Citation: *Director of Occupational Health and Safety v. Government of Yukon, William R. Cratty and P. S. Sidhu Trucking Ltd., 2010 YKTC 42*

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Docket: 09-04203
09-04204
09-04205
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY

v.

GOVERNMENT OF YUKON, WILLIAM R. CRATTY AND
P.S. SIDHU TRUCKING LTD.

Appearances:

Lenore Morris	Counsel for the Director of Occupational Health and Safety
Judy Hartling	Counsel for Government of Yukon
Andre Roothman	Counsel for William R. Cratty
Brian Beresh	Counsel for P.S. Sidhu Trucking Ltd.

DECISION

[1] In September 2007, the Government of Yukon Department of Community Services awarded a contract to P.S. Sidhu Trucking Ltd. for the construction of the sub-grade and base for a portion of roadway in the City of Whitehorse known as the Hamilton Boulevard Extension. William Cratty was employed by Sidhu Trucking as the superintendent on the project.

[2] To construct the roadway, it was necessary to do extensive explosive blasting in order to remove rock along the planned route. The project was intended to extend

Hamilton Boulevard generally southward from existing residential subdivisions to connect with the Alaska Highway. Along the way, the road would pass near to the Lobird Trailer Court, an RV Park, and a garden supply business.

[3] Initially, Sidhu Trucking engaged a firm from Prince George B.C. to undertake the blasting work. Later, as the project fell behind schedule, a local blaster, Peter Hildebrand, was brought in. As the contract required, Mr. Hildebrand was a licenced blaster and had extensive blasting experience.

[4] Mr. Hildebrand conducted some 18 blasts along the roadway from November, 2007 to early May 2008 without incident. However, on May 6, 2008, Mr. Hildebrand detonated his largest blast to date on the Hamilton Boulevard project. This blast showered the Lobird Trailer Court with rock. The rock (called “flyrock”) varied in size from small pebble-sized pieces to missiles weighing 22 kg. One demolished a shed; another crashed through the roof of a trailer and landed in the occupant’s living room. One tenant, who was outside, was forced to run for cover. Remarkably, no one was injured or killed.

[5] It soon became apparent that Mr. Hildebrand was unaware of how close the blast site was to the Lobird Trailer Court. He had variously estimated the distance at 400 to 600 meters. In fact, the trailer park is only 149 meters away at the closest point. The proximity of the trailer park is not obvious from the blast site, as the park is uphill and separated from the roadway by trees; however, resort to a map or roadway plan would have readily and clearly shown just how close the trailer park actually was.

[6] Mr. Hildebrand was charged with violating the *Occupational Health and Safety Act,* R.S.Y. 2002, c. 159. He entered a guilty plea and was fined.

[7] Charges against Sidhu Trucking, Mr. Cratty and the Government of Yukon Department of Community Services proceeded to trial. By consent of the parties, the charges, though contained in three separate Informations, were tried together.

[8] The charges are:

T.C. #09-04205 (P.S. Sidhu Trucking Ltd.)

> Count #1: On or about the 6th day of May, 2008, at or near Whitehorse, Yukon did unlawfully commit an offence as an employer during the Hamilton Boulevard Extension Construction project, by failing to ensure that the processes under its control were safe and without risks to health, contrary to paragraph 3(1)(a) of the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159, when it allowed its worker to engage in blasting activities in a manner that caused flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon.
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> Count #2: On or about the 6th day of May, 2008 at or near Whitehorse, Yukon, did unlawfully commit an offence as an employer during the Hamilton Boulevard Extension Construction project, by failing to ensure that work techniques and procedures were adopted and used to prevent or reduce the risk of occupational injury contrary to paragraph 3(1)(b) of the *Occupational Health and Safety Act,* R.S.Y. 2002, c. 159 when it allowed its worker to engage in blasting activities in a manner that caused flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon.
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> Count #3: On or about the 6th day of May, 2008, at or near Whitehorse, Yukon, did unlawfully commit an offence as an employer during the Hamilton Boulevard Extension Construction project, by failing to take all reasonable precautions, or implement measures, to prevent occupational injuries and diseases to workers by controlling hazards through engineering and administrative procedures and developing safe work

procedures contrary to section 1.04(b) and (c) of Part 1 of the Occupational Health and Safety Regulations, O.I.C. 2006/178, when it allowed its worker to engage in blasting activities in a manner that caused flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon.

