Her Majesty the Queen in the Right of Ontario (Ministry of Labour) v. The Corporation of the City of Guelph et al.

[Indexed as: Ontario (Ministry of Labour) v. Guelph (City)]

110 O.R. (3d) 517

2012 ONCJ 251

Ontario Court of Justice,
Epstein J.
April 20, 2012

Employment -- Occupational health and safety -- Offences -- Offence under s. 31(2) of Act of providing negligent or incompetent advice which endangered worker not a continuing offence -- Wall of municipal building collapsing five years after completion of project -- Charges against architect and engineer under s. 31(2) not instituted within one year after last act or default upon which prosecution was based occurred as required by s. 69 of Act -- Discoverability principle not applying to limitation period in s. 69 -- Offence under s. 25(1)(e) of Act of failing as employer to ensure that wall was safe for workers a continuing offence -- Charge against City under s. 25(1)(e) not statute-barred -- Occupational Health and Safety Act, R.S.O. 1990, c. O.1, ss. 25(1)(e), 31(2), 69.

The defendant City undertook a project in one of its parks to construct a building containing washrooms and change rooms. The project was substantially completed in June 2004. In June 2009, a student was killed when a concrete wall in the women's washroom fell apart. The City was charged with failing, as an employer, to ensure that a wall was capable of supporting all

loads to which it may be subjected, without causing the materials therein to be stressed beyond the allowable unit stresses, contrary to s. 25(1)(e) of the Occupational Health and Safety Act. The other defendants, the project's architect and engineer, were charged with providing negligent or incompetent advice which endangered a worker contrary to s. 31(2) of the Act. The defendants brought a motion to dismiss the charges on the basis that they were laid outside the limitation period in s. 69 of the Act, which provides that "No prosecution under this Act shall be instituted more than one year after the last act or default upon which the prosecution is based occurred." The Ministry submitted that ss. 25(1)(e) and 31(2) of the Act create continuing offences and that the limitation period did not begin to run until the wall collapsed, less than a year before the charges were laid.

Held, the motion should be dismissed with respect to the City and granted with respect to the other defendants. [page518]

The offence under s. 31(2) of the Act of providing negligent or incompetent advice is not a continuing offence. The alleged provision by the architect and the engineer of negligent or incompetent advice occurred years before the wall collapsed. The fact that the danger may have continued did not serve to extend the limitation period. The discoverability principle does not apply to s. 69 of the Act. The charges against the architect and engineer were laid outside the limitation period in s. 69. The offence under s. 25(1)(e) of the Act is a continuing offence. The charge against the City did not relate to a single act and was not tied to the construction project. Rather, s. 25(1)(e) imposed a duty on the City in its role as employer to ensure that a workplace was maintained in a safe manner. That obligation continued beyond any construction phase and endured for as long as the site remained a workplace. The charge against the City was not statute-barred.

Cases referred to

R. v. Pickles, [2004] O.J. No. 662, 237 D.L.R. (4th) 568, 184 O.A.C. 78, 41 C.L.R. (3d) 166, 5 M.P.L.R. (4th) 1, 60 W.C.B. (2d) 556 (C.A.); R. v. Rutherford, [1990] O.J. No. 136, 38 O.A.C. 41, 37 C.L.R. 238, 75 C.R. (3d) 230, 9 W.C.B. (2d) 743 (C.A.); R. v. Unicrane Inc., [1991] O.J. No. 3776, 1991

CarswellOnt 2955 (C.A.), apld
Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc., [2010] O.J. No. 1504, 2010 ONSC 2013, 261 O.A.C. 27, 93 C.L.R. (3d) 145 (S.C.J.) [Leave to appeal refused [2011] O.J. No. 24, 2011 ONCA 13, 272 O.A.C. 347, 328 D.L.R. (4th) 343]; R. v. Bell, [1983] 2 S.C.R. 471, [1983] S.C.J. No. 83, 3 D.L.R. (4th) 385, 50 N.R. 172, 8 C.C.C. (3d) 97, 36 C.R. (3d) 289, 11 W.C.B. 13; R. v. Industrial Appeals Court, ex parte Barelli's Bakeries Pty Ltd., [1965] V.R. 615 (S.C. Vict., Aus.), consd
Other cases referred to
Ontario (Ministry of Labour) v. Hamilton (City) (2002), 58 O.R. (3d) 37, [2002] O.J. No. 283, 155 O.A.C. 225, 52 W.C.B. (2d) 484 (C.A.); R. v. EFCO Canada Co., [2010] O.J. No. 3939, 2010 ONCJ 421; R. v. Hamilton Health Sciences Corp. (2000), 51 O.R. (3d) 83, [2000] O.J. No. 3929, 137 O.A.C. 187, 7 C.C.E.L. (3d) 30, 47 W.C.B. (2d) 564 (C.A.); R. v. Kidd Creek Mines Ltd., [1989] O.J. No. 3333, 2 C.O.H.S.C. 57 (Prov. Ct.); R. v. Newton-Thompson (2009), 97 O.R. (3d) 112, [2009] O.J. No. 2161, 2009 ONCA 449, 67 C.R. (6th) 243, 244 C.C.C. (3d) 338, 249 O.A.C. 320; Windsor Utilities Commission v. Ontario, