Citation: *Yukon (Director of Occupational Health and Safety)* v. *Yukon Tire Centre Inc. et al.,* 2013 YKTC 92

Date: 20131113
Docket: TC 12-06231
Registry: Whitehorse

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

IN THE MATTER of the *Occupational Health and Safety Act,* R.S.Y. 2002, c. 159, and the *Occupational Health and Safety Regulations,* O.I.C. 2006/178;

DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY

v.

YUKON TIRE CENTRE INC. and PAUL BUBIAK and
NORTH 60 PETRO LTD. and FRANK TAYLOR

Appearances:

Judith M. Hartling	Counsel for Director of Occupational Health and Safety
James Tucker	Counsel for Yukon Tire Centre Inc. and Paul Bubiak
William K. McNaughton	Counsel for North 60 Petro Ltd.
André Roothman	Counsel for Frank Taylor

RULING ON APPLICATIONS

[1] On November 13, 2013, I dismissed these applications with reasons to follow. These are my reasons.

[2] Yukon Tire Centre Inc., Paul Bubiak, North 60 Petro Ltd. and Frank Taylor have been charged on an Information alleging a number of breaches of the *Occupational Health and Safety Regulations,* O.I.C. 2006/178, passed under the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159. The charges arise out of a fatal industrial accident

that occurred on November 15, 2011. The Director of Occupational Health and Safety alleges that on that day, a Kenworth truck operated by North 60 Petro had been taken to Yukon Tire Centre's tire shop for work on the truck's tires. The work was performed by Dennis Chabot, an employee of Yukon Tire Centre. Mr. Chabot advised his supervisor that the work had been completed but that he was going to recheck the torque on the wheel nuts. Mr. Bubiak cell phoned North 60 Petro to advise that the truck was ready. Mr. Bubiak also went outside and started the truck to warm it up. At North 60 Petro, Paul Taylor assigned Allan Lelievre to pick up the truck and drive it back to North 60's yard. When Mr. Lelievre and Mr. Taylor arrived at Yukon Tire, the truck was running. Mr. Lelievre failed to notice that Mr. Chabot was under the truck and drove off. Mr. Chabot was run over and killed.

[3] Yukon Tire Centre Inc., as Mr. Chabot's employer, faces counts 1 to 5 of the Information. Yukon Tire sought to quash counts 1, 2 and 3. Paul Bubiak, Mr. Chabot's supervisor, faces counts 6 to 9 inclusive. He sought to quash all four counts.

[4] North 60 Petro Ltd. is charged on counts 10, 11 and 12. It sought to quash counts 11 and 12.

[5] Frank Taylor, Mr. Lelievre's supervisor, faces counts 13 and 14. He applied to quash both counts against him.

[6] I pause to note that pleas have already been entered to all counts by all accused and leave of the Court is required to bring an application to quash. The Director was not opposed and I granted leave despite the fact that the applications come a year after the charges were laid and virtually on the eve of trial.

[7] Charges laid under six separate sections of the *Regulations* were attacked.

These are sections 1.06(a), 1.07(2), 3.02, 3.03, 6.03(b) and 6.38.

[8] These sections provide as follows:

…

1.06 A worker shall only operate any tool, equipment, machinery or process if he or she is

(a) adequately trained in the safe operation of the equipment or process involved, and the related safe work procedure, and…

1.07…

(2) Before any part of a machine or equipment is cleaned, oiled, adjusted or repaired

(a) any motion that may endanger a worker shall be stopped, and

(b) any part that has been stopped shall be immobilized.

…

3.02 Where a worker could be injured by the unexpected energization or startup of machinery or equipment, or the unexpected release of an energy source, the energy source shall be isolated and effectively controlled.

3.03 Whenever machinery or equipment is shut down for maintenance work, all energy-related hazards shall be effectively controlled before work is done.

(1) All parts and attachments shall be secured against inadvertent movement.

