ONTARIO COURT OF JUSTICE

CITATION: *Ontario (Ministry of Labour) v. Quinton Steel (Wellington) Limited*, 2014 ONCJ 713
DATE: 2014-12-17
COURT FILE No.: Guelph 13/1354

B E T W E E N :

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
(MINISTRY OF LABOUR)

— AND —

QUINTON STEEL (WELLINGTON) LIMITED

Before Justice of the Peace Thomas Stinson
Heard on August 18, 19, 20, 21, 2014
Reasons for Judgment released on December 17, 2014

Shantanu Roy ..... counsel for the prosecution
Jeremy Warning ..... counsel for the defendant

JUSTICE OF THE PEACE STINSON:

[1] Quinton Steel (Wellington) Limited ("Quinton") operates an industrial facility as a custom steel fabricator at 570 Imperial Road, Guelph, Ontario. This facility is an "industrial establishment" and a "workplace" and Quinton is an "employer" as defined in the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended (the "*OHSA*").

[2] On June 7, 2012, one of Quinton's employees, Martin Vryenhoek ("Vryenhoek"), a "worker" as defined in the *OHSA*, was welding a large steel product on site. Vryenhoek was a finishing welder, one of the most skilled welders working at Quinton. He was working approximately 6.5 feet above ground level. Around 3:30 p.m., he fell to the ground. His injuries ultimately, and tragically, proved fatal. No one saw Vryenhoek fall. As a result of this incident, Quinton was charged with two offences pursuant to the *OHSA*.

[3] Count #1 alleges that Quinton failed, as an employer,

"to take every precaution reasonable in the circumstances for the protection of a worker, at a workplace....contrary to section 25(2)(h)"

of the *OHSA*. The particulars attached to this charge were amended, on consent of both parties, at the commencement of the trial, to read as follows:

"The accused failed to take the reasonable precaution of installing guardrails at the open sides of a raised wood platform."

[4] Count #2 alleges that Quinton failed, as an employer,

"to inform, instruct and supervise a worker to protect the health or safety of the worker, at a workplace...pursuant to section 25(2)(a)"

of the *OHSA*. It was particularized as follows:

"The accused failed to provide information, instruction and supervision to a worker, Martin Vryenhoek, to protect him from falling while he was working on a raised wood platform."

[5] Both parties agree that the charges in this case, pursuant to *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, are strict liability offences where the burden of proof is on the Crown to establish the *actus reus* of the offence beyond a reasonable doubt. It is then open to the defendant to avoid liability by demonstrating due diligence. At the commencement of the trial, defence counsel advised that it would not be putting forth a defence of due diligence. The defendant thus concedes that if I find that the Crown has proved the commission of the *actus reus* of the offences beyond a reasonable doubt, convictions will follow.

[6] At trial, the Crown called six witnesses. These were Richard Den Bok ("Den Bok"), an industrial health and safety inspector with the Ministry of Labour, Bryn Appleton ("Appleton"), David Manickchand ("Manickchand"), Matthew Duchesne and Victor Klassen ("Klassen"), all of whom were employees of Quinton on June 7, 2012, and Ian Leach ("Leach"), then the Quality Assurance Manager at Quinton, and now its General Manager. The defence called one witness, Stefan Gajewski ("Gajewski"), the president of Quinton.

The Events of June 7, 2012

[7] Den Bok was advised late in the afternoon on June 7, 2012 that an accident had taken place at Quinton. He arrived around 6:30 that evening and met with Leach, who showed him where the accident occurred. Den Bok took photographs, several of which were entered as exhibits during the course of this trial.

[8] Many of the photographs show the accident scene. Most show a large steel object, known as a slide. Two A-frame steps, like ladders, are positioned at one end of the slide, with a two-by-ten plank positioned horizontally across the top of the A-frames.

[9] Notwithstanding that the pictures only show one plank, it is agreed that Vryenhoek

had been standing atop two planks, placed beside each other, at the time he fell. I accept as facts Den Bok's measurements that the planks were each 96 inches in length, 1.75 inches thick and 9.75 inches wide. Vryenhoek would thus have been standing on a platform that was 19.5 inches wide when he fell.

[10] Over the next few days, Den Bok continued his investigation.

The Ministry of Labour Orders and Quinton's Reaction

[11] Den Bok eventually issued two orders to Quinton on June 15, 2012.

