PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Halifax Port Authority*, 2022 NSPC 13

Date: 20220224
Docket: 8453323
Registry: Halifax

Between:

Her Majesty the Queen

v.

Halifax Port Authority

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	July 12, 14, 20, September 14, 2021 in Halifax, Nova Scotia
Decision	February 24, 2022
Charge:	148(1) Canada Labour Code
Counsel:	Monica McQueen, Maile Graham-Laidlaw for the Crown Stan MacDonald, Paul Niefer, for the Defendant

By the Court:

Introduction

[1] The Halifax Port Authority (HPA) is charged with an offence under the *Canada Labour Code*. It is alleged that they failed, in respect of a work place controlled by them, to install prescribed barriers to prevent rear-dumping vehicles from tipping at the edge of a sudden drop in grade level.

[2] The allegation arises out of a tragic incident. On July 9, 2018, Michael Wile drowned when the dump truck he was operating went into the water at the Fairview Cove Sequestration Facility (FCSF).

[3] The FCSF was the site of a marine infill project designed to extend useable land for a potential container terminal expansion. The project also provided a location for disposal of pyritic slate which is hazardous unless sequestered. The HPA administered the facility as federal property and was paid a fee to receive the slate. However, daily operations were managed by David Seaboyer, the president and sole employee of a private company paid by the HPA to oversee the facility. Slate was hauled to the FCSF by dump truck and dumped at a designated location at the water's edge (the active work face).

[4] Due to the hard work and cooperation of counsel, the issues in this case were considerably narrowed. Much of the evidence was presented through Agreed Statement of Fact or materials filed on consent, all but one element of the offence was conceded and no due diligence defence was put forward.

[5] The only disputed element is whether the Crown has proven the location was a "work place". To be a work place for purpose of this proceeding, the location must be a "place" where an employee of the HPA was "engaged in work" for the HPA.

[6] Employees of the HPA worked at the FCSF from time to time and the Crown argues that Mr. Seaboyer, who described himself as self-employed, was a de facto employee of the HPA. However, neither Mr. Wile nor any of the other operators who hauled slate to the FCSF were employees of the HPA and no

employee of the HPA ever operated a dump truck at the active working face or was otherwise exposed to a risk of tipping at the edge of a sudden drop in grade level.

[7] The Crown argues that the FCSF is an integrated whole. Employees of the HPA worked there, therefore it is a "work place" of the HPA and they had a duty to install barriers in accordance with the regulated standard. They did not, so they are guilty of the offence.

[8] The Defence argues that "work place" must be interpreted contextually and purposively so as to require a reasonable nexus between the area in which "an employee is engaged in work" and the risk that the specific duty and regulation are intended to address. Interpreted in that way, the location under consideration should be the active work face since that is the location where the risk identified in the legislation existed. Since no employee of the HPA ever operated a dump truck at the active work face or was otherwise exposed to the hazard identified in the legislation and Regulation, the location is not a work place.

[9] That argument requires me to determine the geographic and functional scope of "work place". Understanding the nuances of the argument requires further legal and factual background.

Charge and Legislation

[10] The Halifax Port Authority is charged that it did:

> On or about July 9, 2018, at or near Halifax, in the Province of Nova Scotia failed to install guards, guard-rails, barricades and fences in the work place in order to prevent rear-dumping motorized materials handling equipment from tipping at the edge of a sudden drop in grade level, as prescribed by subsection 14.40 of the *Canada Occupational Health and Safety Regulations SOR/86-304*, contrary to subsection 125(1)(b) of the *Canada Labour Code*, thereby committing an offence under subsection 148(1) of the *Canada Labour Code*.

[11] Sections 125 and 148 are found in Part II of the *Canada Labour Code* (the Code) which deals with Occupational Health and Safety. It applies "to and in respect of employment" that is "on or in connection with the operation of any federal work, undertaking or business" (s. 123(1)(a)).

[12] "Federal work, undertaking or business" is defined in s. 2 of the Code and includes "… any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the

foregoing, (a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada".

[13] The purpose of Part II, as it read at the time, was "to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies." (s. 122.1).

[14] The general duty on every federal employer is to "ensure that the health and safety at work of every person employed by the employer is protected" (s. 124).

[15] This case concerns the specific duty created by s. 125(1)(b) which reads as follows:

> 125(1) Without restricting the generality of section 124, **every employer shall, in respect of every work place controlled by the employer** and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> > **(b) install guards, guard-rails, barricades and fences in accordance with prescribed standards**;

[16] "Employer", "employee" and "workplace" are defined in Part II of the Code:

> **Employee** means a person employed by an employer;
>
> **Employer** means a person who employs one or more employees and includes an employers' organization and any person who acts on behalf of an employer;
>
> **Work place** means any place where an employee is engaged in work for the employee's employer

[17] The prescribed standard that applied in this case is found in subsection 14.40 of the *Canada Occupational Health and Safety Regulations* (SOR/86-304) (the Regulation) which, at the time of the alleged offence, read as follows:

> 14.40 Where rear-dumping motorized materials handling equipment is used to discharge a load at the edge of a sudden drop in grade level that may cause the equipment to tip and in order to prevent the motorized materials handling equipment from being backed over the edge,
>
> (a) a bumping block shall be used; or

(b) a signaller shall give directions to the operator of the equipment.

Arguments and Analysis

[18] The Crown acknowledges that the combined effect of s. 125(1)(b) of the Code and sub-section 14.40 of the Regulation requires the Crown to prove the following unless conceded:

- date, jurisdiction and the corporate identity of the accused;
- the validity of the Regulation;
- that the HPA is an "employer" subject to Part II (ss. 2, 123(1)(a), 124 & 125 of the Code);
- that the location of the alleged offence was a "work place" of the HPA (s. 125 of the Code);
- that the HPA could exercise control over the location (s. 125 of the Code);
- that the activity at the workface involved "rear-dumping motorized materials handling equipment" being used to "discharge a load at the edge of a sudden drop in grade level that may cause the equipment to tip" (sub-section 14.40 of the Regulation); and,
- that on July 9, 2018, no signaller or bumping block was in use at the workface at the FCSF as prescribed by subsection 14.40 of the Regulation.

[19] The only element the Defence disputes is that the location of the alleged offence was a "work place" of the HPA, as required by s. 125(1) of the Code. All other elements are conceded or not disputed and the Defence does not advance a due diligence defence.

