CITATION: *Ontario (Ministry of Labour) v. Nault*, 2018 ONCJ 321
DATE: May 11, 2018

IN THE MATTER OF
the Occupational Health and Safety Act, R.S.O. 1990, c. O.1

Between

Her Majesty The Queen In Right Of Ontario
(Ministry of Labour)

Prosecutor

and

Jason NAULT
and
Antonio DIBARTOLOMEO

Defendants

Ontario Court of Justice
Brampton, Ontario
Quon J.P.

Reasons for Judgment

Trial Heard:	January 9, 2018.
Oral Judgment:	March 9, 2018.
Written Judgment released:	May 11, 2018.

Charges:

(1) *Jason Nault is charged with "worker operate equipment in a manner that may endanger himself or another worker", contrary to s. 28(2)(b) of the O.H.S.A.*

(2) *Antonio DiBartolomeo is charged with "worker operate equipment in a manner that may endanger himself or another worker", contrary to s. 28(2)(b) of the O.H.S.A.*

Counsel:

D. Simpson, prosecutor for the Ministry of Labour.
Jason Nault, self-represented
Antonio DiBartolomeo, self-represented

Cases Considered or Referred To:

Blue Mountain Resorts Ltd. v. Bok, [2013] O.J. No. 520 (Ont. C.A.), per MacPherson, Armstrong and Blair JJ.A.

Lévis (City) v. Tétreault, [2006] S.C.J. No 12 (S.C.C.).

Niagara (Regional Municipality) v. Kosyatchkov, [2013] O.J. No. 424 (Ont. S.C.), per Ramsay J.

Ontario (Ministry of Transportation) v. Balasubramaniam, [2017] O.J. No. 5007 (Ont. C.J.), per Quon J.P.

Ontario (Ministry of Transportation) v. Don's Triple F Transport Inc., 2012 ONCA 536, [2012] O.J. No. 3754 (Ont. C.A.), per Feldman, Armstrong JJ.A. and Himel J. (ad hoc).

Ontario (Ministry of Labour) v. Enbridge Gas, 2011 ONCA 13, [2011] O.J. No. 24 (Ont. C.A.), per Watt J.A. (in chambers).

Ontario (Ministry of Labour) v. Hamilton (City) (2002), 58 O.R. (3d) 37 (Ont. C.A.), per Weiler, Sharpe and Simmons JJ.A.

Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc., [2011] O.J. No. 4510 (Ont. C.A.), per Rosenberg, Cronk and Watt JJ.A.

R. v. Blair, [1993] O.J. No. 1477 (Ont. Ct. (Prov. Div.)), per Harris J.

R. v. Brampton Brick Ltd., [2004] O.J. No. 3025 (Ont. C.A.), per Weiler, Laskin and Feldman JJ.A.

R. v. Canada Brick Ltd., [2005] O.J. No. 2978 (Ont. S.C.), per Hill J.

R. v. Canadian Tire Corp., [2004] O.J. No. 3129 (Ont. S.C.), per Hill J.

R. v. Cancoil Thermal Corp. (1988), 1 C.O.H.S.C. 169 (Ont. Prov. Ct.), per Megginson J.

R. v. Chrima Iron Works, 2007 ONCJ 78, [2007] O.J. No. 726 (Ont. C.J.), per Rogerson J.

R. v. Cooper's Crane Rental (1987) Ltd., [1990] O.J. No. 1868 (Ont. Ct. (Gen. Div.)), per Mandel J.

R. v. Courtaulds Fibres Canada (1992), 76 C.C.C. (3d) 68 (Ont. Prov. Div.), per Fitzpatrick J.

R. v. Dofasco Inc., [2007] O.J. No. 4339 (Ont. C.A.), per Winkler C.J.O., Simmons and MacFarland JJ.A.

R. v. Gonder (1981), 62 C.C.C. (2d) 326 (Y.T.C.), per Stuart C.J.

R v. MacMillan Bloedel Ltd., [2002] B.C.J. No. 2083 (B.C.C.A.).

R. v. Petro-Canada, [2008] O.J. No. 4396 (S.C.C.).

R. v. Petro-Canada (2003), 171 C.C.C. (3d) 354 (Ont. C.A.), per Catzman, Laskin and Goudge JJ.A.

R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5 (S.C.C.).

R. v. Pioneer Construction Inc., [2006] O.J. No. 1874 (Ont. C.A.), per Weiler, Rosenberg and MacPherson JJ.A.

R. v. Rio Algom Ltd. (1988), 66 O.R. (2d) 674, 46 C.C.C. (3d) 242 (Ont. C.A.) per Howland C.J.O., Goodman and Grange JJ.A.

R. v. Sadeghi-Jebelli, 2013 ONCA 747, [2013] O.J. No. 5728 (Ont. C.A.), per Laskin, Gillese and Strathy JJ.A.

R. v. Sault Ste. Marie (1978), 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353 (S.C.C.).

R. v. Saunders, [1990] 1 S.C.R. 1020 (S.C.C.).

R. v. Timminco Ltd. (2001), 54 O.R. (3d) 21**,** [2001] O.J. No. 1443 (Ont. C.A.), per Osborne A.C.J.O., Charron and Feldman JJ.A.

R. v. Vézina, [1986] 1 SCR 2 (S.C.C.).

R. v. Wyssen (1992), 10 O.R. (3d) 195 (Ont. C.A.) per Dubin C.J.O., Finlayson and Blair JJ.A.

York (Regional Municipality) v. Tassone, [2007] O.J. No. 1109 (Ont. C.A.), per Sharpe, Simmons and Cronk JJ.A.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 78.1(1) and 106(2).

Industrial Establishments Regulation (O.H.S.A.), R.R.O. 1990, Reg. 851.

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, ss. 28(1)(d), 28(2)(b), and 66(1)(a).

Proceedings Commenced By Certificate Of Offence Regulation (O.H.S.A.), R.R.O. 1990, Reg. 950, s. 5(1) and Schedules 66.2, 67, 67.1, 67.2, 67.3, 67.4, 67.5, 68, and 69.

Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 3(2)(b), 13(1)(b), 13(2), 13(3), 25, and 25(3).

Authorities or Reference Material Referred to or Considered:

Libman, R. Libman on Regulatory Offences in Canada, (Salt Spring Island, B.C.: Earlscourt Legal Press Inc., (student edition #1 (2014)).

Swaigen J., Regulatory Offences in Canada - Liability & Defences (Scarborough, Canada: Carswell - Thomson Professional Publishing, 1992), p. 81.

Exhibits Entered:

Exhibit "1" - photographs of two signs taken by MOL Inspector Neil Martin on December 22, 2016, which are posted outside the employees' lunchroom just before employees would enter the production and warehouse area of the Coca Cola plant located 15 Westcreek Boulevard, in the City of Brampton. (2 pages)

First sign: This sign has a heading that states: "Core Safety Rules". The first paragraph of that sign also states: "It is the Company's policy and expectation that every associate

conducts himself or herself in a manner that will not jeopardize their own safety or the safety of others. Adherence to company safety rules is mandatory and subject to standard disciplinary procedures if violated. However, due to the potential of resulting in serious or life-threatening injury or illness to either the person performing the action or others, the following Core Safety Rules have been adopted. Therefore, a violation of a "core Safety Rule" can warrant discipline, up to and including termination of employment". In addition, the last paragraph of that sign states, "your responsibility is to perform your work in a safe and healthy manner, to follow established safety rules and procedures, and to report or address unsafe acts or conditions to your supervisor. Ultimately it's each individual's responsibility to follow safe work practices. Safety is the responsibility of each associate."

Second sign: This sign has the following heading: "Coca-Cola Refreshments. Welcome to the Brampton Production & Distribution Centre". Also, in this sign are graphics and wording. There are also three headings which indicate: "Required PPE, Required Actions, and "Not Allowed". Under the heading "Not Allowed" are graphic symbols in a circle with a diagonal slash across the respective symbols. One of the graphic symbols is of a "cell phone" with words underneath it that state: "No Personal Communications Devices". There is also a graphic symbol of a "personal media device and headphones" with the wording underneath it that state: "No Personal Media Devices".

Exhibit "2" - copy of Brampton Warehouse Employee Incident Report dated "December 19th". The Report states that the "Incident time" is "8:03 AM", that the "Type of Incident" states it is in respect to: "Cell Phone Use", and that the "Author" is stated as "Joe Hunt". (1 page)

Exhibit "3" - copy of "Will State of Joe Hunt" dated October 10, 2017, signed by both "Joe Hunt" and MOL Inspector "Neil Martin". (1 page)

Exhibit "4" - photographs of two signs taken by MOL Inspector Neil Martin on December 22, 2016, that are posted outside the employees' lunchroom just before employees would enter the production and warehouse area of the Coca Cola plant located 15 Westcreek Boulevard, in the City of Brampton. (2 pages)

First sign: This sign has a heading that states: "Coca-Cola Refreshments. Welcome to the Brampton Production & Distribution Centre". In this sign are also graphics and wording. In addition, there are three headings which indicate: "Required PPE, Required Actions, and "Not Allowed". Under the heading "Not Allowed" are graphic symbols in a circle with a diagonal slash across the respective symbols. One of the graphic symbols is of a "cell phone" with words underneath it that state: "No Personal Communications Devices". There is also a graphic symbol of a "personal media device and headphones" with the wording underneath it that states: "No Personal Media Devices".

Second sign: This sign was displayed on the video monitor and has a heading that states: "Use of Personal Cell Phones". The first sentence of that sign states:

- Personal Media Devices and Personal Cellular Telephones are strictly prohibited in all work areas, inside and outside of the building. Work areas are defined as:

    - Production Filling rooms and Packaging Areas
    - QA Lab, Water Treatment, and Syrup Room
    - Warehouse and Shipping/Receiving Areas
    - Maintenance Shop
    - Outside Truck Pad, Loading Docks and Pallet Yard
    - All Coca-Cola Vehicles
    - Fleet Garage Area

Exhibit "5" - copy of a photograph that was taken on December 22, 2016, at the Coca-Cola plant located 15 Westcreek Boulevard, in the City of Brampton, which shows the back of the defendant, Jason Nault, who is sitting on a stationary forklift that is located at the end of a row, and which also shows Jason Nault holding a scanner with an illuminated screen. (1 page)

Exhibit "6" - copy of a photograph that was taken on December 22, 2016, at the Coca-Cola plant located 15 Westcreek Boulevard, in the City of Brampton, which shows the back of the defendant, Jason Nault, who is sitting on a stationary forklift that is located at the end of a row, and which also shows Jason Nault holding a cellphone with an illuminated screen. (1 page)

Exhibit "7" - copy of a photograph that was taken on December 22, 2016, at the Coca-Cola plant located 15 Westcreek Boulevard, in the City of Brampton, which shows the close-up of the scanner with an illuminated screen that was shown in Exhibit “5” that was being held by Jason Nault. (1 page)

1. INTRODUCTION

[1] Like motorists who unlawfully hold or use cellphones or other mobile communication devices while operating or driving motor vehicles on public highways in Ontario, workers that use cellphones or other mobile communication devices while operating equipment or machines in factories or warehouses, such as a forklift, would also pose the same danger to themselves or others, as a consequence of being distracted to what is going on around them while using those mobile communication devices.

[2] In this case, the defendants, Jason Nault and Antonio Dibartolomeo, had been both assigned on December 19, 2016, by their employer, Coca-Cola Refreshments Canada, to drive or operate forklifts for the purpose of transporting pallets of bottles and cans of product coming off the production line to the warehouse area for storage. Another worker, Joe Hunt, had also been assigned on the same day to operate a forklift in the same warehouse area of the Coca-Cola plant where both defendants had been operating their respective forklifts. At trial, Joe Hunt had testified to having observed the two defendants at approximately 8:05 a.m. on December 19th sitting on their respective forklifts in a stationary position and holding and looking at cellphones, which for safety reasons were devices that had been forbidden by their employer to be in the warehouse or production areas of the Brampton Coca-Cola Production and Distribution Centre located at 15 Westcreek Boulevard, in the City of Brampton. Because of the danger to himself and others, Joe Hunt had complained to his supervisor and then to management at the plant about workers holding and using cellphones while operating forklifts in the warehouse area of the plant, and then had refused to work until the potential danger to himself had been addressed. Management at the plant had tried to resolve the safety concerns raised by Joe Hunt internally, but were unable to do so to Joe Hunt’s satisfaction. As a result, the Ministry of Labour (MOL) were called and informed about a worker who had refused to work because of safety concerns at the plant. MOL Inspector Neil Martin was then assigned to investigate the “work

refusal" complaint at the Coca-Cola plant and on December 22, 2016, MOL Inspector Martin attended the Coca Cola plant located at 15 Westcreek Boulevard, in the City of Brampton, to investigate the complaint.

[3] To reiterate, as part of Coca-Cola's safety policy, cellphones and other mobile communication devices are forbidden to be taken inside the production and warehouse areas of the Coca-Cola plant by employees. This company policy banning these devices from being in the production and warehouse areas is posted on a sign and also displayed on a television monitor located just outside the employees' lunchroom, which employees would see just before they entered the production and warehouse areas of the plant. Furthermore, the sign and the television monitor also contain notices or information about other safety measures and company safety policies. Ergo, for safety reasons and subject to disciplinary action by their employer, the defendants had been prohibited by their employer from taking their personal cellphones or mobile communication devices into the production or warehouse areas.

[4] Consequently, after interviewing and speaking to managers at the Coca-Cola plant; Joint Health and Safety committee members; Joe Hunt, the worker who filed a "work-refusal" complaint; a worker named Mohammad Andrees, who was also working in the warehouse area on December 19, 2016; and the two defendants, Jason Nault and Antonio DiBartolomeo; and after completing his investigation at the Coca-Cola manufacturing plant located at 15 Westcreek Boulevard, in the City of Brampton, MOL Inspector Martin charged both Jason Nault and Antonio DiBartolomeo ("the defendants") on December 22, 2016, and January 5, 2017, respectively, for contravening s. 28(2)(b) of the Occupational Health and Safety Act, R.S.O. 1990, c. O.1 ("O.H.S.A."), for being workers who had operated equipment in a manner that may endanger himself or another worker.

[5] In their defence, both defendants contend that neither of them had been engaged in driving or operating their forklifts at the time that Joe Hunt may have seen them holding or viewing their cellphones, since both of their respective forklifts had been stationary at the time and turned off. Moreover, for Antonio Dibartolomeo's defence to the charge in particular, Dibartolomeo said he was not on his forklift, but off of his forklift, which had been stopped and turned off, and that he had not been using his cellphone, since he had handed his cellphone off to another worker named Mohammad Andrees, who had been the one who had been using Dibartolomeo's cellphone to download an application onto the cellphone for Dibartolomeo. And, as for Jason Nault's particular defence to the charge, Nault said that firstly, he had been using a company scanner in the warehouse area to locate product and that Joe Hunt may have mistakenly thought that the scanner he was using was a cellphone; and that secondly, if it is determined that Hunt did indeed observe Nault using a cellphone while he was seated on his forklift then Nault contends that he had not been using his cellphone for personal use but had been using his cellphone for work purposes, as a calculator to keep track of the number of pallets of product in order to determine where to move and store

product, and to also use it as a watch, as there were no clocks displayed in the warehouse area, so that he would know when to take his breaks. Nault also contends that he had not been operating a forklift and that it had been stopped and turned off when he was using his cellphone for work purposes. Moreover, Nault contends that when he was using his cellphone for work purposes, his turned-off forklift had been stopped at the end of a row so that he would not have posed any danger to anyone else in the warehouse area.

