

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Atlantic Road Construction and Paving Limited*,
2024 NSSC 99

Date: 20240409

Docket: Hfx No. 523263

Registry: Halifax

Between:

His Majesty the King

Applicant

v.

Atlantic Road Construction and Paving Limited

Defendant

| |
|-----------------|
| DECISION |
|-----------------|

Judge: The Honourable Justice Ann E. Smith

Heard: October 3, 2023, in Halifax, Nova Scotia

Counsel: Alex Keaveny, for the Provincial Crown
Michael P. Blades, for the Respondent

By the Court:

Background

[1] The Crown appeals the acquittals of Atlantic Road Construction & Paving Limited ("ARCP"), which was accused of regulatory offences contrary to the *Occupational Health and Safety Act*, S.N.S. 1996, c. 7 ("OHSA") and the *Blasting Safety Regulations*, N.S. Reg. 89/2008 ("BSRs").

[2] The charges against ARCP stemmed from blasting activities conducted in February 2019 on a construction site on Pepperrell Street in Halifax. The respondent was alleged to have committed various violations of the BSRs including violations involving the improper storage and handling of explosives (including detonators), improper documentation of blasts, and failures to report blasting incidents, thereby committing offences pursuant to s. 74 of OHSA.

[3] The trial evidence was heard by Judge Paul B. Scovil on September 6, 7, 8, 12, 13, 14, and 15, 2022, with closing arguments by video on February 3, 2023. The court received nine exhibits, including CCTV footage of the blasting conducted by ARCP at the Pepperrell site, records of delivery and return of explosives, blast logs and other documents. The trial judge acquitted ARCP of all charges.

[4] The Crown seeks an order for a new trial.

Issues

[5] The Notice of Appeal lists 12 grounds, two of which were abandoned. The remaining grounds of appeal give rise to the following five issues:

1. **Issue 1 (Counts 1, 6, and 13)**: Did the trial judge err in finding as a fact that the Crown failed to prove beyond a reasonable doubt that Tom Wilson, ARCP's blaster in-charge, stored detonators in the ARCP pickup truck as alleged on February 5, 6, and 7, 2019?
2. **Issue 2 (Counts 1, 6, and 13)**: Did the trial judge err in finding that Mr. Wilson keeping detonators in the ARCP pickup truck as alleged by the Crown (if it occurred) would not, beyond a reasonable doubt, violate the BSRs?

3. **Issue 3 (Counts 10, 11, 19 and 20)**: Did the trial judge err in finding that the Crown failed to prove beyond a reasonable doubt that:
 - a. the jobsite occurrence on February 7, 2019, was a reportable “blasting incident” under section 12 of the BSRs; or that
 - b. the jobsite occurrence on February 25, 2019, was a reportable "blasting incident" under s. 12 of the BSRs?
4. **Issue 4 (Count 15)**: Did the trial judge err in finding that the Crown failed to prove that complete original (or complete authentic copies) of "blast logs" had been tendered by the Crown, and refusing to admit the documents?
5. **Issue 5 (Count 15)**: Did the trial judge err in finding that the Crown had failed to prove that the proffered "blast log" documents, even if admitted, were non-compliant relative to the requirements of the BSRs?

Legislation

[6] Section 74 of the OHSA states:

Offences and penalties

74(1) A person who

(a) contravenes this Act or the regulations; or

(b) fails to comply with

(i) an order or direction made pursuant to this Act or the regulations, or

(ii) a provision of a code of practice adopted pursuant to Section 66,

is guilty of an offence and liable on summary conviction to a fine as set out in subsections (1A) and (1B), or to a term of imprisonment not exceeding two years, or to both a fine and imprisonment.

(1A) A person is liable

(a) to a fine of not more than two hundred and fifty thousand dollars; or

(b) for a second or subsequent offence, within five years from the date of conviction for a previous offence, to a fine of not more than five hundred thousand dollars.

(1B) ...

(2) In addition to a fine imposed pursuant to subsection (1A), (1B) or (3), the court may impose a fine not exceeding twenty-five thousand dollars for each additional day during which the offence continues.

(3) Where a person is convicted of an offence pursuant to this Act and the court is satisfied that, as a result of the commission of the offence, monetary benefits accrued to the offender, the court may order the offender to pay, in addition to a fine imposed pursuant to subsection (1A), (1B) or (2), a fine in an amount equal to the estimation by the court of the amount of the monetary benefits.

[7] The BSRs impose a general duty on an employer and a blaster-in-charge to comply with the Act and the regulations:

General duty to comply with the Act and these regulations

7 An employer and a blaster with direction and control of a blasting operation must ensure that the blasting operation is conducted in a manner that complies with the Act and these regulations.

Standard of review

[8] The standards of review applicable on a summary conviction appeal are well-established. Pure questions of law are reviewed for correctness; the appeal court is free to replace the trial judge's opinion with its own.

[9] Findings of fact and factual inferences may not be interfered with absent palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, at paras. 10-14; *R. v. Clark*, 2005 SCC 2, at para. 9; *R. v. C.E.*, 2009 NSCA 79, at paras. 30-31). A "palpable and overriding" error is one that is plainly seen and shown to have affected the result (*Housen*, at para. 6; *Clark*, at para. 9). In other words, a palpable and overriding error is both obvious and dispositive. In *Waxman v. Waxman*, 2004 CanLII 39040 (Ont. C.A.), the Ontario Court of Appeal described the palpable and overriding standard this way:

[296] The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: *Housen* at 246. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with

accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.

[297] An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at 281.

[10] Questions of mixed fact and law involve applying a legal standard to a set of facts. In *Housen*, at para. 36, the court noted that "[m]atters of mixed fact and law lie along a spectrum." Questions of mixed fact and law are reviewable for palpable and overriding error, unless the trial judge made some extricable error by applying the wrong standard, failing to consider a required element of a legal test, or a similar error in principle. Such an error may be characterized as an error of law and therefore reviewed on a correctness standard (*Housen*, at paras. 27-37).

[11] It has been said that distinguishing between questions of mixed fact and law and questions of law is often a difficult exercise. In *Halsbury's Laws of Canada - Civil Procedure* (2021 Reissue) at HCV-21, the authors provide the following helpful commentary on the issue:

The distinction between questions of law on the one hand, and questions of mixed fact and law on the other, reflects the proper role of appellate courts in the judicial system. Questions of law can have far-reaching effects, well beyond their impact on the parties to a particular dispute. Courts of appeal are tasked with ensuring the consistency of the law and its application; they are not simply another forum for parties to continue their private litigation. The precedential value of a particular issue marks the key difference between a question of law and a question of mixed fact and law. The more fact-specific the case, the less useful an intervention by the court of appeal would be to anyone other than the parties to the instant case.

[12] I will identify the standard of review applicable to each issue as I consider them.

Issue 1 - Alleged storage of detonators in the ARCP pickup truck

[13] Counts 1, 6 and 13 are all laid under s. 31 of the BSRs:

1. On February 5, 2019, Atlantic Road Construction & Paving Limited, being an employer under the Act, failed to ensure explosives were stored in a magazine or day box on February 5, 2019, contrary to section 31 of the Blasting Safety Regulations, thereby committing an offence contrary to section 74(1)(a) of the Occupational Health and Safety Act.

6. On February 6, 2019, Atlantic Road Construction & Paving Limited, being an employer under the Act, failed to ensure explosives were stored in a magazine or day box on February 6, 2019, contrary to section 31 of the Blasting Safety Regulations, thereby committing an offence contrary to section 74(1)(a) of the Occupational Health and Safety Act.

13. On February 7, 2019, Atlantic Road Construction & Paving Limited, being an employer under the Act, failed to ensure explosives were properly stored, contrary to section 31 of the Blasting Safety Regulations, thereby committing an offence contrary to section 74(1)(a) of the Occupational Health and Safety Act.

[14] Section 31 of the BSRs states:

Storing explosives

31 An employer must ensure that explosives are stored only in a magazine licensed under the Explosives Act (Canada) or in a day box.

[15] The BSRs define "explosive" at s. 3(m):

3(m) "explosive" means a substance, including a detonator or primed explosive, that is manufactured or used to produce an explosion by detonation or deflagration and that is regulated by the Explosives Act (Canada), but does not include ammunition for weapons, fireworks or explosive-actuated tools;

[Emphasis added]

[16] Section 33 of the BSRs provides further direction with respect to detonators under the heading "Storing detonators":

Storing detonators

33 (1) An employer must ensure that a detonator is not stored in the same day box or magazine as another type of explosive.

(2) An employer must ensure that a detonator is not placed in the same compartment of a vehicle as another type of explosive, unless the detonator is separated from the other type of explosive by using a day box.

[17] The Crown took the position at trial that the evidence showed boxes of detonators being stored by Mr. Wilson, ARCP's blaster-in-charge, in his company

pickup truck on February 5, 6, and 7, 2019. The trial judge's determination that the Crown had failed to prove beyond a reasonable doubt that detonators were stored in Mr. Wilson's pickup truck on the days in question was a factual finding reviewable for palpable and overriding error.

[18] The trial judge set out his conclusion at paragraphs 23-25 of his decision:

[23] Here there is no evidence that detonators were stored in the vehicle with other explosives. While Mr. Wilson testified that he sometimes kept detonators in his truck and that the truck was always locked, he did not give any testimony in a reliable manner as to what on the [sic] specific days detonators were stored in his truck.

[24] In addition, I can not find, beyond a reasonable doubt, on the totality of the evidence presented by the Crown, that on the particular days charged detonators were placed in the ARCP vehicle.

[25] The video contained with the delivery information from Atlantic Explosive make it likely that materials placed in the ARCP truck were detonators, but it is not proof beyond a reasonable doubt.

[19] The Crown submits that the evidence that ARCP stored detonators in the pickup truck on the dates charged was overwhelming and uncontradicted. The Crown argues that although individual detonators are not clearly visible on the CCTV footage, the videos, when considered with witness testimony and the Atlantic Explosives delivery records, allows for only one reasonable inference - the boxes placed in Tom Wilson's ARCP pickup truck contained detonators. The Crown says the trial judge erred in concluding that the Crown had failed to prove beyond a reasonable doubt that detonators were kept in Mr. Wilson's truck because there was nothing on the record to support a reasonable inference that the boxes contained anything else.

[20] ARCP argues that the Crown cannot meet the heavy burden of proving that the trial judge made a palpable and overriding error in finding that the videos, coupled with the other evidence, did not amount to proof beyond a reasonable doubt that ARCP kept detonators in the pickup truck on the specific days in question. ARCP highlights the trial judge's findings elsewhere in the decision as to the unhelpfulness of the CCTV footage. It notes, for example, that in relation to the Crown's allegation that the CCTV footage showed Mr. Wilson carrying detonators and other explosives in the same bucket, the trial judge found the CCTV footage to be so poor and so lacking in clarity that it was "impossible to tell what, if anything,

is in the bucket". ARCP notes that the trial judge held that the video footage alone could not even amount to proof on the civil standard of a balance of probabilities, let alone proof beyond a reasonable doubt. ARCP further submits that the trial judge referenced in detail the key testimony of Mr. Wilson that he "sometimes" kept detonators in his pickup truck but that he had no knowledge or memory as to what he did on the days in question.

[21] This Court finds that the evidence before the trial judge proved beyond a reasonable doubt that Mr. Wilson kept detonators in his ARCP pickup truck on February 5 and 6, 2019. This Court is not persuaded, however, that the trial judge made a palpable error when he concluded that the Crown failed to prove that Mr. Wilson kept detonators in his truck on February 7, 2019.

[22] Mr. Wilson testified that he was ARCP's blaster-in-charge at the Pepperell site, and the only person at ARCP with a Class 1 blasting certificate. He was assisted by two blasting assistants - Scott Thompson and Dave Randall.

[23] The evidence at trial established that ARCP used the following products to perform its blasting operations:

- Fortel Pro emulsion explosives - Large 65mm x 400mm (2.5" x 16") tubes.
- Pentex boosters - Small 90g (3oz) cannisters.
- Handidet detonators - Detonator assemblies with a surface connector on one end and a detonator on the other, linked by bright yellow shock tube. The surface connector and the shock tube contain a small amount of explosive.
- Connectadet detonators - Detonator assemblies with a connector block on one end and a connecting clip on the other, linked by green shock tube. The connector block and the shock tube contain a small amount of explosive.
- ElectricMS detonator assemblies - Detonator assemblies with a detonator connected to a wire.

[24] Detonators were also described in the evidence as "caps."

[25] ARCP connected the various explosives for each blast as follows. The Handidet detonator was placed inside the Pentex booster, and the Pentex (with the

detonator inside) was placed inside the Fortel Pro. This combination of explosives was then lowered into each hole using the detonator cord. Each hole was then filled with stemming, which is a type of clear stone or gravel. With the stemming in place, the only thing protruding from each hole was the yellow detonator cord. On the surface, the explosives in each hole were connected in a single series using the Handidet and Connectadet detonator assemblies. Three-ton blasting mats were then applied over the holes using an excavator. The final detonator (or cap) was hung on the wall to be used as the "tell-tale", while the first in the series was connected to an ElectricMS detonator assembly, which was connected to the blasting machine. Mr. Wilson testified that "it's a completely non-electric system, and you use one electric cap to detonate the whole blast" (Trial transcript, p. 44). Connecting the ElectricMS detonator was the final step before detonation.

[26] The explosives needed for blasting, including the detonators, were never kept on site overnight. Mr. Wilson testified that on the day before he was scheduled to blast, he would order the necessary explosives from Andy Joyce at Atlantic Explosives. The following morning, Mr. Joyce would bring the order to the site, where it would be unloaded. Mr. Wilson or someone else from ARCP would sign an Atlantic Explosives document confirming delivery of the various components of the explosives order. Once Mr. Wilson had finished that day's blasting, he would call Mr. Joyce to come back to pick up the remaining explosives and any empty explosive boxes.