[20] The Crown spent some time in its written and oral argument addressing the extent to which the HPA controlled the facility. The ability of the HPA to control the site has been conceded. I agree with the Defence that control is a necessary requirement for a finding that the duties in s. 125 applied to the HPA, but it is not sufficient. There must also be a finding that the location was a work place. The extent of control or whether control is exclusive might be relevant in determining whether a proposed interpretation of work place is reasonable or in assessing the

potential consequences of accepting one interpretation over another, but control over a physical space is not determinative of whether that place is a work place.

Background Facts

[21] The evidence was presented through: a comprehensive Agreed Statement of Fact (ASF) filed pursuant to ss. 655 and 795 of the *Criminal Code* (Ex.1); the testimony of Mary Clarke, a health and safety officer with the federal Department of Labour, Trevor Routledge, an occupational health and safety officer with the Nova Scotia department of labour, and David Seaboyer, site manager for the FCSF; audio recordings of interviews by Officer Clark of Paul MacIsaac (Ex. 4 and transcript in aid) and Chris MacDonald (Ex. 8 and transcript in aid) and, various documents, photographs and recordings entered through these witnesses or on consent.

[22] At the relevant time, the HPA, a Canadian Port Authority, incorporated under the *Canada Marine Act*, administered the FCSF as federal property under Schedule B of the Letters Patent under the *Canada Marine Act*. The FCSF is located in Halifax, adjacent to the Fairview Cove Container Terminal and the Bedford Basin. The HPA undertook a marine infill project, approved by the Department of Fisheries and Oceans, to extend useable land into the Basin for a potential container terminal expansion. The project also provided a location for disposal of pyretic slate which is generated from local construction projects and is hazardous unless sequestered in a non-oxygenated environment such as below water.

[23] The HPA paid SiteLogic, a private company, to oversee the FCSF. David Seaboyer, its president, representative and sole employee, was the site manager who oversaw its daily operations.

[24] Access to the site was through a cordoned entrance off the Africville Road. An area at the entry to the property was accessible to public vehicles. However, vehicular access to the remainder of the property was controlled.

[25] The main activity on the site was the infill/sequestration project. However, there was activity taking place on the property other than the sequestration of slate. For example, an area referred to as the “creosote cemetery” (a burial ground for creosote-laden material) and an area that had been part of the former city dump so contained household garbage and was under investigation for possible rehabilitation.

[26] The HPA had agreements with companies who wished to dispose of pyritic slate (the Generators). Mr. Seaboyer signed most of these agreements on behalf of the HPA. The Generators were permitted to dispose of the slate at the FCSF for a fee, in accordance with conditions which included quality and environmental restrictions.

[27] Dump trucks (conceded to be rear-dumping, motorized, materials-handling equipment for purpose of the Regulation) were used to deliver and discharge loads of slate to the site. These trucks and their operators were provided by the Generators. The HPA did not employ any of the operators or own any of the trucks.

[28] The sequestration operation at the FCSF involved receiving slate from the Generators, which was placed below the waterline and then capped with non-hazardous fill, thereby extending the shoreline and creating more useable land. Dump trucks would arrive at the FCSF, present themselves to a scale house where their load would be weighed and a photograph taken of the front of their truck. They would then proceed to the designated area to dump their load. That location would change over time as the project progressed and the infilled area, referred to as the "working platform", expanded. Mr. Seaboyer would designate the specific area where the dump trucks were to dump their load each day. This area, referred to as the "active working face", was on the working platform at the water's edge, between two barriers used to identify the location. Mr. Seaboyer testified that the goal was to have the trucks close enough to the edge so that half of the load went into the water and half stayed on the deck, however, experienced drivers could get 75% of their load into the water.

[29] When the site was open and operational there was no physical barrier between the scale house and the active work face. The working platform and active work face were not fenced off or otherwise physically separated from the remainder of the facility.

[30] The ASF includes admissions that:

- The edge of the active working face, along the water, has and had on July 9, 2018 "a sudden drop in grade level" from the platform level to the water level; and,
- During dumping operations at FCSF (discharge at the working face by rear- dumping, motorized, materials-handling equipment) there was

> no bumping block, guard rail, barricade or fence between the dump trucks and the water at the active working face on July 9, 2018.

[31] Mr. Seaboyer testified that a "safe dump ramp" (a ramp sloping up to the water's edge, also described as a "berm") was created as a function of dumping a portion of the load on the deck. This would create a berm which was then flattened down to make a ramp. The ramp was not inspected or recreated after every dump. Rather, it was monitored in a general way and attended to about four times a day unless a problem was reported by an operator or observed by Mr. Seaboyer. The Defence did not argue that this slope or berm would have satisfied the requirements in Regulation 14.40 for a bumping block or signaller.

[32] A separate company was contracted by the HPA to provide equipment and operators, material, transportation, and supervision necessary for the reception, disposal, and sequestration of the slate and the stockpiling, loading, hauling and placement of capping and cover material. This "placement" work was carried out under the direction of Mr. Seaboyer. It included maintenance of the berm at the active working face and providing a spotter when one was used. In 2014, a signaller (spotter) who was an employee of the placement company but under the direction of Mr. Seaboyer was added to the operation at the FCSF. However, at the end of 2017, the person who held that position was terminated and no signaller was in use on July 9, 2018. No employees of the HPA performed placement work.

[33] It is agreed that Michael Wile drowned on July 9, 2018 while operating a dump truck and discharging material at the active working face of the FCSF because his truck went into the water.

[34] It is also agreed that Mr. Wile was not an employee of the HPA and that no employee of the HPA operated "rear-dumping motorized materials handling equipment" at the active workface of the FCSF.

[35] The HPA employed Chris MacDonald as its Environmental Manager. Information about his involvement with the FCSF came from the ASF, the testimony of Mr. Seaboyer and Officer Clark's interview with Mr. MacDonald which was filed on consent.

[36] Mr. Seaboyer testified that after 2015, his contact with the HPA was with Mr. MacDonald. There were significant environmental concerns with the operation at the FCSF, so Mr. MacDonald oversaw the operation of SiteLogic. His

role was to ensure that the organization was compliant with all environmental laws and requirements. He provided operational direction and oversight for the site surveys and water sampling. Mr. Seaboyer testified that Mr. MacDonald was involved in other work at the location but left the operation of the sequestration facility to him with little instruction.

[37] In his interview, Mr. MacDonald described his role with the FCSF as the representative of the HPA, in contact with Mr. Seaboyer to ensure "that the Sequestration facility was operational and had the resources required to facilitate work" (p. 3 of transcript). He described his role as "quite limited" because he allowed Mr. Seaboyer to "operate and manage the facility" and said he was "a support" to Mr. Seaboyer in various ways to ensure they were within the *Fisheries Act* Authorization limits (p. 4 of transcript). He visited the site to speak with Mr. Seaboyer and to ensure that the infill area and types of materials used for infill remained within environmental limits.