[6] On the other hand, the prosecution submits that the circumstance of a worker operating equipment in a manner that may endanger himself or another worker under s. 28(2)(b) should be interpreted broadly to include a worker using a cellphone while standing beside a turned-off stationary forklift or while sitting on a turned-off stationary forklift in a work area where there are the presence of other workers and workers using equipment or machines.

[7] Accordingly, for the reasons that follow, the prosecution has met their legal burden in proving beyond a reasonable doubt that both defendants, Jason Nault and Antonio Dibartolomeo, have committed the *actus reus* of their respective offences under s. 28(2)(b), and because neither defendant has respectively met their burdens in proving either branch of the defence of due diligence on a balance of probabilities, then both defendants will be convicted of committing the offence of "worker operate equipment in a manner that may endanger himself or another worker, contrary to s. 28(2)(b) of the O.H.S.A.

[8] The trial of the two charges had been held over three days: May 11, 12, and 18, of 2017. After closing submissions, judgment was reserved and adjourned to be given on March 13, 2018. On March 13, 2018, oral reasons were given that found the two defendants had been guilty of contravening s. 28(2)(b) of the O.H.S.A., with the proviso that a written judgment would follow. These, therefore, are the written reasons for the oral judgment that was given on March 13, 2018:

2. THE CHARGES

[9] By Part 1 Certificates of Offence and summonses issued to Jason Nault and Antonio DiBartolomeo, both were charged with contravening s. 28(2)(b) of the O.H.S.A., which states:

> 28(2) No worker shall,
>
> …
>
> (b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself, herself or any other worker; or
>
> …

[10] For the defendant, Jason Nault, he was charged specifically on Certificate of Offence #31609524926Z that was filed on December 29, 2016, with the following offence:

> *on the day of 2016 12 19 8:05 AM*
>
> Jason NAULT (municipal address removed for privacy]*,*
> *Barrie, Ontario, [postal code removed for privacy],*
>
> *at COCA-COLA*
> *15 Westcreek Blvd*
> *BRAMPTON*
>
> *did commit the offence of*
>
> *Worker operate equipment in a manner that may endanger himself or another worker*
>
> *Contrary to the Occupational Health and Safety Act, R.S.O. 1990, c. O.1, Sect. 28(2)(b).*

[11] For the defendant, Antonio DiBartolomeo, he was charged specifically on Certificate of Offence #31609524927 that was filed on January 5, 2017, with the following offence:

> *on the day of 2016 12 19 8:05 AM*
>
> Antonio DiBartolomeo (municipal address removed for privacy]*,*
> *Barrie, Ontario, [postal code removed for privacy],*
>
> *at COCA-COLA*
> *15 Westcreek Blvd*
> *BRAMPTON*
>
> *did commit the offence of*
>
> *Worker operate equipment in a manner that may endanger himself or another worker*
>
> *Contrary to the Occupational Health and Safety Act, R.S.O. 1990, c. O.1, Sect. 28(2)(b).*

[12] Moreover, if the defendants are convicted of contravening s. 28(2)(b) of the O.H.S.A., then under s. 66(1)(a) of the O.H.S.A. they are subject respectively to a maximum fine of $25,000 or to imprisonment for a term of not more than 12 months, or to both [*emphasis is mine below*]:

Penalties

66(1) *Every person who contravenes or fails to comply with,*

(a) a provision of this Act or the regulations;

(b) an order or requirement of an inspector or a Director; or

(c) an order of the Minister,

is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than twelve months, or to both.

3. BACKGROUND

(a) Four Witnesses Testified In The Trial

[13] At the trial, four witnesses testified. Two witnesses testified for the Crown while both defendants had testified in their own defence.

[14] For the Crown, their 2 witnesses were Joe Hunt, a now retired and former employee of the Brampton Coca-Cola Production and Distribution Centre, who had been the worker that had refused to work and then filed a complaint with the management of the company about workers using cellphones while operating forklifts in the warehouse area, and (2) Neil Martin, the MOL inspector, who had investigated the complaint and then charged both defendants.

(b) Summary of the Testimony From The Four Witnesses

(i) Joe Hunt, retired and former employee of Coca-Cola

[15] Joe Hunt testified that he has now retired from working for the Coca-Cola Refreshments Canada company after 30 years of employment with them. He also said that on December 19, 2016, he had been assigned to operate a forklift to load and unload a trailer in the warehouse or IPT (International Provincial Transport) part of the Brampton Coca-Cola Production and Distribution Centre located at 15 Westcreek Boulevard in the City of Brampton.

[16] In addition, Joe Hunt said he knows the two defendants, Jason Nault and Antonio Dibartolomeo, who were both driving forklifts in the production area of the plant on December 19, 2016, while Hunt was driving a forklift in the warehouse part of the plant on the same day. However, Joe Hunt said that he did not have any direct

interaction with them on that day, but did observe both of them in the “aisles” of the warehouse operating forklifts.

[17] On that day of December 19th, Joe Hunt said that he had been given 30 pallets of product to load onto a trailer in the warehouse area of the plant and had used a hand-held scanner to locate the whereabouts of the product in the warehouse. In driving his forklift towards that location of where the product in the warehouse was shown to be on the scanner, Hunt said that he had being driving down one aisle when he had observed a forklift parked in the aisle about 50 feet away from Hunt, which Hunt said was being operated by Jason Nault. Joe Hunt also said at that moment he had observed Jason Nault seated on the forklift looking at a cellphone that Jason Nault was holding, but not talking into it. Hunt also said that he could not get by the parked forklift being operated by Nault, so he then honked his horn once and then proceeded the other way to get around the parked forklift. In addition, Joe Hunt said that the forklift that was being operated by Jason Nault was stationary and not moving, but that it had been on.

[18] In respect to what he had observed about Antonio Dibartolomeo on December 19, 2016, Joe Hunt testified that when Hunt had been driving his forklift in the main aisle, he had tried to go in the same aisle where Dibartolomeo was situated, which was either the “K” or “L” aisle. He said that Dibartolomeo had been in the racking and backing up, which was about 50 feet away from Hunt. Joe Hunt also said that he had observed Dibartolomeo showing his cellphone to Mohammed Andrees, another employee of the company. In addition, Hunt said that Andrees’ job was warehousing in which Andrees had to move one rack of product to another for production. Furthermore, Hunt said that he had observed both Andrees and Dibartolomeo seated on their respective forklifts when Dibartolomeo had been backing out of a rack. Hunt then said that Dibartolomeo had stopped right beside Mohammed Andrees, forming a T-shape with their respective forklifts. Then, when Dibartolomeo and Andrees were in close proximity to each other, Hunt said that he had observed Dibartolomeo show Andrees something on Dibartolomeo’s cellphone. At that point, Joe Hunt said that he was upset, since he had been in a bad mood from being assigned a difficult job for which he was not trained for and because he had to find a different route to go around both Dibartolomeo and Andrees.

[19] Joe Hunt then said that he went to his supervisor and put in a “work refusal” because of the workplace being unsafe due to employees with cellphones on forklifts. Furthermore, Hunt said that the company policy on cellphone use was that once a worker got on the floor past the lunchroom then no cellphones were permitted. Hunt also said there was a big poster located outside the lunch room before a worker would enter the production floor that contained a picture of a cellphone with an “X” on it. Moreover, Hunt said that he had been trained on this company policy against cellphones being on the floor and that he had helped in implementing this policy. Hunt also explained that approximately 3 to 3½ years earlier he had run into a problem in the afternoon with another worker who had

been seated diagonally on a forklift. In explaining what happened on that earlier occasion, Hunt said he had been going backwards with product on his forklift and had honked his horn at the parked forklift. He then went to his supervisor and then to the front reception to speak with the manager about the workplace problem.

[20] In addition, when Joe Hunt was shown a photograph of the sign that is located outside the lunchroom (Exhibit "1"), Hunt confirmed that the picture of the cellphone with the "X" on it was what he had earlier described as the company policy against cellphones on the floor. Hunt also said that he believes that there is one of those signs also displayed in the warehouse area.

[21] Furthermore, Joe Hunt said that there is also a T.V. monitor on the production wall opposite the door to the lunchroom, which continuously keeps showing different safety measures and policy.

[22] When asked why he had launched the "work refusal", Joe Hunt explained that he had been on the Joint Health and Safety Committee for 5 years at the Thorncliffe Coca-Cola plant (which had closed in 2011), and that he had taken an oath when he joined the Committee, so that he could not just ignore what was going on the floor.

[23] Furthermore, when cross-examined by the defendant, Jason Nault, about which aisle Hunt had actually seen both of the defendants on their forklifts while holding cellphones, Joe Hunt said that his memory was vague because it had been so long ago and because he did not take notes. Hunt also said he could not explain nor identify the difference between a "row" and an "aisle" when he had referred to seeing the defendants on their forklifts in an "aisle".

[24] And, then when asked in cross-examination on how many times Hunt had called the Ministry, Joe Hunt replied that he had only called the Ministry in respect to cellphones and riders on forklifts.

[25] In addition, during cross-examination, the defendant, Antonio Dibartolomeo, had asked Joe Hunt why he had given two conflicting statements, one being a statement given by Hunt on December 19, 2016 (Exhibit "2") and a typed "will-say" signed by Hunt and MOL Inspector Martin and dated October 10, 2017 (Exhibit "3").

[26] In the December 19, 2016, statement, Joe Hunt had written that at 8:03 a.m. Jason Nault had been stopped in "isle Q024" and that "M. Andrees approached behind to get by and blew horn and asked Jason to move. Then Jason left. After Tony and M. Andrees had a little conversation over something Tony showed to Andrees. At this time I felt it was unsafe to drive and reported to Ed Moffatt".

[27] And, for the supposedly conflicting statement given by Hunt on October 10, 2017 (Ex. 3), which was a typed "will-say" prepared by MOL Inspector Neil Martin, in

which the "will-say" indicated that Joe Hunt would say that: "On December 19, 2016, I observed Jason Nault operating a forklift when he was using his cellular telephone. He was in the middle of the aisle, stationary on the phone. He was holding it in his hand. I do not know if he was playing games or texting. I was trying to get by and could not. I had to honk my horn a couple of times. On the same date, I observed Tony Dibartolomeo holding his cellular telephone when he was seated on his forklift. The forklift was not moving. He reached out with it to show Mohammed. He did not get off his fork lift".

[28] In reply to that question about the conflicting answers, Joe Hunt said that for the second statement Hunt had given on October 10, 2017 (Exhibit "3"), Hunt said that MOL inspector Neil Martin had come to his house. In addition, Hunt said that at that point he had been out of work for a while and that he did not have any notes in front of him and had based his second statement on his memory and did not know the exact times and locations, and had called the location an "aisle" instead of a "row", since he did not realize that he would be called as a witness. Moreover, Joe Hunt said he had looked for his notes and details that he had written down for the trial, but had cleaned out his locker when he had retired and had dumped out a lot of things, and this trial was now occurring nearly a couple of years after his retirement.

[29] In addition, Joe Hunt said that the handwriting for the top part of the December 19, 2016, handwritten statement, was not his handwriting. However, for the bottom part of that December 19 statement he did admit that it had been his handwriting and that he had written that part on December 19. And, as for the October 10, 2017, typed statement, Hunt said that he did not prepare that statement.

[30] Furthermore, Joe Hunt said that the defendants were in the racking area, but is not quite sure what is called an "aisle" and what is called a "row". However, Joe Hunt said that they were not tucked away. Moreover, Joe Hunt said that his first statement (Exhibit "2") had been based on what he had noticed, which was that Jason Nault was seated and in the middle of an "aisle" or "row" and that Jason Nault was on his cellphone. But more importantly, Joe Hunt said that Jason Nault was not moving and not scanning any product and that Joe Hunt is able to tell the difference between a "scanner" and a "cellphone", and that Nault was not using a scanner, since Hunt himself was also using a scanner to do his job on December 19th and using a scanner requires holding it by the black handle of the scanner.

(ii) <u>Neil Martin, MOL Inspector</u>

[31] MOL Inspector Neil Martin testified that he has been employed as an inspector with the Ministry of Labour for 13 years. He also said that the Ministry of Labour had received a complaint from Joe Hunt near the end of November of 2016 about an unsafe situation involving forklift operators using hand-held communication devices while operating a forklift in the warehouse and production area of the Coca-Cola plant. As a result of the complaint, MOL Inspector Martin said he was

assigned the complaint and responded by convening a meeting of the Joint Health and Safety Committee of management and worker members and the Health and Safety Manager of the Brampton Coca-Cola Production and Distribution Centre located at 15 Westcreek Boulevard in the City of Brampton.

[32] Moreover, MOL Inspector Martin said that Coca-Cola Refreshments Canada is an employer and that the Brampton Coca-Cola Production and Distribution Centre is an industrial establishment under the O.H.S.A. Regulations. At the meeting, MOL Inspector Martin said he had discussed the complaint with the workplace parties. In addition, he said that the company had an internal policy that restricted the use of mobile devices, which included cellphones, in the warehouse because of safety concerns. He also said he had learned of an earlier incident in which a worker had been struck by a forklift in the warehouse and that cellphone use had been blamed for the cause of the accident. Furthermore, he was advised that the workplace parties had looked into that accident and had used their internal response system to deal with their concerns.

[33] Shortly after MOL Inspector Martin's visit to the Coca-Cola plant to conduct the meeting with the Joint Health and Safety Committee, MOL Inspector Martin said the Ministry of Labour received a "work refusal" complaint from Joe Hunt on December 19, 2016. Moreover, MOL Inspector Martin said that the workplace parties' had conducted an internal investigation into the "work refusal" by Joe Hunt, but were not able to resolve the refusing worker's safety concerns. MOL Inspector Martin said he then contacted the management of the company and was informed that the refusing worker had been reassigned to different work. At that point, MOL Inspector Martin said he had arranged to meet with the affected workers on December 22, 2016.

[34] On December 22, 2016, MOL Inspector Martin said he had attended the Brampton Coca-Cola Production and Distribution Centre at 15 Westcreek Boulevard. He also said he had brought his tape recorder with him. He then said he met and with Joe Hunt, as well as taking a statement from Hunt. In addition, MOL Inspector Martin said he also spoke with Michael McGarrigle, a management member of the Coca-Cola company, and had collected the company policy on the use of cellphones in the warehouse area of the plant, and also did a physical inspection of the warehouse area.

[35] In the warehouse area, MOL Inspector Martin said he had observed signage that was posted that had indicated that the use of cellphones and personal communication devices was prohibited in different areas of the plant. He also said that he had learned that Joe Hunt had observed Jason Nault and Antonio Dibartolomeo in the warehouse area designated as "QR024". Moreover, MOL Inspector Martin said he had also attended that location in the warehouse, but learned that it was actually designated as "Q1024". In that location, MOL Inspector Martin said he had observed warehouse racking that would support heavy skids of bottles and cans, which were product that was manufactured at the

plant. He also said the forklifts used to pick up the product were a double-wide type of forklift, which can pick up 2 skids of product at once, and which are much bigger and heavier than the typical one-lift forklift seen at most warehouses. Moreover, he said the warehouse area had been well lit. In addition, he said there were pedestrian walking areas and aisleways in the warehouse area in which forklifts would meet. He also said there were rules in place which governed the intersections in the warehouse area where forklifts would meet each other.