[27] Mr. Wilson said that when Atlantic Explosives would arrive with his order, he would put the explosives in the day box and that he "usually" kept the detonators "locked up in my truck" (Trial transcript, p. 60). He said he only kept detonators in his truck and there were "never" any other types of explosives in his pickup truck (Trial transcript, p. 522). Mr. Wilson was asked whether he would put the detonators into a day box if he had to leave the site. He said, "No, I keep - keep them in the cab of my truck" (Trial transcript, p. 181).

[28] Mr. Wilson was asked on direct examination how he would transport the detonators from his pickup truck down to the blasting area or "hole":

Q. All right, just - just explain what you mean by that. So, you have a bucket to carry your cap...when you say a cap, what's a cap?

A. Detonator.

Q. Okay. And you say you don't take a full box down. What do you mean by that?

A. No, if I know - if I've marked out the shot already I'll know how many caps - detonators I'm going to need, so that's what I take.

Q. And you carry them in what?

A. A bucket.

(Trial transcript, p. 156)

[29] During his testimony, Mr. Wilson was shown portions of the CCTV footage obtained on various dates in February and March 2019. Mr. Wilson identified himself in the videos primarily by his clothing and his hard hat, which was white and round, with a full brim:

A. Yeah, that's me in my black jacket and I was the only one on that site with that type of hard hat, I think.

Q. That type - you mean with the white hard hat, the big white one?

A. Round one.

(Trial transcript, p. 120)

[30] Mr. Wilson was shown footage from the morning of February 5, 2019, with a time stamp of 08:01:51. He confirmed that the video showed the Atlantic Explosives delivery truck arriving at the site. He further testified that the footage showed him putting detonators in the cab of his truck:

Q. Okay. And you appear to be on the - is that the driver's side of the truck?

A. Yes.

Q. All right. And are there any doors or anything on that side?

A. Yes.

Q. And what - what - what are you - what's the access from that side of the truck?

A. Detonators.

Q. Okay.

Q. And what are you doing now, sir?

A. Putting the detonators in the cab of my truck.

(Trial transcript, pp. 159-160)

[31] Andrew Joyce, the delivery driver for Atlantic Explosives at the relevant time, also testified at trial. He confirmed that detonators and other explosives were stored in separate parts of the delivery vehicle:

Q. All right. And, when you're putting explosive products onto your truck, are different products put in different locations in the truck?

A. Yeah. Detonators and powder would be separated [sic] each other.

Q. Okay. And so, where would the detonators be on the truck you were driving for Atlantic Explosives?

A. They'd be on, in the front compartment. On the front of [sic] box there's separate compartment that the detonators would be stored in.

Q. All right. And the door to that compartment is located where?

A. It would be on the driver's side just behind the cab.

Q. Okay. And so, that's the detonators where do the other explosives go?

A. They'd be on the back of the truck?

Q. Okay.

A. In the main compartment.

(Trial transcript, pp. 805-806)

[32] Mr. Joyce was shown the same portion of the video from the morning of February 5, 2019, starting at 08:02:02:

MR. KEAVNEY: Mr. Joyce, I'm going to replay the video. I want you to pay attention to the driver's side of the truck and you tell me if you see anything.

A. Okay.

Q. Your Honour, I'll go back further than that. And please then describe, if you see, well, if you see anything happen to the driver's side of the truck you just tell me to stop and then I'll ask you what you saw. I'm pausing the video, Your Honour, at 8:03:17. Mr. Joyce did you see anything happen at the driver's side of the truck?

A. Well, I can't really see a lot from this angle but if I had to guess I'd say we're...

Q. I don't want you to guess, Sir. I can certainly go in closer to the image. Mr. Joyce, did you see any activity on the driver's side of the truck?

A. Yeah, it looks like we're opening the compartment on the side of it.

Q. All right. And when you say the compartment, what are you referring to?

A. By the detonator compartment.

(Trial transcript, p. 825)

[33] A review of the CCTV video footage is instructive. The video, which was captured by a camera on the roof of the Atlantica hotel, shows the Pepperell Street construction site. Concrete barriers and fencing surround its outer perimeter. Inside these barriers is a relatively narrow street-level perimeter which encloses a large L-shaped pit. Other than on the side facing the street (the bottom of the L), the pit is surrounded by fencing covered in orange tarps or mats. While the pit and external perimeter occupy three-quarters of the screen, both lanes of the street in front of the construction site are also visible at the bottom of the frame.

[34] In the segment of the video referenced above, Mr. Wilson and another man (who Mr. Wilson said was likely Scott Thompson) are shown at the bottom right of the screen, standing on the street at the rear of Mr. Wilson's ARCP pickup truck. The pickup truck is parked just inside the construction site's street-level perimeter, on a diagonal. The truck's front-end faces into the site, with its cargo bed at roughly a 135-degree angle to the street. A white delivery truck enters from the left side of the frame, on the street. It drives a short distance before it crosses into the empty oncoming lane, pulls up alongside the worksite fence and parks, just past the two men.

[35] Mr. Wilson approaches the driver's side of the delivery truck, walking between the truck and the fence. He stops at the driver's side of the truck. Only his hard hat and the tops of his shoulders are visible. A door on the driver's side of the truck, just behind the cab, swings open. Mr. Wilson disappears from view. Mr. Thompson then joins Mr. Wilson at the driver's side of the truck and also briefly

disappears from view. Approximately ten seconds later, both men walk back into view, each carrying a similar looking box. They proceed directly from the rear of the delivery truck to the passenger side of Mr. Wilson's ARCP pickup truck. Mr. Wilson opens the passenger side door and places both boxes inside the truck's cab (08:03:35-08:03:45). Mr. Wilson then picks up a nearby white bucket and places it on the ground near the open cab door, where it disappears from view.

[36] While Mr. Wilson is putting the boxes in his truck, the delivery truck driver exits the vehicle and walks to the back of the truck where he appears to unlock the rear door and open it. Mr. Thompson removes a box from the back of the delivery truck and carries it onto the site, into the day box area. There are two white day boxes, one of which is open. Mr. Thompson places the box in the open day box. The delivery truck driver also removes a box from the back of the truck and follows Mr. Thompson to the open day box. He hands the box to Mr. Thompson, who places it into the same open day box. The driver returns to the back of his truck, followed by Mr. Thompson. Each man retrieves another box and carries it down to the day box area, where Mr. Thompson adds one of the boxes to the day box. He sets the other down on top of a waist-high rectangular structure, which functions as a makeshift table. The delivery driver retrieves one final box from the back of the truck before appearing to lock the rear door. He hands the box to Mr. Thompson, who walks back to the day box area and places it directly on top of the box on the makeshift table. After handing off the last box, the driver gets back into his truck and drives away (08:06:00-08:06:57).

[37] While Mr. Thompson and the delivery driver are retrieving boxes from the back of the delivery truck and taking them down to the day box area, Mr. Wilson is busy doing something at the passenger side door of his truck cab. Only his hard hat and the tops of his shoulders are visible, so it is impossible to see exactly what he is doing. When asked about it on direct examination, Mr. Wilson stated:

- Q. At 08:04:27 what are you doing?
- A. Cutting my detonators.
- Q. And what's Mr. Thompson doing?
- A. Putting the explosives in the day box.

(Trial transcript, p. 164)

[38] As the delivery driver is retrieving the final box from the back of the truck, Mr. Wilson starts to walk away from the passenger side of his pickup truck. He picks up the white bucket and closes the truck cab door. He then sets the bucket on the ground one or two steps away. Mr. Thompson passes Mr. Wilson as he walks back up to collect the final box from the delivery driver. Mr. Wilson stands in place until Mr. Thompson returns with the final box. Mr. Wilson picks up his bucket and follows Mr. Thompson over to the makeshift table (08:06:00-08:06:10). Mr. Wilson was asked about this portion of the video on direct examination:

Q. Just pausing the video here, 08:06:03. What's happening now, sir?

A. I'm walking.

Q. Are you carrying anything?

A. Bucket.

Q. And what's in the bucket?

A. Detonators I would say.

(Trial transcript, p. 161)

[39] When the two men reach the makeshift table, Mr. Thompson sets the final box on top of the other one. Mr. Thompson removes the lid from the top box, while Mr. Wilson puts his bucket next to it on the makeshift table. The contents of the box are a bright red colour. Although it is difficult to tell for certain, it appears that Mr. Thompson is transferring some of the contents of the box into the white bucket. Mr. Wilson testified as follows:

Q. All right, Mr. Wilson, what are we watching? What's - what are you and Mr. Thompson doing?

A. Well, I'd say we were getting the 90 grams out.

Q. And 90 grams, that's what product?

A. Pentex boosters.

Q. And why do you say that?

A. Because that's what it looks like.

(Trial transcript, p. 165)

[40] Mr. Wilson then picks up the bucket and walks out of frame to the right, heading in the direction of the ramp or slope down into the pit, the entrance to which is just off screen. As Mr. Wilson walks away, Mr. Thompson puts the lid back on the box, puts the box into the day box, closes the lid and appears to lock it. As Mr. Thompson returns to the one box left on the makeshift table, Mr. Wilson re-enters the frame, now in the pit, and walks toward the blasting area with his bucket. Mr. Thompson then picks up the box from the makeshift table and carries it off screen in the direction of the ramp. Mr. Thompson soon re-enters the frame in the pit, carrying the box on his shoulder, and follows Mr. Wilson toward the blasting area. When asked about this segment of the video, Mr. Wilson testified:

MR. KEAVNEY: So, Mr. Wilson, we're at 08:08:29, so what are you doing and what is Mr. Thompson doing?

A. We're walking down to where we're going to be loading the shots.

Q. What are you carrying?

A. A bucket with detonators.

Q. And what is Mr. Thompson carrying?

A. A case of explosives.

(Trial transcript, pp. 166-167)

[41] The pickup of explosives on February 5, 2019, is also captured on CCTV video. At 13:08:27, the Atlantic Explosives truck enters from the left, driving down the street in front of the construction site, until it drives off screen. Mr. Wilson walks to his truck, now parked at a different area of the site, and retrieves two boxes from the cab. The boxes appear to have similar dimensions as the ones he placed in his pickup truck that morning. Mr. Wilson carries the boxes, one under each arm, as he walks off screen in the direction of the delivery truck. Mr. Wilson was shown the video and testified as follows:

Q. Thank you. After all blasts for the day have been done, what's the next thing that happens with regards to the explosives?

A. I call for a pick up.

Q. It's 13:08:16, I'm going to begin playing it at one-time speed, Your Honour, focusing on the truck and day box area. Do you know what's happening now, Mr. Wilson?

A. It looks like Andy coming for a pick up.

Q. Is anything happening in the area of your truck, Mr. Wilson?

A. I'm standing beside my truck. I think that's me anyway.

Q. I just want to zoom in to Mr...your truck area, Mr. Wilson. It's at 11...sorry, 13:09:17, Your Honour. What are you doing now, Mr. Wilson?

A. Getting the detonators out of the cab in my truck.

Q. And where do the detonators go after all the blasting's been done for the day?

A. Pardon?

Q. Where do the detonators go after all the blasting has been done for the day?

A. They go back to Atlantic Explosives magazines.

(Trial transcript, pp. 216-217)

[42] The Atlantic Explosives delivery and pickup slips confirm that detonators and explosives were delivered to the Pepperell site on February 5, 2019, with the remainder being picked up later the same day.

[43] The evidence for February 6, 2019, is as follows.

[44] At 09:00:34, the white Atlantic Explosives delivery truck enters the frame from the left, driving along the street in front of the Pepperell construction site. Unlike the previous morning, the delivery truck drives up the street and out of frame. In other words, the actual unloading of the explosives is not captured on video. At 09:01:03, a man walks out of frame in the direction of the delivery truck. At 09:04:11, the man re-enters the frame, carrying one box in each hand. He places both boxes into the open day box. He then walks around the day box and picks up a white bucket. He places the white bucket on the ground in front of the day box. The man closes the day box lid and appears to be locking it. He then reopens the lid, picks up the bucket and walks out of frame again, in the direction the delivery truck. The rooftop camera suddenly begins to move, zooming in on other parts of the site, making it impossible to see the street.

[45] At 09:06:15, when the camera pans back out, the man is shown carrying boxes over to Mr. Wilson's pickup truck. He opens the passenger side door of the truck cab and puts the boxes inside. When Mr. Wilson was shown the footage, he testified that it showed Mr. Thompson putting detonators into his truck:

Q. All right. Do you see anyone in the vicinity of your truck?

A. No. No. Oh yeah, that's Scott there. I just didn't see him. He's putting the detonators in the cab of my truck.

(Trial transcript, p. 227)

[46] At 09:10:43, a man exits the driver's side of the cab of the pickup truck. He stands by the open door while he puts on his jacket and round white hard hat. He closes the door before walking around the front of the pickup truck to the passenger side of the cab. He opens the cab door. There are two buckets, one inside the other, on the ground beside the truck. The man separates the two buckets, one white and one blue. He places them on the ground directly in front of the open cab door, where they disappear from the camera's view. The man retrieves several items from inside the cab of the pickup truck and appears to drop them into one or both of the buckets. After several minutes of this process, the man closes the cab door, picks up both buckets and walks away from the pickup truck (09:14:40). Mr. Wilson identified himself as the man in the video:

Q. Is anything happening around your truck right now, Mr. Wilson?

A. I'm getting out.

Q. What are you doing now, Mr. Wilson?

A. I'd be getting my detonators out, I believe.

Q. Now what are you doing, Mr. Wilson?

A. Still getting my detonators out.

Q. Can we see the detonators in the video?

A. No. You can see me putting something in the bucket and it would have to be detonators.

(Trial transcript, p. 229)

[Emphasis added]

[47] The first blast of the day was loaded from 09:25:00 to 09:58:00. The crew has a coffee break, and at 10:19:00, the excavator begins covering the blasting area with numerous three-ton blasting mats. The blast, which is shown on video, is fired at 10:47:03.

