

The newest word in regulatory offences (*R. v. City of Greater Sudbury*)

Litigation | Litigation & Dispute Resolution | Occupational Health and Safety Act | Supreme Court of Canada

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The Supreme Court of Canada in 2024 delivered an important decision in the area of regulatory prosecutions in the case of *R. v. Greater Sudbury (City)*.^[1] This appeal arose from a fatal accident and concerned 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 tragically 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".

The legal issue on the appeal concerned 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.

Justice Martin J. (Wagner C.J. and Kasirer and Jamal JJ. concurring) provided the short answer in the following paragraph:

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).^[2]

I A Broad definition of "employer" does not require the prosecution to prove control

The Supreme Court embraced a broad definition of "employer" without reading in a requirement of control:

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.^[3]

The Court points out that the absence of a control test is consistent with the general law in relation to independent contractors:

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).[4]

II The Safety valve of Due diligence

The Court recognizes that such a wide definition requires a safety valve, and that mechanism is the due diligence defence:

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.[5]

III Functional analysis: employers have the best evidence about contractual relationships with subcontractors

From a functional perspective it makes sense for a defendant to adduce evidence about the level of control that it has over its subcontractors. This is why the Court situates that test within the due diligence defence:

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).[6]

In my view, the placement of the test of control over subcontractors within the due diligence defence is justified as a matter of logic and functionality. The company that hires a subcontractor has the best access to the contractual documents and arrangements with that subcontractor. It does not make functional sense to require the prosecution to prove beyond a reasonable doubt the intricacies of contractual relationships with subcontractors. The same logic was applied by the Court in the *Wholesale Travel*[7] case where the Court commented that the defendants have better access to the systems of due diligence that they utilise.

I would add two caveats to my support of the principle that control over subcontractors ought to be considered at the due diligence stage.

(i) Prosecutors should exercise discretion

I would hope that regulators would exercise discretion to not lay charges in the event that companies and organizations can produce evidence that they exercised due diligence in the retention and supervision of subcontractors. This discretion would save both the judicial system and potential defendants considerable expense in appropriate cases. There is generally no costs rule in regulatory proceedings to reimburse defendants who must prove a legal defence of due diligence.

(ii) The fiction that regulatory offences do not punish should be jettisoned

In my view it was unnecessary for the Supreme Court to rely on the rationale that regulatory offences do not condemn and punish past, inherently wrongful conduct, but rather their goal is to "preven[t] ... future harm through the enforcement of minimum standards of conduct and care". With respect, this language confuses an *ex ante* scheme with *ex post* regimes.

A true ex ante system

A true system to prevent future harm through the enforcement of minimum standards would be an *ex ante* licensing regime. One could imagine a legislative scheme whereby a contractor would have to apply for a site specific permit to build a building at a certain address, in the same way that a restaurant chain would apply for a liquor licence at a given restaurant location. Breaches of the permit could lead to the licence being revoked.

As the tragic facts in the *City of Sudbury* case illustrate, the area of occupational health and safety is an area where more expansive use of *ex ante* licensing regimes could proactively save lives.

The present system is ex post and not proactive



The present system under the occupational health and safety regimes in Canada is not a true *ex ante* regime. Rather, this legislation is an *ex post* regime whereby charges are only laid after a breach of the regulations or a tragic event. An *ex post* regime is used in most Criminal Code prosecutions. The same principles apply in Criminal Code *ex post* prosecutions. The punishment that is meted out after the fact serves to deter on both specific and general levels. The goal is to condemn and punish past, inherently wrongful conduct. In addition, in the Criminal Code scenario, one of the purposes of punishment is to prevent future harm through the enforcement of minimum standards of conduct and care via the mechanism of both specific and general deterrence. In the *ex post* world, the only real difference between regulatory offences and Criminal Code offences is the severity of punishment, which is higher under the Criminal Code.

There is a clear distinction between true *ex ante* licencing regimes that proactively seek to prevent harm before it occurs, and true *ex post* regimes that punish after the fact to achieve various goals including deterrence of future offences. The test with respect to control of subcontractors can be framed within the *ex post* model without muddying the waters and referring to prevention of future harm.

To summarize, within the *ex post* regime, the placement of the test of control over subcontractors within the due diligence defence is justified as a matter of logic and functionality. The company that hires a subcontractor has the best access to the contractual documents and arrangements with that subcontractor.

(iii) The dissent with respect to control

It is worth noting that in *R. v. Greater Sudbury (City)*, a strong dissent was written by Rowe, O'Bonsawin JJ. (dissenting) (Karakatsanis J. concurring). The dissenting judges posed the following question:

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.[8]

Justice Cote wrote a separate dissent. In her 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.[9]

(iv) The test of stigma

The Supreme Court decision in *R. v. Greater Sudbury (City)* also attempts to justify the reversal of the onus with respect to control over subcontractors on the basis of reduced levels of stigma:

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.[10] [emphasis added]

The concept of stigma has been used by the Court in the context of administrative monetary penalties ("AMPs"). In the decision in *Guindon* the court found that "no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty".[11] The decision does not elaborate on the reasons for this conclusion. There is no doubt that the stigma from a criminal conviction with the possibility of imprisonment and the imposition of a criminal record is higher than an AMP. An analysis of stigma may require further elaboration in the future. For example, the measure of stigma could perhaps be the subject of expert evidence using an appropriate sample size in a future case.[12]



Now the Court in *R. v. Greater Sudbury (City)* has ruled that 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.