[38] Mr. MacDonald did not have an office at the FCSF. However, he communicated with Mr. Seaboyer daily by text, telephone and sometimes emails. Mr. MacDonald also attended the FCSF frequently. He was there at least once per week and sometimes more often. He would sometimes see Mr. Seaboyer but would also sometimes text to say he was coming and not visit with Mr. Seaboyer. He would generally stay for less than an hour.

[39] Mr. MacDonald was familiar with many of the features and procedures at the site, including the general process for receiving the generators at the scale house, the presence of the "safe slope" at the working face, the fact that a loader and excavator were on-site and used to maintain the slope, the fact that the person who occupied the position of "checker" was terminated (although he did not appreciate that the position would be terminated) (pp. 10, 16, 18, & 21 of transcript).

[40] When at the site, he would observe and discuss the progress of the work with Mr. Seaboyer but would not do anything physically. It is agreed that Mr. MacDonald did not operate any dump trucks or heavy equipment there and was not exposed to the risk identified in sub-section 14.40 of the Regulations.

[41] Mr. MacIsaac was a Vice President with HPA. In his interview, he acknowledged that after the incident and subsequent Notice of Danger issued by the Department of Labour on July 13, 2018 (Ex. 9), he advised he would shut down operations, took measures to respond and then provided Officer Clark with a

Memo outlining new procedures. In his interview, he confirmed that Mr. Seaboyer was responsible for day to day management of the facility but also acknowledged that the HPA had the management of the facility, through Mr. MacDonald, and was not merely a landlord (pp. 3 & 4 of transcript).

[42] Mr. Seaboyer testified that, on occasion, other employees of HPA attended the FCSF. For example, IT personnel and HPA dump truck drivers. He said that the IT employees attended a few times to help set up or deal with problems relating to the computers used in the scale house. The HPA truck drivers attended once or twice, bringing material other than slate to the site to be stored or used for purposes other than the in-fill project. Mr. Seaboyer testified that he believed that HPA employees stayed away from the water's edge.

[43] In their respective interviews with Officer Clark, Mr. MacDonald and Mr. MacIsaac both confirmed that various HPA health and safety officers attended at the FCSF to become familiar with the operation (p. 11-12 of MacDonald transcript and pp. 9, 27 and 35 of MacIsaac transcript).

[44] Mr. Seaboyer denied that he was an employee of the HPA and described himself as a self-employed person who provided services to the HPA on a fee for services basis.

[45] Mr. Seaboyer and SiteLogic were charged with offences under the Nova Scotia *Occupational Health and Safety Act*. They each pleaded guilty to two offences under s. 74(1)(a) of the Act. Specifically, failing to take every precaution that is reasonable in the circumstances to ensure the health or safety of persons at or near the workplace as required by s. 14(a) by failing to ensure there was a "spotter" in place at the working face when operators were dumping slate and failing to ensure the site-specific safety requirement of a "safe dump ramp" was in place at the working face.

Arguments and Analysis

[46] The Crown argues that the definition of "work place" requires only that the location of the alleged offence is a place where employees of a federally regulated employer were engaged in work for that employer. The Crown submits that the "place" is the entire FCSF and "engaged in work" for ones employer includes any type of employment. The Crown submits that the FCSF was an integrated whole and employees of the HPA were engaged in work there. Therefore it was a work place. Specifically, that Mr. Seaboyer was an employee rather than a self-

employed independent contractor. Further, others, such as Mr. MacDonald and, to a lesser extent, HPA safety managers, IT staff and truck drivers, all worked at the site from time to time. As a result, regardless of whether Mr. Seaboyer was an employee of the HPA, there were employees of HPA who were engaged in work for the HPA at the FCSF. Therefore, the FCSF was a "work place" as defined in the Code. The HPA had control over that work place so was subject to the duties in s. 125(1) and had the specific duty under s. 125(1)(b) to install the barriers prescribed by Regulation. It did not, so is guilty of the offence charged.

[47] The Defence argues that "work place" must be interpreted contextually and purposively with reference to the specific duty at issue in a given case and the nature of the danger or risk that the duty and associated regulations are intended to address. Specifically, that the scope of "work place" should be limited by a requirement that there be a reasonable nexus between the hazard identified in the legislation and a realistic risk to a federal employee. Interpreted in that way, its scope in this case would be restricted to the active work face at the FCSF which is the area where the hazard identified in the legislation existed. The Defence argues that since no HPA employee was engaged in work there or was otherwise realistically exposed to the danger that s. 125(1)(b) and the Regulation were designed to guard against, the location was not a federal work place as required by s. 125(1)(b).

[48] In response, the Crown argues that "work place" should not be defined by reference to risk to employees of the defendant company or even to federal employees in general. To do so would import a new element into the offence and ignore the reality that the duties on employers in the Code, and the specific duty in s. 125(1)(b), are not limited to protection of employees of the defendant company or even federal employees. The Crown argues this interpretation is consistent with the clear language of the provisions, common sense since it is the defendant who was in the unique position to comply with the provisions, the purpose and scheme of Part II of the Code and occupational health and safety legislation in general as well as the trend in the case law to interpret occupational health and safety legislation as attributing legal responsibility for the protection of workers broadly.

Statutory Interpretation

[49] The Supreme Court of Canada has repeatedly confirmed that "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 (*R v. C.D.*, 2005 SCC 78, para. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[50] Section 12 of the *Interpretation Act*, RSC 1985, c. I-121 provides that "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[51] The proper approach to interpretation of occupational health and safety legislation was summarized by the Ontario Court of Appeal in *Blue Mountain Resorts Ltd. vs. Ontario (Ministry of Labour)*, 2013 ONCA 75:

> [24] Public welfare legislation is often drafted in very broad, general terms, precisely because it is remedial and designed to promote public safety and to prevent harm in a wide variety of circumstances. For that reason, such legislation is to be interpreted liberally in a manner that will give effect to its broad purpose and objective: R. v. Timminco Ltd. (2001), 54 O.R. (3d) 21, [2001] O.J. No. 1443 (C.A.), at para. 22. [page328]
>
> [25] In Ontario (Ministry of Labour) v. Hamilton (City) (2002), 58 O.R. (3d) 37, [2002] O.J. No. 283 (C.A.), at para. 16, Sharpe J.A. reinforced that notion:
>
> > The OHSA 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 purpose 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.

[52] In *R. v. Hicks*, 2013 NSCA 89, at para. 19, Justice Saunders provided helpful guidance to trial judges called upon to interpret terms in a statute. He said that to determine whether a provision applies to particular facts, an interpreter must consider:

- What is the meaning of the legislative text?
- What did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?

