In the Court of Appeal of Alberta

Citation: R v Precision Diversified Oilfield Services Corp, 2018 ABCA 273

Date: 20180822
Docket: 1603-0251-A
Registry: Edmonton

2018 ABCA 273 (CanLII)

Between:

Her Majesty the Queen

Appellant

- and-

Precision Diversified Oilfield Services Corp.

Respondent

The Court:

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment of The Honourable Madam Justice Veldhuis
Concurred in by The Honourable Mr. Justice McDonald

Memorandum of Judgment of The Honourable Mr. Justice Wakeling
Concurring in the Result

Appeal from the Decision by
The Honourable Madam Justice J.B. Veit
Dated the 16th day of September, 2016
(Docket: 121375455S1)

Memorandum of Judgment

Veldhuis J.A. (for the Majority):

Introduction

[1] This appeal arises out of a tragic workplace fatality. The victim, Mr. Frazier Peterson, was a floorhand on a drilling rig operated by Precision Diversified Oilfield Services Corp. (Precision).[1] On December 12, 2010, Mr. Peterson suffered a fatal head injury while working on the rig.

[2] Precision was charged with two offences contrary to the *Occupational Health and Safety Act*, RSA 2000, c O-2 [*OHSA*]. The Crown alleged Precision had violated its "general duty" to ensure the health and safety of an employee, contrary to s. 2(1) of *OHSA* (Count 1). The Crown also alleged Precision had violated s. 9(1) of the *Occupational Health and Safety Code 2009* [*Safety Code*], which required Precision to adopt engineering or administrative controls in order to mitigate workplace hazards (Count 2).

[3] Precision was convicted of both offences at trial: *R v Precision Drilling Canada Limited,* 2015 ABPC 115, 2015 CarswellAlta 1017 (WL Can) [*Trial Decision*]. On appeal, the summary conviction appeal judge overturned the convictions and ordered a new trial: *R v Precision Drilling Ltd*, 2016 ABQB 518, 2016 CarswellAlta 1774 (WL Can) [*Summary Conviction Appeal Decision*]. The Crown sought and obtained leave to appeal to this Court on two questions: *R v Precision Diversified Oilfield Services Corp*, 2017 ABCA 47, 2017 CarswellAlta 164 (WL Can) [*Leave Decision*].

[4] One of the questions upon which leave was granted requires this Court to consider a legal issue that has not been addressed by this Court before, namely, whether the expression "as far as it is reasonably practicable for the employer to do so" is part of the *actus reus*[2] of s. 2(1) of the *OHSA*.

[5] Most of the parties' submissions and the lower courts' discussion about the *actus reus* of s. 2(1) of the *OHSA* have focused on *R v Sault Ste. Marie (City)*, [1978] 2 SCR 1299, 85 DLR (3d) 161, the Supreme Court of Canada's seminal decision on strict liability offences, and the "accident

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[1] The Crown originally charged five members of the Precision Drilling family: Precision Drilling Canada Ltd. Partnership, Precision Diversified Oilfield Services Corp., Precision Drilling Corp., and "Precision Diversified Oilfield Services Corp. and Precision Drilling Corporation operating as Precision Drilling Canada Limited Partnership". The courts below have been somewhat inconsistent in identifying which member of the corporate family was at issue, but at trial, convictions were entered against Precision Diversified Oilfield Services Corp.

[2] *Actus reus* is Latin for the "guilty act" and has been described as the wrongful deed that comprises the physical components of an offence and that generally must be coupled with *mens rea* to establish criminal liability: see *Black's Law Dictionary*, 10th ed, *sub verbo* "actus reus" [*Black's*].

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as *prima facie* proof of breach" approach, which was developed in *R v Rose's Well Services,* 2009 ABQB 1, 467 AR 1. In that case, the summary conviction appeal judge considered the interpretation of the same expression at issue here and he concluded it was not an element of the *actus reus*. Instead, he found that to establish the *actus reus* of the general duty offence, "the Crown may in some cases stop at the facts of the incident - the accident itself - as proof of the *actus reus"*: *Rose's Well Services* at para 68.

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[6] This formulation of the *actus reus* requirement is narrow and does not provide any guidance as to what the Crown is obligated to prove if the facts of the incident are insufficient. In this decision, I provide an interpretation of s. 2(1) of the *OHSA* that results in a more comprehensive framework for the *actus reus* requirement for this general offence provision.

[7] As neither the trial judge nor the summary conviction appeal judge had this new framework before them, and given the appeal judge's other findings that are not subject to appeal, this matter must return for a new trial. As a result, and as explained further below, the Crown's appeal is dismissed.

Facts

[8] The trial judge heard complex testimony about the operation of drilling rigs and the evidence contained a considerable amount of oilfield "jargon". I will confine my review of the evidence to those facts necessary to understand the issues and dispose of the appeal.

[9] The drilling rig where the incident occurred had a conventional rotary table mechanism. A "drillstring" is the assembly that hangs from the top of a drilling rig and includes the drill pipe and the drill bit mechanism. The drillstring is lowered into the well (also called the "hole") in order to drill below ground. The drillstring enters the ground through a "rotary table." The rotary table is the section of the drilling floor that spins and transmits rotational force to the drillstring and the drill bit.

[10] By December 12, 2010, the rig had drilled to its target depth. The drilling crew began to "trip out"—that is, remove the drillstring from the well while disconnecting sections of drill pipe. During the process of tripping out, the driller and floorhands work together to remove pieces of drill pipe for above-ground storage on the rig. The driller operates the rig's controls, including the rotary table and rotary table brake. The floorhands work on the rig floor, using equipment to disconnect drill pipe from the drillstring. The floorhands' equipment includes "slips," which prevent the drillstring from falling back down the hole, and "elevators" and "bales," which lift drill pipe out of the hole and onto a storage rack. As the crew trips out, the driller uses a "table brake" to hold the drillstring in place while turning the rotary table to "spin off" the connection between sections of pipe. This process of turning the rotary table can induce torque into the drillstring.

[11] Torque is dangerous to the floorhands. If there is any "trapped torque" within the drillstring, equipment attached to the drillstring can rotate quickly and unexpectedly. If the

floorhands are standing too close, the spinning equipment can strike them and cause significant injury or death. There are several kinds of trapped torque, the most common form of which is trapped table torque. To address the risk posed by this form of torque, the driller must "feather" the table brake to release the trapped torque before the floorhands lift the slips. There is no visual cue that torque (regardless of the type) remains trapped within the drillstring. Torque is therefore a hidden danger, not immediately obvious to either the driller or floorhands.

