

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Dexter Construction Ltd., 2003 NSPC 047

Date: 20030812
Docket: 1148585; 1148587
Registry: Kentville

Between:

Her Majesty the Queen

Informant

v.

Dexter Construction Company Limited

Defendant

Judge: The Honourable Judge Claudine MacDonald

Heard: August 12, 2003, in Windsor, Nova Scotia

Oral Decision Given: August 12, 2003

Written Decision: October 14, 2003

Counsel: William R. Fergusson, Q.C., for the Crown
David Ferrar, Esq., for the Defendant

By the Court (orally):

- [1] Dexter Construction Limited is charged under two sections of the **Occupational Health and Safety Act**. The first count is that they did, being an employer fail to ensure that excavated material was kept at least one meter from the edge of an excavation or trench, and the second count alleging that Dexter Construction Company Limited, being an employer, did fail to provide at or near the sides of a temporary excavation greater than 1.2 meters in depth fences, guards or barricades to prevent a person from falling into the excavation. So, those are the two charges before the Court in relation to Dexter Construction Company Limited. I note as well that Atlantic Guardrail Construction Limited was charged for the same offences on the same information. This trial was strictly in relation to Dexter Construction Company Limited.
- [2] This is a very concise version of the facts here of what took place back on May 7th, 2001. A culvert was being put in on Trunk 14, near Scotch Village. Dexter Construction Company Limited had subcontracted this work to Atlantic Guardrail Construction Limited. The Atlantic Guardrail employees were building a trench which ran from the shoulder of the road to the centre line of the road on Trunk 14 and the employees from Atlantic Guardrail began to slope the trench then went to get a pipe. It was during that time that Mr. Gillette who was an inspector with the Provincial Government was in the trench and the trench collapsed. Mr. Gillette died as a result of his injuries. An investigation followed and the investigation resulted in these charges being laid against Atlantic Guardrail Construction Limited and Dexter Construction Company Limited.
- [3] Mr. Kelly, the President of Atlantic Guardrail and the President of the company back in May of 2001 gave evidence in this matter. He was on site when this happened. According to Mr. Kelly, his company was doing this work, was subcontracting from Dexter Construction Company Limited. Mr. Kelly testified that it is the foreman on site who is responsible for ensuring that standards are met. He testified as well that there was no guardrail that was up by this trench, that there were cones that were up but no guardrail or fence. He testified further that he was aware of the fact that the excavated material, what's been called the "overburden" or the "fill", is to be three feet from the edge of the excavation. With respect to the involvement of Dexter Construction Company Limited, Mr. Kelly testified that Mr. Flemming, Mr. Flemming being the Superintendent for Dexter, was on site that day. He thought it was 7 o'clock in the morning. Mr. Flemming himself testified that

it was 1 o'clock in the afternoon. In any event I am satisfied that Mr. Flemming was on site on at least one occasion on May 7th, 2001. Mr. Kelly said further that Mr. Flemming, in his words, "would come and go" from the job site; that when Mr. Flemming was on the job site that Mr. Flemming was the head of the job site. When Mr. Flemming from Dexter Construction was not on the job site, then Mr. Kelly himself or another individual as foreman would be responsible for the job site. Mr. Kelly testified that his company, Atlantic Guardrail, had done work for Dexter since 1979 or 1980 and he also said in his own words "I was pretty much on my own when I worked for Dexter". Dexter would provide supplies and check on the progress of the job. He testified as well that in order to do work for Dexter, one had to be a member of the Nova Scotia Construction Safety Association. I believe it was Mr. Kelly who testified about what exactly that means in terms of requirements that have to be met and a self audit by the NSCSA in order to be accredited through the NSCSA.

- [4] Bruce Langille was called as a witness. He is a Risk Manager for the Province of Nova Scotia and he described the overburden or the fill as being on both sides of the trench from the ditch to the centre line. He testified that the fill pile was very close to the edge of the pavement. In his estimation it was less than a foot away from the edge of the pavement.
- [5] Joel Marsman was called as a witness. He said in his words, "I didn't notice barricade around the trench and there was fill on both sides of the trench". He didn't measure this but he estimated that the fill was approximately two feet from the edge of the trench. And he was also asked and I believe this was in cross-examination whether or not that fill or overburden could serve as a barrier and he testified that in his opinion that it could.
- [6] Henry King is an Occupational Health and Safety Officer with the Province. It was his evidence that this trench was approximately five feet deep and four feet wide. Further, it was his evidence that the overburden or the fill was piled on both sides of the trench; that the two walls of dirt did not effectively form a barrier. It was through this witness that a number of photographs were introduced into evidence and those photographs depict the site, the overburden and gives some idea with respect to the size of the trench, with respect to the size of the overburden and distances.
- [7] Mr. Flemming was called as a witness. Mr. Flemming is a Construction Superintendent with Dexter Construction Company. His duties include ensuring compliance with the Occupational Health and Safety Legislation. It was his evidence that he had been on site at about 1 o'clock in the afternoon.