Count #4: On or about the 6h day of May, 2008, at or near Whitehorse, Yukon, did unlawfully commit an offence as an employer, by failing to ensure that an unusual occurrence with explosive materials involving flyrock falling into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon was reported immediately to the Director of Occupational Health and Safety, contrary to section 14.12(a) of Part 14 of the Occupational Health and Safety Regulations O.I.C. 2006/178.

T.C. # 09-04203 (William R. Cratty)

Count: 1: On or about the 6th day of May, 2008 at or near Whitehorse, Yukon, did unlawfully commit an offence, as a supervisor hired by P.S. Sidhu Trucking Ltd., by failing to ensure that a worker holding a blaster's permit received proper instruction and performed his work without undue risk, contrary to paragraph 7 (a) of the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159, when he allowed his worker, holding a blaster's permit, to engage in blasting activities in a manner that caused flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon contrary to section 14.04(3) of Part 14 of the Occupational Health and Safety Regulation, O.I.C. 2006/178.

Count #2: On or about the 6th day of May, 2008, at or near Whitehorse, Yukon, did lawfully commit an offence as a supervisor, hired by P.S. Sidhu Trucking Ltd., by failing to ensure that an unusual occurrence with explosive materials involving flyrock falling into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon was reported immediately to the Director of Occupational Health and Safety, contrary to section 14.12(a) of Part 14 of the Occupational Health and Safety Regulations, O.I.C. 2006/178.

T.C. #09-04204 (Government of Yukon)

Count #1: On or about the 6th day of May, 2008 at or near Whitehorse, Yukon as a constructor during the Hamilton Boulevard Extension construction project, did lawfully commit an offence by failing to ensure

> that its contractor on the project, P.S. Sidhu Trucking Ltd., and P.S. Sidhu Trucking Ltd.'s supervisor William Cratty and blaster Peter Hildebrand working on the project, carried out measures and procedures prescribed by the *Occupational Health and Safety Act* and regulations, contrary to subsection 4(a) of the *Occupational Health and Safety Act* R.S.Y. 2002 c. 159, which resulted in a blasting incident causing flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon.
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> Count #2: On or about the 6th day of May, 2008, at or near Whitehorse, Yukon, as a constructor during the Hamilton Boulevard Extension construction project, did unlawfully commit an offence by failing to ensure that its contractor, P.S. Sidhu Trucking Ltd., an employer on the project, and P.S. Sidhu Trucking Ltd.'s supervisor William Cratty and blaster Peter Hildebrand working on the project, complied with the *Occupational Health and Safety Act* and regulations, contrary to subsection 4(b) of the *Occupational Health and Safety Act* R.S.Y. 2002 c. 159, when they allowed blasting procedures to take place on the Hamilton Boulevard Extension construction project in a manner which caused flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon.

[9] Since the accident clearly occurred during the course of a project undertaken by the Yukon Government, constructed by Sidhu Trucking and supervised by Mr. Cratty, all would seem to be liable to be convicted unless they exercised due diligence to prevent the accident from occurring. However, each accused raised objections to the charges or the evidence that must be considered before the question of due diligence is reached.

[10] By virtue of s. 2(3) of the *Occupational Health and Safety Act*, the Government of Yukon is bound by the provisions of the *Act*. However, the Government argues that, while the Government was the "owner" of the project, it was not, as alleged, a "constructor" and, in consequence, cannot be said to have breached the duties that the *Occupational Health and Safety Act* imposes on "constructors".