[12] The first of these was issued pursuant to section 13(1) of Regulation 851 (the *"Industrial Establishments Regulation"*), R.R.O. 1990, which is enacted pursuant to the *OHSA*. The relevant portion of section 13(1) cited in the first order reads as follows:

> *13(1) Subject to subsection (2), there shall be a guardrail,*
>
> *(a) around the perimeter of an uncovered opening in a floor, roof or other surface to which a worker has access;*
>
> *(b) at an open side of,*
>
> *(i) a raised floor, mezzanine, balcony, gallery, landing, platform, walkway, stile, ramp or other surface.*

[13] The particulars of the first order were as follows:

> *THE EMPLOYER SHALL ENSURE THAT THE RAISED PLATFORM USED BY A WORKER TO WELD THE SLIDE IN THE SHOP IS EQUIPPED WITH A GUARDRAIL AS PRESCRIBED. (NOTE: THIS ORDER RELATES TO THE JUNE 7 2012 INCIDENT WERE* [sic] *A WORKER SUSTAINED FATAL INJURIES)*

[14] The second order issued by Den Bok on June 15, 2012 was pursuant to section 25(2)(a) of the *OHSA*. It reads as follows:

> *25(2) Without limiting the strict duty imposed by subsection (1), an employer shall,*
>
> *(a) provide information, instruction and supervision to a worker to protect the health or safety of the worker.*

[15] The particulars of the second order were as follows:

> *THE EMPLOYER SHALL PROVIDE TRAINING TO A WORKER REQUIRED TO WORK AT HEIGHTS ON TEMPORARY PLATFORMS, TO PROTECT THE HEALTH AND SAFETY OF A WORKER. (NOTE: THIS ORDER RELATES TO THE JUNE 7 2012 INCIDENT WERE [*sic*] A WORKER SUSTAINED FATAL INJURIES)*

[16] After the accident, but prior even to being issued the orders, Leach and Gajewski testified that Quinton began modifying its safety practices. After receipt of the orders, which it did not appeal, and without obtaining any legal advice, Quinton began fabricating a system of guardrails to be used in conjunction with the A-frame plank system and in any situation where an employee is working at a height of more than two feet above ground level.

[17] Den Bok subsequently completed his investigation, reviewed it with his manager, and sent his report to crown counsel at the Ministry of Labour. This report recommended charges against Quinton in line with the two orders issued on June 15, 2012. While the first order issued by Den Bok recommended a charge against Quinton pursuant to section 13 of the *Industrial Establishments Regulation*, the Crown declined to proceed on this basis. It proceeded, rather, with two charges pursuant to section 25(2) of the *OHSA*, the second of which is substantially similar to the second order issued by Den Bok. The specifics of the two charges faced by Quinton are outlined earlier in paragraphs 3 and 4 of this judgment.

The Legislation

1. Section 85 of the Industrial Establishments Regulation

[18] There was much reference throughout the trial to section 85 of the *Industrial Establishments Regulation* which requires fall protection to be worn by a worker, by means of a safety belt or harness and lifeline. However, this requirement is only mandated where the surface to which the worker might fall is more than three metres below where the worker is situated. As I accept as fact that Vryenhoek was only 6'6" above the ground, less than three metres, Quinton does not face charges under this section.

2. Section 13 of the Industrial Establishments Regulation

[19] Section 13 of the *Industrial Establishments Regulation*, specifically section 13(1)(b)(i), requires a guardrail around the open side of, among other things, any raised floor, mezzanine, balcony, landing, platform or other surface. Section 14(2) mandates that construction of a guardrail comply with the structural requirements contained within the *Building Code*, O. Reg. 332/12 (the "*Building Code*"), enacted pursuant to the *Building Code Act, 1992*, S.O. 1992, c. 23. Section 13 does not mention any minimum height below which a guardrail is not required. Notwithstanding this, and despite Den Bok's recommendation to proceed with a charge under this section, Quinton does not face charges under this section.

3. Sections 26 to 26.9 of the Construction Projects Regulation

[20] Nor does Quinton face charges pursuant to any of sections 26 through 26.9 of Regulation 213/91, (the "*Construction Projects Regulation*") also enacted pursuant to the *OHSA*. These are contained within the heading of that regulation entitled "*Protective Clothing, Equipment and Devices*". Section 26 states that sections 26.1 to 26.9 deal with, among other situations, circumstances where a worker is exposed to the hazard of falling more than 3 metres. Section 26.1 requires workers to be adequately protected by a guardrail system as outlined in sections 26.3(2) through (8). Guardrails, under section 26.3, are only required if a

worker is exposed to a fall of 2.4 metres or more.

[21] Both crown and defence counsel agree that the *Construction Projects Regulation* does not apply to Quinton in this situation as its workplace did not fall within the scope of that regulation. As well, it is clear that the height from which Vryenhoek fell, 6.5 feet, is less than the 2.4 metre threshold for guardrails contained in section 26.3.

4. Section 25(2) of the OHSA

[22] Section 25(2) of the *OHSA* is often referred to as a general duty clause. Section 25(2)(h), which forms the basis for one of the charges faced by Quinton, is broadly worded. It implies that an employer must use an objective standard to take every reasonably foreseeable precaution with respect to workers' protection. This section is often used for prosecutions pursuant to the *OHSA*, especially when there are no applicable sector-specific regulations. This is the section under which Quinton is charged in this case.