At that time he was doing a general check to ensure that traffic control was satisfactory. When Mr. Flemming did his inspection at 1 o'clock in the afternoon Atlantic Guardrail, according to Mr. Flemming, was really at another part of the site. So as I understood the evidence of Mr. Flemming, he was there primarily to ensure that the traffic control was satisfactory but he did not make any inquiries or any checks to see what if anything was taking place with respect to the trench or what was going to be taking place with respect to the trenching.

[8] As part of the evidence, an exhibit was introduced, **Exhibit Number 7**, which sets out the training of some of the Dexter Construction Company Limited employees, including Mr. Flemming. It sets out the courses that he has taken. Further, Mr. Flemming testified that generally he would visit this site every day, sometimes two to three times a day. It was also his evidence that in his opinion Atlantic Guardrail did trenching in a safe and adequate manner. And further he testified that had he been there and had he seen what was taking place he certainly would have corrected this problem. He too was asked about the overburden or the spoils pile and his evidence was that it was not back one metre, it was not back the distance that the legislation specifies it is to be kept back. It was also his evidence that barricades were not in place. Mr. Flemming testified that he only knows about this if he's on site. Further, it was Mr. Flemming's evidence that he had other sites that he was dealing with and that Atlantic Guardrail had not been in the process of building a trench at the time he had been on site at approximately 1 o'clock in the afternoon.

[9] Ron Hyson was also called as witness. He too is an employee of Dexter Construction Company Limited. His evidence was that he is the Director of Human Resources and Occupational Safety for the company. He has been working in that capacity for two and a half years. He testified concerning his responsibilities. He also testified concerning what it means to be Nova Scotia Construction Safety Association Certified, that it means that you must demonstrate that training is up to a certain level. There is an annual self audit. The NSCSA also conducts an audit or an examination as I understand it every three years. He gave evidence as well concerning in a general way the safety policies and practices of Dexter Construction Company Limited. Mr. Hyson testified concerning their safety policy, safety manual and there was indeed an exhibit, **Exhibit Number 6**, which is the company's policy or manual with respect to safe work practices dealing specifically with trenches. Mr. Hyson testified that the company, that is Dexter, runs classes

in the winter on safety issues. Further, that subcontractors are usually provided with a safety manual and they will have ongoing dialogue with the superintendent. Mr. Hyson testified that it is the superintendent's duty to ensure that the subcontractor complies with the safety requirements.

According to Mr. Hyson subcontractors for Dexter Construction Company Limited are to be NSCSA credited and that on many occasions Dexter will indeed review the safety plans of the companies that are doing subcontracting work for them. So Mr. Hyson's evidence really related to the steps that Dexter Construction Company Limited takes in a general way to deal with safety issues and to ensure compliance with safety legislation.

[10] Dealing now with the two charges that are before the Court today. In count number one Dexter is charged with being an employer failing to ensure that excavated material was kept at least one metre from the edge of an excavation or trench. So, looking at this particular charge, the first issue as raised by Defence counsel is whether or not the Crown has established as required that Dexter Construction Company Limited is indeed an employer as the word "employer" is defined in the Occupational Health and Safety legislation. Section 3 of Section P defines "employer" and the **Occupational Health and Safety Act** defines "employer" as follows:

Employer means a person who employs one or more employees or contracts for the services of one or more employees and includes a constructor, contractor of subcontractor.

So clearly the definition of employer under the **Occupational Health and Safety Act** is a very broad definition. Insofar as this matter is concerned I am satisfied that the Crown has proven that Dexter Construction Company Limited was an employer as that word is defined in the legislation. The evidence of Mr. Kelly shows that Atlantic Guardrail was doing this work, were subcontracted, under Dexter. The evidence shows that the Dexter representative was indeed the superintendent of the job site. The supplies were provided by Dexter and as I mentioned the definition of "employer" in the legislation is a broad definition. I am satisfied beyond a reasonable doubt that Dexter Construction Company Limited comes within that definition of employer.