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[12] In the moments before the incident, the rig's driller used the rig's controls to lift the drillstring. While the trial and summary conviction appeal judges disagreed about whether what happened was proven, the appeal judge concluded that it was evident that some part of the drilling equipment struck Mr. Peterson when torque from the drillstring was released: *Summary Conviction Appeal Decision* at para 16. He died from blunt cranial trauma and multiple cranial fractures.

Decisions Below

Provincial Court Trial

Parties' Submissions

[13] Both parties agreed at trial that the offences charged were strict liability offences with the result that the Crown had the onus of proving beyond a reasonable doubt that Precision had committed the *actus reus*, at which point the onus shifted to Precision to prove it had exercised due diligence on a balance of probabilities.

[14] The Crown's theory at trial was that in the moments preceding the incident, the driller failed to release trapped table torque which caused the bales and elevators to turn uncontrollably and strike Mr. Peterson as he stood preparing to lift the slips. While this theory applied to both counts, the Crown made different submissions on the *actus reus* requirements for each.

[15] For Count 1, the Crown relied upon the "accident as *prima facie* proof of breach" approach. Under this approach, the Crown was required to show that the defendant controlled the activities undertaken, and while those activities were being undertaken, the worker was exposed to a harmful situation. Under Count 2, which related to allegations that Precision failed to adopt engineering or administrative controls to mitigate the workplace hazard of uncontrolled release of trapped table torque from the drillstring, the Crown took the position that it was not required to prove that an engineering control was practicable for Precision to implement. Rather, that obligation fell to Precision to prove as an element of its due diligence defence. In the alternative, if the Crown was required to establish this element, it argued that there was evidence before the court that Precision could have installed a light on the console to warn the workers, or an interlock device, which was developed by a competitor, and implemented by Precision after the incident, to prevent the driller from hoisting the drillstring while the rotary table brake remained engaged.

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[16] In response to Precision's due diligence defence, the Crown raised issues regarding foreseeability of the incident and provided argument on whether reasonable steps required Precision to implement an engineering control or better administrative controls.

[17] Precision argued the Crown had not proven the *actus reus* of Count 1 as this was not one of the cases where the "accident *as prima facie* proof of breach" standard applied. It submitted that the Crown's theory failed because there was no evidence from the driller[3] about what he might have told the drillers or whether he forgot to release the rotary brake before hoisting the drillstring.

[18] Precision also provided a number of arguments about why it was not required to implement the interlock and how its comprehensive safety program, which exceeded industry standards and government requirements and layered numerous administrative controls, met its obligation to take all reasonable steps.

Trial Decision

[19] The trial judge turned first to whether the *actus reus* of the offence has been proven by the Crown beyond a reasonable doubt. He was satisfied that the Crown was not required "to prove a precise set of facts conclusively proving causation": *Trial Decision* at para 5. He accepted that in some cases, proof of an accident or incident may be sufficient to establish *actus reus*.

[20] Instead of addressing the precise legal tests under both counts, the trial judge made a number of factual findings, which he believed quieted the controversy, and limited his analysis to Count 1 given the perceived overlap between the facts and analysis between the two counts: *Trial Decision* at paras 6 and 14. He held that it was sufficient for the Crown to meet its burden by establishing that the "deceased was an employee under the company's control and was killed on the job," although the Crown went further and satisfied him that "Mr. Peterson was killed by torque released improperly by the driller": *Trial Decision* at para 32.

[21] The trial judge then turned to the issue of whether Precision had proven due diligence. He recognized that Precision was not required to take outrageous precautions nor need it have perfect foresight regarding hazards: *Trial Decision* at para 11. Much of the discussion in this regard focussed on whether the applicable standard of care required Precision to have fashioned the interlock prior to the incident. The trial judge found that it did: *Trial Decision* at paras 59-65.

[22] The trial judge was also satisfied that if Precision had adopted an alternative administrative control it would have "significantly reduced the risk to the deceased": *Trial Decision* at para 50. Although the trial judge felt that the administrative control was not as good as an engineering control, he was "satisfied that the administrative procedures used by [Precision] were ill-advised and contributed to the tragedy well beyond *de minimus*": *Trial Decision* at para 52. He reasoned

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[3] Neither party called the driller at trial.

that Precision's inadequate administrative control supported a conviction regardless of what might have caused the torque in this instance.

[23] In light of all of these conclusions, the trial judge found Precision guilty of both counts, although he entered a conditional stay on Count 2 under the principle set out in *Kienapple v R,* [1975] 1 SCR 729, 44 DLR (3d) 351.

Summary Conviction Appeal

Parties' Submissions

[24] Before the summary conviction appeal judge, Precision raised a variety of legal and factual errors. In particular, Precision alleged that the trial judge erred in finding that the spinning equipment was caused by trapped table torque, the standard of care required Precision to have installed the interlock, and the pre-incident administrative controls were inadequate.

[25] The Crown reiterated its position that Precision's pre-incident administrative controls were inadequate and Precision was required to at least turn its attention to an engineering control, which it did not do. Foreseeability was important to the Crown's position on due diligence and it pointed to the history of incidents and other evidence about the potential for injury by spinning equipment with pulling the slips.

Summary Conviction Appeal Decision

[26] The summary conviction appeal judge began her analysis by turning to the alleged breach of the general duty found in Count 1. She identified three types of errors: (1) the initial error in finding that the *actus reus* was made out by proof of the accident itself; (2) the errors in assessing evidence; and (3) errors made in concluding that Precision had not made out, on a balance of probabilities, that it had done what was reasonably practicable to avoid Mr. Peterson's death.

[27] In dealing with the *actus reus*, she acknowledged that in certain cases simple proof of a workplace accident would be enough to meet the Crown's burden: *Summary Conviction Appeal Decision* at paras 40 and 47. She held, however, this was not a strict rule of law, and there were situations where more than proof of the accident was required: *Summary Conviction Appeal Decision* at para 42. She was satisfied the Crown had proven that Precision was Mr. Peterson's employer and that the drilling rig had the capacity to endanger the safety of any person. What was missing, however, was an indication that Precision committed any "wrongful act": *Summary Conviction Appeal Decision* at para 46. Since there was no clear cause of Mr. Peterson's injuries, and there was evidence inconsistent with the Crown's theory, she concluded it was necessary for the trial judge to address the evidence to determine whether the Crown had proven the *actus reus* by simply relying upon the accident itself: *Summary Conviction Appeal Decision* at para 44.

