IN THE PROVINCIAL COURT OF NOVA SCOTIA
Cite as: R. v. Nova Scotia (Transportation and Public Works), 2002 NSPC 33

HER MAJESTY THE QUEEN

versus

HER MAJESTY THE QUEEN, in right of
THE PROVINCE OF NOVA SCOTIA, as represented by
THE MINISTER OF TRANSPORTATION AND PUBLIC WORKS

s. 15(a) Occupational Health and Safety Act, S.N.S.
s. 126(4) Occupational Health and Safety General Regulations
s. 126(2) Occupational Health and Safety General Regulations
s. 13(1)(c) and s. 74(1)(a) Occupational Health and Safety Act

DECISION

Before: His Honour Judge John MacDougall

Date of Decision: September 30, 2002

Counsel: Mr. Richard Hartlen, for the Prosecution
Mr. A. William Moreira, for the Defence

[1] The co-defendant, Black and MacDonald Limited ("BML") entered a plea of guilty and, therefore, this decision involves only Her Majesty the Queen in the Right of the Province of Nova Scotia as represented by the Minister of Transportation and Public Works ("TPW").

THE FACTS:

[2] David Walsh, a safety officer employed by the Department of Environment and Labour, was approaching the intersection of Highways # 215 and # 2 at Elmsdale. It was January 18, 2001 at approximately 10:00 a.m. on a bright, clear day. He observed a boom truck lifting an overhanging traffic-light standard onto a pedestal. The head of the boom was precariously close to the adjacent high voltage electrical wires. He parked his vehicle and spoke with Gary Osborne, the site supervisor, an employee of BML.

[3] Mr. Walsh directed Mr. Osborne to have the operator, James Stewart, drop the load and leave the equipment. Upon questioning, no one present could identify who was the safety watch looking out for Mr. Stewart or the voltage in the overhead power lines. Walsh had Joe Forbes, a field supervisor with Nova Scotia Power, summoned and he advised the lines were 3 phase and 25,000 volts. The distance between the head of the boom and the closest wire was measured at 6 feet 2 inches, well within the limit of 10 feet (3 meters). This wire was the street side phase and was identified as carrying 14,400 volts phase to ground. Under the direction of Mr. Forbes, the truck was moved such that it did not intrude into the proscribed zone and the standard was safely installed.

[4] Complicating the investigation of Mr. Walsh was the presence of Darren Murphy. Mr. Murphy is an operations supervisor for TPW and is trained as a civil engineering technologist. On January 4th, he had been advised by the RCMP the light standard had been damaged. He reported this to David Phillips of the Lights and Signals Department and was advised to contact BML to collect and repair it. On January 17th, Mr. Murphy received a call from Kevin Mattie of BML that the standard was repaired and would be installed the next day.

[5] Although under the contract with TPW it was the responsibility of BML to provide traffic control, Mr. Mattie advised BML was short staffed and Murphy agreed to provide this support. Prior to the contracting out of services to BML Murphy had provided similar assistance for Lights and Signals personnel. To ensure the site was ready, Murphy attended the scene and ordered the snowbank to be pushed back. He also prepared a hazard

report with respect to traffic including a sketch of the intersection, a weather report and relevant excerpts from the Nova Scotia Traffic Control Manual. He had briefed his two signalmen on their responsibilities and was on site to ensure they were following orders. It is acknowledged Murphy's training is in traffic control. He is not trained with respect to work around electrical wires and at no time did he give advice with respect to issues other than traffic.

[6] On arrival at the workplace Mr. Walsh correctly assumed that having ordered the work to be done TPW was by definition a constructor under the *Occupational Health and Safety Act* ("*Act*") and *regulations* (*"regulations").* Walsh recognized Murphy as the senior TPW employee on site and, therefore, ostensibly in charge. The limited role of Mr. Murphy is not in dispute and from the outset BML employees acknowledged the installation project was their responsibility.

[7] There is agreement an offence has been committed. The Defense admits TPW was a "constructor" as defined by the *Act* and also an "employer" because a constructor is included in the definition of employer.

