its occupational health and safety responsibilities by hiring an independent contractor instead of entering a typical employment relationship. But it does not follow that an employer is responsible for the employees and independent contractors of other employers.

There is also substantial agreement with Rowe and O'Bonsawin JJ.'s interpretation of the duties of employers under s. 25(1)(c) of the Act, which must be read in context and together with the applicable Regulation. It would be absurd to interpret s. 25(1)(c) literally to require each employer on a construction project to ensure compliance with all applicable regulations. On a construction project, while each employer is responsible for the health and safety of its own workers, the constructor is responsible for health and safety across the project.

The belt and braces approach to occupational health and safety is not without reasonable limits and should not be interpreted in a manner that extends the reach of the Act beyond what was intended by the legislature. To impose duties on employers that they cannot possibly fulfil does not further the aim and purpose of the Act, which is to promote worker safety. The position that workplaces will be safer if every employer is made responsible for every possible safety obligation has superficial appeal, but it also creates a clear disincentive for a municipal project owner to engage

in quality control efforts. A municipal project owner is not an employer on the construction site merely because it employs quality control inspectors. Holding every project owner strictly liable for all safety hazards it encountered in its quality control efforts — and which it did nothing to create — renders the quality control exception meaningless. It would no longer matter that owners do not become constructors by hiring quality control personnel. They would simply become employers who, in addition to constructors, have a strict duty to ensure compliance across the construction project.

The due diligence defence only becomes relevant once the elements of the statutory offence have been established. An employer's ability to make out a potentially costly and burdensome defence is irrelevant to the proper interpretation of who is an employer on a construction site and to the scope of its corresponding statutory duties. It does not prevent future harm to impose statutory liability on employers who have no connection to, or control over, the safety obligation in question. Where an employer on a construction site did have some measure of control over the safety obligation in question, the burden shifts to the employer to demonstrate that it took every precaution reasonable in the circumstances.

In a careful and thorough analysis, the trial judge in the instant case repeatedly rejected the Ministry's position that the City or its inspectors exercised control over any construction work at the project. The trial judge properly found that the Ministry had not proved that the City acted as an employer on the construction site. Interpaving was both the constructor of the project and the employer of the road grader

operator who fatally struck and killed a pedestrian. The City's involvement in the project was limited to quality control and it was not responsible for the completion of any construction work. The trial judge's conclusions on the City's lack of control at the project are findings of fact that deserve deference. The trial judge also correctly found that even if she was wrong in concluding that the City was not an employer on the construction site, the City took every precaution reasonable in the circumstances to ensure safety at the project. It would be an extravagant proposition to say that a municipal project owner becomes an employer of every person on a project by attending the project for the limited purpose of quality assurance. To impose statutory liability on the City in these circumstances would be a regrettable departure from the established scheme of the Act. The City was not statutorily obligated to ensure compliance with the Regulation which applied only to the workplace parties involved in the actual construction work at the project site.

Cases Cited

By Martin J.

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International Ltd., [1992] O.J. No. 1711 (QL), 1992 CarswellOnt 2751 (WL); *R. v. Thomas G. Fuller & Sons Ltd.*, 2008 CarswellOnt 9276 (WL); *R. v. Cox Construction Ltd.*, 2008 CarswellOnt 9540 (WL); *R. v. Saskatchewan Power Corp.*, 2016 SKPC 2; *Ontario (Ministry of Labour) v. Dofasco Inc.*, 2007 ONCA 769, 87 O.R. (3d) 161; *R. v. Campbell*, [2004] O.J. No. 129 (QL), 2004 CarswellOnt 116 (WL); *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21; *Ontario v. London Excavators & Trucking Ltd.* (1998), 40 O.R. (3d) 32; *Ontario (Ministry of Labour) v. Pioneer Construction Inc.* (2006), 79 O.R. (3d) 641; *Ontario (Ministry of Labour) v. United Independent Operators Ltd.*, 2011 ONCA 33, 104 O.R. (3d) 1; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983; *Ontario (Ministry of Labour) v. Reid & DeLeye Contractors Ltd.*, 2011 ONCJ 472; *Ontario (Ministry of Labour) v. Nor Eng Construction & Engineering Inc.*, 2008 ONCJ 296; *R. v. Marina Harbour Systems*, 2008 CanLII 64002; *R. v. EFCO Canada Co.*, 2010 ONCJ 421; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Director of Occupational Health and Safety v. Government of Yukon, William R. Cratty and P.S. Sidhu Trucking Ltd.*, 2012 YKSC 47; *R. v. Dan Gamache Trucking Inc.*, 2005 BCSC 1487, 23 M.V.R. (5th) 305; *R. v. Bradsil 1967 Ltd.*, [1994] O.J. No. 837 (QL), 1994 CarswellOnt 4450 (WL); *R. v. Cancoil Thermal Corp. and Parkinson* (1986), 27 C.C.C. (3d) 295; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300; *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63, [2013] 3 S.C.R. 756; *R. v. Grant Forest Products*

Inc. (2002), 98 C.R.R. (2d) 149, rev'd 2003 CarswellOnt 6071 (WL); *Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*, 2013 ONCA 75, 114 O.R. (3d) 321; *R. v. Gonder* (1981), 62 C.C.C. (2d) 326; *R. v. Inco Ltd.*, [2001] O.J. No. 4938 (QL), 2001 CarswellOnt 10933 (WL); *Ontario (Ministry of Labour) v. Linamar Holdings Inc.*, 2012 ONCJ 295; *Ontario (Ministry of Labour) v. Wal-Mart Canada Corp.*, 2016 ONCJ 267, 32 C.C.E.L. (4th) 313; *R. v. Imperial Electric Ltd.*, 1998 CarswellBC 4085 (WL); *R. v. Amherst Fabricators Ltd.*, [2003] N.S.J. No. 280 (QL); *R. v. XI Technologies Inc.*, 2011 ABPC 313; *R. v. Rio Algom Ltd.* (1988), 66 O.R. (2d) 674; *R. v. Brampton Brick Ltd.* (2004), 189 O.A.C. 44.

By Rowe and O'Bonsawin JJ. (dissenting)

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v. Ontario, 2009 ONCA 374, 95 O.R. (3d) 414; *R. v. Grant Forest Products Inc.* (2002), 98 C.R.R. (2d) 149; *Imperial Oil Ltd. v. Ontario (Ministry of Labour)* (1993), 10 C.O.H.S.C. 210; *R. v. Campbell*, [2004] O.J. No. 129 (QL), 2004 CarswellOnt 116 (WL), aff'd (2006), 140 C.R.R. (2d) 143; *Commission de la santé et de la sécurité du travail du Québec v. Acier AGF Inc.*, 2001 CanLII 12761; *Commission de la santé et de la sécurité du travail v. Poudrier et Boulet Ltée*, [1982] AZ-83147017; *Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*, 2013 ONCA 75, 114 O.R. (3d) 321; *Ontario (Ministry of Labour) v. Black & McDonald Ltd.*, 2011 ONCA 440, 106 O.R. (3d) 784; *R. v. K.B. Home Insulation Ltd.*, [2008] O.J. No. 6019 (QL), 2008 CarswellOnt 10891 (WL); *R. v. Bradsil 1967 Ltd.*, [1994] O.J. No. 837 (QL), 1994 CarswellOnt 4450 (WL); *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795; *R. v. Structform International Ltd.*, [1992] O.J. No. 1711 (QL), 1992 CarswellOnt 2751 (WL); *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900; *Ontario (Health and Long-Term Care, Land Ambulance Programs) v. Canadian Union of Public Employees, Local 2974.1*, 2010 CanLII 11302; *Willick v. Willick*, [1994] 3 S.C.R. 670; *R. v. Brampton Brick Ltd.* (2004), 189 O.A.C. 44; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Halifax Port Authority*, 2022 NSPC 13; *Director of Occupational Health and Safety v. Government of Yukon, William R. Cratty and P.S. Sidhu Trucking Ltd.*, 2012 YKSC 47; *R. v. Gonder* (1981), 62 C.C.C. (2d) 326; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Stelco Inc. v. Ontario*

(*Ministry of Labour*), 2006 CanLII 28110; *Ontario v. London Excavators & Trucking Ltd.* (1998), 40 O.R. (3d) 32.

By Côté J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Fairburn A.C.J.O. and Watt and Huscroft JJ.A.), 2021 ONCA 252, 15 M.P.L.R. (6th) 161, [2021] O.J. No. 2113 (QL), 2021 CarswellOnt 5697 (WL), setting aside a decision of Poupore J., 2019 ONSC 3285, 88 M.P.L.R. (5th) 158, [2019] O.J. No. 2957 (QL), 2019 CarswellOnt 8916 (WL), which affirmed the acquittals entered by Lische J., and remitting the matter to the Ontario Superior Court of Justice. Appeal dismissed on equal division, Karakatsanis, Côté, Rowe and O’Bonsawin JJ. dissenting.

Ryan J. Conlin and Jeremy Schwartz, for the appellant.

David McCaskill, Giuseppe Ferraro and William Robinson, for the respondent.

Kevin MacNeill and Jean-Simon Schoenholz, for the intervener the Retail Council of Canada.

Jonathan C. Lisus, Zain Naqi and John Carlo Mastrangelo, for the interveners the Regional Municipality of York, the Regional Municipality of Peel, the Regional Municipality of Durham, the Regional Municipality of Halton, the Regional Municipality of Waterloo and the Regional Municipality of Niagara.

Ben Parkin and Johanna Goosen, for the intervener the Workers’ Compensation Board of British Columbia.

The reasons of Wagner C.J. and Martin, Kasirer and Jamal JJ. were delivered by

MARTIN J. —

I. Introduction

[1] This appeal arises from a fatal accident and concerns the proper interpretation of Ontario’s *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (“Act”). The Corporation of the City of Greater Sudbury contracted with Interpaving Limited to act as constructor to repair a downtown water main. An Interpaving employee struck and killed a pedestrian when driving a road grader, in reverse, through an intersection. Contrary to the accompanying regulation, *Construction Projects*, O. Reg. 213/91 (“Regulation”), no fence was placed between the construction project workplace and the public intersection, and no signaller was assisting the Interpaving worker (see ss. 65 and 104(3)). In separate proceedings, Interpaving was tried and convicted for breaching the duty of employers under s. 25(1)(c) of the Act to “ensure that . . . the measures and procedures prescribed [in the Regulation] are carried out in the workplace”.

[2] The legal issue on this appeal concerns the statutory liability, if any, of the City as an employer for breaching this same duty. In response to being charged and prosecuted by the Ontario Ministry of the Attorney General (Ministry of Labour, Immigration, Training and Skills Development) (“Ministry”) under s. 25(1)(c), the City

conceded it was the owner of the construction project and acknowledged that it sent quality control inspectors to the project, but denied that it was an employer, arguing that it lacked control over the repair work and had delegated control to Interpaving.

[3] The trial judge acquitted the City because Interpaving, not the City, had direct control over the workers and the intersection and thus the City was not an employer under s. 1(1) (paras. 86-88, reproduced in A.R., vol. 1, at pp. 16-17). Alternatively, even if the City breached its obligations, it acted with due diligence as “every precaution reasonable in the circumstances” was taken (para. 91). The City’s acquittal on the basis that it was not an employer was upheld by the provincial offences appeal court; the court did not address the Ministry’s appeal of trial judge’s finding that the City acted with due diligence (2019 ONSC 3285, 88 M.P.L.R. (5th) 158). The Court of Appeal, in a unanimous decision, allowed the appeal and set aside the decision of the provincial offences appeal court judge. The court affirmed and applied the definition of “employer” established in its leading 1992 decision, *R. v. Wyssen*, 10 O.R. (3d) 193, found the City liable under s. 25(1)(c) as an employer, and remitted the question of the City’s due diligence to the provincial offences appeal court (2021 ONCA 252, 15 M.P.L.R. (6th) 161). The City appeals to this Court and asks us to determine what role control plays in regulatory prosecutions against employers under s. 25(1)(c) of the Act.

[4] The short answer is that while control over workers and the workplace may bear on a due diligence defence, nothing in the text, context or purpose of the Act

requires the Ministry to establish control over the workers or the workplace to prove that the City breached its obligations as an employer under s. 25(1)(c).

[5] In s. 1(1), the Act defines “employer” broadly — without any reference to control — and charges all employers to uphold several statutory duties. There is simply no reason to embed a control requirement into the definition of an “employer” or graft a control requirement onto s. 25(1)(c) when the legislature deliberately chose not to do so. Indeed, diminishing an employer’s duties by reading in a control requirement under either or both provisions would thwart the purpose of this remedial public welfare legislation. This Act is specifically designed to expand historically narrow safeguards and seeks to promote and maintain workplace health and safety by expressly imposing concurrent, overlapping, broad, strict, and non-delegable duties on multiple workplace participants in what is known as the “belt and braces” strategy. The interpretation advanced by the City not only defeats this intention, but would also create undesirable and unnecessary uncertainty and jeopardize efficient administration of the Act’s strict liability offences. Instead, control is properly considered in deciding whether an employer who has breached the Act can nevertheless defend on the basis that it acted with due diligence. It is open to an accused to prove that its lack of control suggests that it took all reasonable steps in the circumstances.

[6] Accordingly, I agree with the Court of Appeal that the City was an employer and breached its duty under s. 25(1)(c). I would therefore dismiss the appeal

and uphold the Court of Appeal's order remitting the question of due diligence to the provincial offences appeal court.

II. Analysis

[7] My analysis proceeds in three parts. I first provide an overview of the Act. Second, I explain why the Ministry need not prove control in a prosecution against an employer under s. 25(1)(c) of the Act. Third, I comment on the role of control in relation to the due diligence defence under s. 66(3)(b).

A. *Overview of the Occupational Health and Safety Act*

[8] The Act seeks to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. As set out in *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.), at para. 16:

The [Act] is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

[9] The Act's public welfare purpose is confirmed by its history. Following the 1976 *Report of the Royal Commission on the Health and Safety of Workers in Mines* ("Ham Commission Report"), the Ontario government engaged in substantial

legislative reform. It repealed various predecessor statutes that only provided workplace protection to employees. When the Act was introduced in 1978, it expanded the definition of “employer” to extend protection to independent contractors, reflecting “the clear intention of the legislature to make employers responsible for ensuring safety in the workplace” (see *Wyssen*, at p. 199).

[10] The Act fulfills its public welfare purpose by allocating various occupational health and safety duties among various classes of workplace actors, including constructors, employers, and owners (see ss. 23, 25 and 29, respectively). These duties are often concurrent and overlapping: several different actors may be responsible for the same protective functions and measures. This is known as the “belt and braces” approach to occupational health and safety:

. . . the Act and Regulations use more than one method to ensure workers are protected. So, if the “belt” does not work to safeguard a worker, the backup system of the “braces” might, or vice versa. If all workplace parties are required to exercise due diligence, the failure of one party to exercise the requisite due diligence might be compensated for by the diligence of one of the other workplace parties. The purpose is to leave little to chance and to make protection of workers an overlapping responsibility.

(*Ontario (Minister of Labour) v. Enbridge Gas Distribution Inc.*, 2010 ONSC 2013, 261 O.A.C. 27, at para. 24)

[11] Under the “belt and braces” approach, where multiple workplace entities fail to safeguard health and safety, they cannot point to others’ failures as an excuse for their own; each workplace participant must ensure that the workplace is safe (*R. v. J. Stoller Construction Ltd.*, 1986 CarswellOnt 3654 (WL) (Prov. Ct.), at para. 22; *R.*

v. Stelco Inc. (1989), 1 C.O.H.S.C. 76 (Ont. Prov. Ct.), at pp. 83-84; *R. v. Structform International Ltd.*, [1992] O.J. No. 1711 (QL), 1992 CarswellOnt 2751 (WL) (C.J. (Gen. Div.)), at para. 17 (WL); *R. v. Thomas G. Fuller & Sons Ltd.*, 2008 CarswellOnt 9276 (WL) (C.J.), at para. 54; *R. v. Cox Construction Ltd.*, 2008 CarswellOnt 9540 (WL) (C.J.), at paras. 189-92; *R. v. Saskatchewan Power Corp.*, 2016 SKPC 2, at para. 35 (CanLII), citing *Ontario (Ministry of Labour) v. Dofasco Inc.*, 2007 ONCA 769, 87 O.R. (3d) 161). The Ham Commission Report advocated for an “internal responsibility system” whereby all workplace participants share responsibility for workplace safety, highlighted that “a safe workplace involves all participants working together in a shared responsibility system”, and recognized “a positive and proactive duty on all participants” (*R. v. Campbell*, [2004] O.J. No. 129 (QL), 2004 CarswellOnt 116 (WL) (C.J.), at paras. 28-29 and 65).

B. *What the Ministry is Required to Establish*

[12] Section 66(1)(a) of the Act makes it an offence for a workplace actor to breach one of the Act’s obligations, including s. 25(1)(c), which is a strict liability offence (*R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (C.A.), at para. 23). As such, when s. 25(1)(c) is the subject of the charge, the Ministry only needs to prove the *actus reus* beyond a reasonable doubt to ground a conviction; the Ministry does not need to prove *mens rea*. To prove the *actus reus*, the Ministry must prove that workplace participant was an employer under s. 1(1) and that there was a breach because the

employer did not ensure that the prescribed measures and procedures were carried out in the workplace.

[13] My colleagues Rowe and O’Bonsawin JJ. and I agree that the definition of “employer” is a free-standing and distinct question from the question of the scope of the duty under s. 25(1)(c) (see para. 75). Though the interpretation of “employer” in s. 1(1) and of the duty in s. 25(1)(c) are related insofar as the provisions provide context for one another and are governed by the same statutory purpose, these two questions must remain analytically distinct. Additionally, my colleagues Rowe and O’Bonsawin JJ. and I agree that control should not be embedded into the definition of “employer” (paras. 93 and 97). Where we part ways is the role of control in relation to the employer’s duty in s. 25(1)(c).