[48] At 11:44:44, the individual Mr. Wilson previously identified as himself is seen returning to the passenger side door of his pickup truck cab. He opens the door and reaches inside. He retrieves an armload of bright yellow items from inside before closing the cab door (11:46:23).

[49] Mr. Wilson was asked about this portion of the video and testified as follows:

Q. What are you doing now, Mr. Wilson, at 11:44:50?

A. What's who doing?

Q. Sorry.

A. Who?

Q. What are you doing right now?

A. Me?

Q. Yeah.

A. I just opened the door on my truck. I don't know what I'm doing.

Q. Know what you're doing, Mr. Wilson?

A. Looks like I'm getting the Handidets out.

Q. And the Handidets are the detonators with the yellow shot [sic - shock] tube?

A. Yes.

(Trial transcript, pp. 251-252)

[50] With the yellow items in his left arm, he walks to the truck bed, where he retrieves something else that he carries in his right hand. He walks over to the day box area where the man previously identified as Mr. Thompson is retrieving two buckets, one blue and one white. The two men start to walk toward the right side of

the frame, then stop near the day box area, facing one another. Mr. Wilson takes the blue bucket from Mr. Thompson and drops the yellow items into it. Mr. Thompson walks over to the day box and appears to start to unlock it. Mr. Wilson hands him the white bucket. Mr. Thompson flips open the day box and places the bucket inside (11:49:06). He then leans over the day box, doing something inside it. Mr. Wilson stands at the end of the day box, watching whatever Mr. Thompson is doing. At 11:49:43, Mr. Thompson lifts the white bucket up out of the day box and hands it to Mr. Wilson, who places it on the ground at Mr. Thompson's feet. When asked about this section of video, Mr. Wilson testified:

Q. Sorry. I'm zooming into the ...(inaudible)...following you. We now see on left Lonnie's trailer on the right of the day boxes. This is at 11:46:55. What do we see happening now, Mr. Wilson?

A. Scott's walking with two buckets. I'm walking with an arm load of detonators.

Q. So, what's happening now, Mr. Wilson, at 11:49:44?

A. I guess we're getting the stuff out for another blast, explosives.

Q. And where are you at this time?

A. Next to the day box.

Q. And where is Scott?

A. At the day box.

(Trial transcript, p. 252)
[Emphasis added]

[51] Mr. Thompson continues rummaging in the day box as a third man, wearing a standard white hard hat and a yellow vest, stops to talk to Mr. Wilson. The third man walks away. Mr. Thompson removes some items from the day box and drops them into the white bucket at his feet. Mr. Wilson picks up the white bucket in his right hand (11:50:47). He then walks back over to the blue bucket, which he picks up with his left hand. Mr. Wilson starts walking in the direction of the ramp down into the pit, which is visible on the screen. He disappears off screen instead of proceeding immediately down the ramp. Meanwhile, Mr. Thompson removes a box from the day box, which he places on top of the second, closed day box next to him. After closing and appearing to lock the day box, he picks up the box and hoists it

onto his shoulder (11:51:55). Mr. Thompson then walks over to the ramp and down into the pit. Mr. Wilson reappears, still carrying the two buckets, and follows Mr. Thompson down into the pit (11:52:30). The men continue until they reach the blasting area and proceed to load the holes for the next blast.

[52] Mr. Wilson was asked what the video showed at 12:25:01:

Q. All right. At 25:01, 12:25:01, I'll turn it to one time speed. The camera begins to move at 12:25:10. I'm just going to play this in slow motion. I'm going to pause it at 12:25:15. Mr. Wilson, explain to His Honour what we're looking at here on the screen.

A. A mess. Hole plugs on the ground, Handidet shot [sic - shock] tube coming out of the holes.

Q. All right. When you say Handidet shot [sic - shock] tubes. How is that visible on here? What does it look like?

A. The yellow sot [sic - shock] tube laying on the ground.

(Trial transcript, p. 262)

[53] The second blast is not shown on the video, as the camera is zoomed in on another portion of the site. When the camera pans back out at 13:19:27, the excavator is removing the three-ton blasting mats from the blasting area. The explosives pickup on February 6, 2019, is also not captured on video, as the camera is zoomed into the top of the site from 14:36:04 until 16:11:26, at which point the ARCP truck is no longer on scene.

[54] The evidence of what happened on February 7, 2019, is quite different than that for the previous two days. The camera is positioned such that only a portion of the street in front of the site is visible. There is no footage of the white Atlantic Explosives delivery truck arriving at the site. At 08:05:36, two men enter the frame from the right, each carrying a box on his shoulder, and walk down the ramp into the pit. The men disappear from view for a period of time behind an excavator. They re-emerge and proceed down into the blasting area where they drop the boxes on the ground. No boxes are brought to Mr. Wilson's pickup truck, which is visible in the lower left hand of the screen, nor is anything placed in either day box.

[55] At 08:07:25, Mr. Wilson enters the frame from the right, carrying two buckets. After a visit to the port-a-potty, Mr. Wilson picks up his buckets again and makes

his way down into the pit and over to the blasting area (08:11:46). The three men prepare the blast. Mr. Wilson testified that he only intended to do a single blast with 24 holes on February 7, 2019. The first blast is shown on video at 09:06:24. However, only a portion of the blasting mats move with the explosion. As will be discussed in more detail later, only eight of the 24 holes fired as planned, due to a surface cut-off. One of the three-ton blasting mats had pinched or crimped the shock tube, preventing the detonation of some of the holes. After Mr. Wilson confirmed that a cut-off had indeed occurred, he doubled up the surface connectors to detonate the rest of the holes and fired them successfully. He testified:

Q. All right. Does the - okay, all right. All right. So, you investigate, you find the problem, what's next?

A. I - I hook up - I hooked up... Okay, I always send Scott to get some more detonators, like the pictures you showed here. So we double them up on the surface.

Q. Okay.

A. I double up everything on the surface just in case something else has been affected, okay? So, now I'm going to have two - two lines of surface connectors to detonate the rest, and I hook a - another tell tale. Well, tell tales are already there. I hook another surface connector on for detonation, and replace the mats and I shoot it.

(Trial transcript, pp. 58-59)
[Emphasis added]

[56] The second blast is shown on video at 09:38:50. Mr. Thompson is shown picking up two explosives boxes at 09:41:29 and tossing them into the day box at 09:43:18. Mr. Wilson testified that the boxes appeared to be empty:

Q. From the, from the, what we saw on the video about the boxes, in your experience, based on your experience, did it look like those boxes were empty?

A. The way he's flipping them around and the way he's running up the hill, yeah I said they're empty.

Q. Thank you.

(Trial transcript, p. 340)

[57] The Atlantic Explosives' records include both a delivery and a pickup slip for February 7, 2019, although no pickup is shown on video after the second blast. The

Court notes, however, that the video evidence for February 7, 2019 ends at 10:12:00, after Mr. Wilson has left the site in his pickup truck.

[58] Although Mr. Wilson performed two blasts instead of one (due to the cut off), the Atlantic Explosives' records indicate that only one ElectricMS detonator assembly was used from the 21 that were delivered. The pickup slip further indicates that only detonators and Pentex boosters were picked up, and no Fortel Pro. Mr. Wilson testified that he sometimes takes only what he needs from the delivery truck and brings the materials down to the blasting area. Nothing is placed in his pickup truck or in a day box. In other words, the Atlantic Explosives delivery and pickup occur at the same time. Mr. Wilson testified as follows:

A. And there's something else you don't [sic]. if I only took off Andy's truck what I needed he would have left the rest on his truck and that would have went as a return.

Q. Okay.

A. Do you understand what I'm saying? I knew what I had to do. I'm saying I would have took off what I needed. I obviously didn't take three cases of detonators and ah...connectors off...

Q. Okay.

A. ...because I didn't put any in my truck.

Q. Okay.

A. So, I'm saying I took what I needed. Andy, if you get him on he can tell you the same thing. If, I'll take what, what I need, I'll leave the rest on his truck in these circumstances because I don't need it on the job.

Q. Okay.

A. And if Andy goes back he'll take it back. If he goes and makes his other deliveries and then comes back to me then it goes back as... I'm just saying.

Q. Okay. So, just so I understand your evidence, so what you were explaining there is in that circumstance you only take down to the site what goes in the hole and that's it.

A. Pretty much every time on that site.

...

Q. Okay. You're just saying it's possible that's what happened.

A. It's more than likely that that happened.

Q. Okay. Based on what?

A. On what I'm watching. And I'm pretty sure where I got no more explosive that's all I was going to do that day.

Q. Okay.

A. So, when we get ready to go down and do a blast, I tell Scott right to the half stick what we need to take down and he takes it down. I take the boosters we need, connectors and detonators that we need down the hole.

Q. Okay.

A. It simplifies everything.

Q. So just... Thank you. This is...this is very, this is exactly what I want His Honour to understand then. So just, so what you're saying is, after looking at all this, this could be the, the return appears to have happened at the same time as the delivery.

A. Yes.

(Trial transcript, pp. 340-343)
[Emphasis added]

[59] Mr. Wilson was then asked where the ElectricMS detonator for the second blast on February 7, 2019, came from. He testified:

Q. All right. And before you blasted Pepperell, or specifically for the two blasts we watched, what product was used to initiate those blasts?

A. Ah, electric detonator.

Q. And after the, the first blast ah, when you needed a second time...

A. Umhum.

Q. ...where did the electric detonator for the second blast come from?

A. I always have at least one spare.

Q. Where do you keep that spare?

A. In my truck.

Q. And...all right. So, that's where the electric detonator came from?

A. It would have had to, yeah.

(Trial Transcript, p. 376)

[60] On the video for February 7, 2019, at 09:33:16, before the second blast, Mr. Wilson is shown approaching the driver's side of his pickup truck. He opens both cab doors on the driver's side and reaches behind the driver's seat to retrieve a bag. He puts it on the driver's seat where he opens it, making an unzipping motion. Mr. Wilson retrieves something from the bag and closes the cab doors. The item appears to have a cord, which dangles from Mr. Wilson's right hand. At 09:34:31, Mr. Wilson, who is still on street level not far from his truck, tosses the item down to Dave Randall in the pit, who picks it up.

[61] At 9:35:20, Mr. Randall walks back toward the blast area and tosses the item to Mr. Thompson, who bends over and does something with it on the ground in front of the pile of blast mats. Mr. Wilson was not asked about the portion of the video where he retrieves the item from the cab of his pickup truck and tosses it down into the pit. Nor was Mr. Joyce asked during his testimony about whether delivery and pickup of explosives ever occurred at the same time.

[62] On cross-examination, Mr. Wilson confirmed that although he testified on direct as to what he believed the video footage depicted, he has no actual memory of the events of February 5, 6, or 7, 2019:

Q. Okay. You have no actual memory of any specific day at the Pepperell site, whether it's February 5th, 6th or 7th, 2019. Correct?

A. Correct.

Q. The videos that we watched last week, watching them, in fact, did not trigger any actual memory for you. Correct?

A. Correct.

Q. And so, naturally you have no ability to say whether or not those videos do, in fact, accurately depict any specific event or day's events from a particular day on that jobsite. Correct?

A. Correct.

...

Q. A little bit. Okay. But, other things, like watching buckets supposedly being carried from point A to point B on the jobsite, you have no memory of that. Correct?

A. No. No.

Q. And no knowledge of what's actually in those buckets at any point in time?

A. Correct.

(Trial transcript, pp. 400-401)

[63] With respect to boxes of detonators being placed into his pickup truck, Mr. Wilson said:

Q. Watching a box or several boxes be carried to and placed in a pickup truck that looked like your pickup truck, you have no memory of that?

A. Ah...actual memory, no.

Q. And no actual knowledge of what was in the boxes. Correct?

A. I don't know how to answer that. I know what I did with my caps. I just don't remember it day by day.

Q. Okay.

(Trial transcript, p. 401)
[Emphasis added]

[64] Mr. Wilson also testified as follows on cross-examination:

Q. Mr. Wilson, at the Pepperell jobsite did you ever place detonators in your pickup truck?

A. Yes, I did, yeah.

Q. Yes, you did.

A. Yeah.

Q. You did and your understanding based on your knowledge and experience was that it was permissible and compliant to the regulations for you to do that. Correct?

A. Yes.

Q. Now, before we get into that, before we get into why, is it necessarily the case that every single day, always without fail you have detonators inside your truck?

A. (Inaudible).

Q. Or would they sometimes go into the white boxes?

A. Sometimes they go in the white boxes if I had to leave for any length of time.

Q. Okay. Okay. So, it's not a case that every single day without fail detonators were placed in your pickup truck. Correct?

A. True. Correct, yeah.

Q. Okay. And obviously being almost four years later, even with the benefit of watching videos, you can't actually remember...

A. No.

Q. ...specifically on, on any given day...

A. No.

Q. ...whether detonators were put in your pickup truck or not?

A. No.

Q. No. Now, I'm more than happy to go back and show the videos to you if you want, if you need it, but I'll ask you some questions. And, like I said, if you want to watch the videos, Mr. Wilson will [sic] do it. You couldn't actually see from those videos what those boxes were that people were carrying towards the pickup truck, could you?

A. Couldn't see, no.

Q. You couldn't tell what was inside the boxes?

A. No.

Q. Might have detonators, in which case you think it's perfectly compliant and legitimate to do that, but it might not have been. Correct?

A. Correct, yeah.

Q. People leave the video frame heading in the direction of where a white van drove in and then exited the video. You have no ability to say, if that person walks back into the video frame with a box where that box came from. You just can't say?

A. No.

Q. No. Similarly if the video appears, based on your best guess to show you going to your truck with a bucket in hand or a bucket sitting on the ground, you couldn't see on the video an actual detonator or detonators.

A. No.

Q. That you, that you took out of your truck and put in a bucket, could you?

A. You couldn't see them, no.

Q. No. You're just making a guess that...

A. Yes.

Q. ...you might have done that because sometimes you did.

A. Yes, yeah.

Q. It could have been putting gloves or a clipboard in the bucket for all we know. You couldn't tell from the video, could you?