- What are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

[53] I will use that general structure in my reasons.

Meaning of the Text

[54] It is helpful to set out the Defence argument first. The Defence acknowledges that "work place" is textually defined in a broad and flexible manner and argues that, because of this, it must be read contextually and purposively to avoid extending the reach of the Act beyond its intended scope and purpose and to avoid absurdities. The Defence argues that the scope of "work place" should not be defined so broadly that it imposes a duty on an employer to protect every employee from every risk regardless of whether that employee will ever reasonably be exposed to that risk. Instead, it should be defined in the context of the specific risk identified in the legislation and should require a reasonable nexus between the area in which an employee is engaged in work and the risk that the specific duty and associated regulations are intended to address. The Defence argues that the duty at issue here, in s. 125(1)(b), and the protections in the associated Regulation are intended for the protection of employees who are engaged in work for the employer (in this case HPA employees) and since no HPA employee was exposed to the risk identified in the legislation, there is no nexus.

[55] The Crown argues that the plain and ordinary meaning of "work place" and its constituent parts ("place" and "engaged in work") are clear and intentionally broad. Further, the factual and legal context here supports an interpretation that the "place" for purpose of the definition of work place is the entire FCSF, "engaged in work" should include any type of work and the duty in s. 125(1)(b) is not limited to protection of employees of the HPA.

[56] The starting point for determining the meaning of "work place" is the statutory definition. Its important constituent parts are the requirement that a work place be "a place" where an "employee is engaged in work for their employer". "Employee" and "employer" are defined but "place" is not.

[57] Dictionary definitions of "place" are not overly helpful and, in its ordinary usage, "place" can refer to a narrow and specific location such as a house, a room, a table or even a box on the table in the room in the house or a broad and general area such as a city, region or country. As such it is unrestricted in scope and its

meaning is entirely context dependent. The result, as the Defence notes, is that "work place" is similarly unrestricted by geographical or physical boundaries. As such, its meaning is also context dependent.

[58] The statutory definitions of employee and employer do not limit the type of employment. As such, "work place" is also functionally unrestricted.

[59] It is also helpful to consider how courts in other cases have interpreted "work place". The Supreme Court of Canada has endorsed the conclusion that "work place" must be interpreted "broadly to account for all the areas in which an employee may be engaged in work…". (*Canada Post Corp. v. Canadian Union of Postal* Workers, 2019 SCC 67, para. 46). For example, in *Canada Post*, for purpose of determining the scope of a letter carrier's work place, the definition was interpreted as broad enough to include letter carrier routes and points of call. Similarly, in *Bell Canada v. CEP*, 2011 OHSTC 21, the Canada Occupational Health and Safety Tribunal concluded that the definition of "work place" was flexible and could consist of several buildings in different locations of a city, or even different cities. (para. 9).

[60] In (*Attorney General) v. P.S.A.C*, 2000 CanLII 16713 (FC), the Federal Court did not disturb a finding of a Regional Safety Officer (RSO), that "work place" for purpose of the Code encompassed an entire building, including the parking lot, the lawn, the surroundings of the building and any attachments to the building (paras. 10 & 24). A summary of the facts is helpful. A building was federally owned and federal employees worked in the building. A provincial firm was hired to do some construction on the outside of the building and erected scaffolding. During an unrelated inspection, it was noted that several of the workers were not wearing proper fall protection equipment. Section 125(1)(v) of the *Canada Labour Code*, required a federal employer to "... ensure that every person granted access to the work place by the employer..." used the prescribed safety equipment. The RSO concluded that the exterior of the building and scaffolding was a "workplace" and directed the federal employer to comply with s. 125(1)(v). That interpretation was not disturbed by the Federal Court.

[61] The Crown relies on this decision to support its argument that neither "place" nor "engaged in work" should be narrowly construed to include only the specific physical space where one or a small number of workers undertake specific acts of work. Rather, "place" includes the entire site enveloping the work activity

being carried out by the employer, including buildings and land and "engaged in work for the employer" should contemplate any type of work.

[62] In this decision, the Federal Court implicitly accepted that the outside of the building where the repair work was being done was part of the federal workplace despite that no federal employee was involved in the repair work or at risk of falling from a height, the repair work was functionally very different than the work being done by federal employees which was presumably office work, and the scaffolding was physically separate from the interior of the building where the federal employees were working.

[63] This would support the Crown's argument in the case before me. However, that implicit finding has to be treated with caution. The RSO's interpretation of "work place" was apparently not contested before the Federal Court and so was not the focus of the Court's decision. At issue was whether the RSO had misinterpreted "every person". In a relatively brief decision, the Federal Court concluded that "every person" included provincial employees.

Context, Purpose and Intent

[64] To determine the meaning of "work place", I also have to consider it in the context of the specific duties imposed in s. 125(1) and the broader context of Part II of the Code and its supporting Regulations.

[65] The Defence argues that the necessity of interpreting "place" (and by extension, "work place") by reference to risk is illustrated by referring to other duties contained in s. 125(1) and the various Regulations that support those duties. For example, the Defence submits it would be reasonable to treat a multi-floor building as a single work place when considering the employer's obligations to prevent risk of fire or explosion under s. 125(1) and the supporting Regulations. Risk of fire could arise on any floor, including unoccupied floors, but would endanger employees anywhere in the building. As a result, it would be reasonable to require the federal employer who controlled the building to protect its employees by complying with the various duties set out in legislation and the Regulations, regardless of whether the fire started on a floor where employees were engaged in work.

[66] However, the Defence submits it would not be reasonable to treat the entire building as a single work place when considering the employer's obligation to prevent the risk of drowning if there was a sewage treatment pool in the basement.

The risk of drowning would only exist in the basement. It would not be reasonable to require the employer who controlled the building to provide all employees with equipment to protect against drowning. In that context, it would be reasonable to interpret "work place" for purpose of those duties and Regulated standards as restricted to the basement.

[67] The Defence further argues that requiring a nexus between the area where an employee works and the risk identified in the provision is reasonable in the context of s. 125(1)(b) because the duty identified in that specific sub-section is aimed at protecting the health and safety of federal employees, and not others. The Defence submits this is clear when s. 125(1)(b) is read in the context of the other duties in s. 125(1) and the broader context of Part II.

[68] The Defence submits that most of the specific duties under s. 125(1) require a connection between the risk and a federal employee. Some provide protection to any or all persons who are granted access to a work place (at the time of the alleged offence, these included ss. 125(1)(l), (w), and (z.14)). However, the Defence argues that these are exceptional provisions whose language explicitly extends their protection to non-employees. Since s. 125(1)(b) does not contain that language, it does not apply to all persons and only applies to employees.