(1) Proving the City Is an “Employer” Under Section 1(1) of the Act Does Not Require the Ministry to Prove Control

[14] The Act defines an employer as

a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

[15] The meaning of “employer” was thoroughly canvassed and authoritatively determined in *Wyssen* (see *Ontario v. London Excavators & Trucking Ltd.* (1998), 40

O.R. (3d) 32 (C.A.), at p. 40; *Ontario (Ministry of Labour) v. Pioneer Construction Inc.* (2006), 79 O.R. (3d) 641 (C.A.), at para. 19; *Dofasco Inc.*, at para. 9; *Ontario (Ministry of Labour) v. United Independent Operators Ltd.*, 2011 ONCA 33, 104 O.R. (3d) 1, at para. 38).

[16] In that 1992 decision, the Court of Appeal for Ontario eschewed, not embedded, a control requirement for who qualifies as an employer. In doing so, the court endorsed the “belt and braces” approach of placing overlapping responsibilities on all workplace actors, regardless of their level of control, in order to best protect worker safety. Blair J.A., for the majority, considered the text, context and purpose of s. 1(1) in concluding that the definition of “employer” is broad, unconnected to control, and encompasses two types of relationships: (1) where a person employs workers; and (2) where a person contracts for the services of workers (p. 196).

[17] It is clear from the text of the definition of “employer” that control is not an element that the Ministry must prove to establish that an accused is subject to the duties of an employer. First, the definition contains no reference to control. It is simply not there when it could have been, if that was the intention of the legislature. This Court must give effect to what the legislature included in the definition of “employer”. To conjecture and then grant priority to what the legislature chose not to include, by adding an additional element into the definition, “would be tantamount to amending [the Act], which is a legislative and not a judicial function” (*R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 26 (emphasis deleted); see also *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 8).

[18] Second, at common law, a person's relationship with an independent contractor is typically characterized by a lack of control on the part of that person over the contractor (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, at paras. 33-48). The phrase "contract *for* services" is used, at common law, to refer to such relationships. Comparatively, "contract *of* service" is used to denote an employment agreement. By referring to a "contract *for* services" in the definition of "employer", the legislature signaled its intent to capture employer-independent contractor relationships under the "employer" definition (*Wyssen*, at pp. 196-98). Since *Wyssen* found that such relationships are captured by the definition, it follows that a person can be an employer under the Act even where they lack control over the worker or the workplace. *Wyssen's* interpretation applies to all employees and workplaces, including those in the construction industry.

[19] In addition, as noted in *Wyssen*, prior to the Act's enactment, other pieces of worker safety legislation defined "employer" in a way that excluded independent contractor relationships (p. 199, citing *Industrial Safety Act, 1971*, S.O. 1971, c. 43, s. 1(e); see also, e.g., *The Construction Safety Act, 1973*, S.O. 1973, c. 47, s. 1(h)). The shift in this Act to expressly include employer-independent contractor relationships within the definition of "employer" signals the legislature's intention to remove from the definition the traditional common law control condition that distinguishes employment and independent contractor relationships. Incorporating control into the s. 1(1) definition would therefore reintroduce a characteristic of the former regime,

which was abolished because it failed to adequately promote and protect workplace safety.

[20] It is also significant that while the legislature did not include control in the definition of “employer”, it did in the definition of “constructor”. In s. 1(1), “constructor” is defined as “a person who undertakes a project for an owner”; “undertaking a project” involves assuming control over it (*Ontario (Ministry of Labour) v. Reid & DeLeye Contractors Ltd.*, 2011 ONCJ 472, at para. 42 (CanLII)). The absence of a control requirement for employers thus reflects an intentional legislative choice that must be respected.

[21] Accordingly, authorities that have read a control requirement into “employer” are irreconcilable with *Wyssen*, inconsistent with the text, context and purpose of the Act, and should not be followed (see, e.g., *Ontario (Ministry of Labour) v. Nor Eng Construction & Engineering Inc.*, 2008 ONCJ 296, at para. 88 (CanLII); *R. v. Marina Harbour Systems*, 2008 CanLII 64002 (Ont. S.C.J.), at paras. 27-30; *R. v. EFCO Canada Co.*, 2010 ONCJ 421, at paras. 59-60).

[22] It follows from the straightforward application of *Wyssen*, as well as the text, context and purpose of s. 1(1), that the City was an employer under both branches of the Act’s definition. I agree with the Court of Appeal that it was an employer of the inspectors, whom it employed directly and dispatched to the construction project. Further, under the second branch, the City was an employer of Interpaving, with whom it contracted to undertake the construction project. Because the definition of

“employer” encompasses employer-independent contractor relationships, an owner who contracts with a constructor is an employer under s. 1(1) of the Act. The text of the “employer” definition captures a person who contracts for the services of workers, and “worker” is defined as including “[a] person who performs work or supplies services for monetary compensation”. This encompasses constructors, who perform work and supply services for monetary compensation. Thus, the reference to contracting for the services of workers in the “employer” definition clearly captures contracting with constructors.

(2) Proving the City Breached Section 25(1)(c) of the Act

[23] The duties imposed by the Act are numerous, varied and stated in precise, purposeful ways. In some cases, they are linked to a particular workplace or project (see, e.g., ss. 23(1) and 25(1)(c)) or to the workers (see, e.g., ss. 23(1)(c) and 25(2)(a)). In other cases, they are more broadly stated (see, e.g., s. 25(1)(a)). The relevant obligation in this case is tied to the workplace.

[24] The City is alleged to have breached s. 25(1)(c), which requires that an employer “shall ensure that . . . the measures and procedures prescribed are carried out in the workplace”. This obligation applies to employers across all sectors. For employers in the construction industry, the relevant measures and procedures are prescribed in the Regulation. A review of s. 25(1)(c)’s text, context, and purpose reveals that control on the part of the accused is not an element of this duty. The

Ministry does not need to prove that the City had control over the Interpaving workers or the workplace as part of the *actus reus* of the s. 25(1)(c) offence.

(a) *Text*

[25] The plain text of s. 25(1)(c) does not limit this duty to workers or workplaces over which the employer has control. The legislature could have written in an internal limitation akin to a control requirement in relation to this duty but chose not to. This is all the more important because, in contrast to s. 25(1)(c), it did precisely that in s. 25(2)(h), where the employer’s obligation to take precautions is limited to those precautions “reasonable in the circumstances”. That the legislature did not limit s. 25(1)(c), whether by reference to a control requirement or otherwise, reflects an intentional choice that this Court should not disturb.

[26] By comparison, other statutes express a different legislative choice. For example, in *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, the text of the duty at issue required the employer to inspect “every work place controlled by the employer” (para. 9, citing s. 125(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2). Thus, Parliament explicitly decided that the employer’s duty should be triggered by the employer’s control over the workplace. Similarly, in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, the foundational case setting out the structure of regulatory offences, the relevant offence was discharging or depositing, or causing or permitting the discharge or deposit of, material of any kind into a water course. This Court interpreted the *actus reus* of the offence of “causing” the discharge of material

as incorporating a control element (p. 1329). No similar language can be found in s. 25(1)(c). This indicates that a different legislative choice was made by the Ontario legislature.

[27] The language that the legislature chose to use in s. 25(1)(c) — namely, the use of the word “ensure” — also speaks to and supports the broad nature of this duty. In *Wyssen*, Blair J.A. noted that the dictionary definition of “ensure”, as it appeared in the predecessor to s. 25(1)(c), is to “make certain” (p. 198). This duty “puts an ‘employer’ virtually in the position of an insurer who must make certain that the prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors” (p. 198). This “sweeping”, “undeniably strict” and “non-delegable” duty “cannot be evaded by contracting out performance of the work to independent contractors” (p. 198).

[28] The strict nature of this duty also led the Court of Appeal to reject reading a *mens rea* requirement into s. 25(1)(c) (*Timminco*, at paras. 22-26). Clear language, like the words “wilfully”, “with intent”, “knowingly” or “intentionally”, would be necessary to view s. 25(1)(c) as a *mens rea* offence (*Timminco*, at para. 26). That the legislature instead used the word “ensure” “suggests that [it] intended to impose a strict duty on the employer to make certain that the prescribed safety standards were complied with at all material times” (*Timminco*, at para. 26). For the same reasons that reading in a *mens rea* element would be inappropriate, a control requirement cannot be read into s. 25(1)(c).

[29] This conclusion about the text of s. 25(1)(c) is further supported by this Court's reasoning in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635, which considered the interpretation of "employer" in s. 196(1) of British Columbia's *Workers Compensation Act*, R.S.B.C. 1996, c. 492. The workplace owner, West Fraser Mills, hired an independent contractor, and one of the contractor's employees was killed in a workplace accident. The Workers' Compensation Board of British Columbia determined that West Fraser Mills had breached its regulatory duty as an owner under s. 26.2(1) of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97, by failing to ensure that "all activities of the forestry operation are both planned and conducted in a manner consistent with this Regulation and with safe work practices acceptable to the Board". It then imposed a penalty under s. 196(1) of the enabling statute, which permits the Board to penalize an employer. West Fraser Mills was seen as an employer, in addition to being an owner, because it employed individuals to carry out the duties imposed by s. 26.2(1) of the regulation in relation to the worksite in question.

[30] On appeal, this Court determined that the Tribunal's decision was not patently unreasonable (para. 32). The Tribunal had broadly interpreted West Fraser Mills' duties as an employer under s. 196(1) as relating to the worksite at issue. An "actual connection to the specific accident at issue" existed between West Fraser Mills as the employer and the "*worksite that led to the accident and injury*", even though there was no "employment relationship *with the person injured*" (para. 39 (emphasis in

original)). This interpretation aligned with s. 196(1)'s text, which "focus[ed] not on the specific relationship between the impugned employer and the victim of a workplace accident, but on the relationship between the employer and the worksite that led to the accident and injury" (para. 45).

[31] As with s. 196(1) of the British Columbia statute, the text of s. 25(1)(c) of the Ontario Act concerns occupational health and safety measures present at a physical workplace location to which an employer may be connected by virtue of sending employees there or contracting with independent contractors to perform work there. It states that the measures prescribed in the Regulation must be followed at that location. It does not focus on the nature of the employer's relationship with any particular individual. Crucially, it does not focus on whether that relationship is characterized by control. Because of its language, s. 25(1)(c) cannot be read as applying only when an employer has a degree of control over someone.

(b) *Context*

[32] The duty in s. 25(1)(c) must be understood in the context of the scheme of the Act, including other duties contained therein, the wide definition of "employer", and the existence of a due diligence defence under s. 66(3)(b).

[33] To begin, and to state the obvious, s. 25 imposes various, differently worded duties on employers. Some are drafted narrowly. For example, ss. 25(1)(b) and 25(1)(d) create duties respecting "the equipment, materials, and protective devices

provided by the employer". Similarly, the duty on workers set out in s. 28(1)(b) to "use or wear" equipment, protective devices, or clothing is restricted to the items that the "worker's employer requires to be used or worn". This juxtaposition of narrow duties with the more broadly worded s. 25(1)(c) does not suggest that s. 25(1)(c)'s duty is implicitly narrow. Rather, the narrower provisions show that the legislature intentionally limited some duties (such as s. 25(1)(b) and (d)) to the relationship between an employer and a worker, whereas other duties, including s. 25(1)(c), were intentionally drafted broadly so as to focus on the employer's connection to the workplace rather than any particular worker (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 249-52). The legislature's choice ought to be respected, and there is no need to read down or read into s. 25(1)(c)'s explicitly expansive text.

[34] Second, the broad definition of "employer" is relevant context for interpreting s. 25(1)(c). The breadth of the employer's duties and the broad scope of the definition of "employer" are mutually reinforcing. Narrowing s. 25(1)(c) by reading a control requirement into it runs contrary to *Wyssen* and the modern approach to statutory interpretation.

[35] Though my colleagues Rowe and O'Bonsawin JJ. and I agree that the City is an employer under the Act and that control is not relevant to the definition of "employer", we diverge in our interpretation of s. 25(1)(c). They would read a control requirement into this duty, such that it only applies to employers where there is a "functional relationship between the measure and the employer" (para. 106), which

they describe as “a nexus to the work which is under the employer’s control and performed through their workers” (para. 155). Incorporating control by requiring a “nexus” between an employer and activities under the employer’s control is inconsistent with the text, context, and purpose of the section and with *Wyssen*. While the interpretation of ss. 1(1) and 25(1)(c) raises separate questions, these sections should be read harmoniously as they are nonetheless related.

[36] In *Wyssen*, Blair J.A. observed that the breadth of the employer’s duties under what is now s. 25(1)(c) corroborated the breadth of the definition of “employer” (p. 198). The broad nature of one goes hand in hand with the broad nature of the other. Yet, while my colleagues purport to follow *Wyssen* by leaving the definition broad, in fact they depart from *Wyssen* by narrowing the employer’s duties. In doing so, they introduce an internal inconsistency into the Act by pairing a broad definition of “employer” with a narrow interpretation of s. 25(1)(c), rather than finding harmony between these provisions and treating them as mutually reinforcing as the legislature intended. *Wyssen* observed that the legislature expanded the definition of “employer” to capture employer-independent contractor relationships that are not characterized by control; reading control into s. 25(1)(c) thus creates a dissonance in the Act that undermines legislative intention by reintroducing a previously discarded control element into the new widely worded public welfare legislation.

[37] Third, the existence of the due diligence defence in s. 66(3)(b) of the Act is relevant context because it means that employers who breach s. 25(1)(c) will not be

subject to penalties under the Act if they can show they took all reasonable steps to avoid the breach. Section 66(3)(b) therefore functions as a safety valve, in which the presence of control may be a factor in assessing due diligence. As a result, there is no justification for narrowing the offence under s. 25(1)(c) by overlaying a control requirement. Concerns about fairness are answered by the availability and content of this defence.

(c) *Purpose*

[38] Reading a control requirement into s. 25(1)(c) would also be inconsistent with the purpose of the Act. The Act, to repeat, is a public welfare statute. Its purpose is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. This purpose is achieved through the imposition of shared and overlapping duties: the “belt and braces” regulatory strategy.

[39] A clear example of this approach is found in the overlap between a constructor’s and employer’s duties. Section 23(1)(a) requires constructors to ensure that “the measures and procedures prescribed by this Act and the regulations are carried out on the project”, mirroring the employer’s duty under s. 25(1)(c). This overlap is explicit and intentional. Indeed, s. 23(1)(b) requires constructors to ensure that “every employer . . . performing work on the project complies with this Act and the regulations”. It is entirely in keeping with the regulatory structure and strategy that the Act deploys to achieve worker safety for an employer to have duties that reciprocally overlap with the duties of a constructor irrespective of these entities’ respective degrees

of control over a workplace or a hazard there. Similarly, the required expansive and generous interpretation of the Act means that there may also be more than one employer who is responsible for the safety of the workplace and workers.

[40] Concern that overlapping duties will create confusion because different actors may not coordinate with each other and may implement competing or inconsistent safety measures is unwarranted. Cooperation and communication between workplace actors is built into the Act's scheme (*United Independent Operators*, at para. 55, citing the Ministry's *Guide to the Occupational Health and Safety Act* (1978), at p. 28; see also *West Fraser Mills*, at para. 43). The Act also incentivizes such behaviour: where actors fail to cooperate and communicate, it is less likely that they will be able to successfully mount a due diligence defence. For example, in *London Excavators*, a subcontractor on a construction project was unable to establish the due diligence defence because of its unreasonable reliance on a general contractor's miscommunication about the location of a hazard (p. 40).

[41] However, reading in a control requirement could defeat the Act's public welfare purpose of creating overlapping responsibility. Often, workplace actors will have varying degrees of control over a workplace. Some will have *more* control than others without having *exclusive* control (*Director of Occupational Health and Safety v. Government of Yukon, William R. Cratty and P.S. Sidhu Trucking Ltd.*, 2012 YKSC 47, at para. 69 (CanLII)). This variance matters. Incorporating a control element into s. 25(1)(c) would essentially give workplace actors a tool for frustrating regulatory

prosecutions at the outset, before the burden shifts to the accused to demonstrate due diligence under s. 66(3)(b), by arguing that they had *no* control over a hazard because *other parties had greater comparative control* over that hazard. We cannot ignore this practical, on-the-ground reality, which, if permitted to prevail, would not be conducive to promoting workplace safety. Rather, it would undermine the “belt and braces” approach by turning prosecutions under the Act into a “finger pointing” exercise. As Gotlib J. explained in *Structform*, at para. 17:

The case law is clear that one employer cannot point a finger at another employer who might be closer to the situation. Every employer has a duty to see that the workplace is safe. And in the complexity of construction it is important that every employer use knowledge, due diligence, etc., to ensure that the workplace is safe. An employer is not entitled to say it is someone else’s responsibility.

[42] The point is not that it is prohibitively difficult for a court to ascertain whether control exists or to even assess comparative degrees of control. The point is that situating the assessment of control under the Ministry’s burden to prove the s. 25(1)(c) offence is incongruous with the Act’s public welfare objectives. The focus at the breach stage would move from safety, where it belongs, to parsing who actually controlled what. Creating a control requirement under s. 25(1)(c) is impractical as it is the employer, not the Ministry, who has the best knowledge and evidence about their level of control (*Sault Ste. Marie*, at p. 1325). It is also inefficient as requiring the Ministry to prove control defeats the objective of achieving administrative expediency through the use of strict liability regulatory offences (*Sault Ste. Marie*, at p. 1311).

These problems are precisely what led the Court of Appeal to reject a *mens rea* requirement under s. 25(1)(c) (*Timminco*, at paras. 24-26).