A. No, you couldn't no.

Q. No. But you did sometimes keep detonators in your truck. And you did that because you considered it to be safe and compliant to do so. And when you did that, your truck was always locked. Right?

A. Always.

Q. And the detonators that you placed in your truck, anytime that you did that were only placed there temporarily in the sense that you planning to use them for upcoming blasts that very day.

A. Yes.

(Trial transcript, pp. 515-518)
[Emphasis added]

Analysis of Issue 1

[65] This Court finds that the evidentiary record cannot support the trial judge's conclusion that the Crown failed to prove beyond a reasonable doubt that Mr. Wilson had detonators in his ARCP pickup truck on February 5 and 6, 2019. The uncontradicted evidence established the following:

- Explosives, including detonators, were never kept at the Pepperell construction site overnight.
- On the day before blasting operations, Mr. Wilson would call Andrew Joyce at Atlantic Explosives and place an order for the explosives he needed.
- Mr. Joyce would deliver the explosives the next morning.
- The Atlantic Explosives delivery truck had a separate compartment for detonators, which could not be kept with powder explosives.
- The detonator compartment was located on the driver's side, just behind the cab.
- Other explosives were kept in the back of the truck and accessed through the rear door.
- Upon delivery, Mr. Wilson would either put the boxes of detonators into the cab on his ARCP pickup truck or he would collect only the detonators he needed from the delivery truck and bring them immediately down to the blasting area.
- Mr. Wilson would "sometimes" put detonators into one of the two white day boxes on site "if [he] had to leave for any length of time."

- Mr. Wilson “never” put other kinds of explosives in his pickup truck.
- Mr. Wilson used a bucket to carry detonators from his truck down to the blasting area.

[66] The evidence with respect to February 5, 2019, is as follows:

- The video obtained on February 5, 2019, shows Mr. Wilson and Mr. Thompson each retrieve a box from a compartment located behind the cab of the Atlantic Explosives delivery truck, on the driver's side.
- The two men proceed directly to the cab of Mr. Wilson's pickup truck, where Mr. Wilson puts both boxes inside.
- Mr. Wilson testified that the video showed him putting detonators into his truck.
- Mr. Joyce opens the back door of the delivery truck.
- Mr. Thompson and Mr. Joyce retrieve five boxes from the back of the truck.
- Mr. Thompson puts four of these boxes into the same white day box. He puts the fifth on the makeshift table structure.
- Mr. Wilson testified that the video showed Mr. Thompson putting boxes of explosives into the day box.
- Atlantic Explosives paperwork confirms that detonators and other explosives were delivered to the site that morning.

[67] Based on the Atlantic Explosives paperwork, any boxes removed from the delivery truck on the morning of February 5, 2019, contained either detonators or other explosives. Mr. Wilson testified that he never put explosives other than detonators in his pickup truck. Moreover, the boxes were retrieved from the detonator compartment of the delivery truck.

[68] While Mr. Wilson testified that he had no actual memory of the specific days in question, he had no difficulty identifying what the video showed him doing at each stage of the blasting process.

[69] The only reasonable inferences supported by the evidence are that Mr. Wilson put boxes of detonators into his pickup truck on the morning of February 5, 2019,

and that the detonators remaining after blasting were picked up by Atlantic Explosives at just after 1 pm the same day. In other words, Mr. Wilson kept boxes of detonators in his pickup truck for approximately five hours on February 5, 2019.

[70] The evidence with respect to February 6, 2019, is as follows:

- The Atlantic Explosives delivery truck arrives at the site at 9 am. It drives out of frame.
- Less than a minute later, a man identified by Mr. Wilson as Mr. Thompson walks out of frame in the same direction as the delivery truck.
- Mr. Thompson re-enters the frame three minutes later, carrying two boxes, which he drops into the open white day box.
- At 9:06 am, Mr. Thompson is seen carrying boxes over to Mr. Wilson's pickup truck. He puts the boxes into the cab of the truck.
- Mr. Wilson testified that the video showed Mr. Thompson putting detonators in the cab of his truck.

[71] The Atlantic Explosives paperwork confirms that detonators and other explosives were delivered. Because the delivery truck parked out of frame, we do not know which boxes came out of which compartment. Again, however, Mr. Wilson testified that he never put any other explosives in his pickup truck.

[72] The conclusion that the boxes contained detonators is reinforced by the footage showing Mr. Wilson retrieving an armload of bright yellow items from the cab of his truck at 11:44:44 -11:46:23. Mr. Wilson testified that it looked like he was "getting the Handidets out" and confirmed that Handidets are the detonators with the yellow shock tube. He further testified that the video showed him "walking with an arm load of detonators." Mr. Wilson subsequently put the bundle of yellow items into a bucket, which he carried down to the blasting site. When shown the video at 12:25:15, Mr. Wilson testified that it showed the yellow shock tube coming out of the holes and laying on the ground.

[73] There is no other reasonable inference available on the evidence than that the boxes Mr. Thompson placed in Mr. Wilson's ARCP pickup truck on February 6, 2019, contained detonators.

[74] The evidence with respect to February 7, 2019, is not as compelling. It includes the following:

- Mr. Wilson planned to do one blast that day.
- There is no footage of the white Atlantic Explosives delivery truck coming to the site.
- At 08:05:36, two men enter the frame from the right, each carrying a box on his shoulder, and walk down the ramp into the pit.
- At 08:07:25, Mr. Wilson enters the frame from the right, carrying two buckets.
- Mr. Wilson brings the buckets down into the pit and over to the blasting area.
- No boxes are placed in Mr. Wilson's pickup truck or in the day boxes.
- Mr. Wilson testified that he sometimes only takes the detonators and other explosives he needs off of the Atlantic Explosives truck, leaving the rest of the delivery on the truck to be processed as a return. In other words, delivery and pickup occur at the same time.
- The Atlantic Explosives paperwork indicates that only one electric detonator assembly was used from the 21 that were delivered.
- The first blast is shown on video at 09:06:24.
- Only eight of the 24 holes detonated, due to a surface cut-off.
- After Mr. Wilson confirmed that a cut-off had occurred, he doubled up the surface connectors.
- Mr. Wilson testified, based on the Atlantic Explosives slip showing that he only used one ElectricMS detonator, that the electric detonator for the second blast "would have had to" come from his truck, where he "always" had "at least one spare."
- At 09:33:16, before the second blast, Mr. Wilson is shown retrieving an item from his pickup truck which he tosses down into the pit to Mr. Randall.
- Mr. Randall walks back toward the blasting area and tosses the item to Mr. Thompson.

- After the excavator has replaced the last blasting mat, Mr. Thompson bends over and does something with the item on the ground in front of the pile of blast mats.
- The second blast is completed successfully.

[75] In this Court's view, the evidentiary record in relation to February 7, 2019, considered in its totality, is capable of supporting reasonable inferences other than that the detonator used for the second blast came from Mr. Wilson's pickup truck. Mr. Joyce may have made an error when he wrote on the Atlantic Explosives pickup slip that 20 electric detonators were returned out of the 21 originally delivered to the site. Mr. Joyce conceded at trial that errors in his counts were possible. As to the argument that Mr. Wilson would have only taken one electric detonator from the delivery truck because he only planned to do one blast, there is at least some evidence that Mr. Wilson took more items from the delivery truck than were strictly necessary for a single blast. For example, Mr. Wilson testified that after the surface cut-off occurred, he doubled up on the surface connectors before firing the remaining undetonated holes. Where did these additional surface connectors come from if Mr. Wilson only took enough connectors off the truck for a single blast?

[76] While it is more likely than not that the item Mr. Wilson retrieved from his pickup truck and tossed down into the pit was an electric detonator, the Crown did not ask Mr. Wilson to explain that portion of the video, and there are other reasonable inferences available as to the source of the electric detonator used in the second blast. The trial judge was clearly not satisfied that Mr. Wilson's evidence that he always had at least one spare electric detonator in his truck, in light of his lack of actual memory of the day in question, was sufficient to prove beyond a reasonable doubt that he had a detonator in his truck on February 7, 2019. This Court finds no obvious error in his conclusion.

Issue 1 - Conclusion

[77] The trial judge made a palpable error when he found that the Crown had failed to prove beyond a reasonable doubt that Mr. Wilson kept detonators in his truck on February 5 and 6, 2019 (Counts 1 and 6). As this Court's analysis of the second issue will demonstrate, this error was also an overriding one.

Issue 2 - Detonators stored in vehicles a breach of BSRs?

[78] Although the trial judge found that the Crown had failed to prove beyond a reasonable doubt that Mr. Wilson had stored detonators in his pickup truck on the dates charged, he went on to state at paragraph 25: “It should also be noted that Section 33(2) of the BSR's clearly contemplate [*sic*] the storage of detonators in a vehicle.”

[79] ARCP argues that the trial judge's finding that the storage of detonators in a vehicle is permitted under s. 33(2) of the BSRs is a finding of mixed fact and law. The Crown submits that this issue involves a question of mixed fact and law, and a question of law.

[80] In the view of this Court, the proper interpretation of s. 33 of the BSRs is a question of law reviewable on a correctness standard.

[81] As noted earlier, counts 1, 6 and 13 are all laid under s. 31 of the BSRs, which states:

Storing explosives

31 An employer must ensure that explosives are stored only in a magazine licensed under the *Explosives Act* (Canada) or in a day box.

[82] The BSRs define "explosive" at s. 3(m):

3(m) "explosive" means a substance, including a detonator or primed explosive, that is manufactured or used to produce an explosion by detonation or deflagration and that is regulated by the *Explosives Act* (Canada), but does not include ammunition for weapons, fireworks or explosive-actuated tools;

[Emphasis added]

[83] Section 33, which bears the heading "Storing detonators", provides as follows with respect to detonators:

Storing detonators

33 (1) An employer must ensure that a detonator is not stored in the same day box or magazine as another type of explosive.

(2) An employer must ensure that a detonator is not placed in the same compartment of a vehicle as another type of explosive, unless the detonator is separated from the other type of explosive by using a day box.

[84] The Crown submits that the trial judge correctly cited the principles of statutory interpretation but failed to apply them properly. The trial judge, in relation

to a different charge, referred to Judge Buckle's summary of the law in *R. v. Halifax Port Authority*, 2022 NSPC 13:

[58] Judge Buckle of this court in **R. v. Halifax Port Authority**, 2022 NSPC 13, dealt with statutory interpretation in regulatory context as follows, paras 49-52:

[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?

[85] The Crown argues that the BSRs are protective legislation designed to promote public health and safety - specifically safe blasting - that must be generously interpreted to maximize safety. Narrow or technical interpretations are to be avoided because they would interfere with or frustrate the attainment of the legislature's public welfare objectives.

[86] The Crown says key terms like "explosives" are broadly defined, as are the requirements for use, storage, handling, etc. of "explosives." The BSRs clearly seek to capture the broadest possible conduct. The Crown says ss. 26 to 48, which fall under the heading "Handling and Storing Explosives" provide a clear scheme for how explosives are to be stored. Section 31 provides that explosives - including detonators - are to be stored only in day boxes or magazines. According to the Crown, later sections, including s. 33, provide *additional* restrictions for explosives, detonators, day boxes, magazines, etc.

[87] The Crown submits that s. 31 and s. 33 are not in conflict. While detonators may be "placed" in a vehicle, and "placed" in the same compartment of a vehicle with another type of explosive if separated by using a day box, they may only be "stored" in a day box.

[88] ARCP argues that the trial judge was correct in his conclusion that s. 33(2) explicitly contemplates storing and placing detonators in a vehicle so long as no other types of explosives are present. ARCP further argued that the Crown led no evidence - including no expert evidence - that would have allowed the trial judge to determine how "stored" and "placed" differed in definition (if at all) or that the impugned conduct was something other than detonators being "placed" in Mr. Wilson's truck. ARCP adds that if the provision is ambiguous, the rule of strict construction requires the ambiguity to be interpreted in the accused's favour.

Analysis of Issue 2

[89] In *Sparks v. Nova Scotia (Assistance Appeal Board)*, 2017 NSCA 82, the Nova Scotia Court of Appeal reviewed the principles of statutory interpretation and confirmed that they apply equally to the interpretation of regulations:

[24] The Supreme Court of Canada has reminded us time and time again that we are to take a pragmatic approach to statutory interpretation. Our approach must be both purposive and contextual. For example, in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 at 26 Justice Iacobucci describes this "modern approach":

[26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, 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.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings [...]

...

[26] This approach also applies when, like here, the subject provision is a regulation. Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) makes this point:

§13.18 Interpretation of regulations. It is well-established that delegated legislation, like Acts of the legislature, must be interpreted in accordance with Driedger's modern principle. Generally speaking, the rules governing the meaning of statutory texts and the types of analysis relied on by interpreters to determine legislative intent apply equally to regulations. There are some differences, however. As explained by Binnie J. and Bastarache J. in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, regulations must be read in the context of their enabling Act, having regard to the language and purpose of the Act in general and more particularly the language and purpose of the relevant enabling provisions. Regulations are normally made to complete and implement the statutory scheme and that scheme therefore constitutes a necessary context in which regulations must be read.

[Citations omitted]

[27] As well, Section 9(5) of the Nova Scotia *Interpretation Act*, R.S., c. 235, s. 1 holds that all enactments shall be deemed remedial, and interpreted to insure the attainment of their objects by considering among other matters:

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[28] Then, if after applying a purposive and contextual approach, we are left with an ambiguity, we turn to other interpretative aids. Justice Iacobucci explains in *Bell ExpressVu Ltd. Partnership v. Rex*:

28 Other principles of interpretation - such as the strict construction of penal statutes and the "Charter values" presumption - only receive application where there is ambiguity as to the meaning of a provision. [...]

[29] See also *R. v. C.(L.)*, 2012 NSCA 107 at 41-43.