The Crown's Position with respect to Count #1:

[23] In acknowledging that it needs to prove the *actus reus* of the offence, the Crown states that it is not required to prove that Quinton was aware of any potential hazard. In its opinion, the fact that the fall occurred demonstrates the existence of the hazard. It is also the Crown's contention that I can properly consider the post-incident conduct of Quinton, as noted earlier, when assessing what is reasonable in the circumstances within the context of whether the *actus reus* has been proven.

[24] The Crown acknowledges that it is not suggesting that it would have been a reasonable precaution for Vryenhoek to have worn a safety harness, as outlined in section 85 of the *Industrial Establishments Regulation*, as he was working below the height threshold. That would be the Crown improperly seeking to expand the scope of section 85 and the Crown indicates that it is not attempting to do that.

[25] The Crown's position is simple. While a safety belt or harness and lifeline were not required, Quinton should have installed guardrails at the open sides of any raised wooden platforms because that would have been a reasonable precaution. One of the bases for its conclusion that it would have been reasonable is found in the evidence, which I accept as fact, that some Quinton employees, such as Manickchand, Appleton and Klassen, took it upon themselves to construct guardrails when working on top of the A-frame plank system.

[26] Despite the fact that Quinton does not face charges under the *Industrial Establishments Regulation*, the Crown contends that section 13(1) of this regulation, specifically section 13(1)(b)(i), applies to this case. The wording of that paragraph is found in paragraph 12 of this decision and is further discussed in paragraph 19 of this decision.

[27] The Crown is of the opinion that it is not improper to allege that there should have been a guardrail, as outlined in section 13(1)(b)(i) of the *Industrial Establishments Regulation*, but nevertheless proceed by way of a charge under the general duty clause of section 25(2)(h) of the *OHSA* instead.

[28] The Crown states that the absence of any qualifiers of any of the locations or things contained in section 13(1)(b)(i) means that it can apply in any situation. It contrasts this section with section 17 of the *Industrial Establishments Regulation*, which speaks of a "*fixed walkway*", as opposed to just a "*walkway*" as is set out in section 13(1)(b)(i). Similarly, section 19 of that same regulation speaks of "*permanent platforms*" whereas section 13(1)(b)(i) simply references the open side of a "*platform*".

[29] It would have been easy for Quinton, argues the Crown, in requiring guardrails and in formulating a policy with respect to them, to have had simple regard for the provisions of section 13 of the *Industrial Establishments Regulation*. In the Crown's opinion, it is not a defence for Quinton simply to say that section 13 did not apply to it. The Crown draws my attention to the case of *Ontario (Ministry of Labour) v. Bruno's Contracting (Thunder Bay) Ltd.*, [2007] O.J. No. 5501 (C.J.) which held that a charge under the general duty clause of section 25(2)(h) of the *OHSA* can be read together with a specific section of an applicable regulation to create a duty on an employer.

[30] The Crown also relies on the case of *R. v. Brant Corrosion Control Inc.*, [2008] O.J. No. 5610 (C.J.). Interestingly, in that case the Crown did proceed with a charge under section 13(1)(b) of the *Industrial Establishments Regulation*, as well as a charge under section 25(2)(a) of the *OHSA* itself. It is a case that is, in many ways, similar to this one. It involved a worker falling from a height. The conclusion of the court as to why the worker fell in *Brant Corrosion Control* is found at paragraph 93, when Thibideau J. states:

> *"In fact, the best evidence available is that the actual fall from the platform was caused by the backward thrust and loss of balance occasioned by the commencement of operation of the blast gun.*"

[31] And in paragraph 94, the judge states:

> "*To put it another way, the circumstances of this accident are not so bizarre as to be reasonably unforeseeable and once reasonably foreseeable a system should have been in place to take reasonable precaution against the risk that was foreseen.*"

[32] However, unlike *Brant Corrosion Control*, the defendant in this case does not face charges under both the *Industrial Establishments Regulation* and the general duty clause of the *OHSA*, but only under the general duty clause in section 25.

[33] Notwithstanding the fact that the Crown did not lay charges pursuant to section 13 of the *Industrial Establishments Regulation*, the Crown urges me to consider that section, but then equally vehemently urges me not to consider the charges laid in light of any comparison to the *Construction Projects Regulation*, stating that that regulation has no part to play.

[34] It is difficult to reconcile these positions taken by the Crown. How can it argue against considering the requirements of the *Construction Projects Regulation* on the basis that the provisions of the *Industrial Establishments Regulation* are relevant, but then not proceed on the basis of charges under the *Industrial Establishments Regulation*?

[35] The Crown argues that the evidence from some of its witnesses, such as Manickchand and Klassen, show an awareness of a potential safety hazard in that they sometimes either wore safety harnesses at heights less than the mandated ten feet, or created a form of guardrails. In fact, the pictures of the Quinton workplace which show the scene of Vryenhoek's fatal accident appear to indicate that such a guardrail may well have been in place for the A-frame plank system used by Vryenhoek at the time he fell. This calls into question the very essence of count #1 faced by Quinton. The particulars of this charge allege that there was no guardrail present at the location of Vryenhoek's accident. The photographic evidence would appear to indicate otherwise.

