Publisher's Note

This student edition of the loose-leaf service entitled Profiting from Risk Management and Compliance, by The Hon. Todd Archibald and Kenneth Jull, has been created specifically for your course. The sections included in this student edition are replicated from the original loose-leaf publication.

What's New

In Chapter 2, the role of artificial intelligence is discussed in the context of risk management.

Chapter 3 reviews money laundering and the cautionary tale of the Toronto Dominion Bank paying $3 billion to resolve a U.S. investigation into its anti-money laundering practices.

Chapter 4 updates the role of corporate social responsibility in relation to corporate governance. We argue that there is a love-hate relationship between corporate social responsibility and the role of government.

Chapter 5 introduces a new duty of regulators to warn those who are regulated of complaints and potential issues as part of procedural fairness.

Chapter 6 reviews the continuing trend in the expansion of administrative monetary penalties (AMPs). A new section is added: § 6:4 "Wrongful Violations and Innocence in the World of Administrative Monetary Penalties". We argue that the focus on stigma in the cases has led down the wrong path. The more appropriate question is the risk of a wrongful violation. A parallel is drawn between the research about causes of wrongful convictions, and the potential for some of the same factors to result in wrongful findings of regulatory violations.

Chapter 6 reviews recent AMPs, including the AMP of almost $40 million in the *Cineplex* case of drip pricing. This decision is an important precedent in referring to behavioural research concerning drip pricing, considered in earlier editions of this text.

Developments with respect to evidence and AMPs are also canvassed in Chapter 6. The leading decision in the case of *Guindon* is revisited with further thoughts about potential future constitutional challenges. A significant development is the Supreme Court of Canada decision in *Poonian* which confirmed that there is no afterlife for AMPs after bankruptcy except for disgorgement orders of amounts obtained as a result of fraudulent conduct.

Chapter 7 discusses the risk analysis in the Court of Appeal decision in *Michaud* (covered in previous editions) as it has been applied by the Ontario Land Tribunal in the context of new amendments to environmental legislation such as the Ontario *Conservation Authorities Act*. This supports the use of *ex ante* preventative licencing regimes to prevent harm and risk to life and safety.

Chapter 8 contains significant revisions. The intersection of politics and the enforcement of offences is illustrated by the rise and fall of Elliott Spitzer. The Supreme Court of Canada in 2023 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 that 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 a brief 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 estab-

[1] *R. v. Greater Sudbury (City)*, 2023 SCC 28 (S.C.C.).

lish control over the workers or the workplace to prove that the City breached its obligations as an employer under s. 25(1)(c).[2]

The *Greater Sudbury* case is important and discussed in Chapter 8 on many levels, including definitions of employer, the scope of due diligence, relationships with contractors, and the absence of stigma that the Court identifies in relation to regulatory offences. In Chapter 8, we stress that it will be important for prosecutors to recognise the difference between oversight control on a macro level and specialised expertise of contractors on a micro level.

As we stated in Chapter 6, we submit that the focus on stigma has led our courts 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, we make the same comment. The finding by the Supreme Court that there is no stigma attached to a conviction for a regulatory offence, which could be a wrongful conviction, is interesting. 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.

The Supreme Court of Canada set up the sequel to the *Greater Sudbury* 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. Leave to appeal this decision was refused by the Court of Appeal in 2025. This decision affirms the concept that the determination of due diligence must be analyzed with respect to the specific acts alleged. The employer must show that it acted reasonably with regard to the prohibited act alleged in the particulars and not some broader notion of acting reasonably.

The Supreme Court decision in *Greater Sudbury* recognizes a typology of regulatory offences in the context of occupational health and safety legislation. Some sections 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". The 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 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.

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[2] *R. v. Greater Sudbury (City)*, 2023 SCC 28 (S.C.C.), at para. 4.

Chapter 8 reviews several examples of offences under the *Occupational Health and Safety Act* to illustrate this typology. One debate within the cases relates to the distinction between disjunctive provisions (using the word "or") and conjunctive provisions which require the Crown to prove multiple elements (using the word "and").

A new section in Chapter 8 considers the split in cases across the country with respect to the issue of whether foreseeability is part of the *actus reus* that must be proven by the prosecution, or whether it is confined to the due diligence phase of a regulatory trial. The Ontario cases generally draw a hard line with respect to foreseeability between the *actus reus* stage and the due diligence stage: Foreseeability is an issue that arises at the due diligence inquiry, and not at the stage of determining whether the crown has proved the particular act.

The Western cases go the other way as a result of the decision in *Precision Diversified*. Before *Precision Diversified*, the reasonable foreseeability of steps needed to address an unsafe condition would have been considered when deciding if a company had proven a due diligence defence on a balance of probabilities. Now, this is to be considered in deciding whether both the Crown and the company have met their respective but different burdens of proof.

In Chapter 8, we argue that there is a middle ground which should help to pave the way forward. That middle ground is found in the doctrine of "threshold foreseeability".

New sections are added with respect to the use of expert evidence by both the Crown and the defence.

A new and, we think, exciting section applies behavioural research to the assessment of foreseeability. A growing body of psychological literature has revealed that ordinary causal judgement is susceptible to the violation of norms: when two agents perform the same action (yet one does so in violation of a norm), the norm-violating agent is taken to be the cause of the harmful outcome.

This research has potentially profound implications for the analysis of foreseeability within the context of regulatory offences. There is a risk of tunnel vision if inspectors assume that a norm has been violated and as such this may lead to a premature conclusion of causality or foreseeability. There is also a risk of hindsight bias, that has been recognised in recent jurisprudence.

Chapter 8 also considers the admissibility of post-incident remedial measures as they pertain to due diligence. The treatment of post-incident remedial measures was considered in the case of *Ontario*

(Ministry of Labour) v. Great Lakes Food Company Ltd.,[3] discussed earlier in this Chapter under the concept of foreseeability. In this case, the Crown invited the Court to consider post-incident conduct as proof of the *actus reus* of the offence, specifically the purchase of floater coats by Great Lakes Food after the accident. Work orders were issued on behalf of the Ministry of Labour after the tragic incident. The first of those orders directed Great Lakes Food to provide suitable protective equipment to the people working on the trawler and require that equipment's mandatory use when cold water conditions existed. After the work order was issued, Great Lakes Food purchased floater coats and now requires workers on board all their ships to wear the floater coats while working. The jackets purchased have material that is buoyant, with neoprene to help protect against cold water in case of immersion.

Judge Hilliard ruled that this post-incident conduct could not be considered by the Court as proof of the *actus reus*. All evidence of remedial action by the company may be used solely to refute any defence of due diligence should such a defence be raised.

In determining that the post-incident conduct of Great Lakes Food could not be used as proof of the *actus reus* in this case, Judge Hilliard also considered that the changes implemented were compelled by the work order issued by the Ministry of Labour. Section 66 of the Ontario *Occupational Health and Safety Act* makes it an offence to fail to comply with an order of an inspector. In this case, a number of work orders were issued by the Ministry to Great Lakes Food, one of which was that Great Lakes Food "shall protect workers from the hazard of cold water immersion [...] by providing suitable protection equipment and requiring its mandatory use when cold water conditions exist". The purchase of the floater coats was because of this work order and therefore the action taken by Great Lakes Food was compelled by the Ministry. Accordingly, Judge Hilliard held that such compelled action by Great Lakes Food cannot be evidence of the *actus reus* of the offence on a strict liability offence.

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[3] *Ontario (Ministry of Labour) v. Great Lakes Food Company Ltd.*, 2022 ONCJ 447 (Ont. C.J.).