[8] The position of the defendant is as follows:

a) reasonable care was taken to select BML to do the work formerly done by the Lights and Signals Division with due regard being given to safety, both as it related to the general reputation of the company and as it related to the work to be performed;

b) having contracted out the work to a reputable and competent company, it was not reasonable to anticipate TPW employees would be on the site;

c) Section 23 of the *Act* provides a valid defense to TPW because BML had the greatest degree of control over the site and the safety issues related to the work;

d) TPW, through the person of Mr. Murphy, " reasonably believed in a mistaken set of facts" that BML could be relied upon to comply with the *Act* and *regulations* as required by contract and were, in fact, in compliance and, therefore, pursuant to Section 23(4) TPW could not be held responsible;

e) Section 76(2) of the *Act* is relied upon to distance TPW from the acts of both Murphy and the employees of BML at the site.

THE LAW:

[9] In addition to the charging sections, counsel have referred to the following sections of the *Act*:

> 2. The foundation of this *Act* is the Internal Responsibility System which
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> (a) is based on the principle that
>
> (i) employers, contractors, constructors, employees and self employed persons at a workplace, and
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> (ii) the owner of a workplace, a supplier of goods or provider of an occupational health or safety service to a workplace or an architect or professional engineer, all of whom can affect the health and safety of persons at the workplace,
>
> share the responsibility for the health and safety of persons at the workplace;
>
> (b) assumes that the primary responsibility for creating and maintaining a safe and healthy workplace should be that of each of these parties, to the extent of each party's authority and ability to do so;
>
> 3. In this *Act*,
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> ....
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> (f) "constructor" means a person who contracts for work on a project or who undertakes work on a project himself or herself;[1]
>
> ....
>
> (p) "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 or subcontractor.
>
> 23 (1) A specific duty or requirement imposed by this *Act* or the *regulations* does not limit the generality of any other duty or requirement imposed by this *Act* or the *regulations*.
>
> (2) Where a provision of this *Act* or the *regulations* imposes a duty or requirement on more than one person, the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement.

[1] It is relevant to note, the definition of constructor differs from that in many other Canadian jurisdictions (in particular Ontario from which much of the jurisprudence emanates) in that an owner need only contract work on the project and not undertake the work.

(3) Notwithstanding subsection (2), but subject to subsection (5), where the person with the greatest degree of control fails to comply with a duty or requirement referred to in subsection (2), the other person or persons on whom the duty or requirement lies shall, where possible, comply with the provision.

(4) Where the person with the greatest degree of control complies with a provision described in subsection (2), the other persons are relieved of the obligation to comply with the provision only

(a) for the time during which the person with the greatest degree of control is in compliance with the provision;

(b) where simultaneous compliance by more than one person would result in unnecessary duplication of effort and expense; and

(c) where the health and safety of persons at the workplace is not put at risk by compliance by only one person.

(5) Where the person with the greatest degree of control fails to comply with a provision described in subsection (2) but one of the other persons on whom the duty or requirement is imposed complies with the provision, the other persons, if any, to whom the provision applies are relieved of the obligation to comply with the provision in the circumstances set out in clauses 4(a) to (c) with the necessary modifications.

76 (1) In a proceeding or prosecution against an employer pursuant to this *Act* or the *regulations*, the act or omission of a manager, superintendent or other person who exercises management functions for the employer, is deemed to be the act or omission of the employer.

(2) Notwithstanding subsection (1), the act or omission of a manager, a superintendent or other person who exercises management functions for the employer, is not the act or omission of the employer where it is proven that the employer took every precaution reasonable in the circumstances to ensure that the act or omission would not occur and the employer

(a) did not have actual knowledge of, or could not reasonably have known of, the act or omission; and

(b) did not expressly or impliedly consent to the act or omission.

[10] It is agreed the offences charged are strict liability and, therefore, the principles set out in *R. v. Sault Ste. Marie [1978] 2 S.C.R.1299 ("Sault Ste. Marie")* apply. Once the Crown has proven the *actus reus*, the burden shifts

to the defendant to establish on the balance of probabilities that all reasonable care was taken to avoid the breach or the defendant reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent. Although the Supreme Court did not decide the case on its merits but directed a new trial, the dicta with respect to the application of the defence to the defendant, Sault Ste. Marie is particularly relevant.

[11] The city was charged for water pollution caused by the negligence of a company contracted to dispose of the city's garbage. The city had an obligation not to cause (active participation) or permit (passive participation) pollution from garbage disposal. Justice Dickson assessed the issue as one of control and stated if the city could "or should control the activity at the point where the pollution occurs, then it is responsible for the pollution. ... Whether an 'independent contractor' rather than an 'employee' is hired will not be decisive." (p.1330) He later distinguished between the control and therefore responsibility of the municipality with respect to disposal of garbage and a home owner using a service. He stated the municipality has the ability to control those whom it hires, "either through the provisions of the contract or by municipal by-laws. It fails to do so at its peril." (p.1331)

[12] Justice Dickson made the following comment on the same page when addressing the duty of the municipality:

> The due diligence that must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are, therefore, in law the acts of the corporation itself.