[30] As Justice Iacobucci adds, a provision will be ambiguous when, after a contextual and purposive analysis, we are left with two plausible meanings, both consistent with the legislation's intention. It is only then would we resort to other interpretative aids ...

[31] All that said, at the end of the day, we should interpret legislation in a manner that is both reasonable and just. Ruth Sullivan in *Sullivan on the Construction of Statutes, supra*, explains at §2.9:

At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.

[Emphasis added]

[90] Accordingly, the BSRs must be interpreted in the context of the OHSA, which is intended to guarantee a minimum level of protection for the health and safety of workers. The Act's foundation "is the internal responsibility system ... which is based on the principle that workplace safety is a shared responsibility" (*R. v. Meridian*

Construction Inc.; R. v. London, 2005 NSPC 40, at para. 13). The proper interpretation of s. 33(2) will promote the OHS's objectives.

[91] As noted earlier, the BSRs define the term "explosives" as including detonators (s. 3(m)). Sections 31 and 33 fall within the part of the BSRs dealing with "Handling and Storage of Explosives" (ss. 26 - 48). Section 31 requires employers to "ensure that explosives are stored only in a magazine licensed under the *Explosives Act* (Canada) or in a day box." A "magazine" is defined as "a fixed unit used for storing explosives" (s. 3(o)), while a "day box" is defined as "a portable unit used for storing explosives" (s. 3(k)). Section 41 provides that an employer "must ensure that an explosive is not stored in a day box for longer than 24 consecutive hours." There is no definition of "store", "stored" or "storage."

[92] Additional rules specific to detonators are set out at s. 33:

Storing detonators

33 (1) An employer must ensure that a detonator is not stored in the same day box or magazine as another type of explosive.

(2) An employer must ensure that a detonator is not placed in the same compartment of a vehicle as another type of explosive, unless the detonator is separated from the other type of explosive by using a day box.

[93] As ARCP points out, the heading to s. 33 is "Storing detonators", which supports the trial judge's conclusion that s. 33(2) permits the storage of detonators inside a vehicle. The grouping of provisions under a heading is addressed in Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada Inc., 2022) at §14.05[3]:

When provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions. Conversely, the placement of provisions elsewhere, under a different heading, suggests the absence of such a relationship.

[94] The weight to be attached to a heading is addressed at §14.05[4]:

As with the other descriptive components, the weight attached to a heading depends on the circumstances. In *Law Society of Upper Canada v. Skapinker*, Estey J. wrote:

The extent of the influence of a heading ... will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the

length and complexity of the provision; the apparent homogeneity of the provisions appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the [legislation] and the relationship of the terminology employed in the heading to the substance of the headlined provision.

The weight attaching to a heading may be undermined because the heading itself is obscure, the provision to be interpreted bears no apparent relation to the heading, or the provisions arranged under the heading form no discernible pattern. In *R. v. Stevenson*, for example, the Ontario Court of Appeal was concerned with a Criminal Code provision which made it an offence to use a false affidavit. The appellants relied on the heading "Misleading Justice" to argue that the scope of the offence should be limited to uses designed to mislead justice. This argument did not succeed. While acknowledging that headings are to be read as part of the statute, the Court declined to attach much weight to this heading because several of the provisions grouped below it were clearly not confined to the evil of misleading justice but extended to abusing sworn documents for other purposes as well. Given this, the inference that provisions arranged under a heading have a shared purpose or scope could not be drawn.

[Citations omitted]

[95] Although the heading refers to "Storing detonators", the word "stored" is not used in s. 33(2). Instead, the provision refers to detonators being "placed" in a vehicle. In keeping with the presumption of consistent expression, "stored" and "placed" are presumed to have different meanings. The presumption of consistent expression is summarized in *Sullivan* at §8.04[1]:

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended. Given this practice, it follows that where a different form of expression is used, a different meaning is intended. The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject matter.

[96] However, "like all the presumptions of interpretation, the presumption of consistent expression must be weighed against relevant competing considerations" (*Sullivan*, at §8.04[5]).

[97] While presumptions can be of some assistance, in this Court's view, a consequential analysis is the key to interpreting s. 33(2). If the trial judge's interpretation, which assigns the same meaning to "placed" as "stored", is adopted, it follows that, notwithstanding the clear language in s. 31, detonators can be stored in a vehicle without a day box as long as there are no other types of explosives in the same compartment. The corollary to that, however, is that powder explosives can also be stored in a vehicle without a day box as long as there are no detonators in the same compartment. This cannot have been the drafter's intention.

[98] Section 33(2) contemplates both detonators and other kinds of explosives being placed in a vehicle. Where a detonator and another type of explosive are placed in the same compartment, the detonator must be "separated from the other type of explosive by using a day box." Note that the provision does not require that the detonator be placed in a day box. It merely requires that the detonator be separated from the other type of explosive "by using a day box." This separation could be achieved by placing either the detonator or the other type of explosive in a day box.

[99] The trial judge's interpretation puts s. 33(2) in direct conflict with s. 31, which dictates that "explosives" - including detonators - must only be stored in a magazine or in a day box. Not only is this interpretation contrary to the presumption of coherence, it is inconsistent with the legislative objective of protecting the health and safety of workers.

[100] The proper interpretation of s. 33(2) is one that works in harmony with the other provisions of the BSRs and is consistent with the OHS's purpose. In this Court's view, s. 33(2) must be interpreted as applying to the transporting of detonators and other explosives, with "placed" referring to the temporary placement of detonators in a vehicle for transport. This interpretation finds support in the definition of "blasting activity" in the BSRs. Section 2 of the BSRs states:

Application

2 These regulations apply to every workplace to which the *Occupational Health and Safety Act* applies and at which blasting activity is conducted, other than a mine as defined in the Underground Mining Regulations made under the Act.

[Emphasis added]

[101] "Blasting activity" is defined at s. 3(d) as follows:

- 3(d) "blasting activity" includes all of the following:
- (i) storing, handling, transporting, preparing and using explosives,
 - (ii) drilling at a blasting area or in combination with the use of explosives,

(iii) loading a hole with explosives;

[Emphasis added]

[102] At trial, Terry Duggan, one of the officers with the Occupational Health and Safety division of the Department of Labour, Skills and Immigration involved in the investigation that resulted in the charges against ARCP, suggested that s. 33(2) applied to the transport of detonators and other explosives. ARCP's counsel responded incredulously, pointing out that the transport of explosives is a federally regulated activity. The fact that the transporting of explosives is governed by federal legislation does not mean that provincial regulations dealing with blasting activity within the province cannot contain provisions related to the transport of explosives which are consistent with the federal requirements. Indeed, multiple other provinces have enacted blasting regulations which contain provisions dealing with the transport of explosives - see, for example, *Occupational Health and Safety Regulation - 296/97* (B.C.) at s. 21.24; *Occupational Health and Safety Code*, Alta Reg 191/2021, at s. 473; *The Occupational Health and Safety Regulations, 2020*, OC 579/2020 (S.K.) at s. 26-5; *General Regulation*, NB Reg 91-191, at s. 152; and *Occupational Health and Safety Regulations, 2012*, N.L.R. 5/12, at s. 425(5).

[103] Section 425(5) of the Newfoundland and Labrador *Occupational Health and Safety Regulations, 2012* is of particular interest:

425(5) A detonator shall not be placed in

(a) a magazine or day box with other types of explosives; or

(b) a compartment of a vehicle with another explosive unless they are separated by use of a day box and unless there is compliance with all applicable legislation respecting the transportation of explosives.

[Emphasis added]

[104] While it is not necessary to refer to the blasting regulations of other provinces to properly interpret s. 33(2) of the BSRs, the Newfoundland and Labrador provisions dealing with transport of explosives provide additional support for this Court's interpretation.

Conclusion

[105] This Court finds that the trial judge erred in law in his alternative finding that s. 33(2) permits the storage of detonators in vehicles. As such, the trial judge's factual error regarding the Crown's failure to prove that Mr. Wilson stored

detonators in his ARCP pickup truck on February 5 and 6, 2019 is both palpable and overriding.

Issue 3 - Did the worksite incidents on February 7 and 25, 2019, amount to "blasting incidents"?

[106] Counts 10, 11, 19, and 20 are laid under ss. 12(2) of the BSRs:

10. On February 7, 2019, Atlantic Road Construction & Paving Limited, being an employer under the Act, failed to notify the Director in writing no later than 24 hours after the time of the February 7, 2019, blasting incident contrary to section 12(2)(a) of the Blasting Safety Regulations, thereby committing an offence contrary to section 74(1)(a) of the Occupational Health and Safety Act.

11. On February 7, 2019, Atlantic Road Construction & Paving Limited, being an employer under the Act, failed to submit a blasting incident report to the Director as soon as reasonably practicable in relation to the February 7, 2019, blasting incident, contrary to section 12(2)(b) of the Blasting Safety Regulations, thereby committing an offence contrary to section 74(1)(a) of the Occupational Health and Safety Act.

19. On February 25, 2019, Atlantic Road Construction & Paving Limited, being an employer under the Act, failed to notify the Director in writing no later than 24 hours after the time of the February 25, 2019 blasting incident, contrary to section 12(2)(a) of the Blasting Safety Regulations, thereby committing an offence contrary to section 74(1)(a) of the Occupational Health and Safety Act.

20. On February 25, 2019, Atlantic Road Construction & Paving Limited, being an employer under the Act, failed to submit a blasting incident report to the Director as soon as reasonably practicable in relation to the February 25, 2019 blasting incident contrary to section 12(2)(b) of the Blasting Safety Regulations, thereby committing an offence contrary to section 74(1)(a) of the Occupational Health and Safety Act.

[107] Sections 12(2)(a) and (b) of the BSRs state:

12(2) If a blasting incident occurs, an employer, in consultation with a blaster, must do all of the following:

- (a) notify the Director in writing no later than 24 hours after the time of the blasting incident;

(b) submit a blasting incident report and a copy of the blast log to the Director as soon as reasonably practicable;

[108] A "blasting incident" is defined at s. 12(1)(b):

12(1) (b) "blasting incident" means 1 of the following occurrences:

- (i) a misfire or a suspected misfire,
- (ii) the presence of any fire, heat or gas that creates a risk of an explosive detonating accidentally,
- (iii) injury to any person or damage to property from flying material,
- (iv) flying material leaving the workplace;

[Emphasis added]

[109] The word "misfire" is not defined, although the BSRs do contain a definition of "misfired hole" at s. 3(p):

3(p) "misfired hole" means a charge of explosives in a hole or part of a hole that for any reason has failed to fire as planned, and includes an aborted charge under clause 85(d);

[110] As previously discussed, on the morning of February 7, 2019, Mr. Wilson intended to perform one blast with 24 holes. However, when he fired the blast, only eight of the 24 holes detonated. Mr. Wilson testified that he knew immediately that there had been a surface cut-off when the tell-tale did not go off. He explained that when he is ready to blast, he presses the red button on the electric blaster and watches and listens for the tell-tale to go off. If it does, he knows everything on the surface has detonated and detonation of the explosives in the holes should quickly follow. He testified:

A. Maybe I can explain this a little better. There's 25 mil seconds time on the surface, there's 500 down the hole. Everything on the surface including the tell tale goes before the blast. So, I'm watching the tell tale and listening. I hear it go off, I see it go off, then I see the mats move, in that order.

Q. Okay. So, if the tell tales doesn't go up after the blast...

A. No, before.

THE COURT: What's - what's it telling you when it goes off?

A. That everything on the surface is detonated. There's no more explosives on the ground.

Q. Okay.

A. The way this works it goes from one to the other to the other. If this one don't shoot, the rest of them ain't going to shoot.

MR. KEAVNEY: Okay. All right.

THE COURT: All right, sorry about that, Mr. Wilson.

MR. KEAVNEY: No, that's all right.

A. Including the tell tale. If the tell tale don't go you know you have a problem.

Q. Okay. And the problem - when you say the tell tale doesn't go you know you have a problem, what's the problem in that case?

A. Cut off.

Q. Okay.

A. The mat more...you're putting a three ton mat on a little shock tube...

Q. Okay.

A. ...and you're double matting. I always double mat in the city, so it increases the change [*sic* - chance] of a cut off.

Q. And if there's a cut off what does that mean?

A. Exactly what it says, it cut off. It didn't detonate the whole series.

Q. Okay. So it didn't det...so is it a physical - like physical interruption? Like a...

A. Yeah, it's - it's cut off, it - it - the tube has to stay solid to - to work properly. And if there's a cut off...

A. It could be caught or it could be pinched by a mat.

Q. Okay.

A. Either way it's going to stop the blast, so...

Q. So, everything after the cut off doesn't go off.

A. Correct.

(Trial transcript, pp. 50-52)
[Emphasis added]

[111] Mr. Wilson testified that the situation created no danger whatsoever to workers on site:

Q. Okay, all right. So, take us on it through the process then. So, now you've got the problem. You're taking - you said you're taking the mats off, so are people allowed to return to work while you're investigating?

A. I usually let them go back to work in a spot like this. There's no danger.

Q. Right.

A. There's no danger whatsoever.

Q. When you say that, sir, what are you investigating for?

A. To find where - where it cut off.

Q. Yeah. So, that the - the holes from the cut off to the end, are they still full of explosives?

A. Yes.

Q. Do they still have a - the detonators and the Pentex filling?

A. Yes.

(Trial transcript, pp. 57-58)

[112] Mr. Wilson explained that after he found the surface cut-off, he doubled up the surface connectors and fired the remaining holes successfully.

[113] Mr. Wilson testified that he did not consider a surface cut-off to be a "misfire" under the BSRs:

Q. Okay. And on that note in February of 2019, what was your understanding as to what was a misfire or a suspected misfire?

A. Misfire...like if - if I had a cut off and it became a problem and I had to use the machine to dig it out or fix it or something, I would classify that as a misfire in order to have to call somebody.