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[28] Although this finding meant an end to the Crown's case, the summary conviction appeal judge went on to discuss due diligence in the event that she was wrong with respect to the *actus reus*. She cited the test from *Sault Ste. Marie* and identified a number of instances where the trial judge's conclusions were not supported by the evidence, where the trial judge failed to adequately assess the evidence and where the trial judge failed to give adequate reasons.

[29] Like the trial judge, the summary conviction appeal judge felt there was overlap between the facts and circumstances between the two counts, and concluded that her analysis for Count 1 applied to Count 2: *Summary Conviction Appeal Decision* at para 117. Since there was still some evidence upon which a reasonable trier of fact could have properly convicted, she ordered a new trial on both counts: *Summary Conviction Appeal Decision* at para 119.

Grounds of Appeal

[30] The Crown was granted leave to appeal the following two grounds:

a) Did the Appeal Judge err in law by requiring the Crown, as part of the *actus reus* of the offence, to negate due diligence or prove negligence?

b) Did the Appeal Judge err in law in her interpretation and application of the due diligence test?

[31] During the hearing before this Court, the parties focused on the due diligence evidence and other issues that primarily related to the second ground of appeal. As this Court has not had occasion to consider what is required for the Crown to establish the *actus reus*, the panel sought further submissions from the parties on questions related to the interpretation of s. 2(1) of the *OHSA*:

a) Whether the "due diligence" defence for strict liability offences, as defined in *R v Sault Ste. Marie*, [1978] 2 SCR 1299, determines which party bears the burden of proving (or disproving) that it was "reasonably practicable for the employer" to have ensured the health and safety of a worker, or whether the words "as far as it is reasonably practicable for the employer to do so" define a separate fault element, which goes beyond the due diligence defence described in *Sault Ste. Marie*?

b) What inferences may be drawn, if any, from the fact that the predecessor sections of what are now ss. 2(1) and 41(1) were enacted prior to the release of *Sault Ste. Marie*: see *The Occupational Health and Safety Act*, SA 1976, c 40, ss. 2(1), 32(1)?

c) Whether *R v Rose's Well Services Ltd*., 2009 ABQB 1, and *R v Lonkar Well Testing Ltd*., 2009 ABQB 345, were correctly decided, to the extent they adopted the "accident as *prima facie* breach" interpretation of these provisions;

d) Whether the statutory provisions at issue in decisions such as *R v Saskatchewan Wheat Pool*, 2000 SKCA 73 and *R v Viterra Inc*., 2017 SKCA 51, are distinguishable from the analogous provisions of Alberta's *Occupational Health and Safety Act*?

e) What is the appropriate remedy in this case, in the event the Court determines that the Crown bears the burden of proving that it was reasonably practicable for an employer to ensure a worker's safety in a prosecution under ss 2(1) and 41(1)?

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[32] As the decisions below dealt with Count 1 (the general offence), the parties addressed the legal questions in relation to Count 1.

Standard of Review

[33] Appeals to this Court from a summary conviction appeal decision are limited to questions of law alone: *Criminal Code*, s. 839(1). The standard of review on questions of law is correctness: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

Analysis

Ground One – Did the Appeal Judge err by requiring the Crown, as part of the *actus reus* of the offence, to negate due diligence or prove negligence?

[34] The Crown argues it was entitled to rely on the "accident as *prima facie* proof of breach" as an approach to proving the *actus reus* to satisfy its legal burden and that the summary conviction appeal judge erred in law by requiring it to go further, and prove Precision had committed a "wrongful act," a "breach of duty," or the precise cause of the victim's injury. The Crown states that the expression "as far as it is reasonably practicable for the employer to do so" in s. 2(1) of the *OHSA* identifies the provision as a strict liability offence and is a reference to the due diligence defence. The Crown argues that if it is required to prove that it was reasonably practicable for the employer to ensure the health and safety of a worker, then the effect is to require the Crown to prove negligence. Any interpretation of s. 2(1) of the *OHSA* that requires the Crown to prove negligence is contrary to established jurisprudence, including *Rose's Well Services* and *Sault Ste. Marie*, and the guiding principles and public welfare objectives of the legislation.

[35] Precision submits that the expression "far as it is reasonably practicable for the employer to do so" forms an essential element of the *actus reus* given the principles of statutory interpretation. These words must mean something more than the basic facts of the incident. Precision states that

the Crown must prove a breach of a statutory obligation to prove the *actus reus* and that sometimes the fact of an incident or injury may not be enough to lead to the inference that the employer breached the statute. That is what the appeal judge meant when she referred to the Crown's duty to prove a "breach of duty" or a "wrongful act."

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[36] To assess whether the summary conviction appeal judge erred, it is necessary to understand what the Crown is required to prove. This requires a review of the legislative scheme and the existing case law.

Legislative Framework

[37] The *OHSA* and its regulations establish a comprehensive legislative regime that sets minimum standards for the protection of the health and safety of workers. One way *OHSA* helps to protect workers is to define duties of care that employers owe to their employees. Section 2(1) of *OSHA* defines a broad duty of care that employers owe to workers, typically described as the employer's "general duty":

> 2(1) Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,
>
> (a) the health and safety of
>
> (i) workers engaged in the work of that employer …

[38] Regulations enacted under *OHSA* also define a number of more specific employer duties. In particular, the *Occupational Health and Safety Code 2009 Order*, Alta Reg 87/2009, adopts the comprehensive *Safety Code* promulgated by the Alberta Occupational Health and Safety Council. The *Safety Code* defines hundreds of health and safety obligations designed to reduce risks to workers and prevent workplace injuries. Some of these obligations are very specific and tailored to individual industries or unique hazards. Other duties are framed more generally. For example, in this case, the Crown alleged that the respondent violated s. 9 of the *Safety Code*, which sets out a hierarchy of methods by which employers must address safety hazards identified during a hazard assessment.

[39] The *OSHA* enforces employers' obligations by making it an offence to contravene the standards established in the act or regulations:

> 41(1) A person who contravenes this Act, the regulations or an adopted code or fails to comply with an order made under this Act, the regulation or an adopted code or with an acceptance issued under this Act is guilty of an offence and liable [to fines or imprisonment, with the maximum penalty varying based on whether the offender has committed any prior offences].