[43] It is unnecessarily duplicative to situate an inquiry into the accused's degree of control under *both* the Ministry's burden *and* the accused's burden of establishing due diligence. Even where the language of an offence in a public welfare statute makes control an explicit condition, "it is sometimes difficult to maintain the distinction between the *actus reus* and the defence of due diligence" (*R. v. Dan Gamache Trucking Inc.*, 2005 BCSC 1487, 23 M.V.R. (5th) 305, at para. 13). Far from clarifying the role of control in prosecutions under the Act, actively reading it into an offence like s. 25(1)(c), whose text makes no mention of control, invites further confusion about the proper place of control and what analytical differences there are between the Ministry's burden to prove control and the accused's burden to prove a lack of control. Introducing this additional complexity into proceedings under the Act undercuts the goal of administrative efficiency. By contrast, considering control only under due diligence, where its relevance is entirely uncontroversial, indeed common, offers much-needed clarity and predictability. I return to the due diligence defence below.

[44] Finally, it advances the Act's purpose to impose an employer's duties on the owner of a construction project even if that owner has divested control to a constructor. My colleagues Rowe and O'Bonsawin JJ. argue that the Act intentionally leaves owners who hire constructors with limited responsibilities (paras. 100-102 and

119-25). But, while s. 29(1) imposes duties on owners of workplaces that are not projects, this provision does not suggest that project owners are absolved of statutory duties if they devolve control to a constructor. These duties simply do not apply to project owners; however, project owner duties set out in s. 30 do apply to the project owner regardless of whether they hire a constructor. Moreover, a constructor under s. 1(1) is defined as including “an owner who undertakes all or part of a project by himself”. It is thus not the case that on every construction project an independent contractor is the constructor with overall safety responsibility; the constructor may simply be the owner, if the owner undertakes a project alone.

[45] Most importantly, even where an owner gives up control to a constructor, that same owner can have duties as an employer that may at times overlap with the constructor’s duties. While s. 1(3) prevents an owner who sends inspectors to a worksite from becoming a constructor, it does not prevent the owner from being an employer. And, there is “a connection between increased remedies against owners who hold duties as employers for given workplaces and increased occupational health and safety. The general scheme of the Act is to hold both owners and employers responsible in an overlapping and cooperative way for ensuring worksite safety” (*West Fraser Mills*, at para. 43). This conclusion does not undermine the fact that the Act places overall authority with a constructor. Indeed, guidelines published by the Ministry provide that, even though a constructor is the party with the greatest control over a construction project, “[h]ealth and safety at a project are a shared responsibility [such that] each employer at a project has significant responsibilities for the health and safety

of their workers” (*Constructor guideline*, February 11, 2022 (online)). Occupational health and safety legislation does not create distinct “silos of responsibility” for different actors, nor for different sectors or industries (*West Fraser Mills*, at para. 15), and this sharing of responsibilities is simply another manifestation of the “belt and braces” approach.

(d) *The City Breached Its Duties as an Employer*

[46] As an employer of the inspectors and of Interpaving, the City was required by s. 25(1)(c) of the Act to ensure that “the measures and procedures prescribed [were] carried out in the workplace”. This included ensuring compliance with ss. 65 and 104(3) of the Regulation. On the date of the pedestrian’s death, the measures required by these provisions — a fence between the construction work and the public way, and signallers — were not carried out in the workplace. Thus, the City, as employer, committed the offence under s. 25(1)(c) and its degree of control over the workplace or the workers is not relevant to this finding.

[47] Having determined that the City was in breach of the Act, I turn to the due diligence defence.

C. *The Defence’s Burden: Proving Due Diligence*

[48] Once the Ministry establishes a breach of the employer’s duty under s. 25(1)(c), the burden shifts to the accused to prove, on a balance of probabilities, that

“every precaution reasonable in the circumstances” was taken pursuant to s. 66(3)(b) (see *Timminco*, at paras. 22-26; see also *Sault Ste. Marie*, at pp. 1324-25). I note that the common law defence of due diligence also remains available for strict liability offences under the Act that are not listed in s. 66(3) (see *R. v. Bradsil 1967 Ltd.*, [1994] O.J. No. 837 (QL), 1994 CarswellOnt 4450 (WL) (C.J. (Prov. Div.)), at para. 16, citing *R. v. Cancoil Thermal Corp. and Parkinson* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.)). It is therefore open to the City to escape liability by proving that it exercised due diligence. I begin by explaining *why* control should only be considered at this stage of the analysis, before turning to *how* control ought to be considered.

(1) An Employer’s Control Should Be Considered Only as Part of the Due Diligence Defence

[49] Considering control at the due diligence stage respects the text, context and purpose of the Act and best upholds its purpose of promoting workplace safety. Though a person convicted under s. 25(1)(c) of the Act may be liable to fines and/or imprisonment (s. 66(1) and (2)), a breach of s. 25(1)(c) is not a criminal offence, but rather a strict liability regulatory offence. Its goal is not to “condemn and punish past, inherently wrongful conduct”, but to “preven[t] . . . future harm through the enforcement of minimum standards of conduct and care” (*R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 219; see also *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300, at para. 33; *La Souveraine, Compagnie d’assurance générale v. Autorité des marchés financiers*, 2013 SCC 63, [2013] 3 S.C.R. 756, at para. 90). The legislature’s choice to impose liability

upon an employer, even absent a connection to or control over an activity, was driven *not* by a desire to express opprobrium of inherently blameworthy conduct but by a desire to modify behaviour and reduce the risk of workplace injury. The nature and purpose of strict liability offences means that stigma will not attach to employers who are found to have breached s. 25(1)(c) of the Act. Rather, shifting the burden to the employer to establish a due diligence defence incentivizes employers to take all steps within their control to achieve workplace safety and prevent future harm so that they may avail themselves of the defence should harm occur.

[50] That an employer's degree of control over other parties in the workplace is relevant to its due diligence defence also answers fairness concerns about imposing liability on an employer for a breach caused by another party. Considering control under due diligence means employers lacking control may escape liability. Placing the burden of establishing a lack of control on the employer is logical and preferable, as the employer is best positioned to adduce evidence of its levels of control, expertise, knowledge, and skill. It is not unfair or absurd to shift the burden of proof and costs of proving lack of control to an accused. In *Wyssen*, Finlayson J.A., concurring in the result only, raised fairness concerns that were reprised by the City in this appeal. These concerns were rightly rejected as unpersuasive by the majority in *Wyssen* and the unanimous Court of Appeal in the case at bar. They simply do not support reading a control requirement into provisions without one, especially when control plays a role at the due diligence stage.

[51] In this appeal, no one argues that ss. 1(1) or 25(1)(c) are unconstitutional. While in *Wyssen* Finlayson J.A. also suggested that the definition of “employer” was overbroad (at pp. 202-3), the matter was later argued and rejected in *R. v. Grant Forest Products Inc.* (2002), 98 C.R.R. (2d) 149 (Ont. C.J.), at para. 55, rev’d on other grounds 2003 CarswellOnt 6071 (WL) (S.C.J.). The court found that overbreadth concerns are of limited concern given that the Act is public welfare legislation that enacts strict liability regulatory offences, not criminal offences, and given that the employer duties are subject to a due diligence defence (paras. 53 and 55). As Bélanger J. observed:

Without doubt, the breadth of the legislation is onerous and may have negative consequences relating to cost and economic feasibility of any particular endeavour or enterprise, but it does not unfairly deprive owner/contractors of the means to advance successful defences when they have attended diligently to their responsibilities. [para. 57]

This observation answers the City’s submissions in this appeal. Existing jurisprudence on the interpretation of the Act and the nature of strict liability offences contain all that is needed to affirm the conclusion of the Court of Appeal below. It is unnecessary to revisit or reverse that jurisprudence here.

[52] Additionally, though my colleagues Rowe and O’Bonsawin JJ. point to hypotheticals that they say demonstrate the absurdity of leaving control to due diligence (at paras. 137-39), a close examination of the statutory scheme dispels any such absurdity. First, the hypothetical concerning the caterer fails to appreciate that an employer’s duties under s. 25(1)(c) are limited *to the workplace*. A “workplace” is a distinct definition from a construction “project” (s. 1(1)) and refers to a place where a

worker is or can reasonably be expected to be carrying out their employment duties at the time an incident occurs (*Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*, 2013 ONCA 75, 114 O.R. (3d) 321, at para. 57). It seems unlikely that the caterer's workplace would span the entirety of the construction project, such that the caterer would *necessarily* be charged and found liable in the event of a breach.

[53] Second, the remaining hypotheticals fail to appreciate that the employer is an employer by virtue of contracting for the services of the constructor who is present at the project. When this layer of the "employer" definition is kept in mind, the absurdity of the hypotheticals falls away. The employer's potential liability is not tied to the simple act of sending an inspector to a project. Rather, they are already possibly liable because they are the employer who has deployed a constructor on the project. Indeed, the employer is likely well served by sending an inspector to the project, since, as discussed below, this may well demonstrate that they were duly diligent in hiring and supervising the constructor. As a result, the concern that the risk of liability would dissuade the hypothetical employer from sending inspectors is unwarranted.

(2) How an Employer's Control Informs the Due Diligence Defence

[54] Though I am remitting the issue of the City's due diligence to the provincial offences appeal court, I turn now to *how* courts may assess this defence and how an employer's level of control informs the analysis.

[55] That the employer’s level of control over workers or the workplace is relevant to the due diligence defence is well recognized in existing authorities. As set out in *R. v. Gonder* (1981), 62 C.C.C. (2d) 326 (Y. Terr. Ct.), at pp. 332-33:

Reasonable care implies a scale of caring. The reasonableness of the care is inextricably related to the special circumstances of each case. A variable standard of care is necessary to ensure the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each factual setting. The degree of care warranted in each case is principally governed by the following circumstances:

- (a) Gravity of potential harm.
- (b) Alternatives available to the accused.
- (c) Likelihood of harm.
- (d) Degree of knowledge or skill expected of the accused.
- (e) Extent [to which] underlying causes of the offence are beyond the control of the accused.

Gonder has been followed by courts across Canada when applying the due diligence defence under occupational health and safety legislation (see, e.g., *London Excavators*, at p. 37; *R. v. Inco Ltd.*, [2001] O.J. No. 4938 (QL), 2001 CarswellOnt 10933 (WL) (C.J.), at para. 39 (QL); *Ontario (Ministry of Labour) v. Linamar Holdings Inc.*, 2012 ONCJ 295, at para. 112 (CanLII); *Ontario (Ministry of Labour) v. Wal-Mart Canada Corp.*, 2016 ONCJ 267, 32 C.C.E.L. (4th) 313, at para. 123; *R. v. Imperial Electric Ltd.*, 1998 CarswellBC 4085 (WL) (Prov. Ct.), at para. 37; *R. v. Amherst Fabricators Ltd.*, [2003] N.S.J. No. 280 (QL) (Prov. Ct.), at para. 9; *R. v. XI Technologies Inc.*, 2011 ABPC 313, at para. 201 (CanLII)).

[56] I agree that the “[e]xtent [to which] underlying causes of the offence are beyond the control of the accused” is a relevant factor. The fact-finder should assess,

either in absolute or comparative terms, whether an employer had control over the worker and the workplace. Control is also an implicit consideration in assessing what alternatives were available to the accused (*J. Stoller*, at paras. 22-24; *Campbell*, at para. 68; J. Swaigen and S. McRory, *Regulatory Offences In Canada: Liability and Defences* (2nd ed. 2018), at pp. 123-28). Indeed, “[r]easonableness of care is often best measured by comparing what was done against what could have been done” (*Gonder*, at p. 333 (emphasis added)). “What could have been done” is necessarily limited to steps or measures that are within the workplace actor’s control and thus capable of being carried out.

[57] In the construction context, it may be open to a judge to find that the owner took every reasonable precaution because the owner decided to delegate control of the project and responsibility for workplace safety to a more experienced constructor. Relevant considerations might include whether the owner pre-screened the constructor before hiring the constructor to ascertain, for example, whether the constructor has superior expertise, a track record free of prior convictions for breach of the Act, and the capacity to ensure compliance with the Act and the Regulation (*Grant Forest Products*, at para. 54; D. McKechnie, “Occupational Health and Safety in Construction Law”, in L. Ricchetti and T. J. Murphy, *Construction Law in Canada* (2010), 209, at pp. 219-20). An owner may argue that its relative inexperience with workplace safety was why it chose to delegate control over a project to a more sophisticated constructor.

[58] Another consideration might be whether after executing the contract the owner informed the constructor of any hazards at the workplace and monitored the quality of the constructor's work (indeed, the trial judge placed weight on the fact that the City supervised Interpaving's work) (McKechnie, at pp. 219-20). As well, a court could find that a municipality, such as the City, has the ability to require its contractors to uphold health and safety requirements on a project, since it "is in a position to control those whom it hires . . . and to supervise the activity, either through the provisions of the contract or by municipal by-laws" (*Sault Ste. Marie*, at p. 1331).

[59] Once again, this guidance is not novel. Supervision and inspection have long been seen as sensible steps to take when considering whether that person can avail themselves of the due diligence defence. Put simply, the Act does not "capture within its ambit owners and employers who have exercised due diligence in their choice and supervision of contractors" (*Grant Forest Products*, at para. 57). Hence, categorizing the City as an employer in breach of s. 25(1)(c) of the Act because it sent inspectors to the worksite to monitor Interpaving's work does not condemn the City for supervising Interpaving or otherwise discourage it from doing so. Those efforts may well assist the City in establishing due diligence and escaping liability.

[60] In addition to control, the accused's degree of knowledge, skill or experience and the gravity and likelihood of harm (i.e., the "foreseeability of the accident") are all relevant to whether the accused took every precaution reasonable in the circumstances (*R. v. Rio Algom Ltd.* (1988), 66 O.R. (2d) 674 (C.A.), at p. 682; *R.*

v. Brampton Brick Ltd. (2004), 189 O.A.C. 44, at para. 29). An accused's relative inexperience might support a finding that the accident was unforeseeable, at least from its standpoint.

D. *Summary*

[61] In summary, a court must consider three questions where an owner who contracts for the services of a constructor on a construction project is prosecuted for a breach of s. 25(1)(c):

1. First, has the Ministry proven beyond a reasonable doubt that the Act applied to the accused because the accused was an employer under s. 1(1) of the Act? An owner is an employer if it (i) employed workers at a workplace where an alleged breach of s. 25(1)(c) occurred; or (ii) contracted for the services of a worker at that workplace (including for the services of a constructor). The Ministry is not required to prove that the owner had control over the workplace or the workers there.
2. Second, has the Ministry proven beyond a reasonable doubt that the accused breached s. 25(1)(c) of the Act? There is a breach of s. 25(1)(c) if the safety measures prescribed by the Regulation are not carried out in the workplace to which the owner/employer is connected by a contractual relationship with employees or an

independent contractor. Further, the Ministry is not required to prove that the owner had control over the workplace or the workers there.

3. Third, if the Ministry proves the above, has the accused proven on a balance of probabilities that it should avoid liability because it exercised due diligence under s. 66(3)(b) of the Act? Relevant considerations may include, but are not limited to, (i) the accused's degree of control over the workplace or the workers there; (ii) whether the accused delegated control to the constructor in an effort to overcome its own lack of skill, knowledge or expertise to complete the project in compliance with the Regulation; (iii) whether the accused took steps to evaluate the constructor's ability to ensure compliance with the Regulation before deciding to contract for its services; and (iv) whether the accused effectively monitored and supervised the constructor's work on the project to ensure that the prescriptions in the Regulation were carried out in the workplace.

III. Conclusion

[62] I would dismiss the appeal. I affirm the decision of the Court of Appeal to remit the matter to the provincial offences appeal court for hearing before a different

judge to consider the Ministry's appeal of the City's due diligence defence with respect to counts 8 and 9 of the information.

The reasons of Karakatsanis, Rowe and O'Bonsawin JJ. were delivered by

ROWE AND O'BONSAWIN JJ. —

I. Overview

[63] The appellant, the Corporation of the City of Greater Sudbury ("City"), contracted with Interpaving Limited ("Interpaving") to repair a water main and repave the affected streets. It also sent quality control inspectors to the construction project, who raised safety concerns to Interpaving. Later, a pedestrian was killed at an intersection after several regulatory provisions aimed at protecting public safety were not respected. The City was charged as both a constructor and an employer; it argued that it did not satisfy either definition. On appeal, the only question is whether the City could be liable for breaching its duties as an employer.

[64] This appeal provides the Court with an opportunity to clarify the definition and the duties of an "employer" in Ontario's *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("Act"). While this Court is tasked with interpreting particular provisions within the Act (namely ss. 1(1) and 25(1)(c)) and its accompanying regulation, *Construction Projects*, O. Reg. 213/91 ("Regulation") (namely ss. 65 and 104(3)), we must not lose sight of the careful structure of the scheme as a whole. The

Act and its accompanying Regulation constitute an integrated scheme which contains protections for workers that are *effective* in practice and *reflective* of the reality of modern workplace dynamics.

[65] In the reasons that follow, we seek to further these aims by establishing the meaning and scope of the definition and duties of employers in the construction context. In our view, a clear understanding of who is an employer, and which regulatory measures apply to them, is critical to preserving the integrity of the overall scheme. It is also critical to respecting the legislative purpose of promoting worker safety *in practice* — while guarding against absurd results and, in particular, unbridled ministerial discretion that would leave the scope of an employer’s responsibilities to be resolved *ex post facto*.