Q. Okay. So, just to be...

A. If there was any danger to anybody I would've called somebody. I would've done something.

Q. Okay, just to be clear though, so you - could you repeat that answer? What would you consider to be a misfire suspected in this file?

A. If - if I had a blast and something happened in the blast, it was half buried or - or I would've had to use machine to excavate it or something, then I would consider that a misfire and I'd definitely call somebody to let them know what was going on.

Q. Okay. Now, what if you had a cut off? Would you consider a cut off to be a misfire?

A. That's depends on the site and this site - site specific - a cut off is - is so minor you just hook it back up, shoot it, and go on. But there's no - there was no danger, no risk to anybody.

Q. When you designed and hooked up a blast, do you intend for there to be cut offs? Is that what you want to happen?

A. No.

(Trial transcript, pp. 134-135)

[114] On cross-examination, Mr. Wilson clarified his subjective understanding of misfire as follows:

Q. Now, obviously, your own personal subjective definition of what a misfire is or is not, is not the basis for any charge in this prosecution but I was quite intrigued by your answer, Mr. Wilson, because I think that's actually quite insightful. And I know it's hard and it seemed like you were getting frustrated and mixed up last week. I understand it was a long week, but let's see if we can break this down. I heard you say multiple times last week that, in your view, a misfire it would be a situation where you needed the help of an excavator to dig out a hole. Do you remember saying that?

A. Yes.

Q. Yeah. That need to dig out a hole seemed to be an important aspect of your personal definition of what a misfire is, isn't it?

A. It is, yeah.

Q. So, let me try to summarize for you what my impression is regarding your personal subjective definition of a misfire and you tell me if I'm wrong in anyway at all. Okay. Your personal definition of a misfire is where something failed within a loaded hole itself causing the hole itself to not detonate and the only way to treat that would be to excavate the explosive products back out of the hole. Do I have that right?

A. Yes.

Q. So, that's it.

A. That's my definition, yeah.

Q. That's not even close to what happened during the surface cutoff event, was it?

A. No.

Q. You explained for us what a surface cutoff is. It's when one of the, one of the surface wires running across the top of ground from one hole to another is cutoff or pinched off by the weight of the blasting mats.

A. Or a rock.

Q. Or a rock.

A. Something has cut it and pinched the shock tube, yes.

Q. Right. It's actually quite common and quite routine that that will happened [*sic*] when you use blasting mats, isn't it?

A. It is with that blasting system.

Q. Yes.

A. Yes.

Q. And of course, you double mat your blasts for safety. Right?

A. Yes.

Q. Which adds more weight.

A. Yes. That was...

Q. And it happens on the surface. Correct?

A. Yes.

Q. Nothing with any hole, within any hole itself that was drilled or loaded. Correct?

A. Correct.

Q. Nothing wrong with any of the holes themselves at all. Correct?

A. Correct.

Q. No failures within any of the holes themselves. Correct?

A. Correct.

Q. And based on your knowledge and experience and your interpretation of the Blasting Safety Regulations, you did not consider, you did not consider a surface cutoff to be something that fell within the definition of a so called blasting incident that required reporting to the Department of Labour. Correct?

A. Correct, yeah.

(Trial transcript, pp. 484-486)

[115] The evidence with respect to the February 25, 2019, incident is that an ARCP excavator operator unearthed residual unburned powder remnants from a single hole where the hole did in fact detonate in the normal course (as evidenced by the absence of the blasting cap detonator and booster), but where the powder material itself was partially but not fully consumed. Mr. Wilson testified that it was not a "live explosive", as the detonator had already detonated, and it did not present any safety hazard. Mr. Wilson testified that since there was no "failure to fire", he did not consider the incident to be a "misfire or suspected misfire" or "misfired hole" for the purposes of the definition of a "blasting incident" under the BSRs. Mr. Wilson testified:

Q. And I recognize that you have little, in terms of specific memory of the day, but bear with me and tell me as best you can recall. The first thing I want to be clear

about is what occurred in general in and around that time. You recall that you called to the site to investigate. Correct?

A. Yes.

Q. And you know that work on the jobsite was stopped until you got there and the investigation was performed. Correct?

A. Yes.

Q. In other words, when the explosive material was found by the excavator operator worked stopped. He stopped what he was doing. The situation was reported and everything was shut down until, you, the blaster in charge could investigate. Correct?

A. Yes.

Q. And what was found and what we see in this photograph, correct me if I'm wrong, Mr. Wilson, was a single partial stick of Fortel powder which had detonated but which had not been consumed in the blast. Is that Correct?

A. Yes.

Q. And you know that because, and the photograph shows that the detonator or the blasting cap, as you say, and the booster had both detonated. They weren't there at all. Correct?

A. The detonator is there but it's detonated.

Q. Sure, the detonator is there. It had detonated. The booster is not there at all.

A. Correct, yeah.

Q. And what's left in terms of the Fortel powder had been partially burned...

A. Yes.

Q. ...but not totally.

A. Yes.

Q. And that's something that you refer to as residual powder.

A. Yes.

Q. Where a hole fires or detonates but the powder is not fully consumed.

A. Yes, yeah.

Q. And this was not, as it was found in the ground, it was not a live explosive. Correct?

A. Correct.

Q. And in that sense where it had detonated and was not live it was not a safety hazard per say. Correct?

A. Correct.

(Trial transcript, pp. 504-506)

[116] The Crown led no expert evidence at trial to establish that the term "misfire" has a specific industry or technical meaning, nor did it offer any evidence to rebut Mr. Wilson's testimony that the incidents on February 7 and 25, 2019, created no safety risk to anyone working on site.

[117] The trial judge held that neither of the incidents were reportable "blasting incidents" under the BSRs, reasoning as follows:

[59] The Crown argues that "misfire" is not defined in the *BSR's*. However, the Crown argues the use of "misfired hole," a "misfire" and "misfires", throughout the *BSR's* should provide a broad interpretation to include explosives used in blasting that for any reason failed to fire as promised. Adopting this broad expansive definition would mean something as minor as forgetting to plug in a connection and as a result no blasting takes place would qualify as a "misfire." I also note the Crown referenced the definition of "misfire" contained in a Mindat.org Glossary of Mineralogical Terms which states in part that a misfire involves "an explosive charge in a **drill hole** that has partly or completely failed to explode as planned (emphasis added).

[60] ARCP argues that the term "misfire" and "misfired hole" are two terms which must be presumed to have different meaning and that the Crown has not led any evidence to establish what that different meaning might be. Consequently, the fact the terms are unclear and ambiguous would result in the charge failing.

...

[62] The intention of the legislature in enacting the *Occupational Health and Safety Act* and the regulations on blasting was to ensure a safe workplace where blasting has occurred within the framework of the industry. The overview of the

BSR's relating to the terms "misfire" and "misfired hole" indicates that the intention of the term "misfire" is one that is included in what is termed as "misfired hole". In regard to a blasting occasion, it would not make sense that a faulty button that caused no blast activity to occur would be a "misfire" or "misfired hole" with the resulting responsibility on a blast site that would flow from that under the *BSR's*.

[63] I do not find the crimped cord or cut off that occurred February 7, 2019, meets the definition of a "misfired hole" or "misfire", such as to trigger the notice requirement and the reporting of a blasting incident as required under the regulations.

[64] Accordingly, I acquit ARCP of counts 10 and 11.

[65] Regarding the incident of February 25, 2019, the Crown's main witness, Thomas Wilson, referred to the partial recovered material as a residual powder. His evidence was to the effect that the charge had been expended with some residual powder left. I am not satisfied beyond a reasonable doubt that the Crown has proven there was a "misfired hole" which would trigger the provisions of the *BSR's*.

[66] Accordingly, I acquit the ARCP of counts 19 and 20.

[Emphasis added]

[118] The Crown argues that the trial judge erred in his interpretation and application of "blasting incident" and "misfire or suspected misfire" in s. 12 of the BSRs. Essentially, the Crown submits that "misfire" should be interpreted more broadly than "misfired hole" to include any time explosives - including the explosives inside connectors and shock tubes on the surface - fail to fire as planned, whether a safety hazard results or not. Applying this broad definition, the Crown says, a surface cut-off and the discovery of a partially burned stick of Fortel both qualify as reportable "blasting incidents."

[119] ARCP argues that the trial judge effectively accepted the Crown's position at trial that "misfire" and "misfired hole" are equivalent terms, and highlighted a glossary definition cited by the Crown which described a misfire as involving a failure to fire *within a drill hole*. ARCP says that neither the surface cut-off nor the discovery of the partially burned stick of Fortel involved a charge of explosives in a hole or part of a hole that failed to fire as planned. ARCP contrasts these events with the reportable misfire that occurred on site on March 6, 2019, when an intact primed explosive was unearthed by an excavator.

[120] ARCP further submits that the trial judge also properly held that it would be incorrect as a matter of law to suggest that every conceivable reason for a blast not

detonating, regardless of whether it created any risk to worker safety, must be treated as a reportable "misfire" (*Blue Mountain Resorts Limited v. Ontario (Labour)*, 2013 ONCA 75).

[121] Determining whether the incidents on February 7 and 25, 2019 were "misfires or suspected misfires", and therefore reportable "blasting incidents" under s. 12 of the BSRs, involves the application of a legal standard to a set of facts, making it a question of mixed fact and law. However, the proper interpretation of "misfires or suspected misfires" under s. 12 is a question of law, reviewable on a correctness standard.

Analysis of Issue 3

[122] This Court has previously reviewed the principles that apply to the interpretation of occupational health and safety legislation and regulations. The court must apply a purposive and contextual approach to the interpretation of "misfire or suspected misfire" to arrive at an interpretation that fits the scheme of the OHSA and furthers its purposes.

[123] As noted earlier, s. 12(b) defines a "blasting incident" as follows:

12(1) (b) "blasting incident" means 1 of the following occurrences:

- (i) a misfire or a suspected misfire,
- (ii) the presence of any fire, heat or gas that creates a risk of an explosive detonating accidentally,
- (iii) injury to any person or damage to property from flying material,
- (iv) flying material leaving the workplace;

[124] Considering s. 12(1)(b) as a whole, and in the context of the OHSA, the term "blasting incident" is clearly intended to capture situations which either put persons or property at risk of harm, or which did in fact cause harm to persons or property. This conclusion is reinforced by the steps that must be taken in response to a blasting incident, and the content requirements for the blasting incident report. These steps provide the regulator with the necessary information to conduct a thorough investigation (if necessary), and require the employer and blaster to identify actions that may prevent similar occurrences in the future:

12(2) If a blasting incident occurs, an employer, in consultation with a blaster, must do all of the following:

(a) notify the Director in writing no later than 24 hours after the time of the blasting incident;

(b) submit a blasting incident report and a copy of the blast log to the Director as soon as reasonably practicable;

(c) if 1 or more committees have been established at the workplace, give each committee a copy of the blasting incident report and a copy of the blast log as soon as reasonably practicable;

(d) if 1 or more representatives have been selected at the workplace, give each representative a copy of the blasting incident report and a copy of the blast log as soon as reasonably practicable;

(e) consult with the committee or committees and the representative or representatives, if any have been established or selected, about actions that may prevent a future blasting incident similar to the one that has occurred;

(f) take every precaution that is reasonable in the circumstances to prevent a future blasting incident similar to the one that has occurred.

(3) A blasting incident report must include all of the following:

(a) a summary of the blasting incident;

(b) the date and time of the blasting incident;

(c) the location of the blasting incident;

(d) if a supervisor was directing work in the blasting area, the name of the supervisor;

(e) the name of the blaster under whose direction and control the blasting operation was conducted;

(f) the names of all blasters involved in the blasting operation, together with their blaster certificate numbers;

(g) the name and telephone number of the person completing the blasting incident report;

- (h) the names and addresses of all persons who witnessed the blasting incident;
- (i) if any person was injured as a result of the blasting incident, the name and address of the person and a description of the injuries sustained;
- (j) if any property damage occurred as a result of the blasting incident, a description of the property damage;
- (k) a description of the weather at the time of the blasting incident;
- (l) if the blasting incident occurred during or as a result of a blast, how the blast was initiated;
- (m) the employer's assessment of the cause of the blasting incident;
- (n) a description of actions that may prevent a future blasting incident similar to the one that is the subject of the blasting incident report.

[Emphasis added]

[125] Moving beyond s. 12, other provisions of the BSRs support the trial judge's conclusion that "misfire" and "misfired hole" are intended to refer to the same occurrence:

Misfires

Treating misfired hole

89 (1) An employer and a blaster must ensure that a misfired hole is treated to ensure the removal of all hazards from the misfired hole in a manner that complies with these regulations.

(2) While a misfired hole is being treated, an employer must ensure all of the following:

- (a) that the blasting area is fully illuminated;
- (b) that the work is directly and constantly supervised by a blaster;
- (c) that the cause of the misfire is investigated;
- (d) that precautions are taken to prevent an accidental explosion.

(3) An employer and a blaster must ensure that a misfired hole is treated at a safe and suitable time and in accordance with any instructions provided by the manufacturer of the detonator.

(4) Before treating a misfired hole, a blaster must inform all supervisors of all employees in the blasting area of the means that will be used to treat the misfired hole.

No metallic equipment after misfire

90 If it is known or suspected that a misfire has occurred, a person must not use metallic equipment in the blasting area until a blaster has authorized the use of metallic equipment.

Checking burden after misfire

91 If it is known or suspected that a misfire has occurred and if the method for treating the misfire is reblasting, an employer must ensure that there is sufficient burden before reblasting.

[Emphasis added]

[126] Sections 84 and 85, under the heading "After Firing", are also relevant. These provisions outline the precautions that blasters and employers must take in response to misfired holes or suspected misfires holes:

After Firing

Inspecting blasting area after blast

84 After a blast, an employer and a blaster must ensure that no person enters or moves about the blasting area until a blaster has thoroughly [*sic*] inspected the blasting area for misfired holes and other hazards and has given permission for work to proceed.