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Count 1

[40] In this case, the Crown charged the "general duty" offence as follows:

> On or about the 12th day of December, 2010, at or near Grande Prairie, in the Province of Alberta, [the respondent] being an employer, did fail to ensure, as far as it was reasonably practicable to do so, the health and safety of Frazier Peterson, a worker engaged in the work of that employer, contrary to section [2(1)(a)(i)] of the *Occupational Health and Safety Act*, R.S.A. 2000, Chapter O-2, as amended.

[41] Particulars were neither provided nor requested.

What is the *Actus Reus* of s. 2(1) of the *OHSA*?

[42] Not all aspects of the *actus reus* are at issue in this appeal. For example, the Crown agrees that under s. 2(1) of the *OHSA*, it was required to establish that Precision was an "employer" under the *OHSA* and Mr. Petersen was a "worker". What is at issue is whether the expression "as far as it is reasonably practicable for the employer to do so" is an element of the *actus reus* or whether it is merely the legislature's attempt to codify the common law due diligence defence described in *Sault Ste. Marie*.

[43] For the reasons that follow, I find that the expression "as far as it is reasonably practicable for the employer to do so" forms one element of the *actus reus*. As a result, for an offence under s. 2(1) of the *OHSA*, the Crown must establish beyond a reasonable doubt the following:

> (1) the worker must have been engaged in the work of the employer;
>
> (2) the worker's health or safety must have been threatened or compromised (i.e. an unsafe condition); and
>
> (3) it was reasonably practicable for the employer to address the unsafe condition through efforts that the employer failed to undertake.

[44] These elements are consistent with the language of the provision, the purpose and intent of the legislation, the Supreme Court of Canada's guidance in *Sault Ste. Marie* and interpretations given to similar provisions in other provinces.

The Starting Point: *Sault Ste. Marie*

[45] In *Sault Ste. Marie*, the Supreme Court grappled with the long-unsettled question of whether regulatory and public welfare offences should require proof of subjective *mens rea*[4] or

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[4] *Mens rea* is Latin for "guilty mind" and has been described as criminal intent or recklessness: see *Black's*, *sub verbo* "mens rea".

whether merely committing the *actus reus* should be sufficient to ground a conviction. *Sault Ste. Marie* signaled a landmark shift in regulatory law by carving out middle ground between the competing positions of "full *mens rea*" and "*actus reus* alone." In doing so, the Supreme Court defined three categories of offences—subjective *mens rea*, strict liability, and absolute liability: at 1325-26.

[46] In this case, no one doubts that the "general duty" offence defined by ss. 2(1) and 41(1) of the *OHSA* is a public welfare offence, falling squarely within the second category defined in *Sault Ste. Marie*—that is, strict liability. Occupational health and safety offences are a textbook example of public welfare legislation. There is nothing in the definition of the "general duty" in s. 2(1) that suggests the Crown must prove subjective *mens rea*, and equally, there is no clear language suggesting liability should be absolute.[5]

[47] The issues and the discussion in *Sault Ste. Marie* primarily focused on the justification for a strict liability offence, and the scope of the then newly created due diligence defence. The Court provided very little guidance about what the Crown was required to prove in establishing the *actus reus* for a strict liability offence, besides describing it as the "prohibited act", which was not *mens rea* or negligence. The Supreme Court stated "the doing of the prohibited act *prima facie* imports the offence": at 1326. At no point in the decision did the Supreme Court equate the prohibited act with the existence of the accident or injury or other consequences of the accused's action or inaction.

Statutory Interpretation

[48] The phrase "prohibited act" takes its meaning from the particular legislative provision at issue. As with any question of statutory interpretation, I must read the words of s. 2(1) of the *OHSA* 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 the legislature: *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21,154 DLR (4th) 193.

[49] The words of an enactment define the *actus reus* of an offence: *R v Beatty*, 2008 SCC 5 at para 43, [2008] 1 SCR 49. Further, it is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: *Quebec (Attorney General) v Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831 at 838, 20 DLR (4th) 602. As a result, every word and provision in a statute is supposed to have a meaning and function, and the courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham Ont: LexisNexis Canada Ltd., 2014) at §8.23.

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[5] Absolute liability would be constitutionally impermissible in any event, since s. 41 of *OHSA* provides for imprisonment as a possible penalty. For a discussion see: D. Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Thomson Reuters, 2014) at 206-201.

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[50] Here, the language of s. 2(1) of *OHSA* does not frame the "reasonably practicable" component as a defence, or as a way for the employer to avoid liability. Nor is there anything in the words of s. 2(1) that suggests the burden of proof shifts to the employer. The "reasonably practicable" proviso qualifies the otherwise broad and general duty under s. 2(1), but it does not say liability will fall on the employer *except* or *unless* the accused *shows* or *establishes* it was not reasonably practicable to avoid the unsafe condition. Section 2(1) creates a duty, but says an employers' duty is merely to do what was reasonably practicable.

[51] As a result, in any prosecution for violating a provision of *OHSA* brought pursuant to s. 41(1), the Crown must prove the employer contravened a provision of *OHSA*, and establishing a breach of the general duty is contingent on showing that it was reasonably practicable to ensure a worker's health or safety. It follows that, in order to prove the employer committed an offence by violating its general duty, the Crown must establish it was reasonably practicable for the employer to address the unsafe condition through efforts that the employer failed to undertake.

[52] For these reasons, the ordinary meaning of the provision suggests that the expression is not a codification of the due diligence defence. The legislative history also does not support the codification interpretation either. The language of this provision has remained in force essentially unchanged since Alberta enacted its first general occupational health and safety legislation in 1976: *The Occupational Health and Safety Act*, SA 1976, c 40, ss. 2(1) and 32(1), which was two years *before* the Supreme Court recognized the distinction between offences of strict and absolute liability in *Sault Ste. Marie*. It is difficult to conclude that the legislature had intended to codify common law principles yet to be developed.

[53] In my view, requiring the Crown to prove it was reasonably practicable for the employer to address the unsafe condition through efforts that the employer failed to undertake does not undermine the *OHSA*'s basic goals. I agree that the *OHSA* is remedial public welfare legislation intended to guarantee a minimum level of protection for the health and safety of workers and its provisions ought to be generously interpreted in a manner that is in keeping with the purposes and objectives: *Ontario (Ministry of Labour) v Hamilton (City)* (2002), 58 OR (3d) 37 at para 16, 2002 CarswellOnt 220 (WL Can) (CA). However, it does not follow that a court ought to disregard the principles of statutory interpretation in assessing what is considered to be proof of those provisions: *R v St. John's (City)*, 2016 NLTD(G) 81 at para 19, 2016 CarswellNfld 194 (WL Can). It would no doubt be easier to enforce all kinds of public welfare legislation if the Crown did not have to prove all the elements of the offence beyond a reasonable doubt. But ease of enforcement alone cannot justify disregarding the ordinary meaning of the text and adopting a strained interpretation instead.