[66] In light of the foregoing, we conclude that the definition of “employer” in s. 1(1) of the Act encompasses the City’s relationship with its quality control inspectors. As an employer of the quality control inspectors, the scope of the City’s duties under s. 25(1)(c) of the Act must be examined. Properly interpreted, s. 25(1)(c) holds employers liable for breaching the regulatory measures which apply to them. The present appeal involves measures contained within the Regulation. Having considered the text of the regulatory measures, the structure of the Regulation, its relationship to the division of roles within the Act, and the purposes of the scheme as a whole, we conclude that where certain measures in the Regulation do not specify to whom they apply, these measures apply to an employer when they relate to the work that the employer controlled and performed through their workers. As the courts below did not

properly analyze whether the breach was made out, we would remit the matter for reconsideration by the Ontario Court of Justice at the duties stage.

II. Facts

[67] The facts are not in dispute. In February 2015, the City entered into a contract with Interpaving to undertake a construction project in downtown Greater Sudbury. The contract stipulated that Interpaving would assume control over the entire project, including the role of “constructor” under the Act as well as the responsibility of ensuring that the requirements of the Act and the Regulation were met. In September 2015, a pedestrian who was attempting to cross an intersection within the construction zone was fatally struck by a Caterpillar grader being driven in reverse by an Interpaving employee.

[68] The respondent, the Ministry of the Attorney General (Ministry of Labour, Immigration, Training and Skills Development) (“Ministry”), charged Interpaving and the City under the Act for failing to ensure that certain requirements of the Regulation had been met. The City was charged as a “constructor” and an “employer” under the Act for breaches of ss. 65, 67(4), and 104(3) of the Regulation. Section 65 states that “[i]f work on a project may endanger a person using a public way, a sturdy fence of at least 1.8 meters in height shall be constructed between the public way and the [construction] project.” Section 67(4) provides that “[e]very employer shall develop in writing and implement a traffic protection plan for the employers’ workers at a project if any of them may be exposed to a hazard from vehicular traffic.” Finally, s. 104(3)

states that vehicle, machine, and equipment operators “shall be assisted by signallers” if the operator’s view is obstructed or “[a] person could be endangered by the vehicle, machine, or equipment or by its load.”

[69] On appeal, the only charges in issue pertain to the City’s alleged status as an “employer” and its liability under s. 25(1)(c) of the Act for the breach of ss. 65 and 104(3) of the Regulation. At the Court of Appeal, the Ministry conceded that the trial judge had not made the necessary factual findings to determine guilt of the alleged breach of s. 67(4) regarding the traffic protection plan.

III. Judgments Below

A. *Ontario Court of Justice*

[70] The trial judge acquitted the City of all charges by finding that the City was neither a “constructor” nor an “employer” within the meaning of the Act. Alternatively, if the City was an employer, she found that the City had established the due diligence defence. On the issue of whether the City was liable as an employer, the trial judge determined that “the City did not have control of the conduct of the workplace to bring it within the obligations intended or created by the [Act] for employers” (para. 87, reproduced in A.R., vol. I, at p. 17). The City did not supervise the construction work; nor was it directing the work. Rather, it contracted for the services of Interpaving, which had the relevant knowledge and resources to execute the work. Although the City’s inspectors were at the construction project from time to time, the quality control

inspectors were subject to the constructor's requirements concerning health and safety. Rather than being supervisors on the project, their role was limited to quality control — ensuring that work was performed in accordance with the contractual arrangements so that payments could be made. The trial judge observed that the “punitive sections of the [Act] are intended to make accountable those who do not comply with the provisions of the [Act] and its Regulation in the ‘sphere of operation’” (para. 88). Thus, the City's involvement as an owner seeking to ensure quality control fell outside this purpose.

B. *Ontario Superior Court of Justice, 2019 ONSC 3285, 88 M.P.L.R. (5th) 158*

[71] The Ministry appealed the acquittals to the Ontario Superior Court of Justice. The provincial offences appeal court judge endorsed the reasoning of the trial judge and found no errors in her application of the facts to the definitions of “constructor” and “employer”. He therefore dismissed the appeal and agreed that the City did not exercise control over the project site such that it became the constructor. As to whether the City was an employer by virtue of having quality control inspectors on the project, the provincial offences appeal court judge noted that this was not contemplated by the parties and that adopting the Ministry's approach would substantially change the occupational health and safety liability regime governing construction projects in Ontario. He concluded that the Ministry had not proven that the City exercised significant control over workers on the site. Accordingly, the trial judge properly found that the City was not an employer on site under the Act.

C. *Court of Appeal for Ontario, 2021 ONCA 252, 15 M.P.L.R. (6th) 161*

[72] The Ministry was granted leave to appeal by Brown J.A. of the Court of Appeal for Ontario, but only with respect to the acquittals relating to the charges against the City as an “employer” under the Act (2019 ONCA 854, 93 M.P.L.R. (5th) 179). Given that municipalities often contract out work on construction projects to a third party, Brown J.A. was satisfied that whether a municipality is liable as an employer by reason of the degree of control it exercises raises a question of law of interest to the public at large.

[73] The Court of Appeal allowed the Ministry’s appeal. It concluded that because the City employed quality control inspectors as workers at the project site within the meaning of “employer” in s. 1(1) of the Act, it was liable for violations of the Regulation unless it could establish a due diligence defence. The Court of Appeal recognized that the definition of “employer” covered two relationships — first, that of a person who employs a worker, and second, that of one who contracts for the services of a worker — but that this appeal could be resolved according to the first relationship. As a result, the Court of Appeal concluded that it was not necessary to address the element of control — even though Brown J.A. had granted leave on precisely this issue. It noted that although s. 1(3) of the Act prevents an owner from becoming a constructor by engaging a quality control inspector, it does not preclude an owner from becoming an employer. Finally, the Court of Appeal concluded that the appropriate remedy was to set aside the provincial offences appeal court judge’s decision and remit only the

alleged breaches of ss. 65 and 104(3) of the Regulation to the Superior Court of Justice to hear the Ministry's appeal of the City's due diligence defence.

IV. Issues

[74] The Court must decide whether the City is liable as an employer for the breach of ss. 65 and 104(3) of the Regulation. To do so, we must examine the following two issues:

- (1) Is the City an "employer" under s. 1(1) of the Act?
- (2) Do ss. 65 and 104(3) of the Regulation apply to the City as an employer through the operation of s. 25(1)(c) of the Act?

[75] The courts below proceeded on the assumption that once a party meets the definition of "employer", they are strictly liable for the breach of any regulatory provision through the operation of s. 25(1)(c) and must rely on the due diligence defence. With respect, such an approach conflates the definition of "employer" with the determination of the scope of an employer's duties. On a proper construction of the scheme, it is essential to examine both the definition of the workplace parties and the duties that actually apply to them. An offence cannot be founded on the breach of a duty that does not apply to the accused.

V. Analysis

[76] Before turning to the facts of this case, we provide a brief overview of the Act as a whole. Then, we turn to identifying and explaining the three distinct stages of an inquiry to establish a breach of an employer’s duties under the scheme. First, we examine the definition of “employer” under s. 1(1), since the parties dispute whether the City is an employer under the Act and if so, under which branch of the definition (“definition stage”). Second, we trace the scope of each employer’s duties under s. 25(1)(c) and the Regulation, as the applicability of prescribed measures to an employer is essential to determining the elements of an offence under the Act (“duties stage”). Finally, we briefly consider the due diligence defence under s. 66(3) of the Act in order to contrast the nature of the inquiry at the *offence* and *defence* stages (“due diligence stage”). This analytical approach is consistent with the structure of the scheme and promotes a cohesive reading of the scheme’s enabling statute and regulations.

[77] The usual principles of statutory interpretation, as set out in our jurisprudence, offer guidance in this exercise: “. . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). The Ontario *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, also applies to the Act:

64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

Before analyzing the definition and duties of employers, it is useful to begin with an overview of the Act in order to understand how it operates.

A. *The Occupational Health and Safety Scheme*

[78] During the 1970s, Ontario overhauled its workplace safety legislation following the release of the *Report of the Royal Commission on the Health and Safety of Workers in Mines* (1976), better known as the “Ham Report”. The result of this reform was to replace a patchwork of legislation, including *The Industrial Safety Act, 1964*, S.O. 1964, c. 45, with the *Occupational Health and Safety Act*, which came into force in 1979 (S. R. Ball, *Canadian Employment Law* (loose-leaf), at § 25:1; *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.), at p. 294).

[79] The Act sets out the rights and duties of all parties in the workplace, as well as the procedures for dealing with workplace hazards and for enforcement of the law where compliance has not been achieved voluntarily by workplace parties. Since 1979, the Act has been amended several times to evolve with changing standards of workplace health and safety, while maintaining a system of internal responsibility in which all workplace parties are given responsibilities for health and safety (see *Ontario (Minister of Labour) v. Enbridge Gas Distribution Inc.*, 2010 ONSC 2013, 261 O.A.C. 27, at para. 24). The internal responsibility system is designed to promote coordinated and collaborative relationships between the different workplace parties (*Ontario (Ministry of Labour) v. United Independent Operators Ltd.*, 2011 ONCA 33, 104 O.R. (3d) 1, at para. 55). Although the purpose of Ontario’s Act is not expressly included

within the statute, it has been judicially considered in the past. In *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.), Sharpe J.A. explained that the Act is “a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers” (para. 16). Similarly, in *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21, Osborne A.C.J.O. stated that “[t]he broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace” (para. 22). This purpose has been affirmed recently by the Court of Appeal in *R. v. Bondfield Construction Co.*, 2022 ONCA 302, at para. 59 (CanLII).

[80] In terms of structure, the Act sets out definitions in s. 1(1) and outlines the application and administration of the Act in Parts I and II, including the creation of joint health and safety committees (s. 9). In Part III, the Act enumerates the health and safety duties of employers and other workplace parties. The Act also addresses a variety of workplace matters in Parts IV to VII, from the right to refuse or to stop work to the prohibition of employer reprisals. Finally, the Act provides for a system of enforcement action and offences and penalties in Parts VIII and IX. In particular, s. 66(1)(a) states that it is an offence for a person to contravene a provision of the Act or the regulations. The variety of duties contained within Ontario’s scheme reflects the “belt and braces” approach to ensuring occupational health and safety, wherein “the Act and Regulations use more than one method to ensure workers are protected” (*Enbridge*, at para. 24).

[81] Particularly relevant to the present appeal are the definition of “employer” as set out in s. 1(1), the duty of employers in s. 25(1)(c) as well as the applicability of

measures contained within the Regulation, and the function of the due diligence defence in s. 66(3). The interpretation of these provisions coincides with the three stages of an inquiry to establish a breach of an employer's duties. It also requires the consideration of the definitions of "workplace" and "project" at s. 1(1), the duties of constructors at s. 23(1) and the duties of owners at ss. 29 to 30.

[82] The definitions of various workplace parties, such as owners, employers, supervisors, workers, and constructors, are set out at the beginning of the Act. The definition of "employer" in s. 1(1) reads as follows:

"employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

A "worker" is mainly defined as "[a] person who performs work or supplies services for monetary compensation."

[83] In the construction industry, the Ontario legislature has defined the role of "constructor" as follows:

"constructor" means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer; [s. 1(1)]

Thus, it is important to distinguish a general "workplace" from a "project" that exists in the construction context. Whereas a "workplace" is broadly defined as "any land, premises, location or thing at, upon, in or near which a worker works", a "project" is

defined in regard to construction as “any work or undertaking, or any lands or appurtenances used in connection with construction” (s. 1(1)). Further, although it is possible for a single person to satisfy multiple workplace party definitions, the Ontario legislature has stated that, in the construction industry, “[a]n owner does not become a constructor by virtue only of the fact that the owner has engaged an architect, engineer or other person solely to oversee quality control at a project” (s. 1(3)).

[84] Once a workplace party is found to satisfy the relevant definition set out in s. 1(1) of the Act, it is necessary to then consider which duties actually applied to the party at the time of the alleged offence. The Act separately sets out the duties for each workplace party. The primary duties of a constructor are listed in s. 23(1) of the Act. They are threefold:

23 (1) A constructor shall ensure, on a project undertaken by the constructor that,

- (a) the measures and procedures prescribed by this Act and the regulations are carried out on the project;
- (b) every employer and every worker performing work on the project complies with this Act and the regulations; and
- (c) the health and safety of workers on the project is protected.

[85] As for employers, they are subject to a variety of duties in ss. 25 to 26 of the Act. These duties include providing, maintaining in good condition and using equipment, materials and protective devices (s. 25(1)(a), (b) and (d)), appointing competent supervisors (s. 25(2)(c)), cooperating with health and safety committees (s. 25(2)(e)), and taking every precaution reasonable in the circumstances for the

protection of a worker (s. 25(2)(h)), to name but a few. In addition, employers have a duty to comply with the regulations:

25 (1) An employer shall ensure that,

...

(c) the measures and procedures prescribed are carried out in the workplace;

[86] The “measures and procedures prescribed” are found in various regulations. At issue in this case is the Regulation, which contains approximately 400 provisions relating to all aspects of a construction project — from housekeeping, heat, dust control, and public way protection to platforms and ramps, stairs and landings, welding and cutting, and excavations.

[87] Finally, the Act provides for a defence of due diligence applicable to a limited number of duties at s. 66(3) (similar to the defence which exists at common law):

(3) On a prosecution for a failure to comply with,

(a) subsection 23(1);

(b) clause 25(1)(b), (c) or (d); or

(c) subsection 27(1),

it shall be a defence for the accused to prove that every precaution reasonable in the circumstances was taken.

Thus, on a prosecution for a failure to comply with ss. 23(1), 25(1)(b), (c) or (d) and 27(1), the accused can defend against the charges by proving that they took “every precaution reasonable in the circumstances”.

B. *The Definition of “Employer” Under Section 1(1)*

[88] The parties’ arguments have focused on the definition of “employer” under s. 1(1) of the Act. In the following sections, we address the interpretation of the definition. The definition of “employer” in s. 1(1) covers two broad relationships. On the first branch, a person satisfies the definition of “employer” where they employ one or more workers. On the second branch, a person is an employer where they contract for the services of one or more workers (*R. v. Wyssen* (1992), 10 O.R. (3d) 193 (C.A.), at p. 196).

[89] The Court of Appeal concluded that it did not need to examine the second branch of the definition (at para. 15), because it determined that the City was the employer of the quality control inspectors under the first branch. With respect, we believe that both branches of the definition warrant discussion. The fact that a party is an employer does not mean that they are an employer to *all workers* at a workplace or project, which may affect the scope of their responsibilities. Indeed, when we apply the Act to the present appeal based on our analytical approach, we agree with the Court of Appeal that the City is the employer of its *inspectors* under the first branch of the definition of “employer”. However, the City is not the employer of the workers hired or contracted for by Interpaving under the second branch of the employer definition.

The City's relationship with Interpaving reflects an owner-constructor relationship, not an employer-worker relationship.

(1) The First Branch Is Focused on Traditional Employment Relationships

[90] The first branch of the definition is satisfied if a person “employs one or more workers” (s. 1(1)). It focuses on the employment contract (*Wyszen*, at p. 197) and reflects the traditional conception of a direct employer-employee relationship (D. McKechnie, “Occupational Health and Safety in Construction Law”, in L. Ricchetti and T. J. Murphy, *Construction Law in Canada* (2010), 209, at p. 211). In this way, its scope is relatively straightforward: as soon as a person hires a worker through a contract of employment, they meet the definition of “employer” under the first branch of the definition.

[91] In support of its appeal, the City directed this Court to the decisions of *Ontario (Ministry of Labour) v. Nor Eng Construction & Engineering Inc.*, 2008 ONCJ 296, and *R. v. EFCO Canada Co.*, 2010 ONCJ 421. In *Nor Eng*, rehabilitation work was being performed on a bridge when the south end of the overpass collapsed. One of the charges alleged that an engineering firm failed, as an employer, to ensure that the temporary support structure that it undertook to design was able to support or resist all loads and forces to which it was likely to be subjected (s. 31(1)(a) of the Regulation; s. 25(1)(c) of the Act). Renaud J. admitted that he struggled to “fit the defendant within this section’s definition of ‘employer’” (para. 88 (CanLII)), because the engineering firm had no ability to ensure that the measures were carried out. He noted that the

engineering firm was “removed geographically, temporally, contractually from the situation at the workplace” and “did not have sufficient or any control on the conduct of the workplace to bring it within the obligations intended and created by this legislation” (paras. 88-89).

[92] Similarly, in *EFCO*, a bridge under construction collapsed, injuring several workers. Alongside other counts, EFCO Canada Co. was charged with failing, as an employer, to ensure that its falsework — the supports and bracing used to support the structure — was capable of withstanding all loads (s. 87(1) of the Regulation; s. 25(1)(c) of the Act). Rabley J. determined that EFCO Canada Co. was not an employer within the meaning of the Act at the time of the building of the bridge. He echoed Renaud J.’s analysis in *Nor Eng*, having found that EFCO Canada Co. had “no control over the jobsite” and that its falsework had been installed by other parties. Therefore, it was not an “employer in the ‘sphere of operation’ but a supplier of falsework” (para. 60 (QL, WL)).

[93] In both cases, the judges suggested that a party is not an “employer” if they have no control over the workplace in question. We decline to adopt such an approach, since it conflates the definition of “employer” with the scope of an employer’s duties under s. 25(1)(c). A narrow definition of “employer” would remove a party from all of their obligations under the Act, not merely those related to the workplace. As highlighted by the Workers’ Compensation Board of British Columbia, this includes a variety of important duties, such as the provisions which prohibit employers from taking reprisals against employees (s. 50 of the Act; I.F., at para. 14). It could not have

been the legislature's intention for a party to be freed from all of their responsibilities towards individuals that they directly hired merely because they did not control the workplace.

[94] Moreover, the text of the definition of "employer" is expressly focused on a party's relationship to *workers*. It is inappropriate to narrow it by considering that party's relationship to a *workplace*. The latter relationship only becomes relevant at the stage of determining an employer's duties. Accordingly, the first branch of the definition is satisfied where a traditional employment relationship exists.