[36] Furthermore, MOL Inspector Martin said he had spoken with the defendant, Jason Nault, who he had cautioned and in which he said he had tape-recorded their conversation. Afterwards, MOL Inspector Martin said he had issued a summons to Jason Nault, which had informed Nault that he was being charged with contravening s. 28(2)(b) of the O.H.S.A., for being a worker who had used or operated machinery in an unsafe manner.

[37] In addition, after he spoke with Jason Nault, MOL Inspector Martin said he then spoke with Antonio Dibartolomeo. At that time, MOL Inspector Martin said Dibartolomeo had given him the name of a witness. MOL Inspector Martin said he then spoke with that witness (Mohammed Andrees) on January 5, 2017. Subsequent to speaking with that witness and then after speaking with Dibartolomeo again, MOL Inspector Martin said that he then charged Dibartolomeo with contravening s. 28(2)(b) of the O.H.S.A., as a worker who had used or operated machinery in an unsafe manner.

[38] Moreover, MOL Inspector Martin explained that in the forklift manual and in the forklift training given to forklift drivers or operators, forklift operators are required to focus on the task at hand and not to be distracted by the use of a cellphone while the forklift is on the floor of the warehouse.

[39] In addition, MOL Inspector Martin said there are areas in the plant where forklifts can be parked when they are not being operated. Furthermore, MOL Inspector Martin said he had observed that the area where the forklifts were supposed to be operating in had been designated as a work area.

[40] Also, during his investigation, MOL Inspector Martin said he had observed at the entrance to the warehouse area of the plant a T.V. screen and posted signage. He further said that the T.V. screen provides continuous and rotating safety reminders to workers as they enter the workplace, especially that the use of personal cellphones or personal mobile devices is strictly prohibited in the warehouse and shipping area. Moreover, MOL Inspector Martin said that the workers at the Coca-Cola plant are supposed to keep their cellphones or personal mobile communication devices in their personal lockers or in their personal motor vehicles. He also said he took a photograph of that signage (see Exhibit “4”).

[41] In addition, when asked about the difference in the potential hazard between not wearing a seatbelt while driving a forklift versus using a cellphone when operating

a forklift, MOL Inspector Martin answered that using a cellphone while operating a forklift is a high hazard due to workers being struck by a forklift. But, in respect to not wearing a seatbelt while driving a forklift he said it is not considered to be a high hazard.

[42] Also when asked if he saw any areas for forklifts to park, MOL Inspector Martin said he had observed that there were such areas for parking forklifts that are located adjacent to the warehouse area, at the edges of the production area.

(iii) <u>Jason Nault, the first defendant</u>

[43] Jason Nault testified that there was no need for anyone to honk at him, since he had been parked at the end of a row. He also said he had taken photographs of himself parked with his forklift at the end of "Row Q" on December 22, 2016. In addition, he also said he had taken a photograph of himself holding a scanner with an illuminated screen, which he says could have been mistaken by Joe Hunt as a cellphone. These photographs were entered as Exhibit "5" (a photograph of Jason Nault holding a scanner showing an illuminated screen), Exhibit "6" (a photograph of Jason Nault holding a cellphone showing an illuminated screen), and Exhibit "7" (a photograph of a close-up of a scanner).

[44] In addition, Jason Nault said that when he had been asked by MOL Inspector Martin if he had been on his cellphone, Jason said he had replied that he had used his cellphone to watch the time, since there were no clocks on the floor and he needed to know when to take his breaks. He also said he needed to use his cellphone as a calculator to calculate skid count, so that he would be able to determine where to place product.

[45] But more importantly, Jason Nault said that he was not using his forklift, nor operating a piece of machinery when he would have been using his cellphone to watch the time or when he used it to do calculations for work purposes. In addition, he also said that he had not been blocking any aisle when he had been operating his forklift, since he had been in a row and considering that Joe Hunt in his first statement and in his second statement had actually put him in two different places. Furthermore, Jason Nault said that when he had spoken to the Ministry inspector, Nault did not know about the complaint that had been filed by Joe Hunt.

[46] In addition, Jason Nault said that he admits that he did have his cellphone with him on the floor and that is what he had already been disciplined for internally, in which he had been given a written warning that has been placed in his file. Moreover, Nault said he had already been disciplined for having a cellphone on the floor before the inspector had appeared on December 22, 2016. Furthermore, Nault said that on the date in question there had been no clocks in the building that he was working in, but today there are now clocks that have been put up in that building.

[47] Furthermore, Jason Nault said that he knows that the use of a cellphone is contrary to company policy because of the potential distraction that using a cellphone can cause, and that he has seen the company policy against cellphone use and that there is a T.V. screen which shows reminders of company policy.

[48] However, although he admits to using his cellphone, Jason Nault testified that he had not been driving or operating a forklift when using his cellphone and that he had only been using his cellphone for work-related issues and not for personal use.

(iv) Antonio Dibartolomeo, the second defendant

[49] Antonio Dibartolomeo testified that he has been working for 39 years for the Coca-Cola company in Canada. He also said that he did not use a cellphone and that he had actually gotten off of his forklift and had presented his cellphone to someone else, who had been the person who had actually been using Dibartolomeo's cellphone. Dibartolomeo also said that his forklift is electric and that he had turned off the key to it. In addition, Dibartolomeo said he did have his cellphone with him and that he had someone help him download an application on his cellphone that had been sent to him.

[50] Furthermore, Dibartolomeo said that he had been moving 2 skids of product with his forklift and had gone into a row and did not block Joe Hunt's way. He also said that he did not recall seeing Joe Hunt that day.

[51] In addition, Dibartolomeo said he had actually gotten off of his forklift and had handed his cellphone to Mohammed Andrees, who had been operating a single-load type of forklift (and not a double-type) and had asked Andrees to download an application for him, and as such, had not been the person who had been using Dibartolomeo's cellphone. Dibartolomeo also said that this exchange had occurred at about 8:13 a.m. He further said the cellphone was not turned on and was being used by another person to download an application. In addition, Dibartolomeo said that Mohammad Andrees had downloaded the "What's App" application for him and that when he had handed the cellphone to Mohammad Andrees, Dibartolomeo said that both of them had gotten off their respective forklifts. As such, Dibartolomeo said he had gotten off his forklift and had not been on his forklift when he handed the cellphone to Mohammad Andrees, and therefore, had not been operating his forklift when the cellphone was being used by Andrees to download the "What's App" application.

[52] Moreover, Dibartolomeo said that the person who had been hit by a forklift in the plant on that earlier occasion had been someone from management.

[53] As well, Dibartolomeo said that he would follow company policy, but will always have his cellphone with him regardless, if his mother, who has Alzheimer's, calls

him because she comes first. He also said that he is the prime caregiver for his mother and had been told so by his lawyer.

4. ISSUES

[54] The following are issues that have to be resolved in order to determine whether the prosecution has proven the charges respectively laid against the two defendants:

(1) Has the prosecution proven beyond a reasonable doubt that both defendants have respectively committed the *actus reus* of the offence set out under s. 28(2)(b)?

(2) Has the prosecution proven that both defendants had been holding or using cellphones in the warehouse area of the Coca-Cola industrial establishment?

(3) If the defendants had been holding or using cellphones in the warehouse area of the Coca Cola industrial establishment, were the defendants at the same time also operating their respective forklifts within the meaning of s. 28(2)(b) of the O.H.S.A. when holding or using their cellphones?

(4) Have the charges laid against the defendants under a Part I Certificate of Offence been particularized to "*worker operate equipment in a manner that may endanger himself or another worker",* or have the charges simply been described by the "short-form wording" for the s. 28(2)(b) offence, which would then include all the circumstances set out in s. 28(2)(b) for which the particular statutory provision can be contravened?

(5) Does the prosecution have to prove beyond a reasonable doubt that the defendants were actually operating their respective forklifts while holding or using cellphones as an element of the *actus reus* of the offence set out under s. 28(2)(b) of the O.H.S.A. or is simply holding or using a cellphone in the warehouse area when company policy prohibits the presence of cellphones in the warehouse area while both defendants had care and control of a turned-off and stationary forklift in the warehouse area, proof beyond a reasonable doubt that the *actus reus* of the offence had been committed by both defendants?

(6) If the prosecution has proven that the defendants have respectively committed the *actus reus* of the s. 28(2)(b) offence beyond a reasonable doubt, then have the defendants establish the defence of due diligence on a balance of probabilities in order to be acquitted of committing their respective charges?

5. ANALYSIS

[55] To start with, the prosecution has proven beyond a reasonable doubt that the Coca- Cola Production and Distribution Centre located at 15 Westcreek Boulevard, in the City of Brampton is a workplace and an industrial establishment for the purposes of the O.H.S.A., as well that both defendants are workers employed by Coca-Cola Refreshments Canada on December 19, 2016, and that both of them had been assigned and working as forklift operators on that day in the warehouse area of the 15 Westcreek Boulevard plant.

[56] For the defendants' respective charges, the prosecution contends that both defendants had been using their cellphones while operating forklifts at approximately 8:05 a.m. on December 19, 2016, in the warehouse area of the Coca-Cola plant and that when the defendants were engaged in using their respective cellphones while operating a forklift, they would be distracted as to what is going on around them, which could then endanger the respective defendants as well as other workers in their vicinity. As such, the prosecution submits that the defendants have respectively contravened s. 28(2)(b) of the O.H.S.A. by being workers who used or operated equipment, machines, or devices, or things, or worked in a manner that may endanger the worker or others. Furthermore, the prosecution submits that in order to properly interpret whether the defendants' actions on December 19th had contravened s. 28(2)(b), then the provision has to be given a broad and purposive interpretation to achieve the goal of the legislation of ensuring worker safety and safe work environments. Accordingly, the prosecution submits that in the circumstances, using a cellphone when either defendant had been sitting on a forklift which is stationary and turned off, or even while one of the defendants is standing beside the forklift when the defendant still has care and control of the forklift that is stopped in an aisle or a row in the warehouse area of the plant where workers would be working or where other forklifts would have to travel on, would comprise an offence under s. 28(2)(b).

[57] Contrary to the prosecution's submissions, the defendant Jason Nault submits that he should not be found guilty of violating s. 28(2)(b), since he had not been operating his forklift while using a cellphone because the forklift that he was sitting on had been stationary and turned off and situated at the end of a row, which had been out of the way of any pedestrian or forklift traffic, and therefore, would not have posed a hazard to anyone. Moreover, Nault also contends that he had not been using his cellphone for personal use, but for work purposes as a clock, in order to know when to take his breaks, and also as a calculator, in order to help him determine where to store product in the warehouse that was coming from the production line. Likewise, the defendant Antonio Dibartolomeo contends that he had not been operating a forklift nor using a cellphone, since Dibartolomeo submits that he had not been sitting on his forklift, but contends that he had actually stepped off his forklift, which had been stationary and turned off, and that when he had been standing on the warehouse floor beside his forklift, Dibartolomeo had then handed his cellphone to another worker, named

Mohammad Andrees, who was the person who had been actually using Dibartolomeo's cellphone to download an application for Dibartolomeo.

[58] Ergo, the question that has to be determined is whether the prosecution has proven beyond a reasonable doubt that both defendants had been respectively holding and using a cellphone while they had been using or operating their respective forklifts within the meaning of s. 28(2)(b) of the O.H.S.A. in the warehouse area of the Coca-Cola plant on the day and time in question. If the prosecution meets its legal or persuasive burden, then both defendants will have committed the *actus reus* of the s. 28(2)(b) offence of being a worker that had used or operated equipment, a machine, a device or a thing or had worked in a manner that may endanger himself or any other worker. And, if the prosecution does fulfill its burden in proving that the defendants had committed the *actus reus* of the offence beyond a reasonable doubt, then the defendants will have to establish a defence of due diligence on a balance of probabilities to avoid being convicted of contravening s. 28(2)(b) of the O.H.S.A.

(A) FIRST STAGE: HAS THE PROSECUTION PROVEN BEYOND A REASONABLE DOUBT THAT THE DEFENDANTS HAVE RESPECTIVELY COMMITTED THE ACTUS REUS OF THE OFFENCE OF BEING A WORKER WHO HAD OPERATED EQUIPMENT IN A MANNER THAT MAY ENDANGER HIMSELF OR ANOTHER WORKER?

[59] The offence for which the defendants had both been charged with of "worker operating equipment in a manner that may endanger himself or another worker", contrary to s. 28(2)(b) of the O.H.S.A., is a strict liability offence, since the specific provision did not contain any expressed or implied wording that would make the offence a *mens rea* or an absolute liability offence. As such, in order to determine whether both defendants are guilty respectively of committing that offence beyond a reasonable doubt, a two-stage analysis is required. For the first stage, the prosecution has the legal or persuasive burden to prove beyond a reasonable doubt that both defendants have respectively committed the *actus reus* of the offence. If the Crown meets its burden, then to avoid being convicted of committing the s. 28(2)(b) offence, the onus shifts to the defendants to prove on a balance of probabilities that they had respectively taken all reasonable steps in the circumstances to avoid the particular event or that they had reasonably believed in a mistaken set of facts, if true, would render their respective acts or omissions innocent: R. v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.).

(1) WERE BOTH DEFENDANTS HOLDING AND USING A CELLPHONE IN THE WAREHOUSE AREA OF THE COCA-COLA PLANT ON DECEMBER 19, 2016?

[60] Joe Hunt, who was also driving a forklift in the warehouse area of the Coca-Cola plant, had testified that he had observed both defendants, Jason Nault and Antonio Dibartolomeo, holding and using cellphones on December 19, 2016, at approximately 8:05 a.m., while both defendants had been sitting on their respective forklifts and while their forklifts had been stationary either in a row or in an aisle in the warehouse area, causing Joe Hunt to honk his horn at the defendants, since the defendants' forklifts had been blocking Hunt's path and which then forced Hunt to drive his own forklift around the defendants' forklifts by a different route so that Hunt could get to his destination. In addition, Hunt testified that Nault's forklift had been turned on at the time he had observed Nault holding and using a cellphone.

[61] However, Jason Nault testified that on December 19, 2016, he had been using a scanner and stationed at the end of a row and not impeding traffic when Joe Hunt had observed him supposedly holding a cellphone, and that Nault only had his personal cellphone with him in the warehouse area for work purposes, as there were no clocks at the time posted in the warehouse and that he needed to know when to take his breaks. In addition, Jason Nault testified that he had also needed the calculator on his cellphone so he could calculate how much product needed to be stored in a specific area. Furthermore, Jason Nault said that he had not been operating his forklift at the time Joe Hunt had observed him, since Nault's forklift had been stopped at the end of a row and that Nault's forklift had been turned off at that time.

[62] As for Antonio Dibartolomeo's testimony on what had occurred on December 19, 2016, Dibartolomeo stated that Joe Hunt had been incorrect with what he had observed. In fact, Dibartolomeo stated that he had not been sitting on his stopped and turned-off forklift, but had been actually standing on the warehouse floor and had been off of his forklift when he had handed his personal cellphone to Mohammad Andrees, who was the one who had actually been using Dibartolomeo's personal cellphone to download an app on Dibartolomeo's cellphone, for Dibartolomeo to use later. In addition, Dibartolomeo states that he needs his personal cellphone with him at all times, since his mother has been diagnosed with Alzheimer's, and that his lawyer had advised him that Dibartolomeo is his mother's primary caregiver.