"Constructor" is defined in s. 1 of the *Occupational Health and Safety Act* as follows:

> "constructor means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by themselves or by more than one employee;"

"Project" is defined as:

> "project means a construction project, whether public or private, including
>
> (a) the construction of a building, bridge, structure, industrial establishment, mining plant, shaft, tunnel, caisson, trench, excavation, highway, railway, street, runway, parking lot, cofferdam, conduit, sewer, watermain, service connection, telegraph, telephone or electrical line, tower, pipe line, duct, or well, any other similar thing, and any combination thereof,
>
> (b) a mining development, and
>
> (c) any work or undertaking or any lands or appurtenances used in connection with construction;"

"Owner" is also defined:

> "owner includes a trustee, receiver, mortgagee in possession, tenant, lessee, or occupier of any lands or premises used or to be used as a workplace, and a person who acts for or on behalf of the owner as the owner's agent or delegate;"

[11] The Government of Yukon is clearly the owner of the project. It put out the tenders for the project, entered into the construction contract and paid the cost. However, in this case, the Department of Community Services was much more involved in the project than simply hiring a contractor and paying the bills. It retained overall control and management of the entire Hamilton Boulevard Extension Project, of which the contract with Sidhu Trucking was only a part. The Department had an in-house engineer, Mr. Boehmer, who was designated as "Program Manager". The Department also maintained a full-time inspector, Mr. Kearns, on the job site itself. The contract with

Sidhu Trucking was very detailed and specific as to how construction was to be carried out. In particular, it required that blasting plans be provided to the Department in advance of all blasts. These plans, including plans for the May 6th blast, were forwarded from Mr. Hildebrand to Mr. Boehmer for his review.

[12] The term "constructor" was described in *J. Stoller Construction Limited* v. *The Queen* (November 28, 1986, unreported, Ont. Prov. Ct.):

> "In my view, the learned Justice of the Peace correctly identified the 'constructor' in relation to a construction project, as the person who enjoys and can exercise the greatest degree of control over the entire project and all working upon it, in relation to ensuring compliance with prescribed safety methods and procedures. He plans and organizes the entire project. He has control over what contractors and subcontracts will be permitted to work and continue working upon it. He controls the ultimate 'purse strings' of payment for work upon the project. In planning the proposed project and deciding whether he will undertake it, and how it will be organized, he can consider the dimensions and logistics of the project and, drawing upon his experience and knowledge of the requirements and problems of such a project and his deemed knowledge of the legal requirements concerning occupational health and safety, he can make a reasoned assessment of what would be requisite to ensure compliance with the *Occupational Heath and Safety Act* and Regulations upon the project. He can consider the desirability, in the context of the planned project and the dimensions of what is involved in it, or organizing an ongoing programme of safety instruction for workers on the project (and I recognize that so grandiose a scheme may not be reasonably feasible in the circumstances of many projects). He can turn his mind, based on his experience, to an initial assessment *of how many competent supervisors he will need to hire to provide effective, ongoing supervision on the project in order to ensure that required safety measures and procedures are observed by all involved*. In organizing and engaging his contractors (and laying down guidelines for them in relation to the engagement of subcontractors), he can make it clear (and even contractually provide, if necessary) that non-compliance by anyone with required safety measures and procedures upon the project will not be countenanced, and that anyone unwilling to do all within their power to ensure compliance had better not take the contract, or if found in non-compliance (in a substantial way or repetitively) will be discharged and replaced."

[13] In my view, it is beyond doubt that the Government of Yukon Department of Community Services was the “constructor” on the Hamilton Boulevard Extension Project.

[14] For Sidhu Trucking, two preliminary objections were made.