(2) The Second Branch Extends the Definition of "Employer"

[95] The second branch of the definition involves a person who "contracts for the services of one or more workers" (s. 1(1)). This reflects the "extended definition" of an employer adopted by the legislature (McKechnie, at p. 211). A party is an employer not only if they directly employ one or more workers, but if they enter into a contract for the services of workers (*Wyssen*, at p. 196; *Ontario (Ministry of Labour) v. Pioneer Construction Inc.* (2006), 79 O.R. (3d) 641 (C.A.), at para. 19). In *Wyssen*, Blair J.A. concluded that when a party engages an independent contractor to perform tasks, they become an employer under the second branch of the definition (pp. 197-98).

[96] The wisdom contained in *Wyssen* is about ensuring that an employer cannot escape liability for the safety of their workplace due to a contractual label, and this wisdom endures today. The second branch prevents parties from removing themselves from the application of the Act where they subcontract out work, rather than directly

hiring workers through an employment contract (*Wyssen; Pioneer Construction*, at para. 19; *R. v. Sunderland Co-Operative*, [1993] O.J. No. 4429 (QL), 1993 CarswellOnt 5741 (WL) (C.J. (Prov. Div.)); *Tembec Forest Products (1990) Inc. (Re)*, [1994] O.O.H.S.A.D. No. 3 (QL)). In this way, it ensures that the substance of the employer-worker relationship is not determined by the manner in which it is described in the contract. This is particularly important in the construction field, as subcontracting and labour leasing arrangements have been a long-term feature of the industry (R. Johnstone, C. Mayhew and M. Quinlan, “Outsourcing Risk? The Regulation of Occupational Health and Safety Where Subcontractors Are Employed” (2001), 22 *Comp. Lab. L. & Pol’y J.* 351, at p. 391).

[97] In the present appeal, we need not comprehensively examine the range of contractual relationships which would fall under the second branch, particularly on complex construction projects. Nor is it necessary to determine whether a degree of authority over a worker is required to be an employer (see, e.g., *Abarquez v. Ontario*, 2009 ONCA 374, 95 O.R. (3d) 414, at para. 33; *Pioneer Construction*, at para. 19). Although the second branch is extensive, we acknowledge that it does not capture every contractual relationship indirectly linking an employer to a worker.

[98] However, the present appeal raises the following question: Does an *owner* who retains a *constructor* to undertake a project automatically become an employer of workers hired or contracted for by that constructor? This question was not answered by *Wyssen*; indeed, the facts of *Wyssen* involved a contractor who subcontracted a window-cleaning job to an independent contractor rather than directly hiring workers.

Blair J.A. was not required to interpret the distribution of duties among various workplace parties nor did he consider the owner-constructor relationship. Contrary to our colleague Martin J.'s approach, we would thus answer the question in the negative (paras. 18 and 22).

[99] The *text* of the second branch of the definition of “employer” refers to “contract[ing] for the services of . . . workers”. When an owner contracts with a constructor, they are not seeking to subcontract out particular tasks to any independent contractor instead of hiring workers directly through an employment contract; rather, they are asking an entity to assume plenary oversight and authority to undertake the entire project. The owner is contracting for a *constructor*, a party separately defined in s. 1(1). Thus, the owner-constructor relationship is a specific contractual relationship contemplated by the Act (*R. v. Grant Forest Products Inc.* (2002), 98 C.R.R. (2d) 149 (Ont. C.J.), at para. 32). This relationship reflects the practical reality of the construction industry, where owners promote safety by transferring responsibility to constructors with relevant expertise. That a constructor who “supplies services” may satisfy a strictly literal definition of “worker” under the Act belies the nature of the constructor as the entity *overseeing* workers; it must also, in our view, be reconciled with the legislature’s deliberate choice to carve out a distinct owner-constructor relationship. Contrary to the view expressed by our colleague Martin J. (at para. 22), this relationship does not generally fall within the second branch of the employer definition in s. 1(1) in keeping with a basic rule of interpretation — “implied exception” (*specialia generalibus non derogant*) — in which a specific statutory provision prevails

over a general statutory provision to the extent of any conflict (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at pp. 327-28).

[100] This reading of the text of s. 1(1) is confirmed by the statutory *context*. The Act is specifically designed so that an owner can take a hands-off approach to overseeing the project relative to the constructor. A constructor “undertakes” the project, which indicates that overall authority for the project, including the coordination of health and safety, falls to the constructor. Project owners have far fewer responsibilities, even compared to owners of other workplaces. For example, while owners of other workplaces must ensure that prescribed facilities are provided and maintained and that the workplace complies with the regulations, these duties do not apply to project owners (see ss. 29(1) and 30). This is because by contracting for a constructor, the owner is empowered to surrender control so that another workplace party can assume responsibility for overall health and safety (McKechnie, at p. 214; C. A. Edwards and R. J. Conlin, *Employer Liability For Contractors Under The Ontario Occupational Health and Safety Act* (2nd ed. 2007), at p. 59; *Grant Forest Products*, at para. 32).

[101] In fact, if the owner sought to retain an active role in activities on the project, they would run the risk of becoming the constructor themselves (*Imperial Oil Ltd. v. Ontario (Ministry of Labour)* (1993), 10 C.O.H.S.C. 210 (Ont.), at paras. 13-17). The Act even sets out a limitation to ensure that an owner who sends persons to oversee quality control does not thereby become a constructor on the project (s. 1(3)). Of course, an owner who employs persons to perform this task is an employer to those

workers. Yet the legislature felt the need to ensure that they did not thereby become a *constructor* by crafting a specific limitation. The Act is careful to ensure that the project owner can still oversee quality control, without being subjected to onerous duties relating to the project.

[102] However, treating an owner as automatically being an employer of the workers hired or contracted for by the constructor under the second branch of the employer definition would undermine the design of the scheme. It would mean that by virtue of engaging a constructor to oversee a project, project owners would be assigned responsibilities that would require them to play an active role across this project — a role that the Act sought to avoid by enabling them to contract with a constructor in the first place. Unlike the duties of project owners, employers' duties towards their workers are onerous. For example, they must provide information, instruction, and supervision to workers (s. 25(2)(a)), assist and co-operate with a joint health and safety committee (s. 25(2)(e)), prepare a written occupational health and safety policy (s. 25(2)(j)), and take an active role in preventing violence and harassment (ss. 32.0.1 to 32.0.8). Notably, none of these strict duties are subject to the due diligence defence at s. 66(3). It would defeat the structure of the scheme to treat the owner-constructor relationship as giving rise to an employer-worker relationship.

[103] Finally, preserving the integrity of the owner-constructor relationship when interpreting the second branch of the employer definition is consistent with legislative *purpose*. To achieve the purpose of protecting worker safety, the legislature has defined the various roles on the project and carefully structured the relationship between the

owner and the constructor. Treating the owner-constructor relationship as an employer-worker relationship detracts from the legislation's effectiveness because it ignores the practical differences between these relationships and undercuts the distinct mechanisms by which they promote worker safety. Thus, to protect worker safety, we seek to give faithful effect to the assignment of roles and responsibilities chosen by the legislature.

[104] In sum, the second branch of the employer definition is broad, but it does not turn an owner into the employer of workers hired or contracted for by a constructor. Having examined both branches of the definition of "employer" under s. 1(1), we now turn to the scope of an employer's duties. At issue is the interpretation of s. 25(1)(c) and the accompanying Regulation.

C. *The Duties of an Employer Under Section 25(1)(c) and the Regulation*

[105] The Ministry argues that as soon as a worker is present at the workplace, their employer is liable for complying with all regulatory measures through s. 25(1)(c). This appears to have been the unstated assumption of the courts below (Ont. C.J. reasons, at para. 74; Ont. C.A. reasons (2021), at para. 6). What this interpretation effectively means is that *everyone* who employs *anyone* is responsible for *everything* that *anyone* does. It would be absurd to interpret s. 25(1)(c) and the Regulation as obligating every employer at a construction project to ensure compliance with *all* the measures contained within the Regulation. This is inconsistent with the text of the Regulation itself, the structure of the Act, and the statutory purpose of protecting

workers. It places obligations on employers which are specifically directed at other workplace parties and ignores the carefully legislated distinction between a “project” and a “workplace” as borne out by the definitions of these terms pursuant to s. 1(1) of the Act.

[106] In the sections below, we first explain that s. 25(1)(c) requires employers to comply with the measures which apply to them. Second, we set out the requisite link for particular measures in the Regulation to apply to an employer where they do not otherwise specify to whom they apply. In doing so, we do not import a “control requirement” into s. 25(1)(c), as our colleague Martin J. suggests (para. 35). Our interpretation of s. 25(1)(c) merely recognizes that this duty does not require employers to ensure compliance with measures that do not actually apply to them. We pay close attention to the text, context and purpose of the Regulation and recognize that where a measure is silent as to whom is supposed to ensure its compliance, there must be a functional relationship between the measure and the employer: the measure must relate to the work that the employer controlled and performed through their workers.

(1) Section 25(1)(c) Requires Employers to Comply With Measures That Apply to Them

[107] Section 25(1)(c) is part of a list of duties which uses the words “shall ensure that” at the beginning of the enumeration. Each clause then completes the sentence. The use of the verb “ensure”, followed by the duties to be accomplished, emphasizes the principle of strict liability imposed upon employers (*Legislature of Ontario Debates: Official Report (Hansard) — Daily Edition*, No. 151, 2nd Sess., 31st Parl.,

December 14, 1978, at p. 6187; see also *Timminco*, at para. 26). Among these duties, the employer shall ensure that “the measures and procedures prescribed are carried out in the workplace” (s. 25(1)(c)).

[108] Section 25(1)(c) imposes a duty to comply with the prescribed measures and procedures. Thus, it is by virtue of s. 25(1)(c) that the provisions in the Regulation which apply to the employer become binding on it. The word *prescribed* is defined as “prescribed by a regulation made under this Act” (s. 1(1)). In this sense, s. 25(1)(c) reflects the Act’s secondary function as enabling legislation by imposing a duty to comply with other provisions contained in industry-specific regulations (*R. v. Campbell*, [2004] O.J. No. 129 (QL), 2004 CarswellOnt 116 (WL) (C.J.), at paras. 32-34, *aff’d* (2006), 140 C.R.R. (2d) 143 (S.C.J.)).

[109] Although not expressly stated, it is evident that the phrase “measures and procedures prescribed” cannot refer to all measures contained in the Regulation, since many provisions expressly refer only to parties such as constructors or workers. For example, ss. 21(2) and 67(4) of the Regulation explicitly note that “[a] worker’s employer shall require the worker to comply with subsection (1) [regarding protective clothing, equipment and devices]” and that “[e]very employer shall develop in writing and implement a traffic protection plan for the employers’ workers”, respectively. It would be absurd for an excavating company which had safely equipped its own workers to be liable if a welding company on the other side of the project was not providing its workers with gloves, or for one employer to bear responsibility for ensuring that every other employer had made their own traffic plans. Many regulatory provisions specify

to whom the provision applies, and s. 25(1)(c) should be read consistently to coincide with this pattern of drafting (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 8.04[3]). The legislature clearly did not intend to require an employer to “ensure” compliance with obligations directed only at other workplace parties.

[110] The simple corollary is that s. 25(1)(c) requires an employer to comply with the measures that actually apply to it. This may seem evident, but it must be stated, because the result of the Ministry’s interpretation of the Act is, effectively, to make no distinction between the measures in the Regulation that apply to a particular employer and those that do not. We now turn to the Regulation, since, in light of the foregoing, it is important to determine when a particular regulatory measure applies to an employer.

(2) The Regulation Applies to an Employer’s Work Where There Is a Relationship Between the Measure and the Employer

(a) *The Text of the Regulation*

[111] In the construction context, hundreds of measures are contained within the extensive Regulation. Since s. 25(1)(c) makes an employer liable for not ensuring compliance with the measures that apply to them, it is essential to determine which measures in the Regulation are applicable, bearing in mind the employer’s relationship to their workers.

[112] Some regulatory measures indicate their subject expressly. For example, s. 140(1) sets out requirements applicable to an “employer who uses a suspended work platform”. Similarly, s. 21 indicates that a worker must wear protective clothing and that the “worker’s employer” is responsible for requiring the worker to comply. For these measures, the link required for them to apply is clear, and no further analysis is required.

[113] However, the majority of measures do not indicate who is responsible for them. Instead, they are written in the form of a *safety measure that shall be implemented*, without specifying *who* must implement the measure. The measures at issue in the present case belong to that category:

65. If work on a project may endanger a person using a public way, a sturdy fence at least 1.8 metres in height shall be constructed between the public way and the project.

104. . . .

(3) Operators of vehicles, machines and equipment shall be assisted by signallers if either of the following applies:

1. The operator’s view of the intended path of travel is obstructed.
2. A person could be endangered by the vehicle, machine or equipment or by its load.

[114] At this juncture, the following problem arises: s. 25(1)(c) imposes a duty on the employer to carry out the measures which apply to them; however, the text in many of the measures contained in the Regulation is ambiguous regarding to whom they apply. For example, at first glance, ss. 65 and 104(3) might appear silent on the

link required between the measure and the employer's work in order for them to apply to an employer under s. 25(1)(c). However, when reading the Regulation in light of the context and purpose of the overall scheme, this problem subsides. Indeed, reading a legislative provision in context means that the surrounding provisions and any other relevant provisions must be considered (*United Independent Operators*, at para. 57).

[115] Put simply, a measure contained in the Regulation applies to an employer where it relates to the work that the employer controlled and performed through their workers. Otherwise, employers would have no ability to ensure compliance with that measure nor would the measure bear any relation to their workers' tasks. The structure of the Regulation, the division of roles in the construction context, the relationship with other employer duties, the purpose of protecting workers, and the presumption against absurdity call for such an approach.

(b) *The Structure of the Regulation and the Act*

[116] The Regulation is organized under headings tied to particular work activities. For example, divisions of the Regulation include "Scaffolds and Work Platforms" (ss. 126 to 136.0.1), "Roofing" (ss. 207 to 210) and "Tunnel Equipment" (ss. 309 to 316), or, in the examples above, "Public Way Protection" and "Equipment, General", respectively. This division categorizes the hundreds of measures according to the activities and material involved in a construction project. The subject matter of individual measures also reflects a careful consideration of the situations in which a safety hazard would arise and imposes safety measures accordingly in order to promote

worker safety *in practice*. In most cases, an employer's work will only be related to some of these measures, in contrast to the constructor, who "undertakes" the project as a whole (s. 1(1) of the Act) and ensures that "the health and safety of workers on the project is protected" (s. 23(1)(c) of the Act). In the examples above, not all aspects of a project involve work near a public way; however, where any number of employers control work that is performed by their workers near a public way, they share the responsibility of ensuring that a fence is constructed. Similarly, on a given project, not all employers are completing work that requires them to use vehicles, machines and equipment, but all of those employers who are entrusted with such work are caught by s. 104(3) of the Regulation. The formulation of the Regulation reflects the practical realities of work on a project and how to protect worker safety on the ground. This structure suggests that the measures contained in the Regulation apply to those employers whose work is actually related to their subject matter.

[117] This understanding is not unique to Ontario. In Quebec, the corresponding occupational health and safety regulatory code reflects a similar pattern of drafting, and a similar interpretation was reached by tribunals: when a measure is not addressed to a particular workplace party, [TRANSLATION] "it must be regarded as being addressed to all persons present on a construction site who might, in light of the usual nature of their activities, commit the offence in question, on the basis of their functional relationship with the subject matter of the provision" (*Commission de la santé et de la sécurité du travail du Québec v. Acier AGF Inc.*, 2001 CanLII 12761 (Que. Lab. Ct.), at para. 17, citing *Commission de la santé et de la sécurité du travail v. Poudrier et Boulet Ltée*, [1982] AZ-83147017 (Que. Lab. Ct.); see also B. Cliche et al., *Droit de la santé et de*

la sécurité au travail: La loi et la jurisprudence commentées (3rd ed. 2018)). This functional approach reflects a proper understanding of regulatory drafting in the construction context: when a measure relates to work that one or more employers controlled and performed through their workers, those employers are each in a position to take steps to avoid violations and address any safety hazards.

[118] The necessity of a relationship between a measure and an employer has also been recognized under the Act in other contexts. For example, in *Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*, 2013 ONCA 75, 114 O.R. (3d) 321, the Court of Appeal interpreted the reporting obligation under s. 51(1) of the Act, which required an employer to notify various parties where “a person is killed or critically injured from any cause at a workplace”. Blair J.A. recognized that a purely textual reading of the provision would have imposed a reporting obligation on an employer for incidents unrelated to the employer’s work. He adopted a functional approach based on a “reasonable nexus” to accurately interpret which employers would be liable for the reporting obligation and concluded that “[c]ontextually’ and ‘purposively’ speaking . . . s. 51(1) is not engaged unless there is some reasonable nexus between the hazard giving rise to the injury and a realistic risk to worker safety” (para. 49 (emphasis added)). *Wyssen* and *Blue Mountain Resorts* must be read together. *Wyssen* interpreted the definition of “employer” in keeping with the legislature’s intention to subject different types of employers to the Act as a whole. *Blue Mountain Resorts* considered when the duty in s. 51(1) applied to a given employer on a functional basis, focusing on that particular duty and thereby giving effect to the legislature’s intention. The same interpretative approach flows from the Regulation in this case.

(c) *The Act's Division of Roles in the Construction Context*

[119] As its title (*Construction Projects*) suggests, the Regulation is designed for the construction context. The Act has set out the particular distribution of duties between parties on a construction project, which provides important context for interpreting the applicability of the regulatory provisions. Indeed, establishing a relationship between a measure and an employer is necessary to respect the distinct spheres of operation of an employer and a constructor set out within the Act.