[11] The charge is that Dexter,

being an employer, did fail to ensure that excavated material was kept at least one metre from the edge of an excavation or trench.

Another issue that was raised by Defence counsel is, what is a trench and has the Crown indeed proven as required that at this site that this was indeed an excavation or a trench. "Trench" is defined in the regulations under the **Occupational Health and Safety Act** as follows:

Trench means an excavation in which the excavation depth exceeds the excavation width.

So far as this is concerned, again I am satisfied that the Crown has established that this was indeed a trench. There was the evidence of Mr. King in terms of the depth being five feet, the width being four feet. Not only that, there was a photograph introduced into evidence. I am satisfied that this was an excavation or a trench as defined under the legislation.

[12] The next issue is whether the Crown has established that the excavated material was not kept at least one metre from the edge of this trench. Again I am satisfied that the Crown has established that the excavated material was not kept at least one metre away from the edge of the trench. There was considerable evidence with respect to this. There was the evidence of Mr. Langille but there was also the evidence of Mr. Marsman who testified that the excavated material in his estimation was two feet from the edge of the trench. Again there was the evidence of Mr. Flemming who testified that the spoil pile, that is the excavated material was not back one metre and there are the photographs that show the overburdening; that show the excavation or the trench and give an idea of what the distances involved were.

[13] That being so, I am satisfied beyond a reasonable doubt that the Crown has indeed proven the *actus reus* for count one. The question then becomes due diligence and again this was raised by Defence counsel on the last date. At this stage of the proceedings it is important of course to be mindful that due diligence puts the burden on the Defendant to establish on the balance of probability that all reasonable care was taken in order to avoid the breach. The issue then is whether or not in this particular case, on the facts of this case, whether or not the Defendant has indeed established that all reasonable steps were taken to avoid this breach from taking place.

[14] As I mentioned earlier there was the evidence from Mr. Flemming, Mr. Hyson and Mr. Kelly that in some ways related directly to this issue. The company had published safe work practice material, indeed safe work practices material dealing specifically with respect to excavation. There are

safety policies and a safety manual in place. They offer classes on safety, tool box meetings and offer employee orientation. The evidence was that usually subcontractors are provided with the manual. Usually there would be ongoing dialogue with the superintendent, the superintendent is on site to ensure that the subcontractors are complying with safety legislation. Subcontractors are expected to be NSCSA accredited. On many occasions the company reviews the safety plans for the other companies. Further it was the evidence that Dexter has two, as I understand it, Occupational Health and Safety Inspectors on their own who report to Mr. Hyson and that these inspectors really had the authority to shut down a work site immediately if there are concerns with respect to safety issues. So in a general way that is what the company has done in relation to Occupational Health and Safety issues.

- [15] But let's look specifically at what happened in this particular case. Specifically in this particular case there is no evidence that the safety plans of Atlantic Guardrail were ever reviewed by Dexter Construction Company Limited. Not only that, there is no evidence that the inspectors, as Mr. Hyson referred to, ever were involved in any way with this project that was taking place. There is no evidence that Atlantic Guardrail was ever provided with the safety manual or policies that had been referred to by Mr. Hyson, and really the evidence of Mr. Kelly on this issue I find to be very telling and I'll just refer to the exact words that Mr. Kelly used when he was giving his evidence. Mr. Kelly testified, "I was pretty much on my own when I worked for Dexters. Dexters would provide supplies and check on the progress of the job", and I think that really describes it. He was pretty much on his own. Now perhaps that was because they had a good safety record from back in 1979 or 1980 or a good working relationship with Dexter or what have you. Regardless of the reasons, it's clear that Atlantic Guardrail was pretty much on its own. So although the company in a general way certainly had safety policies in place, insofar as the specifics of this particular case are concerned, Atlantic Guardrail was pretty much on its own.
- [16] I mentioned earlier about Mr. Flemming having made a site visit before this accident had taken place and that visit involved him going there to examine what was taking place with respect to traffic control issues. There was no evidence that, for example, he'd ever discussed with the Atlantic Guardrail employees or with Mr. Kelly what was going to take place with respect to trenching. He did not make any inquiries to ensure that they were ready to

set up the barricades as required. There was no discussion or inquiry to ensure that the overburden was going to be kept the required distance away from the side of the trench.

[17] So that being so, when one looks specifically at this particular case in trying to determine whether or not due diligence has been established, I find on the facts of this particular case that the Defendant has not shown on the balance of probabilities that due diligence was exercised. I am satisfied beyond a reasonable doubt that the Crown has proven the offence and I find Dexter Construction Company Limited guilty of Count one in the information.