[13] Justice Dickson referred to the case of *Tesco Supermarkets v. Nattras [1971] 2All E.R. 127 A.C.* (*"Tesco")* as an example of a correct application of the principle. Tesco was a publically traded company with approximately 800 supermarkets and was charged with selling a box of detergent for 3s. when it was advertised on sale for 2s. The company had an established policy when a product was advertised for sale all regular priced inventory

would be removed from the shelves. The manager was to be informed by staff when all marked down items were sold. The manager was to personally record each morning an inventory of marked down items still available. By mistake the clerk who noticed all sale items had been sold restocked the shelf with full priced product and neglected to inform the manager. In taking inventory the following day the manager mistakenly recorded four empty boxes as marked down product.

[14] The *actus reus* was admitted and the defendant was required to prove due diligence. The company presented the following evidence

- to ensure the system would work, there was in place a careful selection process to hire competent managers,
- there was ongoing education for managers to ensure staff were instructed and properly supervised,
- staff in the store were integrated with respect to experience and authority,
- branch inspectors were responsible for, and regularly visited 6-8 stores each and reported to area controllers who were responsible for and visited 24 stores ensuring the stores were being operated in accord with company policy,
- supervising the performance of all was a regional director who received reports.

[15] The relevant principles set out in *Tesco* are as follows:

- the employer is not responsible for the acts of an employee who has failed to follow the system and avoid the proscribed activity. To punish the employer who established a reasonable system, implemented it and provided for reasonable monitoring would be to punish the blameless - *p. 131*
- the above principle applies equally to a corporation. It can be held responsible only for the negligence of those representing the operating mind or will of the corporation in failing to establish, implement or monitor a system. It cannot be held criminally responsible for the action of a servant acting outside the system unless it is with the consent or connivance of the company - *pp. 132-133*
- to insulate against the acts of subordinates, the system must be imposed without discretion, otherwise, there is an improper delegation of responsibility for which the employer would be accountable. Is the employee a cog in the machine which was devised, or was it left to him to devise it? - *p. 140*

- each individual in the hierarchy has a responsibility and will be held accountable. The commission of an offence may have occurred only as a consequence of the combination of separate acts and each participant will be held accountable to the extent of his responsibility - *p. 154*

[16] The above guiding principles have been adopted and developed in the context of occupational health and safety:

- the purpose of the statute is to impose on each person a responsibility to protect the worker even from his/her own carelessness by creating joint and several obligations. The constructor has a heavy burden commensurate with the ability to control - *R. v. Stelco, [1989] O.J. No 3122 p.5*
- each individual is to be held accountable to the extent of his/her responsibility and/or control as dictated by the hazard presented and not the size, scale of operation or economic resources of the employer - *R. v. Adam Clarke Co., [1990] N.S.J. No. 451 p.3; R. v. Napanee (Town), [1990] O.J. No.731 p.23*
- the duty imposed is not that of an insurer with the benefit of hindsight, which would amount to absolute liability, or to anticipate the way an accident might happen. The duty is to identify risks and develop systems that would minimize the potential hazard - *R. v. London (City), [1999] O.J. No. 4461 p.2*
- the duty can neither be contracted out nor delegated - *R. v. Wyssen, (1992) 10 O.R. (3d) 193 at p.198 (Ont.C.A.)*
- the issue is what the defendant did to discharge his/her duties with respect to that particular site, not what general education did the employer carry out or what a sub-contractor failed to do - *R. v. Dagmar Construction Ltd. [1989] O.J. No. 1665 (Ont. C.A.); R. v. Pierman et.al. (1990), 37 C.L.R. 256 at p. 266.*
- the control of the constructor as it relates to its experience, resources and on-site involvement will impact on the determination of whether due diligence was exercised with respect to prevention of the prohibited act - *R. v. Bellai Brothers (Ontario) Ltd., [1993] O.J. No.1600; R .v. Barrington Development Ltd. et al. (1994), 129 N.S.R. (2d) 92; R. v Eisner Contracting Ltd. [1994] N.S.J. No. 672; R. v Nova Scotia (Department of Supply and Services) [1997] N.S.J. 496; Imperial Oil Ltd.(Re) [1993] O.O.H.S.A.D. No.8; R.v. White [1993] A.R. 254.*