[54] Finally, this interpretation is also consistent with the scheme of the act. The *OHSA* also prohibits and punishes violations of a number of specific duties defined in the *Safety Code*. In many cases, the *Safety Code* defines these obligations using statutory language that suggests the Crown must prove that the employer failed to train, failed to supervise, failed to instruct, or failed to equip its workers as the case may be. Such "specific duty offences" remain subject to the

ordinary principles of governing public welfare offences, as set out in *Sault Ste. Marie*. There is little doubt many of these duties create strict liability offences, requiring the Crown to prove that the accused failed to comply with the particular relevant duty.

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[55] *Any suggestion that this interpretation somehow equates with requiring the Crown to prove negligence must fail for two reasons*. First, the framework essentially requires the Crown to provide and prove particulars of what the Crown alleged the employer failed to do. Particulars, in and of themselves, do not establish negligence. Second, the framework does not impose an impossible obligation on the Crown or result in the Crown negating the due diligence defence.

[56] The Crown is no stranger to providing and proving particulars. Section 581(3) of the *Criminal Code* requires the Crown to provide in the charge sufficient detail of the circumstances of an alleged offence to give to the accused reasonable information with respect to the act or omission to be proven against him and to identify the transaction referred to. Where the Crown charges both specific and general offences for the same incident, as was the case here, the Crown can use the particulars provided in the specific offence as a guide.

[57] Particulars are also consistent with the golden rule; that is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial: *The Queen v Côté*, [1978] 1 SCR 8 at 13, 13 NR 271; *R v Goldstein*, 1986 ABCA 55 at para 9, 70 AR 324.

[58] Particulars also take on enhanced importance in strict liability offences because of the accused's burden of proving due diligence. The due diligence defence is specific to the prohibited act, and to be successful, it must be linked to the particular circumstances of the breach: *Ontario (Ministry of Labour) v Wal-Mart Canada Corp*., 2016 ONCJ 267, at paras 121 and 159, 2016 CarswellOnt 7524 (WL Can). As a result, the Crown cannot merely lead evidence of an incident or suggest that generally not all reasonable steps were taken and sit back and see what happens. This does not provide sufficient direction to the accused to know the case it has to meet.

[59] The Crown will be able to meet its obligation by looking to the evidence about the circumstances of the unsafe condition and incident, any permissible inferences from that evidence, common sense, the *OHSA* and *Safety Code*, or what is revealed through a formal investigation under the *OHSA*. The *OHSA* sets out a comprehensive regime that allows investigators to gather information about the cause of an incident and the employer's preventative efforts. Safety officers have a broad right to attend at the scene of a workplace incident and investigate the causes of the incident: *OHSA,* s. 19(1). An employer must also adopt a written health and safety policy (*OHSA*, s. 32), which will often provide some evidence of the employer's efforts to prevent worker

injury—or the lack thereof. Occupational health and safety prosecutions are not faced with the same evidentiary vacuum as many other regulatory prosecutions.[6]

[60] After the Crown meets its burden, the focus shifts to the accused to establish due diligence on a balance of probabilities. To establish due diligence, the accused will put forward all its evidence on how foreseeable the danger was, what reasonable steps it took to address the unsafe condition, and whether it was operating under any mistake of fact. We agree that the employer's obligation to establish on the balance of probabilities that it took all reasonable steps overlaps with the requirement we have imposed on the Crown to prove it was reasonably practicable for the employer to address the unsafe condition through the particularized efforts. However, these remain distinct inquiries subject to different standards of proof. Certain factors, such as mistake and employee error, may affect the due diligence defence in ways that will not affect the *actus reus* assessment. Thus, it is possible for both sides to meet their obligations on the applicable standard of proof.

Approaches in Other Jurisdictions

[61] The Ontario Court of Appeal and the Saskatchewan Court of Appeal have both imposed obligations on the Crown consistent with our framework under other general offences. In *Ontario v Brampton Brick Ltd.,* 2004 CanLII 2900, 2004 CarswellOnt 2900 (WL Can) (CA) the Ontario Court of Appeal considered the general offence provision of its *Occupational Health and Safety Act*, RSO 1990, C O.1, which states:

> 25 (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> ...
>
> (h) take every precaution reasonable in the circumstances for the protection of a worker;

[62] At para 28, the Ontario Court of Appeal concluded that in a charge under s. 25(2)(h), the onus is on the Crown to prove beyond a reasonable doubt that the precautions particularized in the information are ones that a reasonable employer in the circumstances of the company charged ought to have implemented for the protection of the worker.

[6] The provisions of Alberta's new *Occupational Health and Safety Act*, SA 2017, c O-2.1, are substantially similar, giving investigators significant powers to inspect worksites and compel disclosure of information: see ss. 51, 53. In some ways, the new Act goes further than the existing Act, defining clear obligations on employers to maintain and share certain "health and safety information," and establishing a duty to share information about injured workers: see ss. 14, 48.

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[63] In *R v Viterra Inc*., 2017 SKCA 51, [2017] 10 WWR 474 the Saskatchewan Court of Appeal considered allegations under ss. 124 and 125 of the *Canada Labour Code*, RSA 1985, c L-2. The general offence provision is s. 124 and it states:

> 124 Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[64] Here, the Saskatchewan Court of Appeal found that where the Crown provides particulars, it is required to prove not only the particulars, but that they were necessary:

> [45] Following the reasoning in these cases, I find the *actus reus* of a contravention under ss. 124 and 125 of the *Canada Labour Code* is not necessarily established by proof of the injury or death of an employee at the workplace. All of the necessary elements of the *actus reus*, as particularized in the charge, must be proven. In reviewing the particulars in issue here, I do not find any error in the trial judge's articulation of the *actus reus*, namely, that the Crown must prove beyond a reasonable doubt that Viterra failed in the following:
>
> > (a) failed to instruct the deceased "on how to unplug a blockage in a receiving pit" (at para 14) of a grain elevator in a manner that provided for his health and safety (counts 1 and 2);
>
> ....
>
> [46] The Crown chose to particularize the offences in counts 1 to 4 on the basis that instruction "on how to unplug a blockage inside a receiving pit" and training on how to respond "to a blockage inside the receiving pit" was required. Therefore, the onus was on the Crown to prove it was necessary to provide such instruction and training to the deceased. [emphasis added]

[65] As a result, this framework is not a departure from how other courts are treating similarly worded provisions.