(2) Energy-isolating devices shall be locked out as required by this Part.

(3) Where machinery or equipment is in use for normal production work and is not effectively safeguarded to protect the workers, lockout procedures shall be followed.

…

6.03 Workers shall only operate mobile equipment if…

(b) they have demonstrated competency in operating the equipment to a supervisor or a qualified person,…

…

6.38 Where a mobile equipment operator's view of the work area is obstructed, the operator shall not move the equipment until precautions have been taken to protect the operator and any other worker from injury, including

(a) the inspection, by the operator on foot, of the area into which the equipment will be moved,

(b) direction by a signaller stationed in a safe position in continuous view of the operator and having an unobstructed view of the area into which the equipment will move, or

(c) direction by a traffic control or warning system.

[9] In the contention of the defendants, these sections of the *Regulations* fail to disclose offences against them since they do not create an offence or impose a duty on any person. They further say that, if the sections in question do impose a duty on anyone, it is only upon the employee operating the equipment and not the employer or the supervisor. For its part, North 60 Petro concedes that while s. 6.03(b) and 6.38 might impose a duty on supervisors, they do not impose a duty on the employer.

[10] In making these submissions, the defendants rely heavily upon the decision of the Ontario Court of Appeal in *R.* v. *Elm Tree Nursing Home Inc.* (1987), 20 O.A.C. 277. In that case, a licensee licenced under the Ontario *Nursing Homes Act* sought to quash numerous charges it faced alleging breaches of Regulations passed pursuant to that *Act*. At paragraph 108 Goodman J.A. stated:

… [W]here it was intended that a duty be placed on a licensee or administrator or other person that certain acts be done, various sections expressly so provide. In those instances it is clear that a failure of the person to fulfill the duty imposed by the regulation constitutes an offence under the Act. It is equally clear that any person who does an act which is

> prohibited by the provisions of the regulation will be guilty of an offence and it is not necessary that the prohibition be directed against a particular individual. In my opinion, however, where sections of Regulation 690 do not create a duty or where they create a duty but do not expressly impose such duty on any person there can be no offence created under those sections within the meaning of s. 19 of the *Act*. …

[11] The defendants also point to the decision of the Alberta Provincial Court in *R.* v. *402485 Alberta Ltd.,* 2011 ABPC 91. In that case, a supplier of equipment was charged with failing to comply with s. 12(1)(b) of the Regulations under the Alberta *Occupational Health and Safety Act* by failing to ensure the equipment would safely perform the function for which it was intended. Clearly however, s. 12(1)(b) only applied to an employer. The charge was quashed.

[12] As already noted, the defendants in this case say many of the charges laid do not create an offence against them because the Regulations in question do not create a duty on any one or if they do, then it is only on the operator.

[13] For example, count 1 alleges that the defendant Yukon Tire Centre Ltd.:

> On or about the 15th day of November, 2011, at or near the City of Whitehorse, YT, did unlawfully commit an offence as an employer by failing to isolate and effectively control an energy source to wit: a Kenworth truck when a worker could be injured by the unexpected energization or a start up of the machinery or equipment or the unexpected release of the energy source, contrary to Regulation 3.02 of the Occupational Health and Safety Regulations, O.I.C. 2006/178, *Occupational Health and Safety Act, R.S.Y. 2002, c. 159.*

[14] Count 8 charges Mr. Bubiak with the same offence. It will be recalled that s. 3.02 of the *Regulations* reads as follows:

> Where a worker could be injured by the unexpected energization or startup of machinery or equipment, or the unexpected release of an

> energy source the energy source, shall be isolated and effectively controlled.

[15] In Mr. Tucker's submission, s. 3.02 does not specify any person responsible and, therefore, does not actually impose a duty on anyone. The Regulations specified in counts 2, 3, 7 and 9 he says, suffer from the same defect.