[69] The Defence further argues that interpreting s. 125(1)(b) as applying only to employees is consistent with the broader purpose and objects of the Code reflected in ss. 122.1, 123(1) and 124.

[70] Specifically, s. 122.1 states that the purpose of the Code is "… to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies" (emphasis added). The Defence submits that "employment to which this Part applies" is federal employment. Therefore, the stated purpose of Part II is the protection of federal employees.

[71] The Defence also relies on s. 123(1) which states that Part II applies to and in respect of federal employment and s. 124 which states that the general duty on employers under the act is to ensure that the health and safety of "every person employed by the employer is protected" (emphasis added). Both of which, the Defence argues, support the interpretation that unless otherwise stated, the duties in s. 125(1) relate to protection of federal employees or employees of the specific federal employer.

[72] Finally, the Defence argues that even for those exceptional duties that relate to non-employees, the scope of "work place" is contextually defined based on associated risks.

[73] In summary, the Defence argues that there is no single "work place" that applies to all of the duties under s. 125(1). Each must be defined in the context of the case and with reference to the purpose of preventing the specific risk at issue.

[74] The Crown argues that incorporating risk into the definition of "work place" is inconsistent with both the common law interpretation of occupational legislation and the purpose of the Code.

[75] The Crown submits that occupational legislation including Part II of the Code is focussed on prevention of injury rather than common law tort concepts of foreseeability of risk. This argument finds support in the general jurisprudence which confirms that occupational health and safety legislation is remedial public welfare legislation. It is intended to promote public safety, prevent harm and guarantee a minimum level of protection of workers (*Blue Mountain Resorts,* at para. 23; and, *West Fraser Mills v. B.C. (WCAT)*, 2018 SCC 22, at para 18).

[76] The Crown argues that these principles are also reflected in the Code's statement of purpose, the opening words of which state that the purpose of the Code is "to prevent accidents and injury to health…" (s. 122.1).

[77] The Crown further argues that interpreting "work place" as requiring risk to a federal employee or, more specifically, an employee of the HPA is not supported by a contextual and purposive reading. Specifically, the Crown argues that the specific duty in s. 125(1)(b) is not limited to protection of federal employees and this interpretation is supported by reading that subsection in the broader context of the Code.

[78] First, the Crown disagrees with the Defence assertion that there are only two categories of duties in s. 125(1) - those which specifically refer to "any person" and others which only apply to employees. The Crown argues that there are, in fact three categories - provisions that explicitly apply to employees, provisions that explicitly apply to any person who is granted access and other provisions that don't refer to employees or any person. The Crown submits that the context, clear language in the provision and general purpose of the Code, make it clear that this last category, including s. 125(1)(b), are concerned with creating a safe physical space. These relate to the physical attributes of the work place. They impose a

duty on the federal employer who has control over the workplace in which the hazard arises that creates a risk to any worker or any person.

[79] The Crown argues that because provisions like s. 125(1)(b) are concerned with the physical attributes of the work place, there was no need for Parliament to explicitly use the words "employee" or "any person" in these provisions.

[80] The Crown further argues that the language in the Code's statement of purpose, "…linked with or occurring in the course of employment to which this Part applies", does not limit its scope to "employees" (s. 122.1, emphasis added). If Parliament had intended to cover only federal employees, it could easily have done so by simply saying "employee". Rather, it used broader language that signifies an intent to prevent harm that is connected to federal employment, but not limited to federal employees.

[81] Finally, the Crown argues that neither s. 123(1)(a) nor s. 124 are inconsistent with interpreting the specific duty in s. 125(1)(b) as including non-employees. Section 123(1)(a) uses language with similar breadth to that used in s. 122.1 – "employment … on or in connection with ….". This, the Crown argues, does not limit the application of Part II to federal employees. Further, the general duty on employers set out in s. 124 does not limit the specific duties contained elsewhere. If it did, the many duties that explicitly apply to "any" or "all" persons would make no sense.

[82] The Crown and Defence each argue that their respective interpretation of work place is consistent with the intent of the legislation.

[83] The Defence argues that legislative intent supports the interpretation that s. 125(1)(b) and s.14.40 of the Regulation operate together to protect the safety of federal employees. Further, that interpreting work place by reference to the risk at issue best achieves the purpose of Part II without going beyond its scope and in the circumstances of this case is consistent with the intent of the legislature. To conclude that a place is a work place merely because an employer had control and an employee was present would go beyond the purpose of the duties and be contrary to Parliament's intent.

[84] The Crown argues that interpreting the provisions in the narrow manner proposed by the Defence would be contrary to the general purpose and principles associated with occupational health and safety legislation and the Code.

Consequences of Proposed Interpretations

[85] The Defence argues that a literal and limitless interpretation of "work place" would extend the reach of the Act beyond its intended scope and purpose and lead to absurdities.

[86] Consideration of the consequences of adopting a proposed interpretation of legislative text is a legitimate inquiry (*R. v. Hicks,* para. 19). If the language in a statute is ambiguous, there is no doubt that avoiding absurdity is a reason to prefer one interpretation over another (Sullivan on the Construction of Statutes, 6th Ed.,para. 10.17; *R. v. Mcintosh* [1995] 1 S.C.R. 686, paras. 33 – 36)). As was stated by the Ontario Court of Appeal in *Blue Mountain Resorts* (para. 43),

> As noted above, where there are competing plausible constructions, a statute should be interpreted in a way that avoids absurd results: Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 27; Boma Manufacturing, at para. 109; and Canadian Pacific, at pp. 1081-1082 S.C.R. In Rizzo, at para. 27, Iacobucci J. states that "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences".

[87] Further, "broad language may be given a restrictive interpretation in order to avoid absurdity" (*Blue Mountain Resorts*, para. 29, citing: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, [1995] S.C.J. No. 62, at pp. 1081-1082 S.C.R.; and *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, [1996] S.C.J. No. 111, at para. 109, per Iacobucci J.)

[88] I am satisfied that the definition of "work place" in the Code is sufficiently ambiguous and/or broad to require interpretation and permit consideration of the consequences of the proposed interpretations.

[89] In support of its argument, the Defence has presented several hypotheticals. Consideration of hypotheticals when interpreting the meaning of legislation has been endorsed by both the Supreme Court of Canada and the Ontario Court of Appeal (*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, pp. 1044-1045; and *Blue Mountain Resorts*, paras. 38 – 42).