Count 2

[66] While the parties have not turned their minds to the grounds of appeal within the context of Count 2, given that the courts below treated them as essentially the same, a few comments are warranted.

[67] Count 2 provides:

> On or about the 12th day of December, 2010, at or near Grande Prairie, in the Province of Alberta, being an employer where an existing or potential hazard to workers was identified during a hazard assessment, [the respondent] did fail to take

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> measures in accordance with section 9 of the *Occupational Health and Safety Code 2009,* to eliminate the hazard, or, if elimination was not reasonably practicable, to control the hazard, contrary to section 9(1) of the *Occupational Health and Safety Code 2009* as adopted by the *Occupational Health and Safety Code Order*, Alberta Regulation 87/2009 pursuant to the *Occupational Health and Safety Act*, R.S.A. 2000, Chapter O-2, as amended.

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[68] Since no particulars were provided, it is not immediately obvious what the Crown must prove in order to secure a conviction against Precision for a violation of s. 9(1) of the *Safety Code*.

[69] At trial, the Crown acknowledged that it must prove that Precision identified an existing or potential hazard at the worksite in a hazard assessment and the hazard identified was not eliminated or controlled. However, the Crown took the position that it was not required to prove that the engineering control was practicable for Precision to implement relying on *Rose's Well Services*. Rather, what was reasonably practicable fell to Precision to prove as an element of its due diligence defence.

[70] Section 9(2) of the *Safety Code* states that the employer is required to "eliminate or control a hazard through the use of engineering controls" if it is *reasonably practicable* to do so. For the same reasons we have described above, the principles of statutory interpretation will identity what the Crown is obligated to prove to establish the *actus reus* elements of s. 9 of the *Safety Code*.

Application

[71] In this case, the trial judge accepted the interpretation described in *Rose's Well Services,* namely, that proof an employee was injured while engaged in the work of an employer is sufficient, although he did go further and find that the Crown proved causation. The summary conviction appeal court adopted a more nuanced approach, suggesting that proof of an accident is not enough, in itself, to shift the burden onto the accused to disprove negligence. She also disagreed whether causation was made out on the evidence.

[72] The parties disagree on what it was that the summary conviction appeal judge required the Crown to prove: was it negligence or the prohibited act? I agree with Precision that the appeal judge did not require the Crown, as part of the *actus reus* of the offence, to negate due diligence or prove negligence. Her use of the phrases "wrongful act" and "breach of duty" were just another way of explaining that the Crown did not prove that Precision committed the prohibited act.

[73] I also find that the appeal judge was correct in her conclusion that the "accident as *prima facie* proof of breach" approach was not enough to satisfy the Crown's obligation. While she did not clearly articulate what the Crown was required to prove, I agree with her ultimate conclusion that a new trial is required.

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[74] The Crown has not particularized Count 1. In my view, both counts should have been drafted with greater particularity to provide Precision—and the trial judge—with a better understanding of how the Crown believed Precision had failed to comply with s. 2(1) of the *OHSA* and s. 9(1) of the *Safety Code*. As mentioned above, the golden rule and *Criminal Code* require the Crown to provide particulars of the breach if it is unclear from the information what is at issue, whether particulars are requested or not. While both levels of court concluded that Count 1 and Count 2 were essentially the same, I find that the blended analysis poses difficulty for appellate review. The preferred approach is to consider the counts separately. As a result, I decline to look to the Crown's arguments under Count 2 in order to fill the gaps. Thus, this Court is not in a position to re-evaluate the trial decision under the new framework.

[75] Further, the summary conviction appeal judge questioned a number of the trial judge's factual findings as being not supported by the evidence or not properly explained in his reasons for decision. The questions for which leave was granted do not allow the Court to revisit all these alleged factual errors. Depending on the Crown's particulars, these findings of fact may matter to the determination of whether the Crown met its burden in establishing the *actus reus* of Count 1.

[76] As a result, I leave it to the new trial judge to assess the *actus reus* for Count 1 and Count 2 in accordance with this decision.

Ground 2 – Did the Appeal Judge err in law in her interpretation and application of the due diligence test?

[77] Leave was granted on this ground of appeal because the chambers judge found that the appeal judge may have used a test of due diligence that imposed an obligation on the Crown to disprove compliance with industry standards and specific government regulation. Further, it was possible that the appeal judge did not apply the foreseeability test or the broader due diligence test: *Leave Decision* at para 27.

[78] The Crown provides very little argument on the question upon which leave was granted or to address the issues identified by the chamber's judge. The bulk of its submissions relate to allegations that the appeal judge erred in her review of the evidence and interpretation of the trial judge's decision.

What is the Test for the Due Diligence Defence?

[79] This Court has provided guidance on different elements of the due diligence defence, such as reasonable steps and foreseeability. In *Bruin's Plumbing & Heating*, 2003 ABCA 300 at para 7, 25 Alta LR (4th) 226, the Court stated:

> We would express the due diligence test this way. What should an employer in the position of this employer do to ensure as far as reasonably practicable the health

> and safety of a worker engaged in a neutralization process involving an inherently dangerous chemical?

[80] In *Alberta v XI Technologies Inc.*, 2013 ABCA 282, 556 AR 233 the Court adopted the foreseeability principles from *R v Rio Algmo* 1988 CanLII 4702, (1988), 66 OR (2d) 672 (CA), at para 35:

> XI Technologies also argues that the summary conviction appeal judge misapplied the foreseeability test. The parties concede that the due diligence defence includes an aspect of foreseeability (***R v Lonkar Well Testing Ltd.***, 2009 ABQB 345 (CanLII), 473 AR 1), and that the generally accepted test for foreseeability in the occupational health and safety context is described by the Ontario Court of Appeal in ***R v Rio Algom***, (1988), 1988 CanLII 4702 (ON CA), 66 OR (2d) 674 at para 25, as follows:
>
>> The test which should have been applied was not whether a reasonable man in the circumstances would have foreseen the accident happening in the way it did happen but rather whether a reasonable man in the circumstances would have foreseen that an "overswing" of the gate could be dangerous in the circumstances and if so whether the respondent in this case had proven it was not negligent in failing to check the extent of overswing in order to consider and determine whether it created in any way <u>a potential source of danger</u> to employees and in failing to take corrective action to remove the source of danger. [emphasis added]

[81] There does not seem to be any doubt that although worker error or misconduct is not a form of defence, it may still be relevant to the defence of due diligence and in particular with regards to foreseeability: *R v Sunshine Village Corporation*, 2010 ABQB 493 at para 80, 498 AR 248; and *R v Kidco Construction Ltd*, 2009 ABPC 195 at para 69, 476 AR 152.