[16] For his part, Mr. McNaughton, on behalf of North 60 Petro, contends that while sections 6.03(b) and 6.38 may impose a duty on the operator and his supervisor, they do not specifically impose any duty on the employer. Moreover, he says s. 3 of the *Occupational Health and Safety Act*, which speaks to employer's duties, does not include a general duty to ensure employees comply with the Regulations. Thus, s. 3 cannot be used to make an employer liable.

[17] Mr. Roothman, appearing for Mr. Taylor, submitted that s. 1.06(a) and 6.38 do not impose a duty on the supervisor. The duties of a supervisor are those set out in s. 7 of the *Occupational Health & Safety Act* and Mr. Taylor should have been charged, if at all, under s. 7.

[18] All defendants resisted any suggestion that the charges could be amended at this late date, especially as the limitation period has long since passed.

[19] I agree with the defendants that they cannot be liable if the *Occupational Health and Safety Act,* or the Regulations under which they have been charged, impose no duty upon them.

[20] I do not, however, agree that employers and supervisors are beyond the reach of the Regulations in question.

[21] In my view, the submissions of the defendants result primarily from an unduly narrow reading of the *Occupational Health and Safety Act* and the *Regulations*.

[22] In referring to the interpretation of the Ontario *Occupational Health and Safety Act* in *Ontario (Ministry of Labour)* v. *Hamilton (City)*(2002), 58 O.R. (3d) 37 (C.A.), Sharpe J.A. said:

> [16] 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 purposes 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.

[23] I also note the provision of s. 10 of the *Interpretation Act,* R.S.Y. 2002, c.125*:*

> Every enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects.

[24] To read this legislation as the defendants do would completely frustrate the objective of it as it would, in most cases, absolve employers and supervisors of any responsibility for workplace safety.

[25] As Bellamy J. noted in *Ontario (Ministry of Labour)* v. *Enbridge Gas Distribution Inc.,* 2010 ONSC 2013 when speaking of the Ontario *Occupational Health and Safety Act* – an Act very similar to our own:

> [24] The *OHSA* strives to make every party, every employer, and every individual in the workplace responsible in some measure for health and safety. Accidents can and do happen. However, they do not always happen simply because of one incident. They can happen because of several incidents or omissions, as the appellants contend was the case here. The responsibilities under the Act overlap, creating a redundancy which operates to the advantage of workers. The parties in this appeal described this as the "belt and braces" approach to occupational health and safety, which means the Act and Regulations use more than one method to ensure workers are protected. So, if the "belt" does not work to safeguard a worker, the backup system of the "braces" might, or vice versa. If all workplace parties are required to exercise due diligence, the failure of one party to exercise the requisite due diligence might be compensated for by the diligence of one of the other workplace parties. The purpose is to leave little to chance and to make protection of workers an overlapping responsibility.

[26] Duties under the Yukon *Act* are the same. Although some duties apply to one party or another, many overlap. The duties under the *Act* are not water tight compartments. Safety is a shared concern.

[27] This point was made quite clear by Veale J. when speaking of the Yukon *Occupational Health and Safety Act* in *Yukon (Director of Occupational Health and Safety)* v. *Yukon*, 2012 YKSC 47. At para. 69, Veale J. stated that the *Act*:

> …creates overlapping obligations between owners, employers and constructors, to ensure every participant in a construction project has a safety focus.

[28] As the Court in *Enbridge* noted, it is well recognized that accidents seldom result from a single failure by a single person. There may be many incidents and many persons involved in the accident chain. Safety is a system. Thus it only makes sense to make safety a joint responsibility.

[29] One of the most obvious examples in this case is the argument that s. 106(a) of the Regulations imposes no duty on a supervisor. It is true that the section provides that "a worker [emphasis added] shall only operate…equipment…if he is adequately trained in the safe operation of the equipment". However, that does not mean no one else has any responsibility. The worker has the duty to take the training, but the employer and supervisor surely have the responsibility to provide it.

