

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. R.D. Longard Services Ltd., 2014 NSPC 100

Date: December 4, 2014

Docket: 2690136 and 2690137

Registry: Halifax

Between:

Her Majesty the Queen

v.

R.D. Longard Services Limited

Decision on Application for Particulars

Judge: The Honourable Judge Anne S. Derrick

Heard: November 28, 2014

Decision: December 4, 2014

Charges: section 74(1) of the *Occupational Health and Safety Act*,
R.S.N.S. 1996, C. 7 x 2

Counsel: Peter J. Craig and Alex Keaveny, for the Crown

Robert C. Hagell, for the Defendant

By the Court:*Introduction*

[1] This decision deals with an application for particulars in a prosecution under the *Occupational Health and Safety Act, R.S.N.S. 1996, C.7*. The Defendant argues that particulars are necessary for it to be able to make a full answer and defence to the charges. The Crown says they are not and that the application should be denied. The Crown submits that the disclosure provides the Defendant with all the information it needs and that particularizing the offences will fetter the prosecution.

Context for the Application for Particulars

[2] Following the tragic accidental electrocution of Christopher Boyle on May 21 2013, R.D. Longard Services Limited (“Longard”) was charged under the provincial *Occupational Health and Safety Act*. Mr. Boyle, an electrician, was an employee of Longard working at 201 Chain Lake Drive, a job site where Longard, a company that provides commercial and residential electrical services, had been subcontracted to do electrical work.

[3] I want to note that the facts I just recited have not yet been either agreed to or proven but were provided to me as context for Longard’s application.

[4] Longard is seeking an order pursuant to section 587(1)(f) of the *Criminal Code* for particulars with respect to the two charges it is facing under section 74(1) of the *Occupational Health and Safety Act*. The charge states that Longard, between April 30 and May 22, 2013 did,

As the employer, fail to take every precaution reasonable in the circumstances to provide such information, instruction, or supervision as necessary to the health and safety of an employee at the workplace pursuant to section 13(1)(c) of the *Occupational Health and Safety Act*, thereby committing an offence contrary to section 74(1) of the *Occupational Health and Safety Act R.S.N.S. 1996 C.7* as amended;

And furthermore, did

As the employer, fail to ensure that an electrical installation was serviced, repaired or dismantled in accordance with the latest version of CSA standard CSA C22.1, “Canadian Electrical Code Part 1”, Safety Standard for Electrical Installations” pursuant to subsection 120 of the *Occupational Safety General Regulations* thereby committing an offence contrary to section 74(1) of the *Occupational Health and Safety Act* R.S.N.S. 1996 C.7 as amended.

[5] Count 1 tracks the language of section 13(1)(c) of the *OHS Act* that states: “Every employer shall take every precaution that is reasonable in the circumstances to...provide such information, instruction, training, supervision and facilities as are necessary to the health or safety of employees.” Count 2 recites the legislated provision in the General Provisions of Part 11 of the *Occupational Safety General Regulations*, “Electrical Safety”. Section 120(1) of the General Provisions provides that:

An employer shall ensure that an electrical installation is designed, installed, assembled, operated, inspected, serviced, tested, maintained, repaired and dismantled in accordance with the latest version of CSA standard CSA C22.1, “Canadian Electrical Code Part 1”, Safety Standard for Electrical Installations”.

Particulars and Full Answer and Defence

[6] Longard seeks particulars as a fair trial issue. It states that it needs particulars of the charges so that it will know what the Crown alleges are the reasonable precautions it should have taken to provide information or instruction to, or supervision of, Mr. Boyle. Mr. Hagell on behalf of Longard has said that Longard does not know “what the company did or did not do that it should have done” to prevent Mr. Boyle’s tragic death. Longard also wants to know what it should have done to “ensure that an electrical installation was serviced, repaired or dismantled” in accordance with the *Occupational Safety General Regulations*

(OSGR). Mr. Hagell submits that Longard needs to have particularized what else it should have done to comply with its legislated obligations.

[7] The Crown says that “the means, act(s) and omission(s)” that form the basis of the charges against Longard “have been unequivocally communicated” in the disclosure. The Crown submits that no particulars are required by the Defendant to make a full answer and defence. Mr. Craig illustrated the Crown’s point by using training as an example and stating that Longard should look at what is contained in the disclosure concerning training and what witnesses will say about the training provided by the company with respect to the electrical work employees were assigned to do.

[8] I will note that Count 1 does not explicitly mention training although section 13(1)(c) of the *OHSA* does, in addition to “information” and “instruction.”