[63] However, there is no dispute about whether the defendants had in fact had their respective cellphones with them in the production and warehouse areas of the Coca-Cola plant on December 19, 2016, but rather the dispute is on whether either of the defendants had been using their respective cellphones while sitting on their respective forklifts; and that if the defendants were indeed using their cellphones, then whether either of the defendants had been actually operating their forklifts within the meaning of s. 28(2)(b) while using their respective cellphones; and if either defendant had been using their cellphones while operating their forklifts, then whether their use of cellphones while operating their respective forklifts could have endangered themselves or another worker.

(a) The S. 28(2)(b) Public Welfare Provision Has To Be Interpreted Broadly To Achieve The Purpose Of The Legislation

[64] The defendants' respective s. 28(2)(b) charges are an alleged contravention of the O.H.S.A., which is public welfare legislation that endeavours to establish minimum safety standards in the workplace for protecting workers.

[65] In order to ensure safe workplaces for workers, the O.H.S.A. provides for a hierarchy of responsibilities to ensure that workplaces are indeed safe for workers, that work is being conducted safely, and that workplace hazards are minimized, by placing duties and obligations on constructors, employers, supervisors, and workers to follow and comply with. As such, both defendants by virtue of s. 28(2)(b) have a legal obligation and a responsibility as workers, to not use or operate any equipment, machine, device or thing, or work, in a manner that may endanger himself, herself or any other worker; while Joe Hunt, as a worker, had the legal obligation under s. 28(1)(d) to report to his or her employer or supervisor any contravention of the O.H.S.A., including any of its regulations, or the existence of any hazard of which he or she knows about [*emphasis is mine below*]:

> ***Duties of workers***
>
> ***28(1)*** *A worker shall,*
>
> *(a) work in compliance with the provisions of this Act and the regulations;*
>
> *(b) use or wear the equipment, protective devices or clothing that the worker's employer requires to be used or worn;*
>
> *(c) report to his or her employer or supervisor the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger himself, herself or another worker; and*
>
> *(d) report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows.*
>
> ***Idem***
>
> *(2) No worker shall,*
>
> *(a) remove or make ineffective any protective device required by the regulations or by his or her employer, without providing an adequate temporary protective device and when the need for removing or making ineffective the protective device has ceased, the protective device shall be replaced immediately;*

(b) *use or operate any equipment, machine, device or thing or work in a manner that may endanger himself, herself or any other worker; or*

(c) *engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct.*

Consent to medical surveillance

(3) *A worker is not required to participate in a prescribed medical surveillance program unless the worker consents to do so.*

[66] Moreover, in R. v. Canada Brick Ltd., [2005] O.J. No. 2978 (Ont. S.C.), at para. 122, Hill J. succinctly identified the broad purpose underlying the O.H.S.A., which is to provide a reasonable level of protection for workers in the workplace by requiring employers to conform to certain minimum safety standards in the workplace, and that in order to achieve that goal, Justice Hill also emphasized that the O.H.S.A., which is a remedial public welfare statute, should be interpreted in a manner consistent with that broad purpose and not to employ an interpretation which would be overly narrow and technical [*emphasis is mine below*]:

The philosophy of the Occupational Health and Safety Act, as a regulatory scheme, provides important context to this appeal:

(1) the Act is a remedial public welfare statute whose broad purpose is to provide a reasonable level of protection for workers by requiring employers to conform to certain minimum safety standards in the workplace.

(2) having regard to its remedial purpose of protecting worker health and safety, the legislation is not to be given a narrow technical interpretation but should be interpreted in a manner consistent with its broad purpose.

See R. v. Brampton Brick Ltd., [2004] O.J. No. 3025 (QL) (C.A.), at para. 22; R. v. Timminco Ltd. (2001), 153 C.C.C. (3d) 521 (Ont. C.A.), at p. 528; R. v. The Corporation of the City of Hamilton (2002), 58 O.R. (3d) 37 (C.A.), at pp. 43-4; R. v. Cancoil Thermal Corp. and Parkinson (1986), 27 C.C.C. (3d) 295 (Ont. C.A.), at p. 298; R. v. Ellis-Don Ltd.; R. v. Morra; R. v. Indal Furniture System; R. v. Helmer Pederson Construction Ltd. (1991), 61 C.C.C. (3d) 423 (Ont. C.A.), at pp. 430, 436, 439, 449. At page 439 of the Ellis-Don case, Carthy J.A. (in dissent in the result) stated:

> ... the pressing and substantial objective of the Act, generally, [is] to prevent accidents in the work place ... The Act is directly focused on accident avoidance through measures taken in advance of mishaps and because it applies to a segment of commercial society where there is necessarily a dependence upon profits, measures are needed to assure that workers' safety is not forgotten. The Act is also directed to industries that are prone to a wide variety of dangers

[67] And, even though public welfare legislation, such as the O.H.S.A., is to be interpreted liberally in a manner that will give effect to its broad purpose and objective, while narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided, Sharpe J.A. in Ontario (Ministry of Labour) v. Hamilton (City) (2002), 58 O.R. (3d) 37 (Ont. C.A.), at paras. 16 and 20, clarified that this generous approach which is to be used for the interpretation of public welfare statutes, also requires striking a balance to arrive at an interpretation that would promote the larger objects of the legislation and at the same time respect the procedural rights of the accused [*emphasis is mine below*]:

> *The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purpose and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.*
>
> …
>
> *It remains true, of course, that penal legislation, even of the public welfare variety, must also be interpreted in a manner consistent with the procedural rights of the accused. The accused is entitled to have full and fair notice of the charges and to make full answer and defense to those charges. In the end, a balance must be struck to arrive at an interpretation that promotes the larger objects of the legislation and at the same time respects the procedural rights of the accused.*

[68] Furthermore, in Blue Mountain Resorts Ltd. v. Bok, [2013] O.J. No. 520, the Court of Appeal for Ontario, at paras. 24, 26, and 27, had emphasized that interpreting legislation broadly to accord with the purpose of the legislation does not on the other hand call for a limitless interpretation of its provisions, which could extend the reach of the legislation far beyond what was intended by the legislature [*emphasis is mine below]*:

> *Public welfare legislation is often drafted in very broad, general terms, precisely because it is remedial and designed to promote public safety and to prevent harm in a wide variety of circumstances. For that reason, such legislation is to be interpreted liberally in a manner that will give effect to its broad purpose and objective: R. v. Timminco Ltd. (2001), 54 O.R. (3d) 21 (C.A.), at para. 22.*
>
> …
>
> *This generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions, however.*

> *One of the problems with what is otherwise an understandable approach to the interpretation of public welfare legislation is that broad language, taken at face value, can sometimes lead to the adoption of overly broad definitions. This can extend the reach of the legislation far beyond what was intended by the legislature and afford the regulating ministry a greatly expanded mandate far beyond what is needed to give effect to the purposes of the legislation.*

(b) Had Both Defendants Been Using Their Respective Cellphones In The Warehouse Area Of The Coca-Cola Plant?

[69] Although Joe Hunt's testimony had some inconsistences in respect to whether he had observed the respective defendants in a "row" or an "aisle" in the warehouse and in misidentifying the particular identification number for that specific row or aisle, Joe Hunt's testimony is nevertheless credible and consistent in regards to having observed both defendants holding and using cellphones while seated on their forklifts. Joe Hunt's testimony is also consistent with the undisputed fact that both defendants had their personal cellphones on their respective persons when they were in the warehouse area of the Coca-Cola plant on December 19, 2016, at approximately 8:05 a.m., which makes the presence of the defendants' cellphones in the warehouse area increase the possibility and likelihood that both defendants had indeed used their cellphones in the warehouse area of the plant.

[70] Furthermore, Joe Hunt had been an employee member of the Joint Health and Safety Committee at another Coca-Cola plant, and because of that responsibility and the oath he had taken when he had been on that Committee, Hunt said that he had from that point on been concerned about workers working safely and complying with the company's safety policy. As a result, that experience on the Joint Health and Safety Committee, would have instilled in Joe Hunt the need for workers to comply with safe working processes and policies and would have also made Joe Hunt more attentive or attuned to noticing workers' conduct that could endanger themselves or other workers.

[71] In addition, the omnipresence of personal cellphones in society would make most people knowledgeable and experienced in observing when someone is actually engaged in holding and using a cellphone. Moreover, Joe Hunt had observed both defendants respectively holding and using a cellphone from about 50 feet away, which would not have been too far a distance for Hunt to discern and identify the respective device being held by both defendants as a cellphone. As such, Joe Hunt would have had no difficulty in discerning and concluding whether Jason Nault had been using a company scanner to locate product or that he had been holding or using a cellphone, or whether Antonio Bartolomeo had been holding and using a cellphone. Moreover, Joe Hunt, himself, had also been using a company scanner to locate product in the warehouse on the morning in question, which further supports Hunt's testimony that Hunt had not been mistaken that Jason Nault had been actually using a cellphone instead of a scanner on December 19th.

[72] But more significant, the defendants did not dispute the fact that they had indeed had their personal cellphones with them in the warehouse area on the date and time in question, which establishes that cellphones had been present and available inside the warehouse for the defendants to hold and utilize, and as such, supports Joe Hunt's testimony that he had observed both defendants holding and using cellphones in the warehouse area of the Coca-Cola plant on the morning of December 19, 2016.

(i) Jason Nault contends he had been using his cellphone in the warehouse area for work purposes and not for personal use

[73] In addition, considering that Joe Hunt had to also used a company scanner in his duties in locating product in the warehouse area to transport with his forklift, Joe Hunt had not been mistaken in whether Jason Nault had been using a cellphone or a company scanner when Joe Hunt had observed Jason Nault using an electronic device with an illuminated screen. Moreover, the evidence indicates that the warehouse area was well-lit so that the distance of 50 feet at which Joe Hunt had said that he had been from the defendant, Jason Nault, when Hunt had observed Jason Nault holding and using a cellphone, is not too far a distance for Hunt to properly observe Nault holding a cellphone. As such, Hunt's testimony has not been undermined or discredited by Nault's suggestion that Hunt could have been mistaken about the device that Nault had indeed been holding had not been a cellphone but a company scanner, so as to create a reasonable doubt as to what type of device that Joe Hunt had actually seen Jason Nault holding.

(ii) Antonio Dibartolomeo contends he was not using his cellphone in the warehouse area, but that it had been another worker who had been actually using his cellphone

[74] In respect to the defendant Antonio Dibartolomeo's claim that he was not the one actually using Dibartolomeo's cellphone in the warehouse area, but that Dibartolomeo had handed it over to another worker named Muhammad Andrees, who had been the person who had actually been using Dibartolomeo's cellphone to download the "What's App" application onto Dibartolomeo's cellphone, would still nevertheless be the act of holding and using a cellphone or causing the use of a cellphone in the warehouse area of the plant.

[75] Moreover, Joe Hunt had testified that he had observed both the defendant Antonio Dibartolomeo and the other worker Mohammad Andrees seated on their respective forklifts and stopped adjacent to each other, and that the defendant Dibartolomeo while seated on a forklift had been holding and showing something on a cellphone to Mohammad Andrees.

[76] And, even though Antonio Dibartolomeo had testified that he did not even see Joe Hunt in the warehouse that morning, Dibartolomeo still testified, in response to Joe Hunt's testimony about having observed Dibartolomeo sitting on a forklift and holding and showing Mohammed Andrees something that was on the cellphone, that Dibartolomeo had not been sitting on his forklift but had been instead been standing beside his forklift when he had handed his cellphone off to Mohammed Andrees.

[77] However, leaving aside the question of whether Antonio Dibartolomeo had been sitting on a forklift when Dibartolomeo had supposedly been holding and using a cellphone in the warehouse area, the question that needs to be decided first is whether Dibartolomeo in simply handing over a cellphone to Mohammed Andrees would be evidence of using or operating any equipment, machine, device or thing or work in a manner that may endanger himself, herself or any other worker under s. 28(2)(b). Hence, because s. 28(2)(b) is part of a public welfare statute whose purpose is to protect workers in a workplace and to ensure safe workplaces for workers, then to resolve this question on whether Dibartolomeo had been using or operating any equipment, machine, device or thing, or work in a manner that may endanger himself or any other worker when Dibartolomeo had handed his cellphone to Mohammed Andrees, so that Andrees could download an app onto Dibartolomeo's cellphone for Dibartolomeo to use, then the particular circumstances set out in s. 28(2)(b) for which a worker can contravene the provision have to be interpreted broadly to accord with the purpose of the legislation.

[78] Accordingly, based on the evidence that Dibartolomeo had been at some point holding a cellphone and that Dibartolomeo, in giving his cellphone to Andrees and directing or requesting Andrees to download an app for Dibartolomeo, had caused Mohammed Andrees to use Dibartolomeo's cellphone in the warehouse area, then that particular circumstance would be evidence in respect to Mohammed Andrees being a worker using a device while operating a forklift in a manner that may endanger the worker or another worker, which is one of the circumstances prescribed in s. 28(2)(b).

[79] In addition, Dibartolomeo holding and passing a cellphone to another worker so that the other worker can download an application onto Dibartolomeo's cellphone in order that Dibartolomeo can use the application later, would be evidence of Dibartolomeo's direct involvement in a worker using a cellphone in the warehouse area when cellphones are not permitted in the warehouse area. Furthermore, in this scenario in which Mohammad Andrees would have spent a lengthier duration holding, looking at, and using Dibartolomeo's cellphone than Dibartolomeo's time in holding the cellphone, Dibartolomeo had still caused a worker to use a prohibited cellphone in the warehouse area when he had directed or asked Mohammad Andrees to download an application onto Dibartolomeo's cellphone, and Dibartolomeo would have also caused both himself and Mohammad Andrees to be distracted about what was occurring immediately around them while both

were looking at and using Dibartolomeo's cellphone in the warehouse area of the Coca-Cola plant.

[80] Therefore, in respect to the scenario in which Antonio Dibartolomeo had supposedly passed his cellphone to Mohammad Andrees, in order that Andrees would download an "app" onto Dibartolomeo's cellphone for Dibartolomeo's use, such scenario would also constitute Dibartolomeo holding and using a cellphone for the purposes of s. 28(2)(b). Moreover, Dibartolomeo's argument that it was not Dibartolomeo who had been actually using a cellphone, but that it had been Mohammad Andrees alone who had been using the cellphone is not a convincing argument, since it had been Dibartolomeo who had passed his cellphone to Mohammad Andrees and who had directed and caused Andrees to actively use Dibartolomeo's cellphone, even though cellphones are not permitted in the warehouse area of the plant. As such, in Dibartolomeo's scenario, Dibartolomeo would have been purposely engaged in using a cellphone in conjunction with Mohammad Andrees in the warehouse area, as Dibartolomeo had been directly and sufficiently involved in handling his cellphone, instructing Mohammad Andrees to use his cellphone, and then permitting and causing Dibartolomeo's cellphone to be used by a Mohammad Andrees in the warehouse area.

(iii) Joe Hunt's testimony is credible that both defendants had been holding and using a cellphone while seated on their respective forklifts

[81] Now, because Joe Hunt's detailed testimony had not been undermined in cross-examination, in respect to what he had observed of the defendants' respective actions on December 19, 2016, at approximately 8:05 a.m. in the warehouse area of the Coca-Cola plant, then Joe Hunt's observations that both defendants had been engaged in holding and using a cellphone while respectively seated on a forklift, is credible evidence.