[30] Similarly, s. 6.38 of the Regulations provide that an operator [emphasis added] not move equipment until precautions have been taken to protect the operator and any other workers from injury.

[31] The Regulations in question clearly applies to the operator, but it just as clearly applies to employers and supervisors. The provision of safety equipment, the design of the workplace, and the development and implementation of workplace practices and procedures (including the taking of safety precautions around mobile equipment) are largely under the control of ownership and management and not the employee operator.

[32] I note that in *R.* v. *Concord Paving Ltd.* (2012), 324 Nfld. & P.E.I.R. 48 (N.L.P.C.) the Court held that a somewhat similar provision of the Newfoundland *Occupational Health and Safety Act* did not impose a duty on the employer but only on the operator. To the extent that *Concord Paving* may find that the taking of precautions before moving equipment is solely the responsibility of the operator, I respectfully disagree.

[33] However, there are significant differences between the Yukon and Newfoundland Regulations that may explain the different result.

[34] Section 113(4) of the Newfoundland Regulation stated that:

> …[the operator] shall not move the equipment until suitable precautions have been taken which will protect himself and another worker.

[35] By contrast the Yukon Regulation requires precautions be taken "to protect the operator and any other worker".

[36] Much more importantly, the Yukon *Regulations* (unlike its Newfoundland counterpart) goes on to provide examples of the precautions that must be taken. Those include the provision of a "signaller and a traffic control or warning system". Such precautions are almost exclusively under the control of supervisors and employers.

[37] A further answer to the claim that the *Regulations* impose no duty on supervisors is section 6.05 which provides, amongst other things, that supervisors have the specific duty to ensure that workers do not operate mobile equipment in violation of the *Regulations*.

[38] As already noted, the defendants rely heavily on the decision of the Ontario Court of Appeal in *R.* v. *Elm Tree Nursing Home, supra.* There, numerous charges against a licenced nursing home operator were quashed on the basis that many of the Regulations promulgated under the authority of the Ontario *Nursing Homes Act* did not create an offence or impose a duty on the licensee. The Court found that it was unclear whether or not some of the Regulations created an offence or were simply requirements for obtaining or maintaining a licence. An example was a Regulation providing specifications for the entrance doors to resident's rooms. Moreover, many of the Regulations purported to place a duty on "a nursing home" but the *Act* did not make a

nursing home a legal entity. Since the *Act* was penal in nature, the ambiguities were resolved in favour of the defendant licensee.

[39] It is true that *Elm Tree* suggests that Regulations which do not impose a duty or do not provide on whom the duty is imposed, do not create an offence.

[40] However, several things must be kept in mind.

[41] First, the Ontario *Nursing Home Act*, unlike the Yukon *Occupational Health and Safety Act,* imposed no general duty on licensees similar to those imposed on employees and supervisors by s. 3 and 7 of the Yukon *Occupational Health and Safety Act.*

[42] Second, there have been cases subsequent to *Elm Tree* which held that statutes like the *Occupational Health and Safety Act* may, by necessary implication, impose a duty on persons not specifically named by the Regulations. *Enbridge* is a perfect example. There the owner of a gas pipeline was held accountable for the failure to accurately locate a gas pipeline prior to excavation, despite the fact that the owner was not specifically named in the Regulation in question.

[43] Third and perhaps most importantly, *Elm Tree,* itself, upheld a provision of *Regulation 690* very similar in nature to those under attack here.

[44] In *Elm Tree,* one of the sections in question was s. 55(1)(b), which read:

> An apparatus for restraining a resident shall be applied to a resident only,…
>
> (b) on the written order of a physician who has attended the resident and approved the apparatus as appropriate for its intended use in restraining the resident.