[120] Construction projects are a unique type of workplace engaging a distinct division of roles. As previously stated, the constructor undertakes the project and therefore has a unique role as a backstop for worker safety by bearing overall responsibility for the project and all workers (*Ontario (Ministry of Labour) v. Black & McDonald Ltd.*, 2011 ONCA 440, 106 O.R. (3d) 784, at para. 12; *R. v. K.B. Home Insulation Ltd.*, [2008] O.J. No. 6019 (QL), 2008 CarswellOnt 10891 (WL) (C.J.), at para. 18; *R. v. Bradsil 1967 Ltd.*, [1994] O.J. No. 837 (QL), 1994 CarswellOnt 4450 (WL) (C.J. (Prov. Div.)), at para. 33). On a complex, multi-employer construction project, the Act vests the constructor with responsibility to coordinate work across the entire project. As the Ministry itself recognized in its *Constructor guideline*, “[t]he intent of the [Act] is to have one person with overall authority for health and safety matters on a project. This person is the constructor of the project” (February 11, 2022 (online) (emphasis deleted)). In comparison, the employer is entrusted with particular work on the project; they make an essential contribution to worker safety by ensuring that their work complies with the applicable measures. Properly interpreted, employers

have distinct but overlapping obligations, coordinated by the constructor responsible for overseeing all employers.

[121] The constructor is tasked with ensuring that all employers comply with their obligations:

23 (1) A constructor shall ensure, on a project undertaken by the constructor that,

- (a) the measures and procedures prescribed by this Act and the regulations are carried out on the project;
- (b) every employer and every worker performing work on the project complies with this Act and the regulations; and
- (c) the health and safety of workers on the project is protected.

[122] The constructor's plenary oversight role is clearly set out in this provision; they are specifically required to ensure that *every employer* complies with the Act and the Regulation. Moreover, this duty applies across the entire "project", thereby using construction-specific language in contrast to the general formulation of employers' duties in the workplace under s. 25. The wording of s. 23(1)(b) differs significantly from the duties set out in both s. 23(1)(a) and s. 25(1)(c), because it requires constructors to ensure compliance with duties and regulatory measures that may only apply to other workplace parties.

[123] Section 25(1)(c) subjects employers to a duty to carry out the prescribed regulations that apply to them; there is no employer duty that corresponds to s. 23(1)(b). Interpreting particular measures within the Regulation as if they *always* applied to *all* employers, rather than to employers who have a relationship to the measure, would

undermine the distinctions between s. 23(1)(b) and s. 25(1)(c). Such an interpretation of the Regulation would make every employer responsible for everything under s. 25(1)(c) and would effectively turn s. 25(1)(c) into a duty akin to s. 23(1)(b) despite its distinct wording. The measures prescribed in the Regulation must be interpreted in a way that is sensitive to the distinction between employers and constructors. This is achieved by recognizing that a measure applies to employers where a relationship exists between the measure and the employer's work.

[124] Moreover, it is worth remembering that an employer's obligations extend beyond s. 25(1)(c) and the regulatory measures that directly apply to them. The Act and the Regulation cannot be interpreted using tunnel vision, because s. 25(1)(c) and the associated regulatory measures are only one of many mechanisms to protect worker safety. Among other duties, s. 28(1)(d) obligates any worker to "report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows". An employer also has a duty to "take every precaution reasonable in the circumstances for the protection of a worker" under s. 25(2)(h). Thus, aside from safety hazards not mentioned within the Regulation, these provisions may require an employer to take steps to address violations and hazards that would not normally have fallen within s. 25(1)(c), but which had been reported to them and which they could have brought to the attention of the employers who *did* have control under s. 25(1)(c). Importantly, however, s. 25(2)(h) is an obligation of *means*; it is the appropriate section under which to analyze such situations, rather than through a decontextualized and limitless interpretation of s. 25(1)(c).

[125] Finally, we note that just because the definition of “employer” is broad, every regulatory measure does not necessarily apply to everyone. As we explained, the definition of “employer” in s. 1(1) ensures that entities are subject to a variety of substantive and procedural duties under the Act — of which s. 25(1)(c) is only one. These duties each serve distinct functions in advancing the objective of the statutory scheme. Accordingly, and in contrast to our colleague Martin J.’s interpretation of the scheme (at para. 36), it does not follow that each regulatory measure is equally broad and must apply to all employers simply because the definition of “employer” is expansive; the result in *Blue Mountain Resorts* supports this view. Rather, duties must be interpreted in their proper context in order to further the legislature’s objectives in practice. Our functional and contextual interpretation of s. 25(1)(c) and the Regulation achieves this aim.

(d) *The Purpose of the Regulation and the Act*

[126] Courts should approach statutory and regulatory language “in the manner that best reflects the underlying aims of the statute. This follows from the obligation to interpret the words of an Act harmoniously with the object of the Act and the intention of Parliament” (*British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 50). The interpretation adopted in these reasons best furthers the purposes of the Act. Protecting worker safety is of critical importance; the question is *how* the legislature has chosen to achieve this aim. The Ministry proposes an unbounded interpretation of employer duties and simply asserts that this promotes

the public welfare purposes of the Act. However, such a bald assertion should not be accepted uncritically. It is far from clear that making every employer liable for the acts of all other employers in carrying out all regulatory obligations meaningfully improves worker safety. To the contrary, our interpretation reflects a measured and practical approach that is fully consistent with the legislature's purposes and best promotes the safety of workers on a project. Below, we focus on worker safety through the perspective of overlapping and coordinated duties across a project, the "belt and braces" approach, and the administration of the scheme.

[127] First, our interpretation of s. 25(1)(c) of the Act and the Regulation gives effect to the concept of overlapping responsibilities. Since the workers' activities under each employer's control frequently overlap on complex construction projects, so too will the measures which apply to them under s. 25(1)(c). For example, when multiple contractors send their respective workers up a scaffold, they are each responsible for its safety under ss. 126 to 136.0.1 of the Regulation (see, e.g., *R. v. Structform International Ltd.*, [1992] O.J. No. 1711 (QL), 1992 CarswellOnt 2751 (WL) (C.J. (Gen. Div.)), at para. 6). Importantly, other employers may also be subject to duties under other provisions of the Act (see, e.g., s. 25(2)(h)). The critical distinction is that there is a *functional basis* for the overlap, consistent with the work that the employers controlled and performed through their respective workers. Employers whose work is not related to the regulatory measure will not be arbitrarily sent before the courts to defend their actions in the event of an accident or incident. Similarly, while the constructor's plenary authority across a project will overlap with employers' duties in their respective operational spheres, the scope of the employers' respective

occupational health and safety duties will be functionally based on the work that the employers controlled and performed through their workers.

[128] Such an approach to overlapping responsibilities is consistent with this Court's decision in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635. While reviewing the decision of the Workers' Compensation Board of British Columbia, McLachlin C.J. rejected an interpretive approach to an occupational health and safety provision that would have held only one employer liable where multiple were responsible in a "complex joint set of interactions" (para. 44). On the proposed interpretation of s. 25(1)(c) and the Regulation, the employers involved in a joint set of interactions through their workers will be liable under s. 25(1)(c), since regulatory measures clearly relate to each of their work. Our approach is thus similar to the prevailing interpretation in *West Fraser Mills*, which was based on a "factual link between West Fraser Mills' activities and choices as an employer of individuals meant to monitor the worksite and the incident that occurred" (para. 38).

[129] Although paying lip service to the language of overlapping obligations, the Ministry is effectively proposing *coextensive* obligations among employers, without regard for the activities under their control on the larger project. This approach advances an interpretation that goes "well beyond the proper reach of the Act and the reviewing role of the ministry reasonably necessary to advance the admittedly important objective of protecting the health and safety of workers in the workplace" (*Blue Mountain Resorts*, at para. 4; see also paras. 26-27).

[130] Second, the interpretation of the Regulation in these reasons fully operationalizes the “belt and braces” approach. The goal of a “belt and braces” system is to create meaningful protection *in practice*. Thus, “if the ‘belt’ does not work to safeguard a worker, the backup system of the ‘braces’ might, or vice versa” (*Enbridge*, at para. 24). Yet, if there is no relationship between the measure and the employer’s work, the employer cannot serve as an effective brace. Further, if everybody is responsible for everything, it is difficult for a given employer to determine which of the hundreds of regulatory measures they are responsible for overseeing. The applicability of each measure is, in essence, determined by the Ministry’s use of prosecutorial discretion *ex post facto*. Clearly, the problem with this approach is that if employers do not know who is a belt or a brace, then the safety system cannot function at all and leads to confusion. Imposing measures contained in the Regulation onto employers bearing no relationship to the work at hand adds an indefinite number of illusory braces: they provide a false sense of added safety but, in reality, only increase the legal jeopardy of unrelated workplace parties who could not have ensured compliance with those measures. The “belt and braces” approach is best operationalized when “redundanc[ies]” — a term employed by Bellamy J. in *Enbridge* — exist among the employers who bear an actual connection to the relevant measure (para. 24). These employer duties exist alongside the distinct but overlapping duties of the constructor and other workplace parties.

[131] Put simply, holding employers with no control liable does nothing to increase worker safety — it is this very lack of control which makes them unable to carry out the regulatory measure in the first place. Although the statutory and

administrative law context was different in *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, this Court referenced the more general idea that, in practice, “[a]n interpretation which imposed on the employer a duty it could not fulfil would do nothing to further the aim of preventing accidents and injury” (para. 59).

[132] Third, limitless responsibilities lead to confusion and a lack of coordination on a construction project. If every employer is liable for everything and has duties towards unrelated parties, an individual employer’s sphere of responsibility becomes unclear. Indeed, it stands to reason that when too many workplace parties share too many of the same responsibilities, confusion about when and how those parties must answer the call of duty is bound to arise. These circumstances can lead to duplication and the potential for competing directives (*Ontario (Health and Long-Term Care, Land Ambulance Programs) v. Canadian Union of Public Employees, Local 2974.1*, 2010 CanLII 11302 (Ont. L.R.B.), at para. 83). For example, safety issues could arise if multiple employers with no relationship to the duty or expertise in the area seek to enforce their own version of a particular safety procedure on other workers. Alternatively, unlimited duties can lead to neglect if each employer assumes that duties owed by all employers will have been fulfilled by someone else. Hoping that the due diligence defence will incentivize parties to remedy this problem belies the fact that, properly interpreted, s. 25(1)(c) should not create this problem in the first place. Rather, our interpretive approach assists in avoiding these problems by clarifying the requisite relationship for a measure to apply to an employer.

[133] As we explained, the Act is designed to provide effective protection for the health and safety of workers (*Hamilton (City)*, at para. 16; *Timminco*, at para. 22; *Bondfield*, at para. 59). This objective is furthered by requiring employers to be focused on fulfilling regulatory measures related to work which they control. Conversely, it is frustrated when limitless duties are imposed that ultimately obscure the areas in which an employer can make a practical difference. If every employer is rendered equally responsible for everything, it becomes more difficult for workers and other workplace parties to single out particular employers who should take the initiative, or to seek a uniform response among employers. This undermines the effectiveness of the internal responsibility system, which was at the core of the Act's reform (see, e.g., R. Fidler, "The *Occupational Health and Safety Act* and the Internal Responsibility System" (1986), 24 *Osgoode Hall L.J.* 315). Such an outcome does not promote worker safety; it jeopardizes it. In contrast, the interpretation presented in these reasons clarifies the duties of each employer in relation to their work activities. It also gives meaningful room for the constructor to coordinate the employers' respective activities to maximize worker safety. A practical understanding of how the Regulation connects to s. 25(1)(c) best protects the purpose of the scheme and recognizes how the scheme "operates on the ground" (*West Fraser Mills*, at para. 41).

[134] It is true that the legislature imposed strict liability offences to increase administrative efficiency. However, the fact that the Ministry is spared from proving *mens rea* does not mean that it is able to charge anyone with anything in the Regulation; these are two separate questions. Moreover, determining whether a measure in the Regulation applies to an employer under our interpretation is not an onerous task and

therefore has little effect on the efficiency of the Ministry's work. As we later explain, to determine which measures apply to which employers, courts merely need to ask: What work is an employer responsible for undertaking on the construction project? In this sense, it involves an inquiry into the allocation of tasks on the project and the work actually performed by the employer's workers. This is a basic question that should arise in the Ministry's investigation of an accident or incident. It should inform who the Ministry charges. Taken together, our interpretation promotes the purposes of the scheme while protecting the integrity of its structure.

(e) *Absurdity and Legislative Intent*

[135] It is a well-established principle that the legislature does not intend to produce absurd results. This would occur if an interpretation "leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment" (*Rizzo*, at para. 27).

[136] The Ministry's expansive interpretation of employer duties ignores this principle and leads to absurdity. Applying its interpretation in a construction context, the vast majority of an employer's s. 25(1)(c) duties would be unrelated to their work and impossible for them to fulfill, yet could still result in them being charged. Three examples suffice to demonstrate the absurd results that would flow from the Ministry's interpretation.

[137] First, consider the company that provides catering services on a large construction project and that delivers food and beverage services at various respite locations. While this company employs caterers on the project site and has control over catering tasks, it is uninvolved in most operations on the construction project. Yet, under the Ministry's approach, if a tower crane was erected near the caterer's activities without including automatic limit switches (s. 160(1) of the Regulation), the catering company could be charged, the *actus reus* would be made out, and the catering company would bear the burden of establishing a defence. To subject an employer such as the catering company to this process is absurd. On a large project involving numerous employers, such absurdities would be multiplied.

[138] Second, the group of interveners, including the Regional Municipality of York, raise the following example. A municipality greenlights the construction of a rail system and contracts with a constructor. It sends a quality assurance inspector to check that the lights were installed in accordance with the contract. If an electrical problem causes an accident on the other side of the station, the municipality would have breached s. 25(1)(c) on the Ministry's interpretation merely because its employee was present at the site. Further, according to the Ministry's interpretation of the Act, the municipality would be dissuaded from sending inspectors — who might otherwise improve the project — for fear of being held liable for all regulatory measures under the Act, no matter how unconnected the measures are to the inspectors' activities. Surely, such an absurd outcome does not further the statutory purpose of protecting workers.

[139] Third, one can easily imagine a homeowner who has contracted with a constructor to repair the attic, but who engages an external person to verify that the project is proceeding according to architectural design standards. If, on the same day, one of the constructor's subcontractors falls from a ladder that did not meet regulatory specifications (see s. 80 of the Regulation), should the homeowner be liable as soon as they employed an individual who entered the attic? Similarly, does a small retailer who sends their business employee to the premises to confirm the constructor's performance of the contract become liable for all regulatory measures across the project merely because they are an "employer" whose worker performed a task at the project? These are some of the absurd outcomes that flow from the Ministry's literal interpretation of s. 25(1)(c) of the Act, according to which every employer would be obligated to ensure compliance with every regulatory measure contained within the Regulation. Moreover, as we noted earlier, these entities would not otherwise be forced to comply with such measures, given that the owner-constructor relationship does not simultaneously create an employer-worker relationship.

[140] At the hearing, the Ministry's counter-arguments were twofold. First, prosecutorial discretion will limit the potential for absurdity to occur. Second, even if these employers are charged, the due diligence defence at s. 66(3) will allow them to avoid conviction. Neither of these responses is satisfactory.

[141] On the question of prosecutorial discretion, the Ministry's approach undermines the rule of law. It effectively gives prosecutors unbounded discretion to define the proper scope of each employer's duties by deciding who to charge, rendering

the ultimate delineation of duties in the Act unpredictable and uneven from the accused's perspective. This cannot be what the legislature intended when it sought to enact strict liability offences for administrative efficiency. It crafted a careful scheme to create coordinated working relationships among employers under the oversight of the constructor. It is inconceivable that the legislature would intend for the true scope of s. 25(1)(c) to be determined via prosecutorial discretion. Moreover, the Ministry's reliance on a promise that prosecutors would not charge employers for breaches of regulatory measures over which they had no control emphasizes the absurdity of its own interpretation.

[142] As for the availability of the defence at s. 66(3), it initially presents itself as an appealing solution: courts could accept the broad language of s. 25(1)(c) at face value and simply resolve the absurdities created through a lenient approach to the accused's defence. However, there are multiple flaws with adopting an approach that pushes most of the analysis concerning an employer's responsibility to the due diligence stage.

[143] First, from a methodological perspective, the offence and the defence should not be conflated. The existence of s. 66(3) confirms the nature of certain duties: ss. 23(1), 25(1)(b), (c) or (d) and 27(1) involve strict liability, rather than absolute liability. However, s. 66(3) does not determine the *applicability* of these duties to a party, nor their *content*. These are distinct inquiries, and judges should not abdicate the responsibility of arriving at a reasonable interpretation of a duty merely because a

defence exists or because doing so would improve administrative efficiency for the Ministry.

[144] The Ministry's focus on the due diligence defence flips the structure of offences on its head: every employer is captured by the offence as soon as any regulatory measure is not met, and the accused must bear the burden of pulling themselves out of the ambit of the offence. Owners might point to retaining a constructor, but for most employers on a construction project, the defence would involve justifying why the measure was so unrelated to their work that no precautions were possible; put differently, employers would effectively be forced to argue *at the defence stage* that the offence should not actually apply to them.

[145] Second, the contextual analysis undertaken in our reasons demonstrates that the Ministry's interpretation is inconsistent with other statutory provisions and confuses the roles of employer and constructor. The objective of statutory interpretation must be to "interpret statutory provisions to harmonize the components of legislation inasmuch as is possible, in order to minimize internal inconsistency" (*Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 689). The Ministry's interpretation does the opposite: it undermines the coherence of the overall scheme, while asking the *accused* to bear the burden of repairing it at the due diligence stage. Pointing to the existence of s. 66(3) as a safety valve does not excuse the damage inflicted on the scheme by an unbridled interpretation of s. 25(1)(c) and the Regulation. Even if pushing the analysis to the due diligence stage was a plausible interpretation, courts should favour an approach that reflects the structure and consistency of the legislative scheme.