Waiting period after blast with misfired hole

85 If it is known or suspected that there is a misfired hole, a blaster must wait until the following applicable waiting period has passed before inspecting the blasting area in accordance with Section 84:

- (a) if the charge was fired using a safety fuse assembly, the required waiting period is 30 minutes from the time the last charge was due to explode;
- (b) if the charge was fired using an electric detonator, the required waiting period is 30 minutes from the time the last charge was due to explode or the waiting period recommended by the detonator's manufacturer, whichever is longer;
- (c) if the charge was fired using a method of initiation other than a safety fuse assembly or an electric detonator, the required waiting period is 10 minutes from the time the last charge was due to explode;

(d) if a charge that was meant to be fired using an electric detonator is aborted, the required waiting period is 30 minutes from the time the last charge was due to explode or the waiting period recommended by the detonator's manufacturer, whichever is longer, and all other manufacturer's instructions concerning aborted fires must be followed.

[127] There is no equivalent provision for misfires *simpliciter*. In other words, there is no evidence that the term "misfire" was intended to capture an occurrence or hazard other than a "misfired hole."

[128] In this Court's view, the trial judge did not err in interpreting "misfire" under s. 12(1)(b) to refer to the same occurrence as a "misfired hole", and not, as the Crown suggested, to apply to any failure of an explosive, on the surface or in a hole, to fire as planned. As the trial judge noted, applying the Crown's proposed interpretation would extend the reporting obligation under s. 12 to events that pose no risk to worker safety and which, according to Mr. Wilson's evidence, are inevitable occurrences in blasting. Had the Crown led evidence to show that either of the events on February 7 or February 25, 2019, did, in fact, pose a risk to the workers on site or anyone else in the vicinity, the result could have been different. On the evidentiary record before the trial judge, however, I cannot conclude that he erred in his interpretation of "misfire or suspected misfire" or in his application of that interpretation to the facts. This Court will not interfere with his conclusion that neither of the two events were reportable "blasting incidents."

Issue 4 - Were the Blast Logs Admissible?

[129] Count 15 is laid under s. 13(2) of the BSRs:

15. Atlantic Road Construction & Paving Limited, failed to ensure the blaster made a complete blast log for the February 7, 2019 blast, contrary to section 13(2) of the Blasting Safety Regulations, thereby committing an offence contrary to section 74(1)(a) of the Occupational Health and Safety Act.

[130] Blast logs are dealt with at s. 13 of the BSRs:

Blast logs

13 (1) A blaster with direction and control of a blasting operation must make a blast log for the blast.

(2) An employer must ensure that a blaster makes a blast log.

(3) A blaster must give a copy of a completed blast log to their employer as soon as reasonably possible and, if reasonably practicable, before the end of the day on which the inspection conducted after the blast is concluded as required by Section 84.

(4) An employer must keep the copy of a blast log received from a blaster for at least 3 years after the date of the blast.

...

[Emphasis added]

[131] The evidence at trial with respect to the blast logs was as follows. Mr. Wilson testified that he created blast logs for every blast he performed. He explained that the blast logs for the Pepperell site consisted of two separate records - an ARCP form that he completed, and another document prepared by K&M Inspection Consultants Limited, a third-party consultant. On cross-examination, Mr. Wilson testified:

Q. And K&M, whatever representative they sent to the site, does collaborate with you on site for the preparation of their documentation. Correct?

A. Yes.

Q. For example, you provide various pieces of information to the K&M representative for the purposes of K&M completing their portion of the paperwork. Right?

A. Yes.

Q. Explosives per delay, total quantities of explosives in kgs., number of holes, that's all information that you supply to K&M for the purposes of them filling out this piece of paper.

A. Yes.

Q. And then K&M provides you with copy of that paperwork that they generate as part of their blast and monitoring mandate for every blast. Right?

A. Yes.

Q. And they supply certain information to you that they took the lead and took primary responsibility for recording.

A. Yeah.

...

Q. And of course, you get a copy of K&M's paperwork that you collaborate with them on, and you combine that with the paperwork that you are primarily responsible for.

A. Yes.

Q. And together you regard both documents as comprising the blast log for any given blast.

A. Yes.

Q. And again, I think I asked you this earlier in the day, but just to confirm, there is no required form or format for a blast log and you're free to make a blast log and record the data however you see fit.

A. Yeah.

Q. Right.

A. Umhum. Yes.

Q. As long as the required information can be derived from the record.

A. Yes.

(Trial transcript, pp. 552-555)

[132] Mr. Wilson testified on direct examination that at one time he kept the blast log originals in a filing cabinet in his truck, but that at some point after he became involved in court proceedings, he started dropping his logs into a slot at the office. On cross-examination, he indicated that he could not remember when he changed his practice:

Q. Now you testified last week, that at some point in the past, your practice was to keep your original blast logs in your company truck.

A. Yes.

Q. And you did that because you wanted to have your blast logs close at hand if you were back at the same jobsite and you needed to refer back to them for reason.

A. Yes.

Q. Okay. And you testified last week, that at some point after all these proceedings started that required you to go to Court you started dropping off your logs at the ARCP office instead of keeping them in your ARCP truck.

A. I did.

Q. Now, the first Court appearance that I'm aware of us ever making was August 2019. Would it have been after that, that you started this change in practice?

A. Well, I really can't remember.

Q. You can't remember when you made that change?

A. No.

Q. So, it's entirely possible, that at the time of these events in February and March, 2019, your practice was still to keep the originals in your company truck.

A. Yes.

Q. Okay. And ARCP would still have copies, but the originals would be with you. Right?

A. Yes.

Q. And to be clear, in connection with this jobsite, the Dixel Pepperell site, you personally never received a compliance order from the Department of Labour, did you?

A. No.

Q. No. Nobody, whether it's the Department of Labour anybody else, to your knowledge, came to you asking for your original blast logs. Correct?

A. Correct.

Q. So, it's quite possible that your original blast logs were never submitted to the Department of Labour in connection with their Pepperell investigation. Correct?

A. Correct.

(Trial transcript, pp. 418-420)

[133] On re-direct examination, Mr. Wilson's evidence was different:

Q. All right. All right. And, when you provided... so, you say you have the originals and, and you believe that at this point in time, February 2019, they're in the truck. And copies go to ARCP, is that what you're saying?

A. Not then.

Q. Okay.

A. I took ah... I believe at that time I was taking my blasting logs to the office and putting them in a slot...

Q. Okay.

A. ...in the office.

Q. All right. That's what I wanted to clarify.

A. Yeah.

Q. So, your original logs you dropped off at the office.

...

MR. KEAVNEY: Thank you. So, just to be clear, in February of 2019 you dropped your, you did your original logs not copies to ARCP?

A. Yes.

[134] On March 14, 2019, Officer Terry Duggan at Occupational Health and Safety issued a compliance order to ARCP, requiring it to produce a long list of materials, including:

4. All Blast logs for all the blasts that have taken place for the worksite at the location known as 6030 Pepperell St.

[135] The compliance order was provided to Craig MacPherson, ARCP Health, Safety and Environment Manager. Mr. MacPherson testified that he was responsible for gathering the information to respond to the compliance order. Mr. MacPherson stated that he had never looked at one of Mr. Wilson's blast logs prior to receiving the compliance order:

Q. Was there anyone at ARCP who was responsible for making sure Tom did his blast logs?

A. Again, I think, specifically no, collectively myself and Darren and Greg would... I know I would periodically ask him if he had his blast log.

Q. You'd periodically ask him if he had a blast log?

A. Yeah, yeah.

Q. And...

A. I never looked at it I just asked, you know.

Q. Okay.

A. I wouldn't even know what I was looking at.

Q. You never looked at it. Okay.

A. No. Not that I can recall.

(Trial transcript, p. 671)
[Emphasis added]

[136] Mr. MacPherson testified that he retrieved what he believed were all the blast logs from a filing cabinet and sent them by email to Officer Duggan:

Q. So, you're looking at item 4 on the order?

A. Yep.

Q. All blast logs for all the blast that have taken place at the worksite a location known as 6030 Pepperell Street.

A. Yes.

Q. And did you assist ARCP in complying with that request?

A. I did, yes.

Q. And what did you do to comply with that request?

A. I sought out the logs to send them to Terry Duggan. I think I talked with Bruce, our CFO, where we could get the logs and went through them, and I recall him being involved in getting the logs.

Q. Where did you get the logs from?

A. I got some from, from where we stored the logs in the cabinet.

Q. Okay.

A. I can't recall, I could have asked Tom for logs as well, but I can't specifically remember.

Q. Okay. Were you able to locate all the logs from the Pepperell site, to the best of your ability?

A. Yes. To the best of my knowledge, I sent what I could find, yes.

Q. Okay.

A. Or what was available to me.

Q. Did you provide the Department of Labour with original documents or copies?

A. I really don't know.

Q. All right.

A. Well, no, sorry, I believe I sent them, I think I emailed them to Terry, but I can't, I can't recall.

Q. Okay.

A. I believe I did email those to him.

Q. So, and do you know, so you think you emailed them so when you, so what happened to the originals?

A. I don't know.

(Trial transcript, pp. 703-704)
[Emphasis added]

[137] On cross-examination, Mr. MacPherson testified that he could not confirm that the materials he sent to Officer Duggan were accurate copies of Mr. Wilson's original blast logs:

Q. Number one, blast logs, you said that you obtained the blast logs from the filing cabinet in ARCP's office?

A. Yes, that, that's correct.

Q. And you can't recall doing anything other than going to the cabinet for blast logs. Correct?

A. Yes, that's correct.

Q. Okay. And so, it's true that you don't know, as you sit here today, whether the materials that you sent to Mr. Duggan as being blast logs responding to that aspect of the compliance order, were actually Mr. Wilson's original blast logs. You don't know. Correct?

A. Correct.

Q. And you also don't know whether at that time, February, March 2019, Mr. Wilson's practice was to drop off originals of his blast logs or copies of his blast logs to the office. Correct?

A. Correct.

Q. You have no recollection of going back to M. Wilson after receiving a compliance order in relation to Pepperell and asking for his original blast logs. Correct?

A. I cannot recall if I, if I did go back to him or not. I just don't recall.

Q. Okay. And while, obviously, you would not intentionally deliver an inaccurate version of a document to the Department of Labour, the fact is, you can't say whether the copies of blast logs that are in the document that we looked at earlier are actually fully accurate relate [*sic* - relative] to the originals wherever the originals are. Correct?

A. That, that's correct, yes.

(Trial transcript, pp. 733-735)

[138] The Crown attempted to place what it said were Mr. Wilson's blast logs before the trial court on two separate instances. The first was Exhibit 1, Tab 11, which consists of two separate records prepared by two separate persons: a four-page form that Mr. Wilson allegedly filled out, coupled with a one-page form completed by K&M Inspection Consultants Limited. The second was Exhibit 9, the "red folder."

[139] Mr. Wilson was shown the documents in Exhibit 1, Tab 11, and testified that the records were not original and were inaccurate because they were missing the yellow highlighting that he uses to show delay patterns. Mr. Wilson further testified that he could not confirm whether the records were complete. When asked if the

single-page form filled out by K&M was the complete record they gave him, Mr. Wilson testified:

A. I can't remember if it's one page or what it is...

Q. Okay.

A. ...to be honest.

[140] On re-direct examination, Mr. Wilson was given Exhibit 1, Tab 11 and asked to draw in the missing highlighting. Mr. Wilson did so for the 9:04 am blast on February 7, 2019, but was not able to recall how the highlighter looked for the second:

Q. So, you mentioned in cross-examination that you used a highlighter on your original blast logs.

A. Yes.

Q. And there's obviously no highlighter on these photocopies.

A. Yes.

Q. All right. Just to be clear, the highlighter is, you're highlighting areas of what part of the document?

A. If you look at my first, I guess my first blast 9:04 on February.

Q. Mr. Wilson, how about. I'll do this. I'm going to give you a highlighter.

A. Okay.

Q. Highlight the part of your, of the document that should be highlighter.

A. Sure. You already had it opened. Done.

Q. Okay. I'm just going to show you that. Do you see the...

A. My shot starts there and follow the highlighter till you get to the end.

Q. Okay. I wonder if we could do the same with the next...that was... You highlighted the sketch of shot at tab (e).

A. Yeah.

- Q. We're going to do the same in tab...
- A. Well...
- Q. Open that again.
- A. See, I'm not sure what I did there, so... I can guess what I did.
- Q. I don't want you to guess.
- A. Well, I can't remember.
- Q. So, you can't...(inaudible)...
- A. The marks...
- Q. Okay.
- A. ...if the marks were there, I could tell ya.
- Q. Okay.
- A. The other one was straightforward. This one's not straightforward.

(Trial transcript, pp. 597-599)

[141] The only witness to speak to the documents in the red folder was Officer Duggan, who could only say that the red folder contained the documents he received from Mr. MacPherson in hard copy. Yellow highlighter is visible on these documents. Officer Duggan testified that he did not know whether what he received were originals or copies:

- Q. Okay. You did not specify in your compliance order that ARCP was required produce original blast logs. Correct?
- A. I believe that's correct.
- Q. And neither you or Officer Woodland ever issued a compliance order to Mr. Wilson himself, that blaster in charge who made the blast log in the first instance. Correct?
- A. Correct.

Q. And you said that what you received in the way of blast logs in response to the compliance order was sent in hard copy to your office by Craig McPherson.

A. I believe so.

Q. You have knowledge where he obtained those documents from?

A. No.

Q. No, so, you wouldn't know whether or not what received were originals, copies, copies of copies you just wouldn't know. Correct?

A. That's correct.

[142] The trial judge ruled that the blast logs were inadmissible because the Crown had failed to prove that they were originals or complete and accurate copies:

[82] The Crown sought to introduce the log copies in several ways. The first was through Thomas Wilson. He was shown Exhibit 1, Tab 11(a). Mr. Wilson was able to identify this as the ARCP form for blast logs. When asked if the form was complete and if pages were missing, Mr. Wilson replied: I don't think so, I don't know." He went on to say that he was unsure if information obtained from K & M Special Consultants regarding their records was complete or not.