[15] First, it was argued that the Crown had failed to prove the identity of the accused corporation. It is true that the identity of corporate defendants is generally proved by filing the Certificate of Incorporation or similar document. That was not done in this case, but the contract between the Government of Yukon and P.S. Sidhu Trucking Ltd. was made an exhibit. That document clearly shows that the named defendant undertook the role of contractor for the sub-grade and base construction on the project in question and is signed by Paramjit Sidhu as president of the corporation. The exhibit containing the contract also contains a letter signed by the Minister of Community Services, addressed to “Paramjit Sidhu, President, P.S. Sidhu Trucking Ltd. advising that the company has been awarded the contract for sub-grade and base construction on the Hamilton Boulevard Extension Project. These documents provide sufficient proof of the existence and identity of this defendant.

[16] More significantly, Sidhu Trucking and Mr. Cratty, contended that the *Occupational Health and Safety Act* imposes no duty to safeguard the general public. In effect, they say that it is not for nothing that the statute in question is called the *Occupational Health and Safety Act*. They note that the duties imposed by the *Act* on

owners, constructors, suppliers, employers, supervisors and workers all appear to relate to the health or safety of workers in the workplace.

[17] In this case, there is no evidence that any worker, or anyone within the workplace, was endangered. Indeed, the charges do not allege any danger to workers but instead refer to danger to persons in the Lobird Trailer Court. Consequently, it is argued, there is no allegation of, and no proof of, a breach of duty imposed on either defendant by the *Occupational Health and Safety Act*.

[18] In my view, the contention that the defendants owe no duty whatsoever to the general public results from an unduly narrow reading of the *Occupational Health and Safety Act*. The *Act* is public welfare legislation and should be given a large and liberal interpretation, *Ontario (Ministry of Labour) v. Hamilton (City),* 2002 CarswellOnt 220, 155 O.A.C. 225, 58 O.R. (3d) 37, para 16. I accept that the primary purpose of the *Occupational Health and Safety Act* is to foster workplace health and safety. However, that is not its only objective. It also has the secondary purpose of protecting members of the public who may be impacted by what goes on in the workplace. I adopt the statement of the purposes of workplace health and safety prosecutions contained in *R. v. F. Howe & Son (Engineers) Ltd.* [1998] E.W.J. No. 3314, (English and Wales Court of Appeal (Criminal Division)) at para. 38:

> "[paragraph] 38 The objective of prosecutions for health and safety offences in the work place is to achieve a safe environment for those who work there and for other members of the public who may be affected."

[19] The *Occupational Health and Safety Act* refers (in ss. 15 and 16) to "hazards to workers *or any other person"* (emphasis added). Further indication that the *Act* has the secondary, but still important, objective of protecting the public is found by reference to the sections of the Occupational Health and Safety Regulations that clearly deal with hazards to the general public. These include requirements to cover or fence sidewalks and roadways in close proximity to construction or demolition activities and regulations concerning the transport of explosives on public roads. There are also requirements for guarding blasts and minimum distances specified between explosives magazines and roads or buildings. All of these regulations are clearly designed to protect the general public and extend beyond the boundaries of the workplace.

[20] Finally, and perhaps most significantly, the specific obligation imposed on a blaster by s. 14.04 of the Regulations is "not to permit any work that may jeopardize the safety *of any person*" (emphasis added).

[21] In short, it is not an answer to the present *Occupational Health and Safety Act* charges to simply say that "my activities didn't endanger my workers; they only endangered the general public".

[22] In addition to adopting Sidhu Trucking's argument that the *Occupational Health and Safety Act* imposes no duty to safeguard the public, Mr. Cratty also submitted that the *Occupational Health and Safety Act* does not impose a duty on a "supervisor" to ensure that workers under his supervision comply with the *Act* or the Regulations. The

first charge against Mr. Cratty specifically alleges that he failed to ensure that the blaster complied with s. 14.04 of the Occupational Health and Safety Regulations.