[146] Third, shifting much of the analysis on the contents of the duty and the nature of the employer's work to the due diligence stage has superficial appeal in its apparent simplicity: on this approach, every employer is liable for fulfilling all of the same measures in the Regulation, and the practical problems with such an approach are conveniently hidden from view by pushing them to the due diligence stage. However, this increases uncertainty in practice and ignores the reality of how the scheme operates on the ground. If most of the employer's obligations are outside of their control, they have no ability to even know whether the measures are being complied with or what they could be charged with at any moment. In contrast, requiring that a measure relates to an employer's work provides employers with a greater understanding of their responsibilities and encourages them to take initiative to protect workers.

[147] Fourth, it should not be forgotten that the Act is penal legislation (*R. v. Brampton Brick Ltd.* (2004), 189 O.A.C. 44, at para. 22). Those convicted of an offence are subject to fines of up to \$500,000 and imprisonment for up to one year (s. 66(1)). These are serious punishments for the caterer, the homeowner, or the small business owner on a construction project. It is inconceivable that the legislature intended to allow prosecutors to haul any employer on a massive project to court and force *them* to demonstrate the measure was completely irrelevant to their work in order to save themselves from prison or financial ruin. The interpretation proposed in these reasons recognizes this absurdity and offers a grounded approach that preserves the legislature's intent.

[148] Fifth and finally, the defence at s. 66(3) is illusory for a variety of parties: rather than pay hefty legal fees and seek to mount a successful due diligence defence, small businesses, sole proprietors, contractors, and homeowners may resign themselves to pleading guilty. Insofar as the existence of a due diligence defence is a safety valve underpinning the Ministry's broad interpretation, its practical unavailability for more vulnerable parties should be acknowledged since access to justice remains out of reach for many Canadians. Thus, the availability and content of the due diligence defence do not serve as an adequate safety valve for an employer who has been charged with failing to comply with measures which are unrelated to their work and should never have applied to them in the first place.

[149] In contrast, the interpretation adopted in these reasons gives meaningful effect to the statutory scheme, while avoiding overly broad interpretations that would lead to absurd outcomes. Broad language in a statute should be given a more limited interpretation "in order to avoid absurdity and to give the words their appropriate meaning, having regard to their context, the purpose of the Act and the intention of the legislature" (*Blue Mountain Resorts*, at para. 51; see also *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at p. 1082). Indeed, when a court interprets broad occupational health and safety legislation, "there are safeguards or elements imposed at each stage that offer an opportunity to interpret and restrict that broad language to avoid absurdity" (*R. v. Halifax Port Authority*, 2022 NSPC 13, at para. 130 (CanLII)). This is the case here, with regard to s. 25(1)(c) and the ambiguous provisions in the Regulation. Our interpretation is the product of a careful examination of the text of

s. 25(1)(c) and the Regulation, read in light of its statutory context, the legislature's purposes, and its practical effects on the ground.

(3) Summary and Guidance

[150] In summary, s. 25(1)(c) requires an employer to ensure compliance with all *applicable* regulatory measures. Where the Regulation expressly states to whom its measures apply, there will be no question as to whether they fall within the employer's duty under s. 25(1)(c). Where however, a particular measure is silent concerning to whom it applies, the measure applies when it relates to work that the employer controlled and performed through their workers. This relationship is established when the employer has authority over the performance of a task, usually because it is the portion of the work within the larger project that, whether alone or with other parties, they have been entrusted with performing through the workers they have employed or contracted for. To be sure, multiple parties can be jointly entrusted with a task, since different employers will often collaborate, and thus multiple employers can have an overlapping responsibility to fulfill the same measures (*Director of Occupational Health and Safety v. Government of Yukon, William R. Cratty and P.S. Sidhu Trucking Ltd.*, 2012 YKSC 47, at para. 69 (CanLII)). It is not necessary for the Ministry to assign relative degrees of control over the activity in question. A regulatory measure can apply to the work of multiple employers so long as it relates to each employer. As we explained, the core question is: What work is an employer responsible for undertaking on the construction project? Clearly the Ministry should know whether the measure is

actually related to the employer's work before making the decision to charge that employer.

[151] Such an inquiry does not require fact-specific findings relative to the accident or incident nor in respect of the various employers' resources, intentions or relative degrees of control. When an employer is given responsibility for performing a task (whether exclusive or shared), they are liable for ensuring compliance with all regulatory measures related to this work. This is a binary determination and does not depend on relative control: when an employer undertakes to perform a task through their workers, they must address the safety hazards related to this work.

[152] It is not difficult to determine which duties are involved, since (as noted above) the duties are deliberately organized based on project materials, devices and activities. For example, s. 207(1) of the Regulation reads as follows:

207. (1) If a built-up roof is being constructed, repaired or resurfaced, a barrier shall be placed in the immediate work area at least two metres from the perimeter of the roof.

[153] If one or more employers are entrusted with constructing a roof, then they must ensure that a barrier has been placed in conformity with s. 207(1). Conversely, the measure clearly does not apply to a painting company working on the interior walls. In most cases, this determination would not be in doubt. In any event, it is reasonable to ask the Ministry to demonstrate that a measure — with which non-compliance risks imprisonment — actually applies to the person it is seeking to charge, as prosecutors would have to do in any other instance.

[154] It warrants emphasizing that whether a regulatory measure *applies* to a party (and, thus, whether they can properly be charged) is different from whether they were *diligent in the circumstances* (and, thus, whether they can make out a defence if charged) and from whether there are *aggravating or mitigating factors* at sentencing (and, thus, the penalty in the event of conviction). To explain this distinction, we briefly examine the distinct role of the due diligence defence provided for at s. 66(3).

D. *The Role of the Defence Provided for at Section 66(3)*

[155] If a person is an employer under the Act, they must ensure that the measures which apply to them are carried out in the workplace pursuant to s. 25(1)(c). As we explained, the regulatory measures apply when they present a nexus to the work which is under the employer's control and performed through their workers. Establishing this nexus between the measure and the employer is a binary, threshold question: either the measure applies because it is related to work which the employer has undertaken, or the measure does not apply because such a link is absent.

[156] If a violation of an applicable measure is proven, the employer must make out a due diligence defence as per s. 66(3). Since the measure is related to their work, the employer has the burden of demonstrating the *specific* steps they took to prevent the breach *in the circumstances*. The role that control might play at this stage is fundamentally different. Indeed, making out this defence entails a fact- and situation-specific analysis that can capture the *degree and extent* of the employer's control over the underlying cause of the breach at issue, the *gravity and likelihood* of

the harm, the *alternatives available* to the employer in the circumstances, and the *degree of knowledge or skill* expected of the employer — considerations that are irrelevant to the applicability of the duty (*R. v. Gonder* (1981), 62 C.C.C. (2d) 326 (Y. Terr. Ct.), at pp. 332-33; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Stelco Inc. v. Ontario (Ministry of Labour)*, 2006 CanLII 28110 (Ont. S.C.J.), at paras. 28-32; *Ontario v. London Excavators & Trucking Ltd.* (1998), 40 O.R. (3d) 32 (C.A.)).

E. *Application*

[157] Based on our analysis of the Act, we now examine whether the City is liable as an employer for the breach of ss. 65 and 104(3) of the Regulation.

(1) Is the City an Employer Under Section 1(1)?

[158] The Court of Appeal concluded that because the City had hired quality control inspectors through a contract of employment, it satisfied the definition of “employer” under the first branch (paras. 13-14). We agree with this conclusion. Indeed, at the hearing, the City effectively conceded that it was the employer of its inspectors. The City hired quality control inspectors and owes duties as the employer of these workers under the Act. However, this does not mean that the City is the employer of all workers on the project. By contracting with a constructor, it did not become the employer of the workers that the constructor retained. As explained previously, the owner-constructor contract reflects a distinct relationship contemplated in the Act that does not generally fall within the second branch of the employer

definition in s. 1(1). Consequently, the City is only the employer of its quality control inspectors.

[159] Since the City satisfies the definition of “employer” in s. 1(1), we now turn to the scope of its duties.

(2) Do Sections 65 and 104(3) of the Regulation Apply to the City as an Employer Through the Operation of Section 25(1)(c) of the Act?

[160] In light of our conclusion that the City is an employer of the quality control inspectors, the applicability of the regulatory measures depends on whether it controlled work being performed near public ways (s. 65) or controlled the operation of vehicles, machines and equipment (s. 104(3)). As previously mentioned, the Court of Appeal did not examine this question once it found that the City was an “employer”. Rather, the Court of Appeal stated: “We conclude that the City was an employer within the meaning of the Act and, as a result, was liable for violations of the Regulation found by the trial judge unless it could establish a due diligence defence” (para. 6 (emphasis added)). Respectfully, it was incorrect for the Court of Appeal to find that *because* the City satisfied the definition of “employer” it was liable for the violations under the Regulation. This reasoning rests on an improper interpretation of the Act, as we explained above.

[161] Due to this flawed assumption, the trial judge did not consider the applicability of the regulatory measures, nor did the Superior Court or the Court of Appeal. Accordingly, the proper approach is to remit the matter to the Ontario Court of

Justice to determine whether, following the approach set out above, ss. 65 and 104(3) of the Regulation related to the City and thereby fell within its duty under s. 25(1)(c) of the Act.

VI. Conclusion

[162] For the foregoing reasons, we would allow the appeal and remit the matter to the Ontario Court of Justice to assess whether ss. 65 and 104(3) of the Regulation apply to the City as an employer, and thus whether the City breached its duty under s. 25(1)(c) of the Act.

The following are the reasons delivered by

CÔTÉ J. —

I. Introduction

[163] The entirety of the Elgin Project — including responsibility for compliance with the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (“OHSA” or “Act”) — was under the control of Interpaving Limited, the company hired by the Corporation of the City of Greater Sudbury to be its general contractor. As the municipal project owner, the City sent quality control inspectors to the project “to ensure the quality of work and to protect public funds” (Ont. C.J. reasons, at para. 23, reproduced in A.R., vol. I, at p. 7). The City was not involved in any of the construction

work at the Elgin Project. Its inspectors did not “direct any workers”, “supervis[e] the work”, or “exercise control over the work” (paras. 26 and 86).

[164] In these circumstances, I agree with the trial judge, Lische J., that the City was not an “employer” on the construction project as defined and intended by the Act. I also agree with Poupore J., on appeal, that the trial judge “properly found that the [Ministry of the Attorney General (Ministry of Labour, Immigration, Training and Skills Development)] for Ontario had not proved that the City acted as an employer on [the construction] site” (2019 ONSC 3285, 88 M.P.L.R. (5th) 158, at para. 35). Interpaving was both the “constructor” of the project and the “employer” of the road grader operator who fatally struck and killed a pedestrian. It was charged with breaching s. 104(3) of the accompanying regulation, *Construction Projects*, O. Reg. 213/91 (“Regulation”), which requires operators of vehicles, machines and equipment to be assisted by signallers if the operator’s view is obstructed or if a person could be endangered.

[165] In my view, the City should not share statutory liability for Interpaving’s failures at the construction site. To hold otherwise “would change substantially what has been the practice in Ontario on construction projects” (Ont. S.C. reasons, at para. 34). It would also create a clear disincentive for municipal project owners to engage in laudable quality control efforts and would thus tend to frustrate, not further, the statutory purpose of protecting workers. I would allow the appeal and restore the acquittals entered by the trial court on all charges.

II. Analysis

[166] My analysis proceeds in three parts. First, I discuss why I substantially agree with Rowe and O’Bonsawin JJ.’s interpretation of the duties of employers under s. 25(1)(c) of the Act, which must be read in context and together with the applicable regulations. I further agree that the definition of “employer” in s. 1(1) of the Act does not capture the construction-specific relationship between a project owner and its general contractor (see Rowe and O’Bonsawin JJ., at paras. 99-104). With respect, Martin J. fails to consider the structure of the Act and the carefully legislated distinction between construction projects and other workplaces.

[167] Second, I consider the purpose of the Act and explain why the “belt and braces” approach to worker safety should not be interpreted in a manner that extends the reach of the Act “far beyond what was intended by the legislature” (*Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*, 2013 ONCA 75, 114 O.R. (3d) 321, at para. 27; see also *R. v. Bondfield Construction Co.*, 2022 ONCA 302, at para. 59 (CanLII)). Even a “generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions” (*Blue Mountain*, at para. 26). While due diligence remains available as a defence, it should not affect the proper interpretation of the term “employer” or alter the nature of the statutory offence of a failure to comply with s. 25(1)(c) of the Act.

[168] Third, and where I depart from Rowe and O’Bonsawin JJ., I explain why a municipal project owner is not an employer on the construction site merely because it

employs quality control inspectors (see Ont. C.J. reasons, at paras. 84-90; Ont. S.C. reasons, at paras. 33-35). Rowe and O’Bonsawin JJ. find that “the applicability of the regulatory measures depends on whether [the City] controlled work being performed near public ways (s. 65) or controlled the operation of vehicles, machines and equipment (s. 104(3))” (para. 160). With respect, the trial court answered these questions. Over the course of a 5-day trial, the trial judge heard from 10 witnesses and considered 16 exhibits. In her careful and thorough analysis, she repeatedly rejected the Ministry’s position that the City or its inspectors exercised control over any construction work at the project (see paras. 24-26, 64-67, 71, 81-82 and 86-89). In the alternative, the trial judge was satisfied that the City exercised due diligence, taking “every precaution reasonable in the circumstances to prevent the tragedy that occurred” (para. 91; see also paras. 92-103).

[169] As a result, I would not remit the matter to the trial court. The City was not statutorily obligated to ensure compliance with ss. 65 and 104(3) of the Regulation, both of which applied only to the workplace parties involved in actual construction work at the Elgin Project.

A. *Points of Agreement With Rowe and O’Bonsawin JJ.*

(1) Section 25(1)(c) of the Act Must Be Read in Context

[170] I agree that it would be absurd to interpret s. 25(1)(c) literally — that is, to require each employer on a construction project to ensure compliance with all

applicable regulations (see Rowe and O’Bonsawin JJ., at para. 105). As Rowe and O’Bonsawin JJ. hold, s. 25(1)(c) must be read in context, and its interpretation must be informed by the content of the applicable regulations. Martin J.’s textual interpretation of s. 25(1)(c) is inconsistent with a textual reading of the accompanying regulations. For example, under her interpretation, employers would be required to ensure compliance with safety obligations specifically imposed on other parties, such as the duty of a constructor under s. 17(1) of the Regulation to establish emergency procedures for a project.

[171] Through the Act and Regulation, the legislature has made it clear that construction projects are distinct from other regulated workplaces. On a construction project, while each employer is responsible for the health and safety of its own workers, the constructor is responsible for health and safety across the project (see, e.g., *R. v. K.B. Home Insulation Ltd.*, [2008] O.J. No. 6019 (QL), 2008 CarswellOnt 10891 (WL) (C.J.), at para. 18; *R. v. Bradsil 1967 Ltd.*, [1994] O.J. No. 837 (QL), 1994 CarswellOnt 4450 (WL) (C.J. (Prov. Div.)), at para. 33; D. McKechnie, “Occupational Health and Safety in Construction Law”, in L. Ricchetti and T. J. Murphy, *Construction Law in Canada* (2010), 209, at pp. 213-17; *R. v. Grant Forest Products Inc.* (2002), 98 C.R.R. (2d) 149 (Ont. C.J.), at para. 55). This is confirmed by the Ministry’s own interpretation of the Act. The Ministry’s publicly accessible *Constructor guideline* (February 11, 2022 (online)) states the following:

Definition of “constructor”

The intent of the *Occupational Health and Safety Act* (OHSA or the Act) is to have **one** person with overall authority for health and safety matters on a project. This person is the **constructor** of the project.

...

Health and safety at a project are a shared responsibility. Though each employer at a project has significant responsibilities for the health and safety of their workers, the constructor is the party with the greatest degree of control over health and safety at the entire project and is ultimately responsible for the health and safety of all workers. The constructor must ensure that all the employers and workers on the project comply with the Act and its regulations.

...

Relationship of the constructor to the other parties on a project

The constructor has overall responsibility on a project for compliance with the Act, the Regulation for Construction Projects (O. Reg. 213/91) and other applicable regulations. The constructor may also have duties as an employer or as an owner. [Emphasis in original.]

[172] I therefore disagree with Martin J.'s reliance on *R. v. Wyssen* (1992), 10 O.R. (3d) 193 (C.A.), for the principle that an employer acts as the virtual "insurer" of health and safety. While this may be true in the window cleaning industry, which was at issue in *Wyssen*, it is not true on construction projects. In this specific and unique context, the general contractor or constructor acts as the insurer of health and safety across the project.

(2) A Project Owner Is Not the "Employer" of the Constructor or the Constructor's Workers

[173] As with s. 25(1)(c) of the Act, Martin J.'s literal interpretation of s. 1(1) fails to account for the industry context. I agree with Rowe and O'Bonsawin JJ. that a

project owner who hires a constructor is not the employer of the constructor itself or its workers (paras. 99-104). *Wyssen* established that an employer cannot evade its occupational health and safety responsibilities by hiring an independent contractor instead of entering a typical employment relationship (see *Rowe and O’Bonsawin JJ.*, at para. 96). But it does not follow from *Wyssen* that an employer is responsible for the employees and independent contractors of other employers. In *Wyssen*, Blair J.A.’s reference to the employer as being “virtually in the position of an insurer” related only to the employer’s own independent contractor — there, the deceased window cleaner, with whom the employer had a direct contractual relationship (see p. 198). In this case, the City was therefore not the employer of the workers hired by its general contractor, Interpaving.