The Crown’s Disclosure Obligations

[9] Longard is not saying that the Crown has failed to satisfy its disclosure obligations and accepts that it has received everything the *OHSA* investigators collected. Longard says however that the disclosure does not enable it to understand why it has been charged.

[10] The disclosure provided to Longard was included in the Crown’s response to the application and I reviewed it with the consent of the Defendant. This same approach to an application for particulars was taken by Coady, J. in *R. v. Clarke*, [2014] N.S.J. No. 242, as the learned judge noted at paragraph 41. I am well aware that the disclosure is only relevant to the application for particulars as nothing in it has been proven.

[11] Longard directed me to several cases where particulars were ordered to ensure a fair trial. *R. v. Canadian General Electric Co.*, [1974] O.J. No. 13 (Ont. H.C.J.) and *R. v. Shumiatcher*, [1962] S.J. No. 140 (C.A.) are pre-Charter cases decided before the Crown’s disclosure obligations were established by *R. v. Stinchcombe*, [1991] S.C.J. No. 83. *Canadian General Electric* involved a complex prosecution under the *Combines Investigation Act* and the defendant appears not to have had the benefit of the disclosure that is now be mandated by the *Charter*. In *Canadian General Electric*, Pennell, J. observed at paragraph 33:

“Particulars are due whenever justice would be imperiled if particulars are withheld.” Since that statement was made, *Stinchcombe* established a constitutional right to disclosure and the Crown’s duty to disclose has been “...enshrined...among the fundamental rules of Canadian criminal procedure.” (*R. v. Taillefer; R. v. Duguay*, [2003] S.C.J. No. 75, paragraph 1)

The Effect of Particulars on the Prosecution of a Case

[12] Ordering the Crown to provide particulars has implications for the prosecution of the case. Particulars form part of the indictment and like the other elements of the indictment, must be proven beyond a reasonable doubt. (*R. v. Dalton*, [1999] N.J. No. 388, paragraph 11 (Nfld. S.C.); *R. v. Saunders*, [1990] S.C.J. No. 22, paragraph 5) An order for particulars necessarily leads to constraints on the Crown’s conduct of its case.

[13] The effect on the prosecution of a case of particularizing an offence is illustrated in the Supreme Court of Canada’s decision in *Saunders* where McLachlin, J. (as she then was) explained:

... The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial"...(cite omitted) (paragraph 5)

...

... Where the Crown has evidence of the particular drug involved, this may properly be required to be provided as a particular identifying the transaction. But where the Crown is uncertain as to the particular drug which was the subject of the conspiracy, it may properly decline to give particulars of the drug. The charge may nevertheless stand, provided that it

sufficiently clearly identifies the alleged conspiracy in some other way. There must be a new trial in this case, not because a conviction for conspiracy to import a narcotic cannot be supported without proof of the type of narcotic involved, but rather because the Crown chose in this case to particularize the drug involved and failed to prove the conspiracy thus particularized. (*paragraph 6*)

General Duty Offences under the Occupational Health and Safety Act

[14] Longard's application requires me to consider the nature of the offences being prosecuted. The offences are general duty offences under the *Occupational Health and Safety Act* and its regulations. The Crown referred me to Ross, J.'s decision in *R. v. Della Valle*, [2011] N.S.J. No. 531 (P.C.) which discussed a provision of the *OHS Act* very like section 13(1)(c) cited in Count 1 against Longard. Della Valle was charged with having "failed to take every reasonable precaution in the circumstances to protect the employee's own safety and that of other persons at or near the workplace contrary to s. 17 of the *Occupational Health and Safety Act*." Ross, J. had this to say about the obligations imposed by section 17:

A so-called general duty provision like s. 17 is included in the *OHS Act*...because it is not possible to foresee every safety-related circumstance which will arise in a workplace. It is not possible to lay out a blueprint for how every employee should act in every contingency. In this sense it is akin to section 100 in the *Motor Vehicle Act* which creates a positive duty to drive "in a careful and prudent manner having regard to all the circumstances" and provides an offence for not doing so. While the *MVA* contains many rules about what drivers must do (or not do) in particular situations, it is not possible to foresee all possible situations which may arise on a highway. (*paragraph 35*)

[15] The *Della Valle* case concerned the discovery of asbestos-laden vermiculite insulation. Mr. Della Valle was prosecuted on the basis that the measures he took

to protect other employees and workers and tenants in various housing units that were owned and maintained by his employer were inadequate, that is, he ought to have taken further precautions beyond what he did, to protect the workers and tenants from the health risks associated with the asbestos-riddled insulation.