[36] The Crown also contends, since Quinton did not challenge or appeal Den Bok's section 13 order, that this indicates that it was not surprised that the Ministry had concluded that it was not in compliance. Therefore, in the Crown's opinion, given that a large number of its workers regularly welded at heights, even if below nine or ten feet, Quinton should have had a workplace safety program that specifically addressed this situation and protected its workers. It was certainly not beyond the ability of Quinton to have installed guardrails.

[37] The Crown states, therefore, that if I conclude that section 13(1)(b) of the *Industrial Establishments Regulation* applies to the particular set of facts in this case, then the first charge faced by Quinton has been proven beyond a reasonable doubt, as Quinton ought to have been looking to this situation.

The Crown's Position with respect to Count #2

[38] On the second count, the Crown's focus was on whether Vryenhoek had received instruction and information regarding how to protect himself from falling by means of installing guardrails. It is the Crown's position that Quinton knew, or ought to have known, that guardrails should be installed, and that they ought to have had a policy, and information and instruction for its workers to protect themselves in this manner when working at a height of less than nine feet.

[39] The Crown's position is that if I accept that the only substantive information and instruction to workers at Quinton was that they should wear fall protection equipment when working at nine feet or more above ground level, I must therefore conclude that this is not sufficient to protect the health and safety of workers at Quinton, as it did not consider any safety mechanism other than fall protection equipment.

[40] A great deal of the evidence heard during the trial dealt with the training and instruction received by workers at Quinton. Each new employee, and this included employees returning to work again at Quinton after an absence, such as Vryenhoek, received new employee training from Leach, pursuant to Quinton's "New Employee Manual", and summarized on a "New Employee Orientation Form" developed by Leach. This included a test. As well, there was a mandatory health and safety meeting for all employees held each year around Christmas which also included a test component. Quinton had also developed a Fall Prevention and Fall Arrest Policy in 2005 and 2006.

[41] The Crown is also of the opinion that simply because Vryenhoek was an experienced worker, this does not absolve Quinton of its responsibilities in this regard: See *Ontario (Ministry of Labour) v. Deep Foundations Contractors Inc.*, [2012] O.J. No. 5331 (C.J.) at paragraph 49 and *R. v. Petro-Canada*, [2008] O.J. No. 4396.

The Defendant's Position with respect to Count #1

[42] The defence position is grounded in the premise that just because a death occurred, Quinton is not automatically guilty of an offence. Simply put, the defence contends that it was not reasonable, in the circumstances, for Quinton to have placed guardrails around the open sides of the planks on which Vryenhoek had been standing.

[43] Defence also argues that it is inappropriate for me, when deciding if the *actus reus* has been committed, to consider Quinton's actions after the accident. On that point, it cites the case of *R. v. Dana Canada Corp.*, [2008] O.J. No. 4487 (C.J.) which quotes from a 2008 unreported Ontario Court of Justice decision of Justice Lane in *R. v. Warren Bartram*, in which the court stated:

> *"Post accident changes or improvements, standing by themselves, cannot be taken as an admission of liability or a basis for a finding of liability but evidence of subsequent repair is a circumstance that can be considered, along with other evidence of negligence to show prior knowledge of a hazard, control over the location of the accident or the feasibility of measures."*

[44] The requirement for fall protection is triggered by the hazard of falling a distance. As noted earlier, section 85 of the *Industrial Establishments Regulation* mandates a worker to wear a fall arrest system at heights of three metres or more. Likewise, the *Construction Projects Regulation*, in section 26, addresses the issue of a worker being exposed to the hazard of falling more than three metres. As noted earlier, section 26.3(1) mandates a guardrail at a lesser height, where a worker is exposed to a fall of 2.4 metres or more from the edge or an open side of a floor, including the floor of a mezzanine or balcony, the surface of a bridge, a roof while formwork is in place, or a scaffold platform or other work platform, runway or ramp.

[45] As I indicated earlier, both Crown and defence counsel agree that the *Construction Projects Regulation* does not apply in this case. However, defence counsel suggests that I can still consider its provisions when deciding whether it was reasonable for Quinton to have required guardrails. There was also clear evidence from Leach that Quinton, through its health and safety consultants, borrowed from the language and requirements of the *Construction Projects Regulation* as well as the regulated requirements in section 85 of the *Industrial Establishments Regulation* in developing its Fall Prevention and Fall Arrest Policy.

[46] As an example of how it is appropriate for me to consider non-applicable regulations, defence counsel points to the case of *Re Canadian Union of Public Employees, Local 870*, [1987] O.O.H.S.A.D. No. 13, a decision in which the Director of Appeals of the Occupational Health and Safety Division of the Ontario Ministry of Labour considered the provi-

sions of the *Industrial Establishments Regulation*, notwithstanding the fact that the workplace in question was not an industrial establishment.