[23] Sections 3 and 4 of the *Act* impose a duty on employers and constructors to ensure compliance with the *Act*. Section 3(2)(c) requires employers to:

> "(2) Without limiting the generality of subsection (1), every employer shall, so far as is reasonably practicable,
>
> (c) ensure that workers are informed of their rights, responsibilities, and duties under this Act;"

[24] Sections 4(a) and 4(b) require constructors to ensure that:

> "4 Every constructor shall ensure, so far as is reasonably practicable, that during the course of each project the constructor undertakes
>
> (a) the measures and procedures prescribed by this Act and the regulations are carried out on the project;
>
> (b) every employer and every person working on the project complies with this Act and the regulations;"

[25] Owners also have the duty to ensure that "the workplace complies with the Regulations".

[26] Curiously, however, the supervisor's duties (imposed by s. 7 of the *Act*) do not include any general duty to ensure that persons under their supervision are aware of the provisions of the *Act* or the Regulations or that the requirements of either are adhered to:

> "Supervisor's duties:
>
> 7. A supervisor shall be responsible for
>
> (a) the proper instruction of workers under his direction and control and for ensuring that their work is performed without undue risk,
>
> (b) ensuring that a worker uses or wears the equipment, protective devices, or clothing required under this Act or by the nature of the work,
>
> (c) advising a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware, and
>
> (d) if so prescribed, providing a worker with written instructions as to the measures and procedures to be taken for the protection of the worker."

[27] Consequently, Mr. Cratty argues, even if he failed in his duties under s. 7, those duties do not extend to the charge before the Court. However, s. 7 does impose the duty to ensure that workers under the supervisors' control perform their work without undue risk. The obvious way of performing this duty is to ensure that any Occupational Health and Safety Regulations pertaining to the operation in question are adhered to. In my view, the reference in the charge to s. 14.04 of the Regulations is simply a statement of the nature of the failure in the supervisor's general duty under s. 7 that led to the accident.

[28] Having dealt with the preliminary objections, I turn now to consider the merits of the case. I have no hesitation in finding that both Sidhu Trucking and Mr. Cratty failed in their duty because they did not ensure that Mr. Hildebrand was properly oriented to the site so as to be aware of the close proximity of persons or property likely to be affected by the blasting operations. This information was readily available and was obvious from maps provided to Sidhu Trucking at the time of tendering and as

appended to the construction contract itself. Mr. Hildebrand testified that he never saw a site map until well after the May 6th blast.

[29] Moreover, blasting is an inherently dangerous undertaking and it would only be common sense to be well aware of the distance to persons or structures – especially in an urban area.

[30] However, this is not quite the end of the matter since it must be shown that the safety failure was linked to the accident that occurred. To use a humble and obvious example, if an employer was guilty of failing to ensure that his workers wore protective footwear, but a worker wearing the prescribed hard hat was killed by being struck in the head, the employer would not be liable because he hadn't ensured his workers wore steel-toed boots.

[31] In this regard, the defendants argued that the failure to ensure that Mr. Hildebrand knew how close the Lobird Trailer Court was irrelevant since the accident occurred owing to unforeseeable matters unrelated to distance. According to the defendants, the blast wouldn't have been conducted any differently if the true distance had been known.

[32] The defendants rely heavily on some of the evidence provided by Richard Scott Parker. Mr. Parker is a blasting expert and consultant. He was brought in after the May 6th accident to analyze what went wrong and provide recommendations for carrying out the blasting operations that still needed to be done in order to complete the project.

[33] Mr. Parker testified that blasting is “not an exact science” and there can be problems, including flyrock, that cannot be foreseen or prevented. Even the most skilled and careful blaster cannot create a perfect blast every time. He also indicated that blasting in urban areas is especially problematic.

[34] However, Mr. Parker also said that the blaster should be aware of the distance to structures to within ten meters of the actual distance. He further indicated that it would have been prudent to consider using smaller blasts and to consider the use of blasting mats or sand to cover the blast area and contain flyrock. It is true that he also said that the use of blasting mats is a judgment call for the blaster, since blasting mats can create problems of their own. Placing the mats, which are made of truck tires wired together with heavy cables, can result in damage to detonator tubes resulting in holes that misfire or fail to fire. In this regard, it is significant that sand had been used to cover a number of the prior blasts and that sand and blast mats were used on all subsequent blasts.