APPLICATION OF LAW TO FACTS:

[17] TPW contracted-out the maintenance performed by the Lights and Signals Division on March 27, 2000 after a reasonable search. The tender, as it relates to the subject charges, was for specific services which TPW had been performing and for which there had been developed a system of checks and balances to ensure safety. The evidence described a system in which a journeyman electrician would take charge, attend the site and evaluate the potential hazards, prepare a report, plan and execute the project in a safe and responsible manner. Should there be information or assistance required from Nova Scotia Power Corporation, it was routinely sought and provided. I can only assume the task would have been carried out with the same care and competence demonstrated by Mr. Murphy with respect to traffic control.

[18] The reliance of the defendant on the performance of BML requires a critical look be given both to the contract and the how it was carried out. The binder tendered as Exhibit 9 is an impressive submission put together by BML as part of its tender for the contract. It is understandable that BML scored well on its submission as indicated in Exhibit 10. The reputation of BML, the depth of personnel listed and showcased, the professional Corporate Policy and Safety Manual pertaining to occupational health and safety are impressive. A flow chart illustrates the continuity of responsibility. A Regional Safety officer reports directly to a Regional Vice-President under the President's authority. There are named individuals in the Utility Division who will be responsible for administration of the contract. In the submission there is provision for a Safety Handbook for each employee, provision for site meetings for each project with follow-up minutes and quarterly safety meetings for all staff.

[19] Of particular interest in the Project Safety Plan is the specific inquiry as to whether the owner has a safety program. The question is posed "Are there items / issues where our Program is in conflict or insufficient in comparison with the owners?" and a space is left for a description of the contrast.

[20] I am satisfied that on paper the system presented by BML to TPW is complete and reasonable. However, the evidence leads to no other conclusion than that it is irrelevant with respect to the installation of the traffic-light standard on January 18th.

[21] From the first report of the need for repair there was no planning or hazard assessment. No one on site knew the voltage carried in the overhead wires

or made an effort to determine what it was. The BML supervisor on site was Gary Osborne who did not testify. Mr. Osborne is not included in the BML inventory of personnel and nothing was said about his formal or informal qualifications at trial. The relative ease with which Mr. Forbes addressed the encroachment by repositioning the truck suggests Mr. Osborne paid little attention to his responsibility on the day in question or was simply not up to the task. I accept no one could identify a safety watch when requested by Mr. Walsh, despite the representation there would be a "qualified signalman" in the submission submitted to win the contract.

[22] Mr. Stewart, the boom truck operator with 25 years experience, was listed in the BML 'all star' line-up as having 34 years experience in the utility field. He had been dispatched to the project by management without any specific instruction. No one spoke to him about occupational health and safety with respect to this particular job. He remembers having a copy of the *Act* and *regulations* years ago but doesn't know where they got to. He testified it wasn't his job to check the voltage in the wires and no one raised concern about distance with him until Mr. Walsh arrived. Although Mr. Stewart is the front line person the *Act* is designed to protect, his cavalier approach to this particular job appears to be consistent with that of his employer. Although there was a reasonable system developed to address issues of occupational health and safety there was no implementation or monitoring.

[23] TPW had every reason to be satisfied with the submission of BML on its face. However, as stated above, there must not only be a reasonable system but to be effective the system must be implemented and monitored. The hazard the electrical wires presented on this installation was known or ought to have been. The system TPW had developed through experience on the job, the potentially fatal hazard presented by the electrical wires and the ostensible deference BML was to give to their safety plan required more of TPW than to enter a commercially viable contract. After listening to the various witnesses at trial the only conclusion to draw is the subject installation was a routine job which did not involve significant time or expense and wasn't worthy to treat as a "project". Since TPW was aware of the potential hazard it cannot hide behind BML’s naked promise to carry out the work reasonably and legally. Given the representation by BML to consider the TPW safety system, its failure to do this, in the circumstances, should have been an indication of the degree of commitment BML had to some of the more routine tasks required to be performed under the contract.