[47] It is defence's position that section 25(2), a catch-all section of the *OHSA*, cannot be endlessly malleable, to be used as the basis for charges, especially when there are other sections of the *OHSA* or its regulations that are on point. In support of this, the defence draws my attention to the case of *Re General Motors of Canada Ltd.*, [1991] O.O.H.S.A.D. No. 11, a decision of an Occupational Health and Safety Inspector. At paragraphs 15 and 16 of the decision, Adjudicator Blair states:

> *"It is not my role, or the role of the Inspector, to rewrite the Regulations. This is not to say, of course, that the Regulations provide an exhaustive code of what will constitute reasonable precautions for the safety of workers in all circumstances. However, where the Regulations clearly address a specific subject matter ...unless there is something distinctive about a particular workplace setting which renders the applicable regulation manifestly inadequate to deal with those unique circumstances, it would be contrary to the principles of the Act to use subsection 14(2)(g)* [now 25(2)(h)] *to amend the Regulations. The Act clearly contemplates the use of the regulation-making power to deal with specific situations, and those regulations have the force of law.*
>
> *In the context of occupational health and safety, regulations play a pivotal role. It is not possible or desirable to address every conceivable workplace situation in an act of the Legislature. At the same time, however, the workplace parties require some degree of certainty about their rights and responsibilities in order to apply the Act on a daily basis. Similarly, those charged with enforcing the Act require, wherever possible, clear standards by which to measure the conduct of the workplace parties. Regulations provide for that certainty."*

[48] Relying on this, the defence urges me in this case not to extend the requirements of fall protection, through the use of section 25 of the *OHSA*, beyond what is mandated in section 85 of the *Industrial Establishments Regulation* or, in different workplaces, section 26.3 of the *Construction Projects Regulation*. The *General Motors* case was followed in the Ontario Labour Relations Board decision in *National Steel Car*, [2010] O.O.H.S.A.D. No. 9. In that case, an order issued pursuant to section 45 of the *Industrial Establishments Regulation* was being appealed. In her decision, Vice-Chair McKellar stated, at paragraphs 32 and 33:

> *"Unlike section 45(a), section 85 of the Regulation explicitly addresses concerns about <u>where</u> work is performed, and deals specifically with precautions that must be taken to protect workers who perform work elevated off the ground from the risk of falling. The height from which one of the Employer's workers might fall (1.5 metres) while working on a flatbed trailer is not of sufficient magnitude (3 metres) to engage the requirements of section 85 of the Regulation.*
>
> *Whether an employer has done all it must do to protect workers against the hazard of falling is normally to be assessed having regard to the industrial safety standard*

specifically promulgated to address the hazard of falling – section 85 of the Industrial Establishments regulation. This Order imposes on the Employer a more stringent standard than that imposed by the provisions of the Industrial Regulation designed to address this specific hazard. It cannot be valid to impose a standard more exact than that provided in section 85 simply by issuing an order. The situation here is identical conceptually to that addressed in the General Motors case…where the adjudicator found that an order made under the "every reasonable precaution" section of the Act could not stand were [sic] *it imposed a more stringent standards* [sic] *than that prescribed by the regulation specifically dealing with the hazard in question."*

[49] Similarly, in another Ontario Labour Relations Board case, *Falconbridge Ltd.*, [2000] O.O.H.S.A.D. No. 69, the Ministry of Labour itself appears to support this position. At paragraph 13, Vice-Chair Trachuk states:

"The Ministry bases this argument on the principle that if a matter is dealt with in the Regulations a company cannot be held to a higher standard through the use of section 25. However, that principle is only applicable if the Regulation deals specifically and completely with the statutory requirement and does not conflict with it."

[50] The defence also directly challenges the crown's decision to proceed under the general duty clause of the *OHSA*, rather than with a charge under section 13 of the *Industrial Establishments Regulation*, as recommended by Den Bok. To support this point, it cites the case of *Re Domtar Inc.*, [1988] O.O.H.S.A.D. No. 11, in which the Director of Appeals of the Occupational Health and Safety Division of the Ontario Ministry of Labour states, at paragraph 16:

"However I accept Mr. Theodoru's submission that it could be abusive to use an omnibus provision such as section 14(2)(g) [now 25(2)(h)] *to extend the ambit of the legislation where a regulation is in place that specifically addresses the hazard which is the subject matter of the order."*

[51] To accept the proposition that, under section 13 of the *Industrial Establishments Regulation*, guardrails are required at any height, and to impose that requirement on Quinton through the general duty clause of the *OHSA*, the defence argues, might well render section 85 of the *Industrial Establishments Regulation* meaningless.