[82] Moreover, in regards to the defendants' concern that Joe Hunt had incorrectly identified the "numbering and lettering" assigned for the row or aisle in which Hunt had observed the defendants respectively seated on their stopped forklifts while holding and using a cellphone is not essential or critical in determining whether both defendants had contravened s. 28(2)(b), since identifying the actual assigned identification number for a row or an aisle is not an element of the offence. The essential elements of the offence that had to be proven by the prosecution involve the defendants' actions in operating or using equipment in the warehouse area in a manner which could endanger the defendants or other workers. Similarly, Hunt's misidentification of a pathway in the warehouse of the plant simply as an "aisle" instead of a "row" is also not sufficient to undermine Hunt's credibility in respect to the same question of whether both defendants had been respectively operating or using equipment in the warehouse area in a manner which could endanger the worker or other workers. Furthermore, even though these errors could negatively affect Joe Hunt's credibility, Hunt had explained that he does not normally work in

the job that he had been assigned and doing on the day and morning in question, so that Hunt misidentifying a row as an aisle or in misidentifying the actual row number assigned to that row is not a contradiction or an error that would undermine Hunt's credibility or one that would raise a reasonable doubt as to whether Hunt had actually observed both defendants sitting on a forklift and holding and using a cellphone in the warehouse area of the plant on December 19, 2016, at approximately 8:05 a.m.

[83] In addition, Joe Hunt had also testified to having used a company scanner on that same morning to locate a pallet of product to load onto a transport truck, and as such, would not have been erroneous or mistaken about having observed Jason Nault holding a cellphone instead of a company scanner. In addition, Joe Hunt had at one time been an employee member of the Joint Health and Safety Committee at a different Coca-Cola plant, and because of this previous role, had taken an oath to ensure and uphold safety in the Coca-Cola workplace, and as such, Hunt would have been very much cognizant of safety and the company policy on the prohibited use of cellphones in the production and warehouse areas. Moreover, because of the omnipresence of cellphones in society and the likelihood that Hunt has seen people holding and using a cellphone thousands of times in virtually every setting in everyday life, it would not be unusual or difficult for Hunt to recognize when or whether someone is actually holding and using a cellphone. In addition, when Joe Hunt had made his observations of the defendants respectively holding and using a cellphone, Hunt had made these observations from a distance of approximately 50 feet, which is not a distance that would have been too far away in a well-lit warehouse to accurately or reasonably see whether someone had been actually holding and using a cellphone.

[84] In addition, the defendants had raised the question of the inconsistencies or contradictions between the written incident report dated December 22, 2016, in which part of the contained statement had been in Joe Hunt's handwriting, and the typed "Will State" document dated October 10, 2017, that had been prepared by MOL Inspector Neil Martin and signed by both MOL Inspector Martin and Joe Hunt. A finding that Joe Hunt's testimony had contradicted both of these two documents cannot be made, since a "Will Say" is not an actual out-of-court statement prepared or made by Hunt and is only a summary of the testimony that Hunt could potentially give in the trial. However, the incident report which had been partly written by Joe Hunt is a statement that could be used to contradict Hunt's testimony at trial. However, the inconsistencies between Hunt's testimony at trial and the December 22nd hand-written statement were only in respect to the actual identification number that had been assigned to a row in the warehouse and in Hunt's testimony that he had observed the defendants in an "aisle" instead of a "row", which are not material or crucial elements of the s. 28(2)(b) offence, nor are they sufficiently significant to undermine Hunt's credibility.

[85] Ergo, based on Joe Hunt's credible testimony the prosecution has proven beyond a reasonable doubt that both defendants had been holding and using a cellphone

while seated on their respective forklifts in the warehouse area of the Coca-Cola plant on December 19, 2016, at approximately 8:05 a.m.

(2) <u>WERE BOTH DEFENDANTS "OPERATING" THEIR RESPECTIVE FORKLIFTS WHILE USING A CELLPHONE?</u>

[86] Furthermore, even though Joe Hunt's testimony is credible and evidence that proves beyond a reasonable doubt that both defendants had been holding and using a cellphone while seated respectively on forklifts in the warehouse area of the Coca-Cola plant, the defendants' contentions that there were not operating a forklift because their respective forklifts had been stopped and turned off still needs to be considered to determine if they had both contravened s. 28(2)(b).

[87] Both defendants had contended that even if they had been using a cellphone in the warehouse area of the Coca-Cola plant, neither had been actually engaged in "operating" a forklift, since their respective forklifts had been stationary and turned off, and therefore neither were "operating equipment" in a manner that could endanger themselves or other workers.

[88] Moreover, the defendant, Antonio Dibartolomeo, contends that he was not the person using his cellphone, nor had he been sitting on his forklift, but had actually gotten off his forklift, which had been stopped and turned off, and had been standing on the warehouse floor before he had handed his cellphone over to Mohammed Andrees to download an application onto his cellphone. In addition, Dibartolomeo said he did not even see Joe Hunt on the morning in question. However, this may be due to the possibility that Dibartolomeo had indeed been distracted by his involvement in providing Mohammed Andrees a cellphone in the warehouse to download an application for Dibartolomeo and his personal involvement and attention in directing and causing Mohammed Andrees to use Dibartolomeo's cellphone.

[89] Furthermore, in determining whether both defendants are guilty of committing an offence under s. 28(2)(b) of the <u>O.H.S.A.</u>, the prosecution submits that the totality of s. 28(2)(b) and the circumstances set out in that provision has to be taken into consideration. As a result, the prosecution submits that sitting on a stationary and turned-off forklift or even standing beside a stationary and turned off forklift that is still in the care and control of the forklift operator and which is still located in an area where workers would be working or where forklifts would be travelling in while the forklift operator is distracted by using a cellphone, would encompass the circumstance of "using or operating equipment in a manner that could endanger the particular forklift operator or other workers", as prescribed by s. 28(2)(b).

[90] Hence, when considering the entirety of wording and language used in s. 28(2)(b), there are several circumstances explicitly expressed under s. 28(2)(b) for which the defendants could have contravened that statutory provision. Those statutory circumstances are the following:

> *(1) The defendants had respectively used or operated equipment in a manner that may endanger himself, herself or any other worker;*
>
> *(2) The defendants had respectively used or operated a machine in a manner that may endanger himself, herself or any other worker;*
>
> *(3) The defendants had respectively used or operated a device in a manner that may endanger himself, herself or any other worker;*
>
> *(4) The defendants had respectively used or operated a thing in a manner that may endanger himself, herself or any other worker; or*
>
> *(5) The defendants had respectively worked in a manner that may endanger himself, herself or any other worker.*

[91] Moreover, in respect to the evidence adduced at trial that both defendants had been observed holding and using a cellphone while seated on a stationary forklift, both defendants could have contravened several of the statutory circumstances prescribed under s. 28(2)(b), namely that the defendants had:

- *respectively* used or operated equipment (the forklift) in a manner that may endanger himself or any other worker;
- *respectively* used or operated a machine (the forklift) in a manner that may endanger himself or any other worker;
- *respectively* used or operated a device (the cellphone) in a manner that may endanger himself or any other worker; and
- *respectively* worked in a manner that may endanger himself or any other worker (by using a cellphone while operating or having care and control of a forklift).

[92] However, both of the defendants' respective Certificates of Offence, the charging documents, concisely sets out the charge as "*worker operate equipment in a manner that may endanger himself or another worker*", which is one of the 5 statutory circumstances set out in s. 28(2)(b). Hence, is that specific expression of the charge of *"worker operate equipment in a manner that may endanger himself or another worker*", simply the legally established "short-form wording" for the offence that would encompass all the circumstances set out in s. 28(2)(b), or is it a particularized description of the charge for which the prosecution would have the legal burden to prove that particularization of the charge beyond a reasonable doubt?

(a) <u>Has the charge that was laid against both defendants in their respective Part I Certificates been particularized or is the wording contained in the charge the legislated "short-form wording" for the offence?</u>

[93] To resolve the question of whether the charge on the Certificates of Offence issued to both defendants have been particularized or whether the charge comprises the "short-form wording" for the offence, it should be noted that the defendants' respective charges had been laid under a Part I Certificate. However, neither of the Certificates of Offence contain a "Set Fine". Moreover, both defendants were identically charged with committing the offence of "w*orker operate equipment in a manner that may endanger himself or another worker*". However, in their defence, both defendants contend that neither had been "operating" a forklift, since both defendants had testified that their respective forklifts had been stationary and turned off. On the other hand, the prosecution submits that the entirety of the s. 28(2)(b) provision should be considered and applied in determining whether both defendants have respectively contravened s. 28(2)(b).

[94] To recap, s. 28(2)(b) can be contravened if a worker does "use or operate any equipment, machine, device or thing or work in a manner that may endanger himself, herself or any other worker". The last of the series of circumstances set out in s. 28(2)(b) only refers to "work in a manner that may endanger himself, herself or any other worker" and does not refer to or imply that this "manner of working" refers to using or operating equipment, a machine, a device or thing. In other words, s. 28(2)(b) can be contravened without using equipment, such as a forklift, as long as the worker had been working in a manner that may endanger himself, herself or any other worker, and can be contravened by simply "working in a manner" that may endanger himself, herself or any other worker, but without operating or using any equipment, machine, device or thing. And, for the first four circumstances of the series of circumstances in which a worker can contravene s. 28(2)(b), the worker has to be found to be operating or using either a "machine", "equipment", a "device", or a "thing" in a manner that may endanger himself, herself or any other worker.

[95] In respect to a "particularized" charge, the Supreme Court of Canada at para. 5 in <u>R. v. Saunders</u>, [1990] 1 S.C.R. 1020, had held that in the situation where the charge has been particularized in a specific way, then the prosecution is legally required to prove that particularization beyond a reasonable doubt to obtain a conviction. Moreover, the Supreme Court indicated that the purpose of providing particulars is to permit the accused to be reasonably informed of the transaction alleged against the accused, thus giving the accused the opportunity to make a full defence and to receive a fair trial:

> *I am of the view that the appeal must be dismissed. It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved.*

> *In Morozuk v. The Queen, [1986] 1 S.C.R. 31, at p. 37, this Court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial": R. v. Côté, [1978] 1 S.C.R. 8, at p. 13.*

[96] Also, this requirement that the prosecution must prove the particulars of the offence has been found to apply to regulatory offences trials under Ontario's *Provincial Offences Act:* see R. v. Cooper's Crane Rental (1987) Ltd., [1990] O.J. No. 1868 (Ont. Ct. (Gen. Div.)) and R. v. Chrima Iron Works, 2007 ONCJ 78, [2007] O.J. No. 726 (Ont. C.J.).

[97] Likewise, for regulatory offences the onus is on the prosecution to prove the offence including any particulars set out in the charge beyond a reasonable doubt: see R. v. Brampton Brick Ltd., [2004] O.J. No. 3025 (Ont. C.A.) at para. 24.

[98] And, in Ontario (Ministry of Labour) v. Enbridge Gas, 2011 ONCA 13, [2011] O.J. No. 24 (Ont. C.A.), at para. 41, Watt J.A. confirmed that the prosecutor is bound by any particulars voluntarily supplied or court ordered and must prove beyond a reasonable doubt the essential elements of the offence as charged and particularized in the charging document:

> *In any prosecution, what the prosecutor must prove beyond a reasonable doubt are the essential elements of the offence as charged and particularized in the charging document. The prosecutor is bound by any particulars, voluntarily supplied or court ordered, subject to any rights of amendment that may exist under the governing procedural law and the doctrine of surplusage: R. v. Cox and Paton, [1963] S.C.R. 500, at p. 511.*

[99] Furthermore, in R. v. Sadeghi-Jebelli, 2013 ONCA 747, [2013] O.J. No. 5728, the Court of Appeal for Ontario explained that the rule requiring the prosecution to prove an offence as particularized is grounded on fairness. As a result, the Court of Appeal noted that particulars which have been provided to an accused would permit an accused to be reasonably informed of the transaction alleged, thereby giving the accused the ability to make full answer and defence and to receive a fair trial.

[100] Moreover, in R. v. Vézina, [1986] 1 SCR 2, the Supreme Court of Canada held that the principle that a particularized offence must be proven is subject to an exception for "mere surplusage" or information in the charging document that is not essential to the offence.

(i) "short-form wording" that is used in a charge to describe a regulatory offence in Ontario is legally permissible

[101] In respect to the use of "short-form wording" or "abbreviated wording" to describe a particular regulatory offence, ss. 13(1)(b) and 13(2) of the Provincial Offences Act, R.S.O. 1990, c. P.33, authorizes the Lieutenant Governor in Council by regulation to specify a word or expression that can be used on a form, such as on a Certificate of Offence, to designate that offence, and that the specified word or expression, if used on the form, would be sufficient for all purposes to describe the offence designated by such word or expression. However, those statutory provisions do not require the compulsory use of that prescribed word or expression to describe the offence. In addition, where the regulations do not authorize the use of a word or expression (short-form wording) to describe an offence in a form, then by virtue of s. 13(3) of the Provincial Offences Act the offence may be described in accordance with s. 25 of the Provincial Offences Act [*emphasis is mine below*].

> ***Regulations***
>
> ***13(1)*** *The Lieutenant Governor in Council may make regulations,*
>
> *(a)* ***Repealed****: 2011, c. 1, Sched. 1, s. 7 (1).*
>
> *(b) authorizing the use in a form prescribed under clause (1.1) (a) of any word or expression to designate an offence.*
>
> *(c)* ***Repealed****: 2011, c. 1, Sched. 1, s. 7 (3).*
>
> *(d)* ***Repealed****: 2009, c. 33, Sched. 4, s. 1 (20).*
>
> ***Same, Attorney General***
>
> *(1.1) The Attorney General may make regulations,*
>
> *(a) prescribing the form of certificates of offence, offence notices and summonses and such other forms as are considered necessary under this Part;*
>
> *(b) respecting any matter that is considered necessary to provide for the use of the forms under this Part.*
>
> ***Sufficiency of abbreviated wording***
>
> *(2) The use on a form prescribed under clause (1.1) (a) of any word or expression authorized by the regulations to designate an offence is sufficient for all purposes to describe the offence designated by such word or expression.*

Idem

(3) Where the regulations do not authorize the use of a word or expression to describe an offence in a form prescribed under clause (1.1) (a), the offence may be described in accordance with section 25.

[102] And, in the situation where "short-form wording" has not been legally created to describe a particular regulatory offence, s. 25(3) of the Provincial Offences Act, R.S.O. 1990, c. P.33, specifically provides that where an offence is identified in a count, but the count fails to set out one or more of the essential elements of the offence, then a reference to the provision creating or defining the offence shall be deemed to incorporate all the essential elements of the offence [*emphasis is mine below*]:

Counts

25*(1) Each offence charged in an information shall be set out in a separate count.*

Allegation of offence

(2) Each count in an information shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the defendant committed an offence therein specified.

Reference to statutory provision

(3) Where in a count an offence is identified but the count fails to set out one or more of the essential elements of the offence, a reference to the provision creating or defining the offence shall be deemed to incorporate all the essential elements of the offence.

Idem

(4) The statement referred to in subsection (2) may be,

(a) in popular language without technical averments or allegations of matters that are not essential to be proved;

(b) in the words of the enactment that describes the offence; or

(c) in words that are sufficient to give to the defendant notice of the offence with which the defendant is charged.

More than one count

(5) Any number of counts for any number of offences may be joined in the same information.