[82] The cases also establish that compliance with industry standards is also a relevant factor in determining whether reasonable care was taken: *R v General Scrap Iron & Metals Ltd*, 2002 ABQB 665 at paras 83-92, [2002] 11 WWR 81; and *Rose's Well Services* at para 217.

[83] A good summary of additional principles is found in *R v Value Drug Mart Associates Ltd*, 2014 ABPC 164 at para 200, 594 AR 315:

> Reasonable care and the steps to establish the standard of care vary with the charge and the circumstances involved. Where an employer is charged with an offence under *s. 2(1)(a)(i)* of the *Act,* the employer must demonstrate that he took all reasonably practicable steps to ensure the safety and health of the employee, or operated under a reasonable mistake of fact. The duty on the employers is not one

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> of perfection, and employers cannot be held at fault if the danger was not reasonably foreseeable. The wisdom gained by hindsight is not necessarily reflective of reasonableness prior to the incident. Since the determination of the reasonable steps to be taken is contextual there is no set of questions that apply to every scenario. The degree of supervision or inspection, the business practices adopted, the warnings given in the circumstances, the written or verbal instructions given to the employee may all play a part. The question to be asked is whether the company took all reasonably practicable steps to ensure the employee's safety. The nature of the steps taken may vary with the circumstances. The steps should be examined as a whole to determine whether the steps were all that was reasonably practical in the circumstances.

[84] Courts will be guided by the principles outlined above in ascertaining whether the accused has met its due diligence obligation.

Analysis

[85] The Crown has not identified any error in the appeal judge's articulation or understanding of the due diligence test. The appeal judge referred to *Sault Ste. Marie* and stated that the accused would avoid liability by proving that he took all reasonable care, which would involve considering what a reasonable man would have done in the circumstances: *Summary Conviction Appeal Decision* at para 88. She also summarized the applicable principles as follows:

> [89] In this context, the trial judge was required to assess whether the steps which Precision had taken, including compliance with industry standards and statutory requirements and government enforcement of employee work safety was, on a balance of probabilities, what a reasonable drilling company would have done in the circumstances.
>
> [90] The law is clear that an employer is not an insurer of a worker's safety. Precision did not have to take all conceivable steps to avoid injury. It was only required to take all reasonable steps to avoid injury. Therefore, where the trial judge assesses some possible courses of action – i.e. letting slips ride, installing an interlock device, it could only be through the lens of assessing not what was possible, but what was reasonable.

[86] While it would have been preferable for the appeal judge to also refer to the foreseeability of the danger as one of the principles of due diligence since foreseeability was an issue at trial and there was evidence of a history of injuries occurring during the tripping out procedure, it was not an error for her to fail to discuss it given the other errors she found.

[87] It appears that the Crown's arguments about the appeal judge's review of the evidence and interpretation of the trial judge's decision relate to the appeal judge's application of the due

diligence test. However, its arguments must fail for two reasons. First, the arguments appear to be premised on a misunderstanding that the appeal judge applied the due diligence test and *concluded based on her view of the evidence that Precision took all reasonable steps to ensure Mr. Peterson's health and safety*. That is not what happened. The Crown has also focused on alleged factual errors that cannot impact the ultimate result reached.

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[88] Section 686(1)(a) of the *Criminal Code* authorizes an appeal court to allow an appeal where the verdict is unreasonable or unsupported by the evidence, where there has been an error on a question of law, or where there has been a miscarriage of justice. While a summary conviction appeal judge has a limited ability to re-weigh and re-examine the evidence, he or she does so in order to determine if the evidence is reasonably capable of supporting the trial judge's conclusions: *R v W(R)*, [1992] 2 SCR 122 at 130, 137 NR 214.

[89] While it was not necessary for the appeal judge to consider due diligence given her earlier findings on *actus reus*, she considered it in the alternative. She found that the trial judge made a variety of errors in his assessment of due diligence, which included failing to provide reasons and reaching conclusions that were not supported by the evidence.

[90] In coming to her conclusions, the appeal judge reviewed the evidence in detail. While some of the statements may reflect what she would have concluded under due diligence had she been the trial judge, at no time did she set out what the applicable standard of care was in the circumstances nor did she make a finding as to whether Precision met its obligation. Instead, she concluded that the trial judge erred in concluding that Precision had not discharged its burden: *Summary Conviction Appeal Decision* at para 76.

[91] Whether there is any merit to the Crown's suggestion that the appeal judge erred in her assessment of the facts or reasons is of no consequence because the appeal judge made a critical finding that was sufficient to dispose of the trial judge's assessment of the due diligence defence. She found that the trial judge committed a palpable and overriding error when he concluded that the interlock device was in place with other industry competitors: *Summary Conviction Appeal Decision* at para 34. This finding is outside the scope of the appeal. Viewed in this context, the Crown has not identified any error in the appeal judge's review of the application of the due diligence defence.

[92] Finally, I decline to consider whether the appeal judge imposed an obligation on the Crown to disprove compliance with industry standards and specific government regulation. No arguments were made by the parties on this point, and given the conclusion reached on the first ground of appeal, arguments made about compliance with industry standards and government regulations are best dealt with by the new trial judge.

[93] This ground of appeal is dismissed.

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Conclusion

[94] This appeal raised an important legal issue as to the Crown's obligation to prove the *actus reus* under s. 2(1) of the *OHSA*. The appeal judge recognized that the Crown was required to prove *something more* than the accident or incident in order to convict Precision. While the reasons for decision are not perfect and the appeal judge did not provide sufficient guidance to the Crown on its *actus reus* obligations, she did not err. She also articulated and understood the correct test for due diligence and applied it appropriately within the context of the summary conviction appeal.

[95] For all of the above reasons, the Crown's appeal is dismissed and this matter shall return for a new trial in accordance with these reasons.