With respect, the jurisprudence on the topic of stigma is inconsistent, illogical, and simply a mess.

With respect to the least punitive regime, being AMPs, the Court has described the stigma as not comparable to that attached to a criminal conviction. The logical implication of this is that there is some stigma, but just not a level of stigma that is comparable to that attached to a criminal conviction.

At the next level up from AMPs, which are strict liability offences, one would expect the level of stigma to be higher than that for an AMP, but below that of true criminal offences such as Criminal Code offences.

Yet at this level the Supreme Court makes the blanket statement that “stigma will not attach to employers who are found to have breached section 25(1)(c).” This is clearly inconsistent with the pronouncement in *Guindon* that there is stigma, but just not that comparable to Criminal convictions.

At the highest levels, for offences such as price fixing, the Courts have described such offences as extremely serious. Price-fixing was aptly described in *R. v. Maxone Auto Parts*^[13] as analogous to fraud and theft. Effectively, this was a fraud on the public.^[14] For these offences, one would expect stigma to be at the highest.

In my view, the focus on stigma has led us down the wrong path. The more appropriate inquiry is the risk of a wrongful finding of a violation. In criminal law, there is a collective concern about the risk of a wrongful conviction. Yet this collective concern is not translated into a similar fear about the risk of a wrongful finding of a violation in administrative law. Translated into the world of strict liability offences, I would make the same comment. The finding by the Supreme Court that there is no stigma attached to a conviction, which could be a wrongful conviction, is troubling. The more appropriate question is to evaluate the risk of such a wrongful conviction of a regulatory offence and to build in safeguards to prevent such wrongful convictions.

(v) The sequel

The Supreme Court of Canada set up the sequel to this story by remitting the matter to the first level appeal court to consider the trial judge's finding that the City had acted with due diligence. Justice Cornell ruled that the City had acted with due diligence:

The trial judge found that the City did monitor and supervise Interpaving's work.

It did so by notifying Interpaving about the traffic chaos on 15 September 2015. It did so by taking complaints from the public and making Interpaving aware of the concerns. It did so by raising concerns about signage and insufficient access to crosswalks for the public. It did so when concerns about fencing were raised. It did so by attending periodic progress meetings. The trial judge referred to this evidence when she concluded that the City had acted with due diligence.

Conclusion

All of the evidence that I have reviewed was taken into consideration by the trial judge and formed the basis for the trial judge's finding that the City had exercised due diligence.^[15]

At the end of the day the functionality test proved workable. The City was able to provide evidence of the contractual relationship and the due diligence steps that it took in relation to the subcontractor Interpaving.

Going forward, employers cannot simply defer to the decisions of subcontractors. Employers must have their own supervisory system of due diligence over subcontractors. Such a system should include taking complaints from the public and making the subcontractor aware of the concerns. An employer cannot simply stand by but must raise concerns about occupational safety where appropriate. It will be prudent for representatives of an employer to attend periodic progress meetings.

With respect to potential legislative reform, the tragic facts in the City of Sudbury case will hopefully encourage governments to expand the use of ex ante licencing regimes which could proactively save lives. A PDF version is available to download [here](#).

For more information please contact the author or Gardiner Roberts' **Compliance and Risk Solutions Group**.



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- [1] *R. v. Greater Sudbury (City)*, 2023 SCC 28 at paragraph 4.
- [2] *R. v. Greater Sudbury (City)*, 2023 SCC 28
- [3] *R. v. Greater Sudbury (City)*, 2023 SCC 28 at paragraph 5.
- [4] *R. v. Greater Sudbury (City)*, 2023 SCC 28 at paragraph 18.
- [5] *R. v. Greater Sudbury (City)*, 2023 SCC 28 at paragraph 37.
- [6] *R. v. Greater Sudbury (City)*, 2023 SCC 28 at paragraph 49.
- [7] *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154,
- [8] *R. v. Greater Sudbury (City)*, 2023 SCC 28 at paragraph 139
- [9] *R. v. Greater Sudbury (City)*, 2023 SCC 28 at paragraph 165.
- [10] *R. v. Greater Sudbury (City)*, 2023 SCC 28 at paragraph 49.
- [11] *Guindon v. R.* (2015), 327 C.C.C. (3d) 308, 2015 SCC 41 (S.C.C.) (“Guindon”), para. 84.
- [12] Robert J. Currie, “The Contextualized Court: Litigating ‘Culture’ in Canada” (2005), 9 *International Journal of Evidence & Proof* 73 at 91. A recent decision underlines that judicial notice of cultural factors cannot be made in the absence of expert evidence: see *Quebec (Attorney General) v. 156158 Canada Inc. (Boulangerie Maxie’s)*, 2015 QCCQ 354, 2015 CarswellQue 522 (C.Q.) at paras. 46–47.
- [13] *R. v. Maxone Auto Parts*, 2012 FC 1117 at paragraph 54
- [14] *R. v. Canada Bread Co.* [2023] O.J. No. 2826, 2023 ONSC 3790.
- [15] *R. v. Greater Sudbury (City)*, 2024 ONSC 3959 at paragraphs 32 to 34.

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