Particulars of count

(6) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the defendant reasonable information with respect to the act or omission to be proved against the defendant and to identify the transaction referred to.

Sufficiency

(7) No count in an information is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of this section and, without restricting the generality of the foregoing, no count in an information is insufficient by reason only that,

(a) it does not name the person affected by the offence or intended or attempted to be affected;

(b) it does not name the person who owns or has a special property or interest in property mentioned in the count;

(c) it charges an intent in relation to another person without naming or describing the other person;

(d) it does not set out any writing that is the subject of the charge;

(e) it does not set out the words used where words that are alleged to have been used are the subject of the charge;

(f) it does not specify the means by which the alleged offence was committed;

(g) it does not name or describe with precision any person, place, thing or time; or

(h) it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.

Idem

(8) A count is not objectionable for the reason only that,

(a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an offence the matters, acts or omissions charged in the count; or

(b) it is double or multifarious.

Need to negative exception, etc.

> *(9) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information.*

[103] Furthermore, in Niagara (Regional Municipality) v. Kosyatchkov, [2013] O.J. No. 424 (Ont. S.C.), at paras. 8 to 10, Ramsay J. confirmed that where there is a specific reference in the charge to the statutory provision creating or defining the offence, then as provided for under s. 25(3) of the Provincial Offences Act, that reference would be sufficient to incorporate into the charge the essential elements of the offence. However, Ramsay J. also noted that the legislation does not make it compulsory to make use of that prescribed word or phrase ("short-form wording") to describe the offence [*emphasis is mine below*]:

> *The legislation permits, but does not require the use of a prescribed word or phrase to describe the offence. If a prescribed word is used, the offence is sufficiently described: R. v. Don's Triple F Transport Inc., 2012 ONCA 536 (per Feldman J.A. at Para. 46, Himel J. (ad hoc) concurring on this point at Para. 54.) For example, in the present case, if the officer had written the word "speeding" nothing more would have been required to set out the elements of the offence.*
>
> *Since the prescribed word was not used, one of two things followed:*
>
> *a. The certificate had to meet the requirements of s. 25 of the Act; or*
>
> *b. If it did not, the justice was obliged to amend it unless to do so would have failed to satisfy the ends of justice.*
>
> ***The certificate met the requirements of s. 25 of the POA***
>
> *First, the certificate met the requirements of s. 25 of the Act. It said that the defendant was committing the offence against s. 128 of the* Highway Traffic Act *on the Queen Elizabeth Way in Grimsby at 7:22 pm on a specified date. According to subsection 25(3) of the* POA*, reference to the provision creating or defining the offence is sufficient to incorporate the essential elements of the offence. So the certificate told him that he was driving on the highway at an excessive speed at a certain point in time. That was "sufficient detail of the circumstances of the alleged offence to give to the defendant reasonable information with respect to the act or omission to be proved against the defendant and to identify the transaction referred to" within the meaning of subsection. 25(6) of the* POA*.*

[104] Moreover, in Ontario (Ministry of Transportation) v. Don's Triple F Transport Inc., 2012 ONCA 536, [2012] O.J. No. 3754 (Ont. C.A.), Feldman J.A., writing for the majority of the court, held at paras. 46 to 49, that the description of the offence in the charging document had been sufficient because it had complied with the short

form that the statute states is sufficient for all purposes to describe the offence [*emphasis is mine below*]:

> *In my view, by using the prescribed short form, the Certificate of Offence complies with the POA, and, in accordance with the words of s. 13(2), it is therefore "sufficient for all purposes to describe the offence designated".*
>
> *I am further satisfied that the charging document meets the three objectives identified by W.D. Drinkwalter and J.D. Ewart in Ontario Provincial Offences Procedure (Toronto: Carswell, 1980): identification of the offence; identification of the transaction; and reasonable information with respect to the act or omission.*
>
> *My colleague suggests that had the words "in accordance with the regulations" been added to the short form, that may have been sufficient to provide reasonable information. In my view, that information is sufficiently provided by the specific reference to s. 68.1(1) of the HTA, which contains those exact words.*
>
> *To summarize, I am satisfied that the description of the offence in the charging document is sufficient because it complies with the short form that the statute states is sufficient for all purposes to describe the offence. In my view, compliance with these provisions makes any further analysis unnecessary.*

(ii) The short-form wordings used for specific regulatory offences in Ontario are those prescribed in O. Reg. 950 (Proceedings Commenced by Certificate of Offence)

[105] The present proceedings had been commenced with a Part I Certificate of Offence. The charge that had been laid in both of the defendants' Part I Certificates of Offence were identical and expressed as "w*orker operate equipment in a manner that may endanger himself or another worker*".

[106] Under s. 3(2)(b) of the Provincial Offences Act, R.S.O. 1990, P.33, a provincial offence officer may issue to an accused either an offence notice indicating the set fine for the offence or a summons without a set fine in respect to the Part I Certificate of Offence [*emphasis is mine below*]:

> ***Certificate of offence and offence notice***
>
> ***3(1)*** *In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of an offence may be commenced by filing a certificate of offence alleging the offence in the office of the court.*
>
> ***Issuance and service***

(2) A provincial offences officer who believes that one or more persons have committed an offence may issue, by completing and signing in the form prescribed under section 13,

(a) a certificate of offence certifying that an offence has been committed; and

(b) either an offence notice indicating the set fine for the offence or a summons.

Service

(3) The offence notice or summons shall be served personally upon the person charged within thirty days

[107] The list of authorized "short-form wordings" for specific regulatory offences are those that are found and prescribed in O. Reg. 950 (Proceedings Commenced by Certificate of Offence), for which s. 13(2) of the Provincial Offences Act, R.S.O. 1990, c. P.33, has authorized that the use of short-form wordings used in a charge set out in a Certificate of Offence is sufficient to describe that offence.

[108] Moreover, s. 5(1) of O. Reg. 950 (Proceedings Commenced by Certificate of Offence) provides that words or expressions set out in Column 2 of a Schedule may be used in a certificate of offence, offence notice, or summons to designate the offence described in the provision set out opposite in Column 3 of the Schedule:

5(1) *The words or expressions set out in Column 2 of a Schedule may be used in a certificate of offence, offence notice or summons to designate the offence described in the provision set out opposite in Column 3 of the Schedule under the Act or regulation set out in the heading to the Schedule.*

(2) *For the purposes of subsection (1), either the English version or the French version, if any, of a Schedule may be used.*

[109] Consequently, as the defendants were issued a summons setting out the charge in respect to a Certificate of Offence, then according to s. 5(1) of O. Reg. 950, a "short-form wording" may be used on the summons to describe the offence.

[110] However, in regards to the s. 28(2)(b) offence in question, there is no "short-form wording" that has been legally created to describe that particular charge under any of the O.H.S.A. Schedules of charges under 66.2, 67, 67.1, 67.2, 67.3, 67.4, 67.5, 68, and 69 of O. Reg. 950. As such, where authorized short-form wordings do not exist for a particular regulatory offence, then the wording or expression used to describe the offence in the Certificate of Offence of "worker operate equipment in a manner that may endanger himself or another worker" has to

comply with the requirements of s. 25 of the Provincial Offences Act, which sets out the standards for describing and providing the necessary information about the offence that the accused has been charge with committing.

[111] In that regard, the defendants have defended themselves at trial in regards to the s. 28(2)(b) charge on the basis that they were not actually operating equipment, namely a forklift, as had been specifically expressed in the charge in their respective Certificates of Offence.

[112] Therefore, in fairness to the defendants, and since the doctrine of surplusage does not apply and because no application to amend the charge had been brought by the prosecution, then the defendants' respective charges will be treated as having been particularized by the Ministry of Labour to one of those specific five circumstances set out under s. 28(2)(b) of the O.H.S.A. for which the provision can be contravened by a worker, namely of "operating or using equipment in a manner that may endanger the worker or others".

(b) As part of Coca-Cola's company safety policy, workers are not permitted to have cellphones or personal mobile communication devices in the production or warehouse areas of the Coca-Cola plant?

[113] There is, however, one critical fact that is key to deciding whether the defendants have committed the *actus reus* of the offence. That key evidence is in regards to Coca-Cola's expressed safety policy against the use or presence of personal cellphones in the warehouse area of the Coca-Cola plant. On the photographs marked as Exhibits #1 and #4, the company's safety policy on the use of cellphones in the Coca-Cola plant is clearly outlined and expressed on signs and electronic displays for all workers to observe and read. Those signs and electronic displays clearly indicate that cellphones are prohibited in the warehouse area. Moreover, these signs and electronic displays are on the wall outside of the employees' lunchroom, so that employees would be informed or reminded of the company policy banning personal mobile communication devices or cellphones being brought into the production and warehouse areas of the Coca-Cola plant, just before they enter the production and warehouse areas of the plant.

[114] Therefore, the defendants' employer has recognized and identified the use of cellphones in the warehouse area and other areas of the Coca-Cola plant to be potentially an activity that could endanger workers.

(c) A worker using or holding a cellphone while operating a forklift is a distraction to that worker that could endanger the worker or other workers

[115] Furthermore, a worker operating or using a forklift at the Coca-Cola plant would be proof of an element of the offence that a "worker had been operating or using

equipment" for the purposes of s. 28(2)(b). What's more, driving or operating a forklift, especially transporting a load of bottles or cans of product is a complex activity, both mentally and physically, and involves different hand and foot operations and functions that have to be coordinated, and requires attention and focus. Any distraction that would reduce the forklift driver or operator's focus and concentration could increase the potential for a workplace accident.

[116] Moreover, even without carrying and transporting a load and even when the forklift is stopped and turned off, a forklift driver, who has care and control of a forklift in the production or warehouse areas of the Coca-Cola plant and who is engaged in the use of a cellphone could be distracted to what is actually occurring around them, so that they may not be aware or cognizant of other people being near the forklift, the proximity of other forklift operators moving large loads nearby, that obstructions or hazards have suddenly appeared, or that their pallets of product stored in the warehouse have unsafely shifted. Moreover, this unawareness or inattention to immediate events occurring nearby or an awareness that potentially dangerous situations have arisen or developed may not be properly observed nor recognized in time because the forklift driver's attention had been elsewhere and not on the driver's immediate surroundings, due to being distracted by looking at, concentrating on, or engaged in the use of a cellphone.

(i) Does "using or operating" any equipment, machine, device, or thing or work in a manner in a manner that may endanger the defendant or any other worker, include using a cellphone while the defendant is sitting on a turned-off and stationary forklift?

[117] Although Joe Hunt's observations that he had seen both defendants sitting on a forklift while holding and using a cellphone in the warehouse area of the plant were credible and evidence that proves beyond a reasonable doubt that both defendants were respectively holding and using a cellphone, the defendants' contention is that even if they were indeed using cellphones, that neither were in fact operating a forklift at the time, since both forklifts were stopped and turned off.

[118] In particular, the defendants argue that they are not guilty of committing the s. 28(2)(b) offence based on their contention that neither of them had been actually operating a forklift at the time in which Joe Hunt would have observed them using or holding a cellphone, as both of their forklifts had been stopped and turned off, as well as the defendant Antonio Dibartolomeo testifying that he had been also been off of his forklift and standing on the warehouse floor when he handed his cellphone to Mohammed Andrees.

[119] On the other hand, the prosecution submits that the s. 28(2)(b) charge has to be view in its entirety in constructing or determining the meaning of what constitutes

the prohibited act or omission of a worker prescribed by that provision. In that respect, s. 28(2)(b) prescribes 5 circumstances for which that provision can be contravened. Namely, s. 28(2)(b) can be contravened by a worker operating or using a machine, operating or using equipment, operating or using a device, operating or using a thing, in such a manner that could endanger himself or another worker, or by the worker working in a manner that could endanger himself or another worker.

[120] Consequently, since s. 28(2)(b) has to be interpreted broadly to implement the purpose of the O.H.S.A. to protect the safety of workers by providing safe workplaces, and since a worker is prohibited under that provision from operating or using equipment such as a forklift in a manner that could endanger himself or another worker, and that a worker using a cellphone is distracted as to what could be occurring around the worker, then a worker even sitting on a forklift that is stopped and turned off in a row or an aisle in the warehouse where there could be other workers driving forklifts or walking in the warehouse that would use the row or aisle to travel on, would still pose a hazard to himself and others. Therefore, operating or using a forklift includes the act of sitting on a stopped and turned-off forklift that is stationary in a row or an aisle in the warehouse area of the Coca-Cola plant.

[121] Moreover, concluding that operating or using a forklift includes a forklift driver or operator sitting on a stopped and turned-off forklift in a row or an aisle in the warehouse area, is analogous to a motorist using or holding a cellphone while driving a motor vehicle on a highway and stopped for a red light in Ontario, in which the motorist could be charged with committing a Highway Traffic Act offence of driving while holding or using a hand-held communication device, contrary to s. 78.1(1). It that scenario, it had been held that driving a motor vehicle on a highway included the situation where a motor vehicle is stopped for a red traffic light. On that issue, the Court of Appeal for Ontario reasoned in York (Regional Municipality) v. Tassone, [2007] O.J. No. 1109, that a motorist in a motor vehicle that was stopped for a red light was still engaged in the act of driving on a highway for the purposes of the requirement to wear a seatbelt under s. 106(2) of the Highway Traffic Act, even if the vehicle had been put into the “park” mode while it is stopped for the red light.

[122] Moreover, in deciding the meaning of the phase “drives on a highway” for a seatbelt charge under s. 106(3) [now s. 106(2)] of the Highway Traffic Act, the Court of Appeal in Tassone held, at paras. 7 and 8, that it is important to take a broad purposive approach when interpreting the words "drives on a highway" in s. 106(3) [now s. 106(2)], especially in light of the important statutory purpose of minimizing driver and passenger injuries resulting from car collisions. As such, the Court of Appeal viewed the words "drives on a highway" in that particular section did not render the seat belt requirement inapplicable to the situation of drivers waiting at red traffic lights. Moreover, the Court of Appeal noted that accidents can occur even when vehicles are stopped at traffic lights, and

therefore, they held that s. 106(3) [now s. 106(2)] must be interpreted as requiring the driver to wear a seat belt continuously from the time they put the vehicle in motion on the highway to the time the driver leaves the highway, parks the vehicle in a position in which the vehicle can be left unattended, or gets out of the vehicle [emphasis is mine below]:

> *In our view, the provincial offences appeal judge erred in his interpretation of s. 106(3). When interpreting the words "drives on a highway" in that section, it is important to take the broad purposive approach adopted by several recent decisions of the Supreme Court of Canada from Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:*
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> *Read in light of the important statutory purpose of minimizing driver and passenger injuries resulting from car collisions, the words "drives on a highway", in our view, do not render the seat belt requirement inapplicable to the situation of drivers waiting at red traffic lights. Such an interpretation would be inconsistent with the purpose of this statutory provision. Accidents occur even when vehicles are stopped at traffic lights. In our view, s. 106(3) must be interpreted as requiring the driver to wear a seat belt continuously from the time he or she puts the vehicle in motion on the highway to the time the driver leaves the highway, parks the vehicle in a position in which the vehicle can be left unattended, or gets out of the vehicle.*

[123] But more importantly, the Court of Appeal in York (Regional Municipality) v. Tassone indicated that “parking a vehicle” where it no longer constitutes driving on a highway is the situation where the driver gets out of the vehicle and the vehicle can be left unattended without obstructing a live lane of traffic. Under the Tassone reasoning, parking a motor vehicle so as not to constitute driving on a highway, would not include the situation where a motorist puts the motor vehicle into the “park mode” in a live lane of traffic while it is stopped for a red traffic light, and then stays in the vehicle at the red light.