[174] As to the City’s hiring of Interpaving itself, this reflects an owner-constructor relationship, not an employer-worker relationship (*Rowe and O’Bonsawin JJ.*, at para. 89). With respect, Martin J.’s finding that the City was Interpaving’s employer defeats the structure and purpose of the Act. It reads out the statutory role of constructor and renders the legislature’s express distinction between the duties of project owners and those of non-project owners in ss. 29 and 30 meaningless. Without exception, every project owner would have a strict duty to ensure compliance with all applicable regulations. While Martin J. laments the risk of reading too much into the Act, her own interpretation would impose positive duties on project owners, in every case, far beyond those set out by the legislature in s. 30. The Act is specifically designed to accommodate — and promote — the delegation of

construction projects, including responsibility for health and safety, to qualified constructors.

B. *The “Belt and Braces” Approach to Worker Safety Is Not Limitless*

(1) Statutory Purpose

[175] I do not accept that the “belt and braces” approach to occupational health and safety relied on by my colleagues is without reasonable limits. In *Bondfield, van Rensburg J.A.*, writing for the Court of Appeal, noted that the Act seeks to achieve a *reasonable* level of worker protection:

A generous interpretation, however, should not be confused with a limitless one: *Blue Mountain Resorts Ltd.*, at para. 26. While the OHSA aims to protect workers from both deliberate and inadvertent conduct, including accidents that result when workers make mistakes or are careless or reckless, it is important to remember that the OHSA seeks to achieve a reasonable level of worker protection, not an entirely risk-free work environment. [Emphasis added; citations omitted; para. 59.]

[176] While Martin J. purports to accept that the purpose of the Act is to “promote a reasonable level of protection for the health and safety of workers” (para. 38), her interpretation of the “belt and braces” strategy goes far beyond what was intended by the legislature (see *Blue Mountain*, at para. 27). There is no dispute that the purpose of the Act is to promote worker safety. I simply disagree that it furthers this aim to impose duties on employers that they cannot possibly fulfill (*Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, at

para. 59). This is true whether or not the notion of “control” is explicit in the statutory language.

[177] This point is exemplified by *Ontario (Ministry of Labour) v. Nor Eng Construction & Engineering Inc.*, 2008 ONCJ 296, one of the cases that Martin J. disapproves of as “irreconcilable” with *Wyssen* (see Martin J., at para. 21). I strongly disagree. In *Nor Eng*, a bridge structure collapsed at a construction project in Sudbury. The Ministry sought to hold an engineering company (“Remisz”) liable, as an employer, for breaching s. 31(1)(a) of the Regulation, which reads as follows:

- 31.** (1) Every part of a project, including a temporary structure,
- (a) shall be designed and constructed to support or resist all loads and forces to which it is likely to be subjected without exceeding the allowable unit stress for each material used;

[178] Remisz, based in Ottawa, had produced a sum total of two drawings in accordance with design criteria made available to it from contract drawings for the bridge. It had done so months before the accident occurred. Once the drawings were provided, Remisz received no further communication. The engineering firm acting as the constructor on-site did not review the drawings but “simply filed the[m] away” (para. 86 (CanLII)). The ultimate design of the bridge “varied markedly from the design provided” by Remisz (para. 87). As a result, the court found that Remisz was not an “employer in th[e] workplace on or about [the date of the collapse and] in a position to ensure that the measures and procedures prescribed in section 31(1)(a) of the [R]egulation” were carried out (para. 88). The trial judge explained this as follows:

Remisz Engineers was removed geographically, temporally, contractually from the situation at the workplace.

How can it be said that pursuant to s. 25(1), the defendant corporation could do anything on or about May 7, 2004 to ensure that prescribed measures and procedures were carried out. It is patent and the court finds that on May 7, 2004, there is no evidence suggesting that the defendant, if it be deemed an “employer” within the meaning of the Act, had any control over the workplace in question. In fact, the defendant learned only after the collapse, that the project had not yet been completed. The court concludes that the defendant did not have sufficient or any control on the conduct of the workplace to bring it within the obligations intended and created by this legislation. [paras. 88-89]

[179] I agree. In my view, *Nor Eng* is “irreconcilable” only with Martin J.’s flawed interpretation of *Wyssen*. When the correct interpretation of *Wyssen* is applied to the facts in *Nor Eng*, it is clear that Remisz was responsible for the health and safety of its *own* employees or independent contractors, that is, those working in Ottawa. But Remisz was not an employer at the construction project hundreds of kilometres away in Sudbury. The trial judge correctly declined to hold that Remisz was obligated to prevent safety breaches that occurred months after it prepared its drawings and that had nothing to do with its involvement in the project.

[180] The thrust of Martin J.’s position is that workplaces will be safer if every employer is made responsible for every possible safety obligation. While this approach has superficial appeal (see *Rowe and O’Bonsawin JJ.*, at para. 146), it also creates a clear disincentive for a municipal project owner to engage in quality control efforts. A municipality cannot monitor quality and/or contract compliance without exposing its personnel to safety breaches *already existing* at the construction site. Nonetheless,

Martin J. would hold every project owner strictly liable for all safety hazards it encountered in its quality control efforts — and which it did nothing to create. It is this *exact* concern that the legislature sought to address in s. 1(3) of the Act.

[181] As the trial judge correctly noted, “[t]he OHSA anticipates that an Owner who has contracted with a third-party constructor will have a quality control role on the project” (para. 102). Martin J.’s interpretation, and that of the Court of Appeal, renders the quality control exception meaningless (2021 ONCA 252, 15 M.P.L.R. (6th) 161). It would no longer matter that owners do not become constructors by hiring quality control personnel. They would simply become employers who, in addition to constructors, have a strict duty to ensure compliance across the construction project.

[182] Martin J.’s attempt to minimize the effect of the structural distinctions in the Act falls short. She relies on a limitless application of the “belt and braces” approach, repeatedly falling back on the notion of overlapping responsibilities. Properly interpreted, the Act still contemplates a significant degree of overlap. For example, the health and safety obligations of individual employers with respect to their own workers are shared with the constructor. But the structure of the Act makes it clear that constructors, not employers, are responsible for the health and safety of all workers on a construction project.

[183] I further agree with the submission of the intervener municipalities that general contractors bring needed expertise to the management of construction sites. By contrast, many municipalities or other project owners neither have the resources nor

the institutional capacity to assume that role. The Act recognizes that worker health and safety are promoted by delegation to experts in the construction field.

(2) Due Diligence

[184] Martin J. is of the view that “fairness” concerns are addressed at the due diligence stage (see para. 50). With respect, the due diligence defence only becomes relevant once the elements of the statutory offence have been established. An employer’s ability to make out a potentially costly and burdensome defence is irrelevant to the proper interpretation of who is an employer on a construction site and to the scope of its corresponding statutory duties. This has nothing to do with “stigma” (para. 49), which is applicable in the context of strict liability offences. My concern is rather that, as a matter of purpose, it does not prevent future harm (*ibid.*, citing *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 219) to impose statutory liability on employers who have no connection to, or control over, the safety obligation in question.

[185] More fundamentally, a due diligence defence will simply be unavailing in many circumstances. I fail to see how a typical employer could possibly exercise due diligence, for example, over a constructor’s obligation to complete an approved notification form before using a suspended work platform (s. 7.1 of the Regulation). Similarly, I fail to see how, in *Nor Eng*, the engineering company working in Ottawa could possibly have demonstrated due diligence to ensure the integrity of a bridge structure with which it had no involvement.

[186] Curiously, Martin J. finds that a “close examination of the statutory scheme dispels any . . . absurdity” in similar hypothetical circumstances (para. 52). Despite her conclusion that all employers act as the virtual “insurer” of health and safety across construction projects, she appears to suggest, at para. 52, that an employer’s duties may not “span the entirety of the construction project”. This contradicts her own interpretation of the sweeping duties of employers under s. 25(1)(c) of the Act.

[187] Properly interpreted, the Act does, however, contemplate a meaningful role for the due diligence defence. I simply agree with Rowe and O’Bonsawin JJ. that the defence applies only after it is found that a given safety obligation applied to the employer in question (see paras. 143-44). Where an employer on a construction site did have some measure of control over the safety obligation in question, the burden shifts to the employer to demonstrate that it took “every precaution reasonable in the circumstances” (s. 66(3)).

C. *Application*

(1) The City Was Not an “Employer” on the Construction Project

[188] The real issue in this appeal is whether the City, as project owner and employer of its quality control inspectors, had a statutory duty to ensure compliance with ss. 65 and 104(3) of the Regulation (see Rowe and O’Bonsawin JJ., at para. 160). For the reasons set out below, I agree with the trial judge that the City was not an “employer” on the construction site as defined and intended by the Act (para. 90).

[189] In this case, the Ministry argued at trial that the City had become the constructor of the Elgin Project by virtue of the amount of control it exercised (see Ont. S.C. reasons, at para. 28). The trial judge clearly and repeatedly rejected this position:

The role of the Inspector was to ensure that the work being performed by Interpaving was consistent with the Contract. This included the quality of workmanship, materials and compliance with the Contract's terms

The Inspectors were responsible for ensuring that requests for progress payments to contractors were supported by the nature and quality of work completed. The Inspectors also dealt with the public.

The Inspectors were not responsible for the completion of any construction work. The Inspectors did not direct any workers on the Elgin Project. The Inspectors were required to comply with Interpaving's policies, including health and safety and personal protective equipment. [Emphasis added; paras. 24-26.]

[190] Throughout her reasons, the trial judge further emphasized that the City had no control over the project site or involvement in any construction work:

The fact remains that in actuality, the City did not undertake control of the Elgin Project.

Interpaving had actual, factual control and direction of the Elgin Project.

...

The City did not control the Elgin Project. Interpaving, the constructor, was responsible for health and safety. The City did not exercise control over the site to the point where they became the constructor. The City did not direct Interpaving employees. The City's Inspectors were primarily focused on the quality of the work being performed by Interpaving. The Inspectors assessed the quality of the materials on the Elgin Project and ensured that the work was properly performed prior to Interpaving receiving progress payments.

...

. . . the City did not exercise control over the work at the Elgin Project. The City was clearly an Owner. The Inspector(s) were subject to the Constructor's requirements pertaining to health and safety. The Inspector was focussed on ensuring that the work materials and work product reflected what was set out in the contract and provided feedback with regard to same. The City was clearly not an Employer. The City was not supervising the work. The City was not directing the work. The City hired a third party, Interpaving, because it had the knowledge and resources to complete the work.

There is no credible evidence in this matter that the City had control over the workplace. [Emphasis added; paras. 64-87.]

[191] The City's involvement in the project was thus limited to quality control. It was not responsible for the completion of any construction work. It did not direct or supervise any construction workers. Rather, it sent inspectors to ensure compliance with the terms of its contract, and to protect public funds, before making progress payments. This is not only commendable but also standard industry practice. The trial judge's conclusions on the City's lack of control at the project are findings of fact that deserve deference.

[192] It is entirely conceivable that a different employer at the Elgin Project could share liability with Interpaving, the constructor, for breaches of ss. 65 and/or 104(3) of the Regulation. For example, if Interpaving had hired a paving company to do the grading work, that company would be an employer on the project and strictly liable for any failure to ensure the assistance of a signaller. This liability would be shared with Interpaving, which would remain responsible (as constructor) for health and safety

across the project. The Act is designed to accommodate delegation and overlapping responsibilities of this nature.

[193] However, the role of a municipal project owner who hires quality control inspectors is necessarily different from that of the employer(s) involved in the actual construction work. The City undoubtedly had health and safety obligations vis-à-vis its own employees. For example, if it had engaged five or more inspectors, it would have been required to appoint a supervisor for them under s. 15(1) of the Regulation. But the provisions of the Regulation at issue in this case establish safety requirements — the need for fencing to be erected between construction work and the public and for a signaller to assist operators of heavy machinery — that can apply only to the construction project parties who undertake the construction work itself. The trial judge made it clear that the City was not involved in that work and had no control over it. She correctly held, in my view, that the City was therefore not an employer on the construction site merely by virtue of employing quality control inspectors.

(2) Due Diligence

[194] In the alternative, the trial judge found that if the City was an employer, it exercised due diligence (paras. 91-103). To fully understand her conclusion, it is necessary to consider her extensive review of the evidence. Part of the issue at trial related to the requirement that police officers be present at active or “lit” intersections while construction took place (“Police Requirement”). This requirement was incorporated into Interpaving’s contract with the City (para. 18). To satisfy the Police

Requirement, Interpaving would, when necessary, request officers from the Greater Sudbury Police Service (“GSPS”) through the City, which acted as a conduit. Two weeks prior to the accident, the City’s quality control inspector raised concerns:

[the] Inspector . . . noted that the Interpaving employees were using an excavator in the intersection of Beech Street and Elm Street while pedestrians and vehicles were also using the lit intersection. Flagmen from Interpaving were attempting to direct traffic. There had not been a request by Interpaving as per the Contract or the Police Requirement for GSPS officer(s). [para. 27]

[195] In response, the inspector conveyed his observations to an Interpaving supervisor, “who took no action” (para. 28). He then advised the chief inspector for the City, who contacted a manager at Interpaving. The manager came to the site and “stopped the work in the intersection” (para. 29). The inspector issued an instruction stating that work could not be performed at a lit intersection until police were present (para. 29). Nonetheless, on the day of the accident, Interpaving again worked through a lit intersection without making a request for the police (para. 30).

[196] By the express terms of its contract with the City, Interpaving was responsible for compliance with the Police Requirement as well as for ensuring that the requirements of the Act were met (Ont. C.J. reasons, at paras. 10 and 18). The trial judge found that when the City’s inspectors advised Interpaving of their view that it was breaching the Police Requirement and thus the terms of its contract, the City was “act[ing] appropriately by making Interpaving aware of the violation”:

[The manager] of Interpaving stopped the work through the intersection. That was the Constructor, Interpaving's decision. Moreover, if this act by the City were to constitute taking over the role as Constructor, it may dissuade the City from bringing the breach to the attention of the Constructor, for fear that it would assume the role of the Constructor and all that it entails. [para. 79]

[197] On Martin J.'s interpretation, the City would have shared the constructor's statutory obligations merely by being the employer of its quality control personnel. Not only would it have been "dissuade[d]" from raising issues regarding violations of the terms of its contract with Interpaving, but it would also have been dissuaded from monitoring quality and contract compliance at the project in the first place. The disincentive that Martin J.'s interpretation creates — which s. 1(3) of the Act seeks to avoid — is borne out on the facts of this case.

[198] As the trial judge concluded, "[t]he City should be commended and not condemned for its behaviour" two weeks before the accident in raising concerns about the lack of police at a "lit" intersection (para. 80). This was an "issue of public safety" (para. 80). I agree. By contrast, Martin J.'s approach penalizes the City for choosing to monitor quality and contract compliance. While the Police Requirement derives from the *Ontario Traffic Manual: Book 7 — Temporary Conditions* (2022) and the City's role in maintaining the road network, the same disincentive issue arises with respect to Interpaving's obligations under the Act. The City "suggested to Interpaving that there was insufficient signage, issues with signage and insufficient access to crosswalks for the public" and "advised Interpaving that fencing had been knocked down on the Elgin

Project” (Ont. C.J. reasons, at paras. 95-96). Such action should be encouraged, not condemned.

[199] For these reasons, the trial judge correctly found that even if she was wrong in concluding that the City was not an employer on the construction site, it took every precaution reasonable in the circumstances to ensure safety at the project (para. 91). With respect, my colleagues ignore both the trial judge’s findings on the City’s lack of control and her alternative findings on the due diligence exercised by the City in choosing to remit the matter to the trial court to reconsider the exact same issues. I strongly disagree.

III. Summary and Disposition

[200] In sum, it is an “extravagant proposition”, as noted by the intervener municipalities, to say that a municipal project owner “becomes an employer of every person on a project” by attending the project for the limited purpose of quality assurance (transcript, at p. 51). Properly interpreted, the obligations prescribed by ss. 65 and 104(3) of the Regulation were the responsibility of the constructor and/or the employers who performed the relevant construction work. The City had no involvement in or control over that work and was therefore not an employer at the construction project. To impose statutory liability on the City in these circumstances would be a regrettable departure from the established scheme of the Act. I would allow the appeal and restore the acquittals entered by the trial court on all charges.

[201] Finally, in the interests of clarity, I would respond to the three questions posed by Martin J. at para. 61 of her reasons — in the unique and distinct context of construction projects — as follows:

1. Was the accused an “employer” under s. 1(1) of the Act?
 - a. The fact that a municipal project owner is the employer of quality control inspectors does not make it an employer on the construction project itself or an employer of any construction workers. The Act expressly permits a project owner to employ quality control inspectors without taking on health and safety responsibility for the project (s. 1(3)). Likewise, a project owner is not the employer of its constructor, as this would render the statutory role of constructor redundant.

2. Did the accused breach s. 25(1)(c) of the Act?
 - a. Section 25(1)(c) of the Act must be read in context, and its interpretation must be informed by the content of the accompanying, industry-specific regulations. On construction projects, employers are not responsible for obligations specifically imposed on other workplace parties or over which they have no control. As the Ministry

acknowledges, the constructor is the sole authority responsible for health and safety across construction projects. Each employer is responsible for the health and safety of its own workers.

3. Should the accused avoid liability because it exercised due diligence under s. 66(3) of the Act?

a. The due diligence defence only becomes relevant once the elements of the offence have been established. It does not affect the proper interpretation of the term “employer” or alter the nature of the offence. The defence can only possibly be discharged by an employer on a construction project with some connection to, or control over, the safety obligation in question. Otherwise, the defence will simply be unavailing.

Appeal dismissed on equal division, KARAKATSANIS, CÔTÉ, ROWE and O'BONSAWIN JJ. dissenting.

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