[90] The situation I've already referred to involving the multi-floor building is a useful hypothetical. Assume the multi-floor building is under the control of a

federal employer. Some floors are unoccupied and federal employees are engaged in different types of work on various floors, including a sewage treatment pool in the basement and accountants working on the top floor.

[91] The definition of "work place" in the Code would allow for the entire building to be treated as a "work place".

[92] As previously discussed, this interpretation would be reasonable when considering the employer's obligations to prevent risk of fire or explosion under ss. 125(1)(a), (m), (n), (o) of the Code and various Regulations.

[93] However, the Defence submits this interpretation of "work place" would lead to absurdities when considering the employer's obligation to prevent the risk of drowning in the sewage treatment pool in the basement. Section 125(1)(l) requires the employer to provide every person granted access to the work place with prescribed safety materials, equipment, devices and clothing. Sub-section 12.15(1) of the Regulation reads "if there is a risk of drowning in a work place, the employer must (a) provide every person who is granted access to the work place with (i) a life jacket … (ii) a personal flotation device … or (iii) a safety net …".

[94] In that context, the Defence submits, defining "work place" as the whole building would require the employer to provide all employees and all visitors to the building, including the accountants on the 15th floor, with a life jacket, PFD or a safety net. This would be absurd.

[95] The Defence also referred to other hypotheticals which could potentially involve similar results. For example, airport property is federally owned property where employees are engaged in many different kinds of work and where there are numerous and varied risks depending on where a person works and their occupation. However, the airport property could be treated as a single work place. If so, s. 125(1)(l) would require the employer to provide every traveler arriving at the airport with the various equipment listed in the Regulation such as high-visibility vests, protective footwear, protective head wear etc. This would be the requirement despite that the traveler would not be exposed to any of the risks or entering any area where the risk existed.

[96] Finally the Defence pointed to the evidence in the present case. If the entire FCSF should be treated as one work place for purpose of the Code, there would be a risk of drowning in that work place since it includes a water's edge. Sub-section 12.15(1) of the Regulation would require anyone entering the facility to be

provided with PFDs etc. Ms. Clarke, confirmed that she did not put one on when she entered the facility or went to the working platform to take pictures, but said she would have if she'd approached the water's edge.

[97] The Crown argues that its proposed interpretation would not result in an absurdity in the case before me or in the hypotheticals raised by the Defence.

[98] First, because the scope of the Regulations is restricted by the introductory words in each provision. For example, in sub-section 12.15(1), the provision begins with the words "if there is a risk of drowning…". Other Regulations similarly begin with "if there is a risk of …" and then identify the hazard before setting out the standard the employer must meet.

[99] I do not agree that this submission is a complete answer to the concern raised by the Defence. The complete introductory phrase in sub-section 12.15(1) is "if there is a risk of drowning in a work place…". This reference to "in a work place" is also used in the other Regulations. If "work place" were interpreted as the whole building, the whole airport, the whole of the FCSF, presumably that interpretation would also apply to the Regulation. Using the building hypothetical to illustrate the point, the presence of the sewage treatment pool in the basement would present a potential risk of drowning in "a work place", triggering the employer's duty to provide every person granted access to the "work place" with protective equipment. That would include the accountants on the 15th floor, the postal worker delivering mail to the 15th floor, and members of the public attending the 15th floor to meet with one of the accountants.

[100] The Crown also argued that these types of absurd situations have not occurred, or at least have not resulted in reported cases, so should not be a concern to the Court. In essence, this is an argument that investigative common sense and/or prosecutorial restraint or discretion would operate to prevent absurd consequences. Again, I am not satisfied that this is a complete answer to the concern raised by the Defence. In the criminal context, courts have been reluctant to endorse prosecutorial discretion as a means to narrow the applicability of a criminal provision (*R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 136). In *Cuerrier*, Justice McLachlin (as she then was), in agreement on this point, said that "[p]rosecutorial deference cannot compensate for overextension of the criminal law; it merely replaces overbreadth and uncertainty at the judicial level with overbreadth and uncertainty at both the prosecutorial level and the judicial level" (para. 53).

[101] The hypotheticals put forward by the Defence illustrate that a broad interpretation of "work place" can lead to absurd results. Imposing a duty on a federal employer to provide the accountant on the 15th floor with a PFD or an air traveler with a high-visibility vest would be absurd. The question is what should this Court do in response to that potential absurdity.

[102] I have read all of the cases submitted by counsel and they have been very helpful. I'll focus here on just a couple.

[103] The Defence argument here is very like those that were made in *Blue Mountain Resorts*. In that case, a guest drowned in a pool at a resort. The question was whether the resort had to comply with a provision of the provincial Occupational Health and Safety Act requiring notice to the ministry of labour and preservation of the scene. The Act imposed a duty on employers to report death or injury where "a person" is killed or critically injured from "any cause" at "a workplace". "Workplace" was defined broadly in the legislation as "land, premises, location or thing at, upon, in or near which a worker works". The Court was required to interpret "workplace" and the language in the specific provision to determine the scope of the employer's duty under the Act.

[104] The pool where the guest drowned was intended for use by resort guests for recreational purposes. No Blue Mountain employees were working there at the time the drowning occurred, there was no evidence that the death was caused by any hazard that could affect the safety of a worker, and no reasonable expectation that a worker would be exposed to the hazard in the course of his or her employment.

[105] It is important to recognize that the Court in *Blue Mountain Resorts* was dealing with different legislation and a different factual context than what is before me. The legislation at issue in *Blue Mountain Resorts* defined "work place" by reference to any "worker" whereas the Code defines it by reference to an "employee" engaged in work for that employee's employer. The factual details and context is also different. The location in *Blue Mountain Resorts* was a place where people worked but was not predominantly a workplace. In contrast, the entirety of the FCSF was solely a place of work. As such, care must be taken in applying the specific conclusions from that case to the legal and factual circumstances here. However, the manner in which the Court analyzed the issue and their comments about statutory interpretation in general and specific interpretation of health and safety legislation are helpful.

[106] In *Blue Mountain Resorts,* the Court of Appeal found that a literal reading of the provision would lead to absurd results and extend the reach of the legislation beyond what was intended. It recognized that public welfare legislation must be given a broad and liberal interpretation, but noted that "this generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions" (para. 26). The Court concluded that the language in the provision could be restricted so as to avoid absurdity but still be consistent with the purpose and objective of the Act which was to protect health and safety of workers. It did so by restricting both the definition of "work place" and the scope of the duty in the particular provision under review.

[107] "Work place" was interpreted to mean a place where a worker is carrying out his or her employment duties at the time of the incident or one where a worker might reasonably be expected to be carrying out such duties in the ordinary course of their work. However, the Court did not discuss the meaning of "place" within that definition. Rather the Court, and apparently the parties, simply agreed that the "place" was the pool rather than the whole resort property.