[124] Moreover, this court at para. 59 in Ontario (Ministry of Transportation) v. Balasubramaniam, [2017] O.J. No. 5007 (Ont. C.J.), had used the Tassone reasoning in deciding whether a motorist charged with the offence of driving while using a hand-held communication device under s. 78.1 of the Highway Traffic Act when stopped at a red traffic light, had still been engaged in the act of driving a motor vehicle on a highway for the purposes of s. 78.1., and concluded that the motorist was still engaged in the act of driving on a highway while stopped for a red traffic light:

> *Therefore, as courts in other jurisdictions in Canada and the Court of Appeal in York (Regional Municipality) v. Tassone, [2007] O.J. No. 1109, have held, the*

term "driving", when broadly interpreted in conjunction with the purpose of the legislation and in regards to the context of the statutory wording set out in s. 78.1(1) of the HTA, would include being stopped temporarily on a highway for a red light when the vehicle is not in the park mode, and that drivers would face the same distraction while holding a cellphone whether the motor vehicle is in motion or stopped temporarily on a highway for a red light.

[125] Moreover, just the act of stopping or leaving a forklift on the warehouse floor in an aisle or a row, in order to use a cellphone would inevitably constitute a potential hazard or obstruction to other people or other drivers of forklifts traveling in that aisle or a row.

[126] Ergo, in the present circumstances, the act of a driver of a forklift sitting on a stopped and turned-off forklift while the forklift is still in the warehouse area of the Coca-Cola plant, especially when the forklift is stopped in an aisle or row which pedestrians and other forklifts would use to travel on, and where the forklift had not been parked or stopped in a designated spot where forklifts may be left by the driver unattended safely, would constitute the act of "operating or using" a forklift for the purposes of s. 28(2)(b).

(ii) Does "using or operating" any equipment, machine, device, or thing or work in a manner in a manner that may endanger the defendant or any other worker, include using a cellphone while the defendant is actually situated off of the forklift and standing on the floor?

[127] Even though Joe Hunt's testimony is credible and proof beyond a reasonable doubt that Antonio Dibartolomeo had been sitting on his forklift when he had been holding and using a cellphone, Dibartolomeo's contention that he had not been sitting on his stationary and turned-off forklift, but that Dibartolomeo had been standing on the floor beside his forklift when he had handed his cellphone to a co-worker named Mohammed Andrees, should still be considered to determine if causing a cellphone to be used by another worker while standing beside his stopped and turned-off forklift would constitute the prohibited act of "operating and using equipment that may endanger the worker or others", within the meaning of s. 28(2)(b).

[128] Again, the prohibition against workers "operating or using a machine, equipment, device, or thing or work in a manner that could endanger himself or another worker" under s. 28(2)(b) has to be interpreted broadly to fulfill the purpose of the O.H.S.A. In view of that, even if Dibartolomeo had been standing beside his stopped and turned-off forklift, Dibartolomeo still had care and control of the forklift while the forklift was stationary in an aisle or a row in the warehouse that is a passageway where other workers and forklifts could travel on. Therefore, on Dibartolomeo's claim that he had been standing on the warehouse floor and not seated on his stopped and turned-off forklift when he had handed off his

cellphone to Mohammed Andrees so that Andrees could download an "app" onto his cellphone, Dibartolomeo would have still been in the act of operating or using equipment in a manner that could endanger himself or other workers, considering that he had handed over his cellphone to Mohammed Andrees and had caused Mohammed Andrees to use a cellphone while both of their respective forklifts were stopped in an aisle or a row in the warehouse, which is a spot in the plant not designated for leaving forklifts unattended safely and a location where other workers and workers operating forklifts could be affected by both Dibartolomeo and Mohammed Andrees' actions, since both of their focus, attention, and pre-occupation had been on Dibartolomeo's cellphone. At that point both Dibartolomeo and Mohammed Andrees were effectively using Dibartolomeo's cellphone in conjunction with each other and their actions would have contributed to making the warehouse area a more dangerous workplace for workers.

[129] Furthermore, the Court of Appeal's reasoning in York Region v. Tassone, [2007] O.J. No. 1109, in which it was held that the parking of a motor vehicle on a highway required a motorist putting their motor vehicle into the "park mode" and then leaving the vehicle in a place where it can be safely left unattended, did not mean stopping and leaving the motor vehicle in the middle of a live lane of a highway. Moreover, the Tassone reasoning is equally applicable to the situation where a forklift is stopped in the middle of a row or an aisle in the warehouse, which is analogous to a live lane of traffic on a highway used by motor vehicles. As such, to not operate equipment in a manner that could endanger Dibartolomeo or other workers in the warehouse, Dibartolomeo would have needed to stop his forklift in a proper and designated place in order to park his forklift so that he could leave his forklift unattended safely, at which point he could then obtain his personal cellphone from his locker or his motor vehicle to use while in the employees' lunchroom or employees' change room, if such is permitted by Dibartolomeo's employer. On the other hand, Dibartolomeo and Andrees in stopping their respective forklifts in a row or aisle in the warehouse area to collectively engage in using Dibartolomeo's cellphone where there may be other workers or forklifts travelling in those rows and aisles, is not a prudent nor safe act.

[130] Dibartolomeo also said he had to keep his cellphone with him because he is the primary caregiver for his mother, who has Alzheimer's, and that he had received legal advice that he is responsible for his mother needs, and as such, required a cellphone for that purpose. However, Dibartolomeo's personal circumstance that would have required Dibartolomeo to be able to have cellphone contact with his mother does not trump worker safety in plant. Dibartolomeo, could have established a plan that did not include using a cellphone in the warehouse area, and which would not have violated the company's safety policy nor endanger other workers in the warehouse area, such as arranging emergency messages to be forwarded to him from his mother through his supervisor and through a company receptionist. Or, Dibartolomeo could have asked for an assignment in an area of the plant where cellphones are not banned or an assignment that does

not involve operating machinery or equipment, and where cellphone use would not endanger anyone in the plant.

[131] As a result, the prohibition in s. 28(2)(b) against a worker "using or operating" any equipment, machine, device, or thing or work in a manner in a manner that may endanger the defendant or any other worker, includes Dibartolomeo using a cellphone or causing a cellphone to be used while Dibartolomeo is actually situated off of the forklift and standing on the warehouse floor while Dibartolomeo still maintained care and control of the forklift, especially when the forklift had not been in a designated spot in the plant where forklifts can be left unattended safely, but still in the warehouse stopped and turned off in an aisle or row of the warehouse where other workers or forklifts would travel on.

(iii) Does "using or operating" any equipment in a manner that may endanger himself, herself, of any other worker include using a cellphone while sitting on a stationary forklift at the end of a row in the warehouse area?

[132] Again, Joe Hunt's testimony is credible and proof that establishes beyond a reasonable doubt that Jason Nault had been sitting on his forklift that was stopped in an aisle or row in the warehouse area of the plant when Nault had been holding and using a cellphone. However, Jason Nault had testified that his forklift had been stopped at the end of a row and out of the way of any traffic so that the location of his stopped and turned-off forklift would not have posed a hazard to anyone. In this regard, it is not the subjective view of Nault that is determinative, but whether objectively Nault had been operating any equipment in a manner in a manner that may endanger the defendant, Jason Nault, or any other worker.

[133] If Nault had indeed been stopped at the end of a row, then Joe Hunt's testimony that Hunt had observed Nault in his path and blocking Nault's ability to go forward, which had caused and necessitated Hunt to honk his horn and then having to find a different route to get to his destination, would not have made any logical sense. It is not logical because if Nault's forklift had been stopped at the end of a row, then Nault's forklift would not have blocked Hunt's path that would have necessitated Hunt having to honk his horn in order to get Nault to move his forklift out of the path of Hunt's forklift.

[134] Accordingly, Nault's testimony that he had been stopped at the end of a row is not credible. But, even if Nault's forklift had been stopped at the end of a row while holding and using a cellphone, the question is still whether Nault had been "operating" equipment in a manner that may endanger the defendant, Jason Nault, or any other worker. Again, by Nault being distracted by using his cellphone, even if Nault's forklift would have been stopped at the end of a row, Nault's focus and attention would not have been on what had been happening around him. Conversely, Nault's distraction and pre-occupation with his cellphone would have endangered Nault or another worker in the vicinity of Nault's forklift,

even if the forklift had been stopped and turned off at the end of a row in the warehouse area of the plant.

[135] In addition, MOL Inspector Martin had testified that there had been designated spots in the plant where a stopped and turned-off forklift could be left unattended safely. Nault's forklift had not been stopped at one of these designated spots and Nault still had care and control of his forklift in the warehouse area where other workers and other forklifts would be present and be put at risk, even if Nault's forklift had been stopped and turned off at the end of a row while he had been using his cellphone.

[136] Hence, "operating or using" a forklift includes sitting on forklift, even if the forklift is stopped and turned off and situated at the end of a row in the warehouse area of the Coca-Cola plant, since pedestrians and other forklifts may be around and still be put at risk by Nault's use and distraction of his cellphone and his inattention to his surroundings.

(3) HAS THE PROSECUTION PROVEN BEYOND A REASONABLE DOUBT THAT BOTH DEFENDANTS HAVE RESPECTIVELY COMMITTED THE ACTUS REUS OF THE OFFENCE SET OUT UNDER S. 28(2)(B)?

[137] To repeat, both defendants have been charged with contravening a "duties of workers" provision of the O.H.S.A., namely s. 28(2)(b), which states:

> *No worker … should use or operate any equipment, machine, device, or thing or work in a manner that may endanger himself, herself, of any other worker.*

[138] Specifically both defendants, Jason Nault and Antonio Dibartolomeo were observed by Joe Hunt, a co-worker, operating forklifts in the racking area (the warehouse area) of the Brampton Coca-Cola Production and Distribution Centre while holding and using cellphones, which was against a company policy that had forbidden workers for safety reasons from having cellphones or mobile communication devices in the warehouse and production areas of the plant. Joe Hunt's testimony was credible and not undermined by the defendants' cross-examination. Nor did any of the defendants' testimony create reasonable doubt about whether either defendant had been operating or using a forklift in the warehouse area of the plant when they were engaged in using a cellphone.

[139] And, although the defendants forklifts had been stopped in an aisle or row of the warehouse area and not carrying a load, both defendants' inattention and distraction to what could be happening around them or their surroundings because of their use of a cellphone, may endanger themselves or other forklift drivers or other workers walking in the warehouse area, since neither defendant would have been beware of potential hazards suddenly arising, such as not being aware a worker could be walking close by or that other forklifts carrying a load of product are trying to drive in the path where their stopped forklifts are located.

[140] Therefore, both defendants had violated company safety policy by bringing their personal cellphones into the warehouse area and that holding and using a cellphone while sitting on a forklift that had been stopped and which had blocked the path of other forklifts operating in the warehouse area would constitute the prohibited circumstance under s. 28(2)(b) of "operating or using equipment in a manner that may endanger himself, herself or any other worker".

[141] Furthermore, MOL Inspector Martin testified that there were designated areas around the outside areas of the warehouse where the forklifts could be stopped and turned-off or parked and left unattended safely. However, Joe Hunt did not observe the defendants stopped in those designated areas, but had observed both defendants stopped in in an aisle or row in the warehouse area of the plant, in which workers or other forklifts could travel on.

[142] Moreover, there is no evidence that either defendant had turned off and parked or stopped their respective forklifts in the designated areas of the plant where a forklift could be left unattended safely, in order to facilitate both defendants obtaining their personal cellphones from their locker or car during their breaks and using the cellphones in the workers' lunchroom or change room, if such is permitted by their employer.

[143] Accordingly, both defendants while in the warehouse area of the Coca-Cola plant had been using a cellphone while operating or using equipment, which is not acting or conducting themselves in a safe manner, nor were they concerned for the safety of other workers in the warehouse area, and had violated company policy by bringing a cellphone into the warehouse area where workers would be present and where forklifts were being used by other workers.

[144] Therefore, based on the credible evidence of Joe Hunt, the prosecution has met its burden in proving beyond a reasonable doubt that both Jason Nault and Antonio Dibartolomeo, have committed the *actus reus* of the offence under s. 28(2)(b) of the O.H.S.A. of being a worker that had been operating equipment in a manner that may endanger himself or another worker.

(B) SECOND STAGE: HAVE THE DEFENDANTS RESPECTIVELY PROVEN THE DUE DILIGENCE DEFENCE ON BALANCE OF PROBABILITIES?

[145] Even though the prosecution has proven that both defendants have committed the *actus reus* of the s. 28(2)(b) offence beyond a reasonable doubt, both defendants may still be acquitted of committing their respective strict liability offences, if they can respectively establish the defence of due diligence on a balance of probabilities.

[146] In R. v. Canada Brick Ltd., [2005] O.J. No. 2978 (S.C.J.O.), Hill J. reiterated at para. 129, that the prosecution is only legally required to prove beyond a

reasonable doubt that an accused committed the prohibited act and that once that is done, then negligence is assumed without the necessity of further proof by the prosecution, but that it is still open to the accused to avoid liability by establishing on a balance of probabilities, that a defence of due care is available and that no negligence exists because the defendant had taken all due care and all reasonable steps in the circumstances to avoid or prevent the occurrence of the prohibited act [*emphasis is mine below*]:

> *Generally, with a regulatory offence, it falls to the prosecution only to prove beyond a reasonable doubt a defendant's commission of the prohibited act. Negligence is assumed without the necessity of further proof by the Crown. It is open to the defendant to avoid liability by establishing, on a balance of probabilities, that a defence of due care is available - that no negligence exists because the defendant took, not some, but all due care, all reasonable steps in the circumstances, to avoid or prevent the occurrence of the prohibited act: R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 (S.C.C.), at pp. 373-4, 377; R. v. Rio Algom Ltd., at pp. 249, 252; R. v. Kurtzman (1991), 4 O.R. (3d) 417 (C.A.), at p. 428. In R. v. Sault Ste. Marie, at p. 374, the court described both this "all reasonable steps" route to avoidance of liability as well as the reasonable mistake of fact situation:*
>
> > Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

(1) Did The Defendants Respectively Take All Reasonable Steps In The Circumstances To Avoid Committing The Offence?