[52] The defence also argues that section 13 of the *Industrial Establishments Regulation*, with its requirement for guardrails, is concerned with the fixed premises of industrial establishments and does not set a standard for mobile or temporary setups of equipment which are addressed in section 85. To support this, defence cites the Ontario Labour Relations Board case of *Pepsi Bottling Group (Canada) Co.*, [2005] O.O.H.S.A.D. No. 217. In that case, an inspector under the *OHSA* had issued an order requiring the employer to ensure that measures be taken to prevent workers from accidentally falling from platforms when workers were unloading or loading from work platforms on sides of delivery trucks greater than a 24" height from the ground. The case considers the applicability of section 13(1)(a) of the *Industrial Establishments Regulation*. Vice-Chair McKee states, at paragraph 13:

"What is reasonable in the circumstances of a platform or mezzanine floor in what will usually be a fixed location in a building is, according to the Regulation, not reasonable on a loading dock where employees are loading and unloading trucks. I conclude that this has to do with the nature of the work that employees perform in and around trucks during the loading process, and the fact that buildings are stationary and trucks move. It is not, therefore, in my view, reasonable to import standards from the Building Code to define what is reasonable in the circumstances when there are better analogies in the same section of the Regulation on which the Ministry relies."

[53] Earlier, in paragraph 12 of the same decision, the Vice-Chair had stated:

"With all due respect, there is a difference between a building and a truck."

Defence counsel urges that a similar distinction can be made between a building and a system of A-frames and planks. However, I note that section 13(2)(a) of the *Industrial Establishments Regulation* specifically omits loading docks from the guardrail requirements of section 13(1).

[54] Distinctions can also be made, according to the defence, because of the headings used within the *Industrial Establishments Regulation*. Section 13 is found in a portion of the regulation under the heading "*Premises*". Section 85 is located under the heading "*Protective Equipment*". The seminal text in the field of statutory interpretation is the *Construction of Statutes*, the 5th edition of which (LexisNexis: Markham) was written by Professor Ruth Sullivan in 2008. On the subject of headings within legislation, Sullivan states at pages 392 and 393, that:

"To any person reading legislation, headings appear to be as much a part of the enactment as any other component. There is no apparent reason why they should be assigned an inferior status."

She continues to state, later on page 393:

"The view favoured in most recent judgments from the Supreme Court of Canada is that for purposes of interpretation headings should be considered part of the legislation and should be read and relied on like any other contextual features."

[55] Professor Sullivan cites Estey J.'s decision in *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 481 (S.C.C.), at 486-487, as an example of this. Within the specific context of the *Industrial Establishments Regulation*, the Ontario Court of Appeal's recent decision in *Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc*. (2011), 107 O.R. (3d) 763, at 772-773 is another example where a heading within legislation is held to be a *"relevant and proper guide to the interpretation"*.

[56] Defence counsel urges me to conclude that it was not reasonable for Quinton to be required to install guardrails.

The Defendant's Position with respect to Count #2

[57] With respect to the second charge faced by Quinton, defence argues that I must consider whether the information and instruction specifically provided to Vryenhoek himself was adequate. This can vary, therefore, from case to case, depending on the specific instruction required by both the *OHSA* and any relevant regulations, and also taking into account the actual degree of knowledge and expertise of the worker. On this point, the defence draws my attention to the case of *R. v. Inco Ltd.*, [2006] O.J. No. 4218 (C.J.) wherein the experience of the specific worker is considered by the court.

[58] In this case, there is evidence that Vryenhoek was an experienced fitter welder and that he had previously been the representative, on behalf of other workers, on Quinton's health and safety committee. Leach testified that when Vryenhoek returned to work at Quinton in March 2012, he required Vryenhoek to complete the same new employee orientation as any other new worker, notwithstanding his previous employment of several years' duration with Quinton.

[59] This orientation contained one hour – one-third of the entire orientation – spent on fall safety instruction. Other Quinton employees, such as Appleton and Manickchand, testified that fall safety instruction was provided to them in new employee orientation by Leach. All Quinton employees who testified stated that the annual Christmas health and safety review, which they were required to attend, went over fall protection and safety issues.

[60] In summary, the defence contends that I have no evidence to suggest a deficiency in the content or the format of the instruction provided by Quinton to Vryenhoek.

Rulings

[61] Public welfare legislation such as the *OHSA* contains very broad, general provisions. It is remedial legislation, and, as not every contingency can be considered and governed by statute or regulation, there is a need for a general duty clause, such as that found in section 25. The *OHSA*, therefore, is to be interpreted liberally in a way that will give effect to its purposes and objectives of promoting safety and preventing harm. See *R. v. Timminco* (2001), 54 O.R. (3d) 21 (C.A.) at para. 22.

[62] I also keep in mind the Court of Appeal's ruling in *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37, at para. 16 where Sharpe J.A. stated:

> *"Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided."*

[63] In *Ontario (Ministry of Labour) v. Dofasco Inc.* (2007), 87 O.R. (3d) 161, the Court of Appeal states, at para. 25:

> "*Employees encounter all variations of workplace hazards. Some are inadvertent – for example, employees may slip, misjudge distances, lose their balance, their timing or dexterity may be off, lose concentration or simply be careless. Physical guards or their equivalent are obviously required to prevent against injury in these situations*."