[83] Additionally, Mr. Wilson testified that the exhibits were not originals and not accurate as they did not show yellow highlighting that would have been on the original.

[84] The documents sought to be entered by the Crown were those that somehow were obtained by the Department of Labour.

[85] Jeffery [*sic*] MacPherson, Safety Manager for ACRP, testified that he had received a compliance order from the Department of Labour. This resulted in him being tasked with sending documents, including the exhibits, to the Department of Labour. He stated documents were scanned and when asked if he sent accurate copies he advised he did not alter anything he just gathered up all the documents he could find then scanned and emailed them.

[86] Mr. MacPherson stated he obtained the blast logs from a cabinet in ARCP's office. He could not testify if they were originals or copies of records. He could not testify as to the accuracy of the records and for that matter had no knowledge of how the records came to be in the offices of ARCP.

[87] The compliance order issued to ARCP did not require the production of the original blast logs. The compliance officer, Mr. Duggan, testified that in relation

to the documents he received from Mr. MacPherson, he had no knowledge of where the documents came from, whether they were originals or copies for that matter. Mr. Duggan could not testify as to the accuracy of the documents.

...

[92] The assurance needed for admission under the Nova Scotia Evidence Act, best document rule or any other possible avenues of admission are wanting. As indicated above the logs retrieved by Craig MacPherson could not be identified as copies or originals. There is no evidence of where the originals exist or, if in fact they existed at the time of trial. They were not identified as being accurate and in fact were clearly missing highlighting that would have been on the original.

[93] The evidence by the Crown fails to comply with any rules relating to the admission of the blast logs under any hearsay provisions. They are not admissible here.

[143] The Crown argues that the trial judge committed errors of law, fact, and mixed fact and law when he concluded that the blast log documents were inadmissible. The Crown says the trial judge's findings of fact regarding the blast logs, including his findings regarding the accuracy and reliability of the copies, demonstrate a misunderstanding of the evidence and the law. The Crown says the evidence overwhelmingly proved that the documents in Exhibit 1, Tab 11 and Exhibit 9 were accurate and reliable copies of the blast logs, and that the mere fact that they were colour photocopies and not originals did not preclude their admissibility. The Crown submits that the proffered blast logs should have been admitted as business records, as documents in possession, or as vicarious or corporate admissions.

[144] ARCP submits that a trial judge's decision regarding the authenticity of evidence is a question of fact, subject to the standard of palpable and overriding error (*Elbasiouni v. Brampton (City)*, 2019 ONSC 3524 (Ont. Div. Ct.) at para. 15). ARCP says there was ample evidence to support the trial judge's conclusion that there was insufficient evidence that the records before the court were originals or were accurate, authentic or complete copies of originals. In fact, it says, there was positive evidence of a lack of authenticity or completeness.

[145] ARCP notes that separate and apart from his decision not to admit the proffered documents, the trial judge decided in the alternative that even if he did admit them, he would give them zero weight. ARCP says this conclusion is entitled to significant deference.

Analysis of Issue 4

[146] This is not the first time the court has considered whether a trial judge erred in excluding blast logs proffered by the Crown in an appeal from a trial decision acquitting ARCP of regulatory offences under the OHS Act and the BSRs. The facts in *R. v. Wilson*, 2023 NSSC 80, were similar to this case. ARCP was charged with several offences, including failing to ensure that Mr. Wilson made blast logs in relation to blasts that took place September 11 and 15, and October 9, 18, and 24, 2017, contrary to s. 13(2) of the BSRs. As in this case, Officer Duggan issued a compliance order to ARCP, requiring it to provide copies of all blast logs within the previous year for blasting at the site in question. The trial judge refused to admit the blast logs on the basis that the Crown had failed to prove that the documents represented the complete and authentic blast logs for each blast. On appeal, A.C.J. Duncan affirmed the trial judge's decision. His summary of the positions of the parties and his analysis are worth reproducing in full:

[139] Exhibit 12, Tab 1 was described as a binder of photocopied documents that the Department of Labor put together for the prosecution. The Department of Labor claims to have received copies of these documents from the respondent company, being Mr. Wilson's employer. It was introduced during the testimony of Officer Duggan on January 14, 2020. At that time counsel for the respondents argued that the documents were being entered solely for identification purposes and that each document would have to be authenticated at some later stage if the Crown sought to rely on the documents for the truth of the contents.

[140] The Crown later sought to prove the documents through the testimony of Mr. Natolino whose evidence the trial judge examined in detail. After reviewing the relevant statutory and common law authorities respecting the admission of this documentary evidence the trial judge concluded:

At its core, the issues related to the exceptions to the hearsay [Rule] are grounded in necessity and circumstantial guarantees of trustworthiness. Having considered this argument, I agree with Mr. Wilson's counsel that Exhibit 12, as a blasting log, should not be admitted. The Crown has not proven beyond a reasonable doubt that Exhibit 12 is the complete blasting log used by Mr. Wilson. The nature of the charge is to determine the adequacy of the blasting log. It is the onus on the Crown to produce a true copy of the original. The Crown has failed to do that in this case.

[141] In reaching this conclusion the trial judge offered alternative ways which the Crown could have authenticated the documents in question.

Position of the appellant

[142] The appellant says that the documents in question were photocopies of records that the respondent company had provided to Occupational Health & Safety officers in response to a Compliance Order that required the company to produce blast logs for October 18 and 24 and all blast logs within the previous year for blasting at the quarry at 1255 East Uniacke Road.

[143] In the appellant's submission there were sufficient indicia of the trustworthiness of these photocopies so as to render them admissible.

[144] The appellant argues that these records were provided by Mr. Natolino who "diligently collected the information that the company provided in response to the compliance order". Further, appellant's counsel submits that Mr. Natolino confirmed that he had received these records from the respondent Mr. Wilson and were records of Mr. Wilson which he kept in his company-owned vehicle together with backup copies that might have been in the office.

[145] Other indicia relied upon by the appellant included evidence that Mr. Wilson was responsible for making the blast logs and that the documents contain Mr. Wilson's signature and license number. The records were records required to be kept and produced in accordance with the regulatory regime.

[146] As such, it was submitted that the documents should have been admitted under any or all of these exceptions to the hearsay rule:

1. As business records
2. As documents in possession
3. As vicarious admissions of the company or
4. As admissions of Mr. Wilson.

Legal Principles

[147] It is common ground that tendering a document for the truth of its contents constitutes hearsay which is presumptively inadmissible. Therefore, to be admitted into evidence the onus is on the tendering party to prove the document admissible under an exception to that rule. There are such exceptions in the common law and provided for by S. 23 of the Nova Scotia *Evidence Act*.

[148] In the circumstances of this case, the first step in determining admissibility was for the prosecution to establish that the documents in Tab 1 of Exhibit 12 represented the complete and authentic "blast log" for each blast.

[149] *McWilliams*, Canadian Criminal Evidence, 5th Edition, at chapter 24 says:
24.5

The authenticity of a document may be established through an admission by the opposing party including a formal admission. Alternatively, the tendering party can call the creator of the original or the person who made the copy or someone who witnessed the document being written.

... authentication or genuineness is protected to some degree by the obligation on the proponent to provide the original where it exists, a rule known as the document originals rule. However, secondary evidence or copies are now admissible where the original cannot be produced and a satisfactory explanation has been provided (e.g. no bad faith); or, where requiring the originals would cause unnecessary inconvenience.

24.6

The importance of the documentary originals rule is in decline. Where the original does not exist or is very difficult to produce, copies or secondary evidence may be admitted. The tendering party must provide an explanation for why the original is not available.

24.8

As a general rule, the party tendering a copy is required to prove that it is a true copy of the original. This is normally done by producing a certified copy or evidence that the copy has been compared to the original (i.e. an examined copy). The law with respect to proving the faithfulness of copies was once fairly detailed because before the advent of photocopiers and other technologies, copies were made by hand, and so there was more potential for error. Modern copy-making technologies are generally reliable, and courts are now less likely to strictly require a party to lead evidence supporting the reliability of copies. And so, where a photocopy or carbon paper has been used to make the copy, there is no requirement that there be a comparison between the copy and the original.

...

However, if there is any suggestion that the copy may have been intentionally altered, or that there are pages missing, the party tendering the copy will need to lead evidence in support of the copy's faithfulness. In addition, where a case involves allegations of fraud, forgery or false pretences, the validity of documents will likely be at issue, and the court will be stricter about requiring proof of the truth of copies.

(Emphasis added)

[150] The validity and completeness of the documents in Tab 1 of Exhibit 12 are material issues to the prosecution of the offences alleged contrary to s. 13(5) of the BSR. As such, and as *McWilliams* points out, the court will be stricter about requiring proof of the truth and completeness of copies.

[151] The trial judge was alert to caselaw that held that secondary evidence can be admitted but held that this was not such a case. The trial judge registered several deficiencies with the evidence of authentication: Specifically, he found the evidence of Mr. Natolino to be seriously wanting in the kind of assurances that are needed when dealing with copies.

[152] Mr. Natolino:

- was not advised that the binder he was shown in court was not the same one he had compiled 3 years earlier.
- is not a blaster and when collecting materials to respond to the Compliance Order, he had no specific knowledge of what s. 13(5) of the Blasting Safety Regulations required.
- did not know where he received the records that he turned over to the officers.
- was not asked to verify whether the copy was a true copy of the original.
- was not asked to verify that it was a complete copy of the original documents.
- was not asked whether these documents would be kept in the ordinary course of business.
- was unable to speak to the security of access to the company server.

[153] The trial judge summed up the problem very concisely:

The Crown could have requested the original from Mr. Wilson, they did not. The Crown failed to ask ARCP if the blasting logs as set out in Exhibit 12 were Mr. Wilson's complete logs. Mr. Natolino could not remember ... when he got these documents. Mr. Natolino was not asked if the blasting logs or Atlantic Explosive logs were originally attached to the blasting logs. In fairness to Mr. Natolino, ... he has no blasting experience, and he provided no evidence that he understands the format of the document and whether the document such as Atlantic Explosive logs or K & M reports are part of the blasting logs.

Mr. Malcolmson testified that various reports may be meshed together to provide the information required by section 13(5), which Mr. Natolino never confirmed that the documents that he turned over to the Department were a true and complete copy of the original blast logs.

In my view, ... that is a problem and a major gap in the Crown's case. ... The court cannot be certain it has the complete blasting logs to determine if it complies with section 13 (5). While the threshold of admitting secondary evidence is low, usually a reasonable explanation is provided and the copy

is proven as a copy of the original, ... and the secondary evidence is admitted.

In my view, the low threshold has not been met in this case. Even if the court were to admit Exhibit 12, in my view the Crown has failed to prove beyond reasonable doubt that the blasting logs were not compliant with section 13 (5).

[154] I find no error in the trial judge's understanding of the law or how it was applied to the facts as he found them. I find no palpable and overriding error in the trial judge's findings of facts. Having failed the test for proving authenticity, it is unnecessary to consider other bases upon which the documents might have been admissible.

[Emphasis added]

[147] The trial judge quoted extensively from the trial decision in *Wilson* and found that there were similar deficiencies with the evidence of authentication in this case. In this Court's view, there was sufficient evidence to support his conclusion.

[148] As in *Wilson*, the validity and completeness of the documents are material issues to the prosecution of the offences alleged contrary to s. 13(2) of the BSRs. For this reason, the court will be stricter about requiring proof of the truth and completeness of copies.

[149] As in *Wilson*, the compliance order did not request Mr. Wilson's original logs, nor was a compliance order issued to Mr. Wilson himself. Mr. Wilson's evidence as to whether he had begun submitting his original blast logs to ARCP by February 2019 was inconsistent, and the trial judge was clearly left in doubt on the issue. Mr. Wilson testified that he could not say whether the K&M portion of the blast logs at Exhibit 1, Tab 11 was complete. Mr. Wilson further testified that Exhibit 1, Tab 11 was incomplete, as it was missing his highlighting. No one from K&M was called to testify as to the completeness and accuracy of the K&M portions of the blast logs.

[150] Mr. MacPherson, like Mr. Natolino, is not a blaster and was unfamiliar with the content of the blast logs. He testified that he had never looked at one before responding to the compliance order, and "wouldn't even know what I was looking at." He simply retrieved whatever he could find from a filing cabinet where he was told that ARCP kept blasting logs. He could not confirm whether the documents he provided were originals and complete, or whether they were complete and accurate copies of the originals.

[151] Officer Duggan testified that the documents in the red folder were the materials he received from Mr. MacPherson in response to the compliance order. Like Mr. MacPherson, he could not testify as to the accuracy and completeness of the documents. Mr. Wilson was never shown the documents in the red folder and asked whether they were complete and accurately reflected his highlighting for both blasts.

[152] Relying on *R. v. After Dark Enterprises Ltd.*, [1994] A.J. No. 1057 (Alta. C.A.), the Crown maintained that it had no duty to seize Mr. Wilson's original blast logs. Certainly, as noted by A.C.J. Duncan in *Wilson*, the Crown is entitled to rely on copies of the originals.

[153] The Crown must satisfy the Court, however, that the copies are complete and accurate copies of the originals. The trial judge concluded that the Crown had failed to do so, and I see no error in his findings of fact, in his understanding of the law, or in how he applied it to the facts.

Issue 5 - Were the Blast Logs Compliant?

[154] Having found that the trial judge did not err in ruling that the purported blast logs were inadmissible, there is no need to address this issue.

Conclusion

[155] The trial judge erred in finding as a fact that the Crown failed to prove beyond a reasonable doubt that Mr. Wilson stored detonators in the ARCP pickup truck as alleged on February 5 and 6, 2019. The trial judge further erred in his alternative finding that the storage of detonators in vehicles is permitted by s. 33(2) of the BSRs.

[156] This Court orders a new trial with respect to counts 1 and 6, only.

Smith, J.