[147] In considering the reasonableness of the due care and diligent steps taken by the accused for establishing the defence of due diligence, Fitzpatrick J. had held in R. v. Courtaulds Fibres Canada (1992), 76 C.C.C. (3d) 68 (Ont. Prov. Div.), that assessing an accused's efforts in preventing the prohibited act from occurring does not mean superhuman efforts, but means a high standard of awareness and actions that are decisive, prompt, and continuing:

> *Reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt, and continuing action. To demand more, would, in my view, move a strict liability offence dangerously close to one of absolute liability.*

[148] Similarly, in R. v. Blair, [1993] O.J. No. 1477 (Ont. Ct. (Prov. Div.)), Harris J., in considering the standard of care required for exercising due diligence, had held at para. 169, that it must not be characterized as being unrealistic, superhuman or beyond that which is reasonable [*emphasis is mine below*]:

> *It should be recognized from the outset that the standard of care must not be characterized as being unrealistic, superhuman, or beyond that which is reasonable. If that was the case, the offence would be converted to one of absolute liability, because that type of onus could never be discharged. On the other hand the onus should not be characterized as being flimsy, elusive, a figment of imagination, or something made of compromise.*

[149] In addition, Megginson J. in R. v. Cancoil Thermal Corp. (1988), 1 C.O.H.S.C. 169 (Ont. Prov. Ct.), at p. 186, had held that it is the specific reasonable care or non-negligence in relation to the statutorily-defined *actus reus* of the particular offence which is determinative and not a general state of reasonable care or non-negligence:

> *In the case of the second branch or aspect, it is not "reasonable care" or "non-negligence" at large in the overall prevailing situation that exonerates, but rather "reasonable care" or "non-negligence" specifically relational to the statutorily-defined actus reus (be it commission or omission) of the particular offence charged.*

[150] In respect to whether either of the defendants had taking all reasonable steps to avoid taking their personal cellphones into the warehouse area of the plant, there is no evidence that either of the defendants had accidentally, mistakenly, or by error had taken their personal cellphones into the warehouse area. Moreover, both defendants ought to have known about or been aware of the company's policy on the prohibition against cellphones being brought into the warehouse area of the plant, since there are signs or notices located outside of the employee's lunch room and just before the point where workers would enter the production or warehouse areas of the plant. Specifically, there is a sign and a television monitor that displays safety measures and prohibitions against specific conduct (see Exhibits "1" and "4"). One of the prohibitions displayed on the sign and in the electronic display screen is that, for safety reasons, workers are prohibited from bringing into or having cellphones or mobile communication devices in the production and warehouse areas of the plant.

[151] And, as the evidence establishes, both defendants had intentionally taken their personal cellphones with them into the warehouse area of the plant, which is an area in the plant in which cellphones are forbidden to be by the defendants' employer, and it is in the warehouse area where Joe Hunt had happen to observe both defendants, Jason Nault and Antonio Dibartolomeo, holding and using a cellphone while the defendants were sitting on their respective forklifts. However, both defendants contend that both of their forklifts had been stopped and turned off. As well, Jason Nault said that his forklift had been stopped at the end of a row so that where his forklift had been parked would not have prevented other forklift drivers from having to go around his forklift. And, for Antonio Dibartolomeo's

circumstances, Dibartolomeo testified that he had not been sitting on his forklift, but had standing on the warehouse floor and off his forklift when he had handed his cellphone over to Mohammed Andrees, who had been the person who actually had been using his cellphone.

[152] More importantly, by both defendants having brought a cellphone with them into the warehouse area of the plant and having been seen holding and using or causing the cellphone to be used, when cellphones are specifically banned from being brought into the warehouse area of the Coca-Cola plant by company safety policy, would in the circumstances not be evidence of taking all reasonable steps to avoid committing the offence under s. 28(2)(b).

[153] Moreover, in respect to Jason Nault's claim that he had been using a cellphone as a calculator and clock for work purposes does not excuse his contravention of company safety policy, which prohibits cellphones being brought into the warehouse area of the plant. And, considering that the Nault's cellphone could have been used for other purposes besides as a clock and a calculator, such as using the cellphone for sending text messages, playing electronic games, watching videos, or accessing the internet, then Nault could have been easily distracted from knowing about what had been occurring around him by using his cellphone to conduct such activities, which could have then negatively affected his ability to operate his forklift in a safe manner.

[154] And in Antonio Dibartolomeo's particular circumstances, Dibartolomeo insisted that he needed to have his personal cellphone with him at all times, as his mother has been afflicted with Alzheimer's, is not evidence of due diligence, since having a cellphone in the warehouse area would be a violation of the company's safety policy. Moreover, to safely deal with his mother's situation, Dibartolomeo would need to find a different and legal method for receiving messages from his mother, such as possibly having his mother's calls routed through the company receptionist who can then forward the message to Dibartolomeo's supervisor to give the message to Dibartolomeo, so that when Dibartolomeo gets the relayed message to call his mother, Dibartolomeo can then go to his locker and retrieve his cellphone and then use his cellphone in the employees' locker room or in the employees' lunchroom, away from the warehouse area, if the use of cellphones is permitted in the employees' locker room or lunchroom.

[155] On the other hand, Dibartolomeo's involvement in causing another worker, Mohammad Andrees, to use Dibartolomeo's cellphone when Dibartolomeo had provided his cellphone to Andrees to download an application for Dibartolomeo, would have also endangered himself and the other worker, as well as other workers in the warehouse area, since both Dibartolomeo and Andrees would have been distracted to what could be happening around them. Moreover, flouting company safety policy could also encourage other workers to not comply with other required safety measures and could put other workers in the warehouse at risk.

[156] In addition, by taking his cellphone into the warehouse area and actually causing it to be used by another worker would also contravene the particular circumstance set out in s. 28(2)(b) of "working in a manner that could endanger himself and other workers". Ergo, in causing someone else to use Dibartolomeo's cellphone in order to download an application onto Dibartolomeo's cellphone when such an electronic device is not permitted in the warehouse area, is not taking all reasonable care in the circumstances to comply with company safety policy and is also not evidence of taking all reasonable steps to comply with s. 28(2)(b) of the O.H.S.A., nor would it be evidence of operating equipment or working in a manner that would not endanger himself or other workers in the warehouse area.

[157] As a result, neither defendant has established the first branch of the due diligence defence that they had respectively taken all reasonable steps in the circumstances to not contravene s. 28(2)(b).

(2) Did The Defendants' Respectively Have A Reasonable But Mistaken Belief In A Fact That Would Make Their Act Or Omission Innocent?

[158] For the second branch of the due diligence defence, both defendants contend that they believed that they were not operating a forklift, even if they were found to be using a cellphone, as the forklift they had care and control of that day had been stopped and turned off. And, for Jason Nault in particular, Nault said his forklift had been at the end of a row so that it would not have obstructed the movement of another forklift in the warehouse.

[159] And, in order for either defendant to prove this branch of the due diligence defence, each defendant must demonstrate that not only was the mistake of fact an honest one, but that it had also been based on reasonable grounds: R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299 (S.C.C.), at p. 1318:

> *In this respect, the defence of mistake when raised as a defence to an offence of strict liability is very different than is the defence of mistake of fact when it is raised in a case involving mens rea as an essential ingredient of the offence. In the former case, the mistake of fact must not only be an honest one, but it must be based on reasonable grounds and it must be proved by the accused on the balance of probabilities. In the latter case the defence need only be an honest one and need not necessarily be based upon reasonable grounds and it need only cause the Court to have a reasonable doubt: see R. v. Morgan et al., [1975] 2 W.L.R. 913 (H.L.) and Beaver v. The Queen (1957), 118 C.C.C. 129, [1957] S.C.R. 531, 26 C.R. 193.*

[160] In addition, in Lévis (City) v. Tétreault, [2006] S.C.J. No 12 (S.C.C.), Lebel J. held, at para. 30, that passive ignorance is not a valid defence in criminal law and that the concept of diligence is based on the acceptance of a citizen's civic duty to take action to find out what his or her obligations are [*emphasis is mine below*]:

> *In Mr. Tétreault's case, the judgments of the courts below confused passivity with diligence. The accused did no more than state that he expected to receive a renewal notice for his licence and that he had confused the licence expiry date with the due date for paying the fees required to keep the licence valid. He proved no action or attempt to obtain information. The concept of diligence is based on the acceptance of a citizen's civic duty to take action to find out what his or her obligations are. Passive ignorance is not a valid defence in criminal law. Consequently, the acquittals are unfounded in this case. The Municipal Court should have found the respondent guilty as charged and imposed the fine prescribed by law.*

[161] Moreover, in his textbook, "Libman on Regulatory Offences in Canada", (Salt Spring Island, B.C.: Earlscourt Legal Press Inc., (student edition #1 (2014)), at p. 7-189, Justice Libman highlighted John Swaigen's comments on whether an accused's defence of mistake of fact had been reasonable in Swaigen's treatise, Regulatory Offences in Canada - Liability & Defences (Scarborough, Canada: Carswell - Thomson Professional Publishing, 1992), at p. 81, in which Swaigen had explained that in order to show that a mistake of fact was reasonable, the accused must demonstrate that he or she took all reasonable steps to ascertain the true state of affairs [*emphasis is mine below*]:

> *There is a relationship between mistake of fact and due diligence. Both involve the question of whether the accused exercised all reasonable care. As Swaigen states, to show that a mistake of fact was reasonable, the accused must demonstrate that he or she took all reasonable steps to ascertain the true state of affairs. Notwithstanding the similarity, though, between mistake of fact and due diligence as they relate to the issue of reasonable care, the court's analysis may recognize that they constitute "separate and distinct defences".*

[162] Furthermore, Justice Libman also explained in his textbook, Libman on Regulatory Offences in Canada, at pp. 7-189 to 7-190, by using the case of R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5 (S.C.C.) to illustrate, that an accused has to take care to acquire knowledge of the facts constituting the offence and that failure to acquire such knowledge would not afford the accused the defence of a mistake of fact [*emphasis is mine below*]:

> *the case of R. v. Pierce Fisheries Ltd. Affords an illustration of a case where there was a lack of care taken by the defendant to acquire knowledge of the facts constituting the offence. As it would not have been a difficult matter for an officer or responsible person of the accused company to acquire knowledge of the undersized lobsters which were being packaged on the premises on the day in question, failure to acquire such knowledge did not afford a defence.*

[163] Justice Libman has also provided another illustration in his textbook, at p. 7-190, in which the defence of mistake of fact had not been made out when there had been a failure of the accused to ensure that the equipment or protective devices had been maintained in good condition. In the circumstances of the R. v. Rio Algom Ltd. (1988), 66 O.R. (2d) 674, 46 C.C.C. (3d) 242 (Ont. C.A.) case, where a gate had been damaged and over-swung and had resulted in the fatal injury to

one of the company's employee, the Court of Appeal for Ontario held that the accused's defence of reasonable belief in a mistaken set of facts could not prevail when the accused simply proves that it was mistaken in believing there was no danger of injury to any employee, especially where the injury to the employee had been the result of a failure by the accused to ensure that the equipment or protective devices had been maintained in good condition. Moreover, Justice Libman had explained in his textbook that an accused must show that they had reasonably believed in the mistaken set of facts and that the test for this determination is in effect a combination of subjective and objective elements. In addition, Justice Libman emphasized that whether an accused person had actually believed or not in a mistaken set of facts depends on proof either directly or inferentially of what was subjectively in the accused's mind at the time, and whether that belief was reasonable or not will be determined after an objective examination of the facts which were known to the accused or should have been known to the accused when the accused had formed that belief. Hence, the test is whether a person in the accused's position, with the knowledge that they had or should have had, reasonably have reached the conclusion that they did [*emphasis is mine below*]:

> *A further illustration appears in R. v. Rio Algom Ltd., where the accused was charged with failing to ensure that protective devices were maintained in good condition, contrary to occupational health and safety legislation. The gate in question had been damaged, it over-swung, resulting in a fatal injury to an employee. The court ruled that the accused failed to show that it was not negligent in failing to determine the effect of the damage to the gate. The defence of reasonable mistake of fact was not available, as there was no evidence that the accused reasonably believed that the gate was not in a state of disrepair, or that it had some other reasonable belief in a mistaken set of facts which would absolve it from blame. In delivering the court's decision, the Court of Appeal commented on the mistake of fact defence as follows:*
>
> > A defence to a strict liability offence put forward on the basis of a reasonable belief in a mistaken set of facts cannot prevail where an accused simply proves that he was mistaken in believing there was no danger of injury to any employee as a result of a failure to ensure equipment or protective devices were maintained in good condition or that every precaution reasonable in the circumstances was taken for the protection of a worker unless such failure or failures were based on a reasonable belief in a mistaken set of facts which, if true, would render the act or omission innocent.
>
> *Where the defendants put forth the defence of mistake of fact, they must show that they reasonably believed in the mistaken set of facts. The test is in effect a combination of subjective and objective elements. Whether a person actually believed or not depends on "proof either directly or inferentially of what was subjectively in his mind at the time". Whether that belief was reasonable or not will be determined after an objective examination of the facts which were known to him or should have been known to him when he formed the belief. In other words, "could a person in the defendant's position, with the knowledge that he had or should have had, reasonably have reached the conclusion he did".*

[164] However, as had been determined, using a cellphone in the warehouse area when a cellphone is not permitted to be brought into the warehouse for safety reasons would in the circumstances be working in a manner that could endanger the worker or other workers and would pose the same danger caused by being distracted from using a cellphone when in care and control of a forklift, even if the forklift is stationary, turned off, and even if the worker is not sitting on the forklift, but still responsible for the forklift when the forklift has not been stopped in a designated space to safely park the forklift that would not obstruct or interfere with the movement of other forklifts or people in the warehouse. Otherwise, stopping the forklift in a row or aisle in the warehouse where other drivers of forklifts could travel on in order to use a cellphone would still objectively pose the same danger to other forklift drivers and people in the warehouse area, since the driver of the stopped forklift would be subjected to the same distraction of not being cognizant of what is occurring around them while using a cellphone.

[165] Hence, operating or using a forklift or having care or control of a forklift while holding and using a cellphone in the aisle or row in the warehouse area of the Coca-Cola plant is acting in a manner that may endanger themselves and others. Furthermore, a forklift driver or operator stopping and turning off a forklift in an aisle or a row in the warehouse area of the Coca-Cola plant where other people and forklifts could walk or travel in the same pathway of that stopped forklift could objectively cause potential danger to themselves or to these other workers, if the forklift driver is distracted with the use of a cellphone.

[166] Furthermore, if the defendants had wanted to use their cellphones, then their respective forklifts needed to be off of the warehouse area floor and parked and left unattended safely in a proper and designated area, after which the defendants could then obtain their personal cellphones from their lockers or cars and then hold and use their respective cellphones in the employee lunchroom or employee locker room, if permitted by their employer.

[167] Therefore, as the defence of due diligence has not been made out by either defendant on a balance of probabilities, then the prosecution has met their burden in proving beyond a reasonable doubt that both defendants, respectively, are guilty of committing the offence of being a worker who operated equipment in a manner that may endanger himself, herself, or others, contrary to s. 28(2)(b) of the O.H.S.A.

6. DISPOSITION

[168] Accordingly, for the charge against Jason Nault on Certificate of Offence # 31609524926Z, the Crown has proven beyond a reasonable doubt that the defendant, Jason Nault, had been a worker at an industrial establishment located at 15 Westcreek Boulevard, in the City of Brampton, on December 19, 2016, at 8:05 a.m., who had operated equipment in a manner that may endanger himself or another worker, contrary to s. 28(2)(b) of the Occupational Health and Safety

Act, R.S.O. 1990, c. O.1. Therefore a conviction will be entered against Jason Nault.

[169] And, in respect to the charge against Antonio Dibartolomeo on Certificate of Offence # 31609524927Z, the Crown has also proven beyond a reasonable doubt that the defendant, Antonio Dibartolomeo, had been a worker at an industrial establishment located at 15 Westcreek Boulevard, in the City of Brampton, on December 19, 2016, at 8:05 a.m., who had operated equipment in a manner that may endanger himself or another worker, contrary to s. 28(2)(b) of the Occupational Health and Safety Act, R.S.O. 1990, c. O.1. Therefore a conviction will also be entered against Antonio Dibartolomeo.

Dated at the City of Brampton on May 11, 2018.

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QUON J.P.
Ontario Court of Justice