[108] The phrase "from any cause" in the duty provision was interpreted to require "that there be some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at the site of the incident." (para. 54-55 & 59).

[109] The Court did not import the reasonable nexus requirement into the definition of "workplace", rather it imported that requirement into the meaning of "from any cause" when restricting the scope of the duty. The Court concluded that some restriction of workplace was required, however, went on to say that "the potentially all-embracing expression 'from any cause'" was "the core phrase calling for a restrictive interpretation in order to give the language of s. 51(1) its proper meaning." (para. 52).

[110] This is an important distinction for purposes of the analysis I have to undertake in the case before me.

[111] Similarly, in *Canada Post,* the reach of the legislation was restricted, not by narrowly interpreting "work place", but rather, by restricting the scope of the duty on the employer. The issue was whether s. 125(1)(z.12) of the Code, which required that the employer inspect every part of the work place at least once a year, applied to letter carrier routes and points of call. The Appeals officer, whose decision was upheld by the majority of the Supreme Court of Canada, interpreted

"work place" broadly, concluding that it did apply to the routes and points of call. However, the employer did not have the duty to inspect those areas because s. 125(1) only imposed the duty under subsection z.12 to those parts of the work place that were under the control of the employer and the routes and points of call were not.

Conclusion

[112] The primary issue is whether the HPA had a duty under s. 125(1)(b) of the Code to install a bumper or signaller as prescribed in subsection 14.40 of the Regulations. The Defence argues it did not have that duty because the safety of its employees was not at risk from the hazard identified in the provision. The Defence argument has focused on the scope of "work place". Specifically, whether the location of the alleged offence was a "work place".

[113] That is an element of the offence so the Crown has the burden to prove it beyond a reasonable doubt.

[114] The Crown argues that the plain language of the legislation provides a clear path to liability. The place at issue is the FCSF, the HPA had the ability to control that location and employees of the HPA were engaged in work for the HPA at that location. Therefore it meets the definition of work place. The Crown further argues that its proposed interpretation of work place accords with common sense and is consistent with the general purpose of the Code and the specific purpose of the duty at issue in this case. Finally, the Crown argues that its proposed interpretation would not lead to an absurd result in this or other cases.

[115] The Defence argues that a contextual and purposive interpretation of "work place" would restrict its scope by requiring a reasonable nexus between the area in which "an employee is engaged in work" and the nature of the risk that the specific duty and the regulations are intended to address. To interpret work place without anchoring it to risk, and more particularly to risk to a federal employee, would extend the reach of the Code beyond its intended scope and purpose, place unreasonable duties on employers to protect every employee from every risk regardless of whether that employee will ever reasonably be exposed to that risk and result in absurdities. When one considers the factual and legal context of this case, the HPA should be required to install barriers in accordance with the prescribed standards only where one of its employees operated a rear-dumping motorized vehicle in a place where there was a risk of tipping at the edge of a

sudden drop in grade level. Interpreted as proposed by the Defence, the location under consideration would be the active work face of the FCSF since that is the location where the risk identified in the legislation existed. Since, no employee of the HPA ever operated a dump truck at the water's edge or was otherwise exposed to the hazard identified in the legislation and Regulation, the active work face was not a work place. As such, the HPA did not have the duty under s. 125(1)(b) to install the barriers prescribed by Regulation.

[116] Before I deal with the proper interpretation of work place, I will address the arguments concerning Mr. Seaboyer's status. I find it unnecessary to determine whether he was a de facto employee or a self-employed person. I say that because Chris MacDonald was an employee of the HPA. He was meaningfully engaged in the sequestration work being done at the FCSF, communicated daily with Mr. Seaboyer and attended the facility regularly in relation to his work for the HPA. As such, I have concluded that regardless of whether Mr. Seaboyer was an employee, there was an employee of the HPA who was engaged in work for the HPA at the FCSF. To a lesser extent, other employees such as IT people, truck drivers and safety officers were also engaged in work there for the HPA. However, they attended much less frequently and were much less engaged in the actual work of the facility.

[117] I accept that Mr. Seaboyer was much more involved in the sequestration work being done at the FCSF than Mr. MacDonald or the other HPA employees. However, a conclusion that he was or was not an employee would have no impact on my decision. Neither Mr. Seaboyer nor Mr. MacDonald operated dump trucks at the working face or were otherwise exposed to the risk identified in s. 125(1)(b) of the Code or subsection 14.40 of the Regulation. A conclusion that Mr. Seaboyer was an employee would not assist the Crown if I accept the interpretation of work place proposed by the Defence and a conclusion that he was not an employee would not assist the Defence if I accept the interpretation proposed by the Crown.

[118] I turn now to the question of the proper interpretation of work place.

[119] The word "place" is not defined and its ordinary meaning is not physically precise or geographically restricted in any way. As such "work place" is similarly geographically and physically unrestricted and imprecise. The word "place" in the definition of work place is capable of referring to a specific location such as the active work face or water's edge of the FCSF or a broader area such as the whole

property of the FCSF. Reading the word in its grammatical and ordinary sense, therefore, does not assist me.

[120] The case law is of only limited assistance in determining what is meant by "place". The Courts in *Canada Post* and *Bell* concluded that the definition of work place was necessarily broad and flexible. In *Canada (Attorney General) v. P.S.A.C.* the Court did not interfere with a finding that a work place included the interior and exterior of a building, its parking lot, lawn and surrounding holdings without regard for physical barrier or functional distinctions in work activity. However, in *Blue Mountain Resorts*, albeit when considering different legislation and a different definition of work place, the Court used a much more restricted interpretation of place – a specific pool rather than the entire resort property.

[121] The statutory definition of "work place" does not reference risk, limit "engaged in work" for ones employer to any specific type of work or require a nexus between risk and the employee's work. Therefore, read textually, once the geographic or physical boundary of "place" is determined, a finding that an employee was engaged in <u>any</u> work for his/her employer within that area would result in a finding that the area was a work place.

[122] I agree with Defence that defining place too broadly could in some cases place unreasonable and unworkable duties on employers. As the Court said in *Canada Post*, albeit in the context of discussing the need for the employer to have control, "an 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. 53). Determining the proper dimension or physical limits of the "place" in any given situation will require consideration of all the circumstances, including the physical and functional attributes of the location. I do not rule out the possibility that in some cases consideration of risk might inform a court's decision on the dimensions of "place".