[18] Dealing next with the second count and the second count reads as follows:

that Dexter Company Construction Limited being an employer did fail to provide at or near the side of a temporary excavation greater than 1.2 metres in depth fences, guards or barricades to prevent a person from falling into the excavation.

Dealing with respect to this count, I am satisfied beyond a reasonable doubt that the Crown has indeed established that this was an excavation that was greater than 1.2 metres in depth and I am satisfied beyond a reasonable doubt that the Crown has established that there were not fences or guards or barricades in place as required by the legislation.

[19] First, insofar as the measurements are concerned, the photographs show individuals clearly taking measurements of both the overburden with respect to the trench, and the width and the depth, but what the Court is relying on in terms of the measurements really is the evidence of the witnesses who testified - these witnesses having testified with respect to estimates. Staff Sergeant Grant testified to a photograph here of his height compared to the size of the excavated material. As I said I am satisfied that the evidence in its totality establishes that the excavation or the trench was indeed greater than 1.2 metres.

[20] Insofar as the other part of the issue is concerned, that is the fences, guards or barricades not being in place, what the Defence has put forward as part of the argument here is that the excavated material in itself could indeed form a barricade. As I mentioned earlier when I was reviewing in a general way the evidence of the witnesses, I believe it was Mr. Marsman who was questioned by Defence counsel concerning this and it was his opinion that yes, the fill could serve as a barrier, although another witness, Mr. King, said that no, it could not effectively form a barrier. But insofar as this part of the Defence argument is concerned, to accept the argument that the excavated material

itself could indeed be the fence or the guard or the barricade really would defeat the purpose and objective of not only s. 168 but of the **Act** itself. It would allow an employer to put the excavated material close to the trench and call it a barricade. The purpose of s. 169 is to first ensure that the overburden does not fall back into the trench and the purpose of having a fence or a barricade is to keep people away from the trench so that they do not get injured. To allow the excavated material to be in close proximity to the trench in order to be a fence or a barricade as I say clearly defeats the purpose and objections of the legislation. It is inconsistent with the overall objective of the **Occupational Health and Safety Act**.

- [21] So insofar as the *actus reus* of Count two is concerned, again I am satisfied beyond a reasonable doubt that the Crown has established that Dexter Construction Company Limited, being an employer, did fail to provide at or near the side of a temporary excavation greater than 1.2 metres in depth, fences, guards or barricades to prevent a person from falling into the excavation.
- [22] With respect again to the argument of due diligence, what I said with respect to Count one applies with respect to this count as well. That being so I find that due diligence has not been established on a balance of probability. That being so I find Dexter Construction Company Limited guilty of count two on this Information. It is important to note that in terms of the objective of the legislation and how the legislation is drafted that it deals with joint responsibility. There are a number of sections that deal specifically with that. Not only s. 2 of the **Act** that speaks in terms of the foundation or the spirit of the **Act** but also s. 23 and 76 that deals specifically with the issues of shared responsibility. I have considered those sections of the **Act** as well when coming to a decision as to whether or not in fact the Crown had proven these offences.
- [23] In conclusion, I find Dexter Construction Company Limited guilty both of Count one and Count two in relation to this matter.
- [24] I am going to deal with this matter by way of a fine and the total fine is going to be that as was mentioned by counsel, \$ 5,000.00. There should be a breakdown, \$ 2,500.00 on count one and \$ 2,500.00 on count two for a total of \$ 5,000.00.
- [25] Further, I am going to make the order under s. 75 of the Legislation. I listened carefully to what you had to say and I agree with much of what you had to say. Nonetheless the fact remains that insofar as this matter was concerned Dexter Construction Company Limited bore significant

responsibility for that particular work site and there was a breach of the legislation insofar as the excavated material was concerned and insofar as not having fences or barricades was concerned. And I am going to deal with this matter by making that order. That order is under Section 75(1)(b) of the **Occupational Health and Safety Act**. So I am hereby directing Dexter Construction Company Limited to pay to the Minister, that being the Minister of Labour, \$ 5,000.00 and that will be for the purpose of public education and the safe conduct of the activity in relation to which this offence happened and principles of internal responsibility provided for in the **Act** and no later than November 12th, 2003 will be the date on that order.

CLAUDINE MACDONALD, J.P.C.

KENTVILLE, NS
October 14, 2003