[16] The foundational principle of occupational health and safety legislation is the responsibility shared by employers and employees for the health and safety of the workplace. This means that neither the employer nor the employee bears the sole burden of ensuring that a workplace is safe. How that shared responsibility factors into the issue of culpability in the case of a workplace accident is determined on the facts.

[17] In this prosecution, the Crown will have to prove beyond a reasonable doubt that the measures taken by Longard to protect Mr. Boyle in the workplace were inadequate: that the information or instructions or supervision provided did not constitute taking every precaution reasonable in the circumstances to make Mr. Boyle's workplace safe.

The Right to a Fair Trial

[18] At trial, the Crown must prove beyond a reasonable doubt the essential elements of the offence as set out in the charge but it is not required to prove its "theory". (*R. v. Dalton*, [1999] N.J. No. 388, paragraph 15 (T.D.)) This is a principle that has been consistently endorsed by Canadian courts, that the Crown is not required to set out the "theory" of its case in the Indictment. (*R. v. Groot*, [1998] O.J. No. 3674 (Ont. C.A.), paragraph 14; *R. v. McCune*, [1998] B.C.J. No. 2925 (B.C.C.A.), paragraph 37; *R. v. Gormley*, [1999] P.E.I.J. No. 80 (P.E.I.S.C., App. Div.), paragraphs 73 – 75; *R. v. Govedarov, Popovic and Askov*, [1974] O.J. No. 1837 (Ont. C.A.))

[19] Trial fairness is guaranteed to an accused by the common law and the *Charter*. However a fair trial is not solely constituted by what concerns the accused. A fair trial is "one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused." (*R. v. Harrer*, [1995] S.C.J. No. 81) A trial must be fair from both the perspective of the accused and of society more broadly. (*R. v. Bjelland*, [2009] S.C.J. No. 38) Therefore, where

particulars are required to enable the Defendant to “fairly...defend himself” they cannot be permitted to fetter the Crown in the conduct of the case. (*R. v. Groot*, paragraph 17)

[20] The disclosure indicates what witnesses are expected to say happened at 201 Chain Lake Drive where Mr. Boyle, an experienced journeyman electrician, was doing work on a system with a live electrical feed that had not been disconnected. It appears from the disclosure that the Crown will seek to prove that Longard had no supervisors on site with Mr. Boyle. The Crown alleges that Mr. Boyle had completed similar projects in the past but was not supervised or given instructions from his employer for the completion of this project. The Crown disclosure also indicates how it alleges that Longard failed to comply with section 120(1) of the *OSGR* which requires that employers ensure their employees work in accordance with the Canadian Electrical Code Part 1. Provisions of the CEC Part 1 are referenced in the report of the Crown’s expert, provided in the disclosure. According to the proposed expert, the CEC provides that “No repairs or alterations shall be carried out on any live equipment except where complete disconnection of the equipment is not feasible.” The CEC notes that “CSA Z462 provides assistance in determining severity of potential exposure, planning safe work practices, and selecting personal protective equipment (PPE) to protect against shock and arc flash hazards.”

[21] The proposed Crown expert concludes in his report that, “The electrical work being performed by the Worker at the time of the Incident was not being performed in a safe manner as described in the CEC and its referenced document CAN/CSA Z462-12.” This is evidence the Crown will be seeking to put before me. Whether Longard is culpable for what happened to Mr. Boyle will be determined at trial on the basis of all the evidence, including Defence evidence if any, and proof beyond a reasonable doubt.

[22] The disclosure suggests to me that establishing Longard’s culpability will require the Crown to prove beyond a reasonable doubt what reasonable precautions Longard should have taken to provide information or instructions or supervision to prevent Mr. Boyle’s electrocution and how Longard failed to ensure that the electrical installation at 201 Chain Lake Drive was serviced, repaired or dismantled

in accordance with the latest version of CSA standard CSA C22.1 as required by section 120(1) of the *Occupational Safety General Regulations*. The disclosure materials contain the evidence the Crown intends to rely on for its proof. In relation to offences such as those charged against Longard, the defence of due diligence is available once the prosecution has made out a *prima facie* case. And of course, the onus remains on the Crown throughout to prove what it is alleging against Longard beyond a reasonable doubt.

[23] An order for particulars is unnecessary in this case and will unreasonably restrict the Crown's prosecution. I fail to see how Longard does not know the case it is facing. The legal issues in this prosecution, and the evidentiary basis of the Crown's case, are not obscure, complex, confusing, or vague. I am satisfied that that Longard will be able to make a full answer and defence on the basis of the information it has in hand without particulars. Longard's fair trial rights are not in jeopardy. The application for particulars is denied.