[45] The 12 counts laid pursuant to 355 (1)(b) of the *Regulation* all alleged that:

> … the Licensee … failed to ensure that an apparatus for restraining a resident be applied to a resident only on the written order of a physician who has attended the resident and approved the apparatus as appropriate for its intended use in restraining the resident, to wit: resident [name of resident] contrary to s. 55, s-s. 1(b), of Ontario Regulation 690 and Amendments thereto and did thereby commit an offence contrary to s. 19 of the *Nursing Homes Act* R.S.O. 1980 Chapter 320.

[46] Goodman J.A. held that, although the *Regulation* was not directed to anyone specifically, it, nevertheless, created a prohibition against any and all persons. At para. 86 he stated:

> This section differs somewhat from ss. 10, 11 and 20 in that, properly interpreted, it does create a prohibition. In my view, s. 55(b) means that no person shall apply a restraining apparatus to a resident without the written order of the attending physician. In effect it does create a prohibition against all persons. It does not, however, place a duty on anyone to ensure that its provisions are complied with. In my opinion a contravention of such prohibition by any person either as a principal or an aider or abettor is sufficient to support a charge of an offence under the regulation and s. 19 of the Act.

[47] It is true that Goodman J.A. held that the *Regulation* does not impose a duty on anyone to ensure it is complied with, but he did find that the *Regulation* creates an offence despite the fact that it does not name anyone specifically and that persons other than the principal could be charged as parties.

[48] I find that the Regulations in question in this application are similar. They create an offence. A person who is a party to an offence may be convicted of it. This alone is sufficient to dispose of the applications to quash, whether or not there is a specific duty imposed on employers and supervisors with respect to any of the Regulations in

question, and whether or not the *Act* imposes a general duty on employers and supervisors to ensure compliance with the *Regulations*.

[49] However, in this case, I find that the *Occupational Health and Safety Act* does, in fact, impose broad duties on employers and supervisors.

[50] In this respect, I have already made reference to the overall intent of the *Act*, which is to make safety a joint responsibility.

[51] Moreover, in my view, the provisions of s. 3 and s. 7 of the *Act* clearly impose a general duty on employers and supervisors to ensure compliance with the *Regulations*.

[52] Section 3 of the *Act* sets out the duties of employers:

> **Employer's duties**
>
> 3(1) Every employer shall ensure, so far as is reasonably practicable, that
>
> (a) the workplace, machinery, equipment, and processes under the employer's control are safe and without risks to health;
>
> (b) work techniques and procedures are adopted and used that will prevent or reduce the risk of occupational illness and injury; and
>
> (c) workers are given necessary instruction and training and are adequately supervised, taking into account the nature of the work and the abilities of the workers.
>
> (2) Without limiting the generality of subsection (1), every employer shall, so far as is reasonably practicable,
>
> (a) ensure that workers are made aware of any hazard in the work and in the handling, storage, use, disposal, and transport of any article, devise, or equipment, or of a biological, chemical, or physical agent;
>
> (b) cooperate with and assist safety and health representatives and committee members in the performance of their duties;

(c) ensure that workers are informed of their rights, responsibilities, and duties under this Act; and

(d) make reasonable efforts to check the well-being of a worker when the worker is employed under conditions that present a significant hazard of disabling injury, or when the worker might not be able to secure assistance in the event of injury or other misfortune. *R.S., c.123, s.3.*

[53] There is thus a broad obligation on employers to ensure that proper processes, techniques and procedures are adopted and used so as to prevent or reduce risk to health and safety in the workplace, that workers are made aware of workplace risks and that they are aware of their duties under the *Act*.

[54] The duties of a supervisor are contained in s. 7.

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. *R.S., c.123, s.7.*

[55] Mr. Bubiak and Mr. Taylor contend that the *Occupational Health and Safety Act* does not impose a duty on supervisors to ensure that workers under their supervision comply with the *Act* or the *Regulations*.

[56] It is true that the supervisor's duties in s.7 do not specifically include a duty to ensure that persons under their supervision are aware of the *Act* or *Regulations* or that the requirements of either are adhered to.