[123] In my view, a contextual and purposive reading does not support the Defence submission that the definition of "work place" should incorporate risk to a federal employee as opposed to others. I do not agree that either the specific duty in s. 125(1)(b) or the broader purpose of Part II is limited to protecting the health and safety of federal employees.

[124] I agree with the Crown that s. 125(1) is not exclusively focused on protection of employees and that it includes three categories of provisions - those that specifically protect employees (eg. s. 125(1) (e) (k), (q), (s), (x), (y), and (z)),

those that specifically protect “every person” or “all” persons (s. 125(1), (w) and (z.14)), and other provisions that don’t specifically refer to either (eg. s. 125(1) (a), (b), (c), (d), (h), (i) and (j)). I also agree with the Crown that s. 125(1)(b) and the other duties that do not specifically refer to either employees or to any person deal generally with the physical attributes of the space. There would be no need for Parliament to specify that these duties relate to everyone because the provisions are aimed at making the physical space safe or healthy. Further, if Parliament had wanted to restrict these duties to employees, that could easily have been done in the same manner that it was done in the provisions that are restricted to employees.

[125] Consideration of the Regulations is also helpful. Like the duties in s. 125, some apply specifically to employees, some to all persons and some to the activity or physical space. For example, the regulation at issue here refers to the activity - “if rear-dumping motorized materials handling equipment is used…” and is not limited to where it is used by employees. Whereas other Regulations impose obligations on employers specifically in relation to “every person who is granted access to the work place” (eg. Reg. 12.14 and 12.15). Others impose obligations solely in relation to employees (eg. Reg. 12.07(2)).

[126] This interpretation is in my view not inconsistent with the general purpose of Part II which, as it read at the time, was “to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.” (s. 122.1 of the Code). That general purpose is not limited to keeping employees safe. Its language is broader than that. It is anchored in “employment to which this Part applies” but its stated aim is to prevent accidents and injury that arise out of, is linked with or occurs in the course of federal employment. Again, if Parliament had intended the purpose of the Code to be exclusively the protection of federal employees, that could have been simply stated – “to prevent accidents and injury to health of employees”. Further, if the intent was to restrict the purpose of the Code to the protection of federal employees, the specific duties in s. 125(1) and its many associated Regulations that refer to duties and protections for “any person” or “all persons” would be entirely inconsistent with its purpose.

[127] I also see no inconsistency between this interpretation and the general duty on every federal employer in s. 124, to “ensure that the health and safety at work of every person employed by the employer is protected” (s. 124 of the Code). That provision places a broad duty on employers but does not limit the specific duties imposed in other provisions.

[128] Again, the existence of duties in s. 125(1) that refer to "any person" makes it clear that the general duty does not limit the specific duties or define their scope.

[129] In my view it is reasonable that if an employer controls a place that contains a physical hazard it would have the duty to make that place safe for all users without distinction between employees and other persons. That is particularly so where, as in this case, the person is doing the very work for which the place exists. The situation might be different if the worker was on site for an unrelated purpose such as a power employee who attended the FCSF to check a power line.

[130] I accept that a broad interpretation of "work place" has the potential to result in absurdities. However, absurdity can be avoided without restricting the scope of work place. The definition of work place does not require that an employer control the space and does not require that there be a risk to an employee. However, it is only the starting point for a court's analysis. As a court works through the legislation, there are safeguards or elements imposed at each stage that offer an opportunity to interpret and restrict that broad language to avoid absurdity.

[131] Section 125(1) limits the broad reach of workplace by introducing the element of control. Employers are not subject to the duties and the resulting liability for breaching them unless the employer has control of either the workplace or the work activity. Some of the specific duties under s. 125(1) further restrict the scope of the employers duties by explicitly stating that they only apply to employees. The Canada Occupational Health and Safety Regulations set the standards applicable to the specific duties. These further restrict the scope of the duty by identifying the narrow circumstances in which each standard applies and, in most cases, incorporating a consideration of risk. If, in a case such as the hypothetical of the multi-floor building with a sewage treatment pool in the basement, an employer were charged under s. 125(1)(l) for failing to provide the accountant with a personal flotation device as prescribed in regulation 12.15, the Court would first have to consider whether the building was one work place given that the 15th floor and the location of the pool were physically separated and functionally distinct. The Court would then have to determine whether the federal employer had control over all parts of the building. Finally the Court would have to consider whether, in the circumstances, there was a risk of drowning in that work place. If the answers to all of those questions was "yes", the Court could avoid the absurdity by restricting the meaning of risk in the regulation.

[132] This would be consistent with the approach taken by the Court in *Blue Mountain Resorts.* Rather than over-restrict the definition of work place, the Court avoided absurdity by modestly restricting the definition of work place and more fundamentally restricting the scope of the duty by interpreting the language in that provision.

[133] On the facts before me, I find there is no logical reason to treat the work face as a separate work place. Geographically and functionally, the FCSF was an integrated whole. Once on the property, the waters edge and the working face were not separated from the rest of the property. The work face was not fenced off and was not a great physical distance from the rest of the property. This differentiates it from an airport where the tarmac and concourse are physically separate and often have restricted access. It also differentiates it from a multi-floor building. The primary purpose for the existence of the FCSF was to accept and sequester slate. The active working face was the heart of that operation. So, functionally, it was not separate from the property on which it was located. There were different risks there than would have existed in the scale house, or along the drive from the scale house to the water, but those parts existed together as a functionally related work site. This distinguishes it from the circumstances in *Blue Mountain Resorts* where the property as a whole was not exclusively or primarily a worksite and the pool was not an integral part of the work being done at the resort.

[134] Finally, I do not find that interpreting work place as including the whole of the FCSF or finding that the HPA had a duty to install barriers despite that no employee of the HPA was at risk of tipping would be contrary to the intent and purpose of the Code or would result in an absurdity here.

[135] As I have said, I find that the duty in s. 125(1)(b) was aimed at making the physical space safe for those who used it in the manner specified in the regulation.

[136] The HPA created the FCSF. Its reason for existing was to accept and sequester slate for their infill project. That activity required dump truck operators to dump the slate at the edge of a sudden drop in grade level. The HPA had the ability to control the site, including the ability to install a bumping block or provide a signaller. It did neither. Holding them responsible for that failure would not be unreasonable or absurd.

[137] Therefore, in summary, I would treat the property of the FCSF as the “place” for consideration of whether the location was a “work place”. Mr. MacDonald was an employee of the HPA and was engaged in work for the HPA at the FCSF. His

work was in relation to the sequestration activity at that site. As such, I am satisfied beyond a reasonable doubt that the site was a “work place”. Since all other elements were conceded, I find the HPA guilty of the offence charged.

Elizabeth Buckle, JPC