[35] Thus, I do not accept the proposition that the blast would have been designed and carried out in exactly the same way had the distance to structures been accurately known. In his evidence, Mr. Hildebrand said that he knew in a general way where the trailer park was located, but conceded his lack of knowledge regarding the actual distance and admitted that, had he known, he would have conducted the blast differently. It is also worth noting that, prior to setting off the May 6th blast, workers had been evacuated and guards posted on the worksite at distances of around 350 meters. One assumes that this distance was chosen because it was well beyond the distance

where flyrock might be expected. Consequently, it is difficult to argue that knowing there were persons within 150 meters wouldn't have made any difference.

[36] The exact cause of the flyrock accident on May 6th cannot be determined since the evidence has, quite literally, been blown up. There was a potential flaw in the blast design in that certain of the holes drilled into the rock at the blast site were, in Mr. Parker's opinion, too shallow. These holes are packed with explosive. The shallow holes could have caused the failure of adjacent holes and resulted in rock being projected away from the blast site rather than in the intended direction. Alternatively, the accident could have been caused by an unforeseen joint or crack in the rock. I have greatly oversimplified Mr. Parker's evidence on these points, but it is not necessary to fully explain or understand his theory in order to deal with the final point, which is raised by all the defendants.

[37] Whether the cause was an error in Mr. Hildebrand's blast design or an unforeseen problem in the rock, the defendants say that the accident was not foreseeable, or, if it was, it could only have been foreseen by a blasting expert. It was not discoverable by any reasonably practicable system of supervision.

[38] I accept that the supervisor, the employer and the constructor do not warrant the work of Mr. Hildebrand. They are jointly responsible to oversee his activities but only to the extent that it is reasonably possible to do so. When very specialized work is being carried out, at some point those in a supervisory role must rely on the expertise and

judgment of those persons who have been engaged to perform that work. In the case of blasting, they must rely on the blaster.

[39] Thus, it is argued, the defence of due diligence applies since the accident that occurred was unforeseeable – at least by anyone but a blasting expert. However, this argument misses the point. The distance to structures and persons was knowable. The risk from having structures or buildings nearby was entirely foreseeable even by someone with no blasting expertise whatsoever. Again, the evidence is that the blaster would never have set off the blast if he had known that the Lobird Trailer Court was a mere 150 meters away. While the exact failure that caused the flyrock to rain down on Lobird Trailer Court may not have been foreseeable, the risk from conducting a large blast at that location was, or should have been, obvious.

[40] In addition to considering changes to the blast design itself, the prudent would have considered at least warning the residents of Lobird Trailer Court and posting guards, if not considering other measures including, ultimately, the evacuation of the area.

[41] It is important to recall that the onus of establishing due diligence lies on the defendants. Seen in that light, the import of the evidence given by Mr. Parker becomes clearer. He did not say that everything was done that could reasonably have been done. He did not say that the blast would have been designed and conducted in the same way had the proximity to the Lobird Trailer Court been properly considered.

[42] I turn next to consider whether the Department of Community Services, as constructor, failed in its duty of oversight. Obviously, the constructor's role is less "hands on" than that of the employer or supervisor. Consequently, the degree to which the constructor can exercise control and supervision of a project is somewhat limited. The constructor cannot micro-manage every minute detail of the work that is done. That task is delegated to the actual contractor and its supervisory staff. Nonetheless, the constructor remains jointly responsible for workplace safety: he cannot delegate that responsibility away.

[43] In this case, the constructor retained a considerable degree of control over the blasting operations as it required that blasting plans be prepared and forwarded to the Department in advance of all proposed blasts. While these plans contained information that was not easily reviewable by the Department engineer, who possessed no expertise in blasting[1], the plans also contained other, less technical information, including the distance from the blast site to structures.