Appeal heard on December 1, 2017
Further submissions filed on March 28, 2018

Memorandum filed at Edmonton, Alberta
This 22nd day of August, 2018

Veldhuis J.A.

I concur:

McDonald J.A.

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Wakeling J.A. (Concurring in the Result):

[96] While I concur with my colleague that this matter must be sent back for a new trial, I cannot endorse the analysis relating to the first ground of appeal. Specifically, I do not agree that the words "as far as it is reasonably practicable for the employer to do so", part of s. 2(1) of the *Occupational Health and Safety Act*[7], form an element of the physical components for this offence.

The Words "As far as it is reasonably practicable for the employer to do so" Do Not Constitute Part of the Physical Components that the Crown Must Prove

[97] If the words "as far as it is reasonably practicable for the employer to do so" constitute part of the physical components of the offence, the Crown would be obligated to prove, beyond a reasonable doubt, what was reasonably practicable in the circumstances. This would require the Crown to prove standard industry practices, what a reasonable company would have done, or that the measures taken by the employer were insufficient and unreasonable. In other words, the Crown would have to prove negligence or negate due diligence.

[98] This interpretation cannot be correct, as this is directly contrary to the leading decision of *The Queen v. Sault Ste. Marie.*[8] *Sault Ste. Marie* recognized that it was both justifiable and desirable in regulatory offences to shift the onus of proof to the defendant to establish due diligence on a balance of probabilities.[9] The defendant has all the requisite knowledge and the means of proving what it has done to prevent the breach.[10] In the context of workplace safety legislation, the employer is the party who works in the regulated area, and is far better placed to understand and explain the precautions taken. The employer is in the best position to prove why it was not practicable to take any particular steps to make the workplace safer, as opposed to the Crown attempting to prove why such steps were reasonably practicable.

[99] Requiring the Crown to prove what was reasonably practicable for the employer to do would involve mastering the complexities of each industry and workplace anew in every prosecution under this provision. This would necessarily result in longer and more difficult prosecutions, leading to less enforcement and completely undermining the purpose of regulatory offences in general, which is the protection of the public. As Justice Cory noted in *The Queen v. Wholesale Travel Group Inc.,*[11] "such an approach . . . would effectively eviscerate the regulatory power of government by rendering the enforcement of regulatory offences impossible in practical terms."

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[7] R.S.A. 2000, c. O-2.

[8] [1978] 2 S.C.R. 1299.

[9] Id. 1325.

[10] Id.

[11] [1991] 3 S.C.R. 154, 244.

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[100] The principles of statutory construction further support the conclusion that the words "as far as it is reasonably practicable for the employer to do so" do not form part of the physical components of the offence. When the words are read within the context of the purpose of the *Act* and the guiding principles and public welfare objectives of occupational health and safety, the compelling conclusion is that those words are intended to signal that this is a strict liability offence, as opposed to one of absolute liability for which no due diligence defence is available. If the Legislature intends otherwise, it must use very clear and specific language, which is not present in this case.

The Crown Need Only Prove the Incident Itself

[101] The summary conviction appeal judge correctly cited the law regarding strict liability offences set out by the Supreme Court of Canada and expressly stated that the Crown is not required to prove negligence as part of the physical components of the offence. She also cited the "accident as *prima facie* breach" concept, acknowledging that in some cases the accident itself is all the Crown must prove to establish the physical components of the offence.

[102] The summary conviction appeal judge, however, stated that the Crown's case here was insufficient because it was missing any indication that the employer committed a wrongful act. According to her, this was not a case where the wrongful act could be fairly inferred from the fact of the accident itself; the Crown was required to prove something more. The additional element the summary conviction appeal judge appears to be looking for is a precise way in which the employer has breached occupational health and safety legislation; a clear breach of a specific provision regarding safety harnesses, for example. She also stated there was inadequate evidence about how the accident actually happened, suggesting this is an element the Crown must also prove as part of the physical components.

[103] Not all instances of employers failing to ensure worker health and safety will involve a violation of a specific legislative provision. It is impossible for governments to legislate safety standards for every single aspect of every industry. Similarly, it will not always be possible for the Crown to prove exactly how a workplace incident actually occurred. That is why the general duty to ensure the health and safety of workers is set out in s. 2 of the *Occupational Health and Safety Act*.[12]

[104] As previous decisions have held, to establish the physical components for the general duty offence found in s. 2(1) of the *Occupational Health and Safety Act*, the Crown need only prove beyond a reasonable doubt that something happened within the control of an employer that negatively affected the health or safety of its workers. In other words, the Crown must establish that while the worker was performing the employer's work, an incident took place that affected the worker's health or safety. The breach is the employer's failure to ensure the health and safety of its workers.

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[12] R.S.A. 2000, c. O-2.

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[105] In order to establish the physical components of the general duty offence, the Crown may only need to prove the facts of the incident - the accident itself. In a situation where the employer controls the harmful activities that were undertaken in the workplace and the only possible causes for the accident are safety-related, that is all the Crown must prove in order to establish the physical components of the offence.

[106] In this case, the fact that the Crown did not prove the specific cause of the accident beyond a reasonable doubt is of no consequence. As noted by the summary conviction appeal judge, "[i]t is evident that some part of the drilling equipment struck Mr. Peterson when torque from the drillstring was released".[13] While the exact cause of the accident is unknown, it is clear that the only possible causes of this fatal workplace incident were safety-related, and that was within the control of the employer. The Crown therefore established the physical components of the general duty offence, proving that the employer failed to ensure the health and safety of its worker.

Errors in the Due Diligence Analysis

[107] I agree with my colleague that the summary conviction appeal judge did not err in her interpretation and application of the due diligence test. The trial judge made a number of errors in assessing due diligence, including misapprehending the evidence to make the palpable and overriding error that an engineered solution was in place with other industry competitors.

[108] The errors identified in the trial judge's due diligence analysis are sufficient to overturn the convictions on each of the counts. As pointed out by the summary conviction appeal judge, since there was admissible trial evidence on each of the elements for each of the charges, a new trial is therefore the appropriate remedy.

Conclusion

[109] In the result, the appeal is dismissed and this matter is sent back for a new trial.

Appeal heard on December 1, 2017
Further Submissions filed on March 28, 2018

Memorandum filed at Edmonton, Alberta
This 22nd day of August, 2018

Wakeling J.A.

[13] *The Queen v. Precision Drilling Ltd.*, 2016 ABQB 518, ¶16.

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