[64] However, the *OHSA* cannot achieve the impossible goal of a completely safe, risk-free work environment. There is no duty on the part of the employer to anticipate every possible failure: See *R. v. Petro-Canada*, [2008] O.J. No. 4396 (C.J.), at para. 172. Or, as the Court of Appeal put it in the case of *Blue Mountain Resorts Ltd. v. Den Bok* (2013), 114 O.R. (3d) 321, at para. 26:

> *"This generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions, however."*

[65] In this case, I am of the opinion that it is clearly appropriate, sensible and relevant to consider the applicability of the general duty clause in section 25 of the *OHSA* within the context of requirements under different sections of both the *Industrial Establishments Regulation* and the *Construction Projects Regulation*, while acknowledging, especially with respect to the *Construction Projects Regulation*, that those requirements may not be binding in this case. But to ignore rigidly such provisions can also result in narrow, technical or illiberal interpretations of the law.

[66] A review of the legislation, therefore, shows the following with respect to this case:

1. Fall protection equipment was not required to have been worn by Vryenhoek, as he was working at a height of less than 3 metres above ground level. This requirement is stated in section 85 of the *Industrial Establishments Regulation*, which governs this case. This section is found within the portion of the *Industrial Establishments Regulation* headed *"Protective Equipment"* which also discusses when workers are required to wear head protection, eye protection, foot protection, and when workers should confine long hair, and not wear jewellery or loose clothing. Other than a fall arrest system such as a safety belt or harness and lifeline, outlined in section 85, the only other mention of any form of fall protection in the *"Protective Equipment"* portion of the *Industrial Establishments Regulation* is found in section 86 which requires workers to wear life jackets where there is a hazard of falling into liquids that are sufficiently deep that there is a risk of drowning. Guardrails are not mentioned anywhere in the *"Protective Equipment"* portion of the *Industrial Establishments Regulation*.

2. Had Vryenhoek been working in a workplace that was governed by the *Construction Projects Regulation*, which he was not, he also would not have required fall arrest equipment, as section 26 of the *Construction Projects Regulation* only requires this if a worker is exposed to the hazard of falling 3 metres or more.

3. Had Vryenhoek been working in a workplace that was governed by the *Construction Projects Regulation*, which he was not, he also would not have required a guardrail system, as section 26.3 of the *Construction Projects Regulation* only mandates a guardrail system if a worker is exposed to a potential fall of 2.4 metres of more.

4. Section 13(1)(b)(i) of the *Industrial Establishments Regulation* requires a guardrail *"at an open side of a raised floor, mezzanine, balcony, gallery, landing, platform,*

walkway, stile, ramp or other surface". This section is found within the portion of the *Industrial Establishments Regulation* headed *"Premises".* There are no minimum height requirements mentioned at all in this section. If no restrictions or limitations were placed on the interpretation of this section, its applicability in workplaces would be sweeping and omnipresent.

[67] It is very difficult to reconcile the requirements of sections 13 and 85 of the *Industrial Establishments Regulation*. If section 13 really requires guardrails to be installed, in its broadest interpretation, at an open side of an "*other surface*", its scope would be breathtaking. It would also raise other real and substantive questions. Why would guardrails be required on any raised surface, no matter how slight, if the workplace were governed by the *Industrial Establishments Regulation*, yet only be required at a height of 2.4 metres above ground level if the workplace were governed by the *Construction Projects Regulation*? Why would there be a need at all for fall protection equipment, as outlined in section 85 of the *Industrial Establishments Regulation*, if guardrails were required along the sides of all raised surfaces of any height whatsoever?

[68] The only way of reconciling these obvious contradictions on when and where a guardrail must be erected is to limit the applicability of section 13 of the *Industrial Establishments Regulation*, as otherwise section 85 of that same regulation would be meaningless, and section 26 of the *Construction Projects Regulation* would create a much less strict regime for when guardrails were required, which would also make little sense.

[69] In *R. v. Proulx*, [2000] 1 S.C.R. 61, Chief Justice Lamer stated at para. 28:

> *"It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage."*

[70] Professor Sullivan, in the 5th edition of *Construction of Statutes*, states, at page 210:

> *"Every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant."*

[71] Therefore, as suggested by defence counsel, there do need to be restrictions placed on the applicability of section 13 of the *Industrial Establishments Regulation*. The limits suggested by defence counsel, so that it only governs the fixtures, as opposed to the chattels, contained within an industrial building, make sense, especially considering the headings used within that regulation. Raised floors, mezzanines, balconies and galleries are fixed in place, attached to the building itself. Within this context, section 13 makes sense. I am led, therefore, to the logical conclusion that section 13 does not cover the specific circumstances of the tragic death of Vryenhoek, when he fell from the unattached A-frame and plank system.