[44] Inexplicably, many of these plans indicated that the distance to structures was "N/A". Mr. Hildebrand, who prepared the plans, testified that "N/A" meant "not available", although the acronym is also commonly understood to mean "not applicable". In either case, receiving plans for blasting on an urban area, in known proximity to structures including the Lobird Trailer Court, which indicated either a lack of information or a lack of concern regarding structures, ought to have raised a red flag.

[1] The interesting question of whether or not it might be necessary in certain circumstances for those in a supervisory capacity to possess specialist knowledge in order to discharge their duties under the *Occupational Health and Safety Act* does not need to be answered in this case.

[45] Of course, some of the plans, including that for the May 6th blast, did indicate a distance, but, as we have seen, the distance given was wildly inaccurate. The Department, which was in possession of maps clearly showing the proximity of Lobird Trailer Court, ought to have reviewed and questioned the plans. In short, although there were many aspects of the blast plans that the Department had to take on faith, the distance to structures was a fundamental, obvious and easily verifiable fact. It is clear from Mr. Boehmer's evidence that he received and reviewed the plans only in a clerical sense, making sure they were submitted and were filled out, but without conducting any actual review of the contents.

[46] With respect to the failure of foresight by constructor, employer and supervisor, it should also be noted that there had been an earlier incident in November 2007, where a rock had gone through the roof of a trailer at the Lobird Trailer Court. The rock involved in that incident was small and smooth and there was some question as to whether or not it was flyrock from the blasting operations on the Hamilton Boulevard project. However, it is most likely that it did, given the timing of the occurrence and the lack of any reasonable alternative explanation. The incident was investigated and all the defendants were aware of it. At that time, the blasting location was considerably further away from the trailer park than the May 6th blast. This incident should have alerted all concerned to the location of the trailer park, the potential for flyrock to land there, and resulted in an extra degree of vigilance.

[47] Sidhu Trucking and Mr. Cratty were also charged with failing to immediately report the blasting incident to the Director of Occupational Health and Safety as required by s. 14.12(a) of the Occupational Health and Safety Regulations.

[48] The blast occurred at approximately 7:00 P.M. on May 6th, 2008. It was not reported to the Director until 10:15 A.M. on May 7th. Although the incident occurred outside of normal business hours, the Director maintains a telephone answering service so that reports can be made, and received, twenty-four hours a day, seven days a week.

[49] The defence contends that “immediately” actually means “promptly” “as soon as practicable” or “within a reasonable time”. However, I am unable to read the legislation in that way. “Immediately” is a clear and unambiguous term meaning “without delay” of “without an interval of time”. Reporting the incident fifteen hours later is not immediate reporting.

[50] Of course, I accept that the defence of due diligence applies. If the defendants did all they reasonably could to report and were prevented from doing so by a failure of the Director’s communications system, they would have a defence. In this case, there is a suggestion in the evidence that Mr. Cratty attempted to telephone the Director on the evening of May 6th, but no one answered. There is a dispute between prosecution and defence as to the admissibility and / or weight of this evidence, but even if we assume that one attempt to call was made, it would not suffice, without more, to establish due diligence.

[51] Finally, it is contended that the Regulation requiring immediate reporting to the Director had been complied with because Mr. Boehmer, the program manager, who was, of course, an employee of the Yukon government, was advised of the incident sometime during the evening of May 6th. However, the Regulation is, again, quite specific and requires that the Director of Occupational Health and Safety and not just any government official, be notified.

[52] In the result, I find that the charges against the several defendants have been proved. The Crown conceded that the rule in *R. v. Keinapple* [1975] 1 S.C.R. 729 applies and that convictions should only be entered on one count applying to each delict. Consequently, convictions will be entered against the defendant P.S. Sidhu Trucking Ltd. on counts 1 and 4 and against the defendant Government of Yukon Department of Community Services on count 1. William Cratty stands convicted on both counts.

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FAULKNER, T.C.J.