[24] The position of TPW was the same as Sault Ste. Marie with respect to control and the ability to determine a reasonable safety standard. The responsibility of a constructor in Section 15(a) of the *Act* is clear and the defendant must be held accountable for what it has failed to do to meet its responsibility. BML has the personnel to carry out its safety plan without interference from TPW personnel, but TPW has a responsibility and the resources to ensure the system is implemented and monitored.

[25] Assuming the system used by the former Lights and Signals Division was reasonable, TPW ought to have required that system be adopted by BML, or where there was deviation, require agreement. Much of what BML proposed was identical to the TPW experience. If only a journeyman electrician could supervise the project, as was suggested by David Hamilton, then this should have been a minimum safety requirement incorporated into the contract. If a person other than one with such formal qualifications was to be in charge then he or she could be approved in advance. With the benefit of fax and e-mail, a hazard report could be filed with TPW at the time the work order is acknowledged or at least with the statement of account. If it is reasonable, the hazard report could be prepared when the truck arrived to pick up the standard. TPW would have confirmation that someone on site knew the voltage and was competent to prepare the report, if not the ability to assess the risks and fully respond to the hazard. It is not for me to say if these procedures are suitable but only to use them as examples as to why I am not satisfied by the defendant, on the balance of probabilities, it used reasonable care. Therefore, I find the defendant guilty on the first count.

[26] The remaining charges relate to acts of an employer on-site. i.e.

- s. 126(4) - permit Mr. Stewart to work within 3 meters of the energized line without due precautions;
- s. 126(2) - permit work within 6 meters of a line without knowing voltage prior to work;
- s. 13(1)(c) and s. 74(1)(a) - fail to ensure information, training and instruction was provided to employees at a work place.

The evidence is not contradicted that Darren Murphy and his crew attended for the limited purpose of traffic control and these duties were carried out reasonably. The signalmen were instructed with respect to their duties and Mr. Murphy was there to monitor them. It is not suggested by the Crown the *Act* requires that the signalmen carry copies of the *Act* and *regulations*

on their person. TPW contracted for services to be preformed by BML and it was not reasonable or necessary to make provision to have Mr. Murphy or any employee of TPW take a supervisory role over the employees of BML. When Murphy agreed to provide traffic control it was outside the scope of the contract or system which was entered into by TPW and, therefore, at the site he was not representing the operating mind of TPW in the context of assuming a role of supervision of BML. Although the specific BML system was defective in implementation and monitoring the operating mind of TPW would not contemplate extending the duties of Murphy as suggested by the Crown.

[27] Counts two, three and four charge TPW for its failure as an employer to ensure the system bought from BML was implemented and monitored. To determine the degree of accountability of TPW as an employer I must once again assess the degree of control TPW had in the context of *Sault Ste. Marie* and *Tesco* (supra) and as applied in the various Nova Scotia cases referred to above. I do not accept the Crown contention that because TPW is an employer as defined by the *Act* it is to be held accountable to the same extent as BML with respect to the failure of BML employees to comply with the *Act* and *regulations.* Such an approach would ignore the impact of control and punish TPW twice for its negligence as a constructor.

[28] The responsibility of BML as an employer is to hire and fire, educate and supervise, allocate responsibilities and discretion, determine remuneration etc: The employees at the workplace were under the control of BML and their actions directed by individuals in BML with the responsibility to fulfill the TPW contract. TPW did not interfere with or attempt to influence the exercise of control or responsibility by BML. It is not a question that BML did not have the resources to properly carry out its responsibility and therefore TPW should step into the breach. In the circumstances TPW could not reasonably be held responsible for what happened at the site in Elmsdale. The actions of BML employees were outside the scope of the system purchased by TPW and the operating mind or will of TPW cannot be said to have approved, consented or connived in the actions of the BML employees. I have already commented upon the very limited role of Darren Murphy.

[29] The application of sections 23 and 76 does not go beyond the development of the jurisprudence. The duty imposed primarily on BML is not visited on TPW without qualification. This would create absolute liability for the negligence of another and would ignore the ability of the defendant, as an employer not as a constructor, to control the events. TPW did not intrude

into the BML exercise of control or management over BML employees, nor was it required to do so.

[30] The operating mind and will of TPW entered into a contract with BML providing for a system of maintenance which adequately addressed the issues safety. It will be held responsible for its failure to independently ensure the system was implemented and monitored when it could and should have done so. Under the *Act* TPW is deemed to be an employer and in this capacity do what is reasonable. I am of the opinion it did what was reasonable with respect to the second, third and fourth counts and therefore enter an acquittal on each of these charges.