[72] Otherwise, to give section 13 the wide interpretation urged on me by the Crown begs the question of why the Crown specifically rejected Den Bok's recommendation of a

charge pursuant to that section.

[73] The only sensible explanation as to why the Crown did not charge under this section is because it too must have concluded that it would be incorrect in law to give it such an open-ended interpretation, and that therefore, if it wished to prosecute Quinton for the death of Vryenhoek, it would have to do so, by default, by means of section 25.

[74] In conclusion, therefore, I find as a matter of law, that the applicability of section 13 of the *Industrial Establishments Regulation* is limited, such that the guardrails required along the open sides of raised floors, mezzanines, balconies, galleries, landings, platforms, walkways, stiles, ramps or other surfaces mentioned in section 13(1)(b)(i) are only required when they are attached to the premises of the building or factory itself. This accords logically with the heading *"Premises"* under which this section is found within the regulation itself, as well as with the references to the *Building Code* in sections 14 and 15 of the regulation, which make no sense in the circumstances of this case. Therefore, with respect to the facts of this case, provisions within the *Industrial Establishments Regulation* contained under the heading *"Protective Equipment"* must, as matters of law, be more relevant and on point than those contained under the heading *"Premises"*.

[75] I conclude, then, as a matter of fact and law, that the provisions of section 13 of the *Industrial Establishments Regulation* do not apply in this case. I further conclude, as a matter of law, that the provisions of section 85 of the *Industrial Establishments Regulation* form a complete and discrete code with respect to the requirements for protecting workers from falls in a case such as this, where the worker is standing atop an A-frame and plank system that is a chattel rather than a fixture within the industrial establishment.

[76] I further conclude, therefore, that based on the *General Motors* and *National Steel Car* cases, cited earlier, it is not appropriate for the Crown to use the general duty clause of section 25 of the *OHSA* to extend requirements beyond those specifically outlined in section 85 of the *Industrial Establishments Regulation*, which does govern this situation.

[77] I further find and accept as fact that no one is aware of any prior similar incidents of a fall or an almost-fall from the A-frame and plank system used by Quinton, where the workplace was open and all activity was generally visible to many people, as well as that the A-frame system in use at Quinton was never the subject of criticism (or approval) by any Ministry of Labour inspector, though the system was never explicitly drawn to the attention of any such Ministry inspector.

[78] Because of this, I find, as a matter of law, that it was not reasonable in this situation for Quinton to have been specifically required to install guardrails to be used in conjunction with the A-frame and plank systems when the worker in question, Vryenhoek, was standing at a height of only 6.5 feet.

[79] As well, as I noted earlier, the photographic evidence indicates that there was a form of guardrail in existence at the time and place that Vryenhoek's fatal accident occurred. None of the other Quinton employees knew who had constructed it. It is not unreasonable,

therefore, to conclude that Vryenhoek himself may well have placed it there. In light of the existence of the guardrail, it is my conclusion that the Crown's attempt to convict on count #1 must also therefore fail because it did not prove the particulars of the offence alleged.

[80] The use of particulars to provide details regarding a charge is mandated within section 25(6) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended, which states:

> *"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."*

[81] Case law from the Supreme Court of Canada also requires the use of particulars when necessary. And where they are present, particulars form part of the charge. The Supreme Court of Canada makes this very clear in the case of *R. v. Saunders*, [1990] 1 S.C.R. 1020, 56 C.C.C. (3d) 220 where McLachlin, J. (as she then was), at page 223 [C.C.C.] states:

> *"It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved."*

She continues later, on the same page, as follows:

> *"The Crown chose to particularize the offence in this case... 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."*

[82] The particulars in count #1 are clear. They allege that Quinton failed to install guardrails at the open sides of a raised wood platform. The photographic evidence indicates that this is not true.

[83] As I have concluded that there was no legal requirement, under section 85 of the *Industrial Establishments Regulation*, for Quinton to have installed guardrails in this situation, it leads me to conclude that there was no gap in the instruction and information which Quinton had provided to Vryenhoek with respect to his working on a raised platform. Therefore, the Crown's case with respect to count #2 must also fail.

[84] As well, I would add that Quinton's post-accident conduct of immediately acquiescing and complying with the orders imposed by Den Bok, which I believe occurred solely out of its genuine dismay and shock that an employee had died on the jobsite, indicates that, if I were to be convicting and sentencing Quinton, which I am not, there would be little, if any, need for specific deterrence.

Conclusion

[85] In summary, for the reasons that I have outlined herein, I am not satisfied that the Crown has proven beyond a reasonable doubt that Quinton committed either of the offences with which it was charged. Both charges against it are dismissed.

[86] I wish to thank both Crown and defence counsel for their thoughtful and thorough arguments in this matter, and for the interesting legal points they raised. As well, I wish to extend my sympathy to Mr. Vryenhoek's family, friends and co-workers.

Released: December 17, 2014

Signed: "Justice of the Peace Thomas Stinson"