[57] However, as I noted in *Yukon (Director of Occupational Health and Safety) v. Yukon,* 2010 YKTC 42 at para 27*:*

> … 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. …

[58] Moreover, some of the counts involving the supervisors allege a failure of instruction or training. These are counts 6 and 13. By virtue of s. 7(a), supervisors are under a specific duty in this regard.

[59] There is a further flaw in the submissions of the defendant supervisors. Both were, to some extent, personally involved in the events leading to Mr. Chabot's death. Mr. Bubiak, in particular, is alleged to have started up the truck. This action could make him a party to counts 7, 8 and 9 irrespective of any allegations of supervisory failure. To be clear, I make no finding in this regard. I only point out that the facts proven at trial will ultimately decide whether the defendants are liable as principals, as parties or for failure of duty.

[60] It is only if the supervisor (or the employer) could not be convicted on any possible assumed set of facts that the charges could be quashed.

[61] There is a further argument to deal with.

[62] North 60 Petro argues that count 11 should be quashed. That count alleges:

> On or about the 15th day of November, 2011, at or near the City of Whitehorse, YT, did unlawfully commit an offence as an employer by failing to ensure that where a mobile equipment operator's view of the work place is obstructed, that the operator not move the equipment to wit: a Kenworth truck until precautions have been taken to protect the operator and any other worker from injury contrary to Regulation 6.38 of the Occupational Health and Safety Regulations, O.I.C. 2006/178*, Occupational Health and Safety Act*, R.S.Y. 2002, c. 159

[63] Mr. Lelievre, the North 60 Petro employee who drove the truck is charged on a separate Information as follows:

> Information #12 – 07064, Count #2: "On or about the 15th day of November, 2011, at or near the City of Whitehorse, YT, did unlawfully commit an offense as a worker by moving mobile equipment to wit: a Kenworth truck when his view of the work area was obstructed, without taking precautions to protect another worker from injury by failing to inspect, on foot, the area into which the equipment was to be moved contrary to Regulation 6.38(b) [sic] of the Occupational Health and Safety Regulations…"

[64] Mr. McNaughton seems to suggest that since Mr. Lelievre is charged with failing to make an inspection on foot, that must also be the allegation against North 60 Petro.

[65] He says it is simply impossible for a corporation to do an inspection on foot. I completely agree, but North 60 Petro is not charged with failing to make an on foot inspection, but rather with a general failure to take precautions to protect the operator or other workers.

[66] In short, there is no reason, in law or in logic, to assume the charges faced by

North 60 Petro and Mr. Lelievre are identical.

[67] Finally, Mr. Roothman submitted that his client should have been charged under s. 7 of the *Act* and not under the *Regulations*.

[68] Arguably, it would have been preferable to refer to s. 3 of the *Act* in each of the charges involving the employers and s. 7 in those against the supervisors. But this misdescription, if it is one, is not fatal to the counts. It is, at worst, a defect of form which could be cured by amendment without prejudice to the defendant. The counts are quite specific and there is no doubt what each of them allege. Adding the additional section numbers would in no way change the nature of the charges or alter the case the defendants must meet.

[69] In conclusion, I find that the *Regulation* sections in question each create an offence and that any person who commits the offence, or is a party to it, may be convicted. The employers and supervisors say they cannot be charged on basis of *respondeat superior* or vicarious liability. I agree, but what the defendants forget is that liability may fall not only on the principal offender but on anyone who aids and abets or is otherwise a party to the offence.

[70] Moreover, given the nature of the failures alleged, i.e. failures of systems, training or supervision almost exclusively under the control of management, it would defeat the entire purpose of the *Occupational Health and Safety Act,* to hold that the *Act* and *Regulations* do not impose a duty on anyone but the employee.

[71] Finally, I hold that ss. 3 and 7 of the *Act* do impose a duty on employers and supervisors to ensure compliance with the Regulations under the *Act*.

[72] In the result, the applications to quash are dismissed.

_____

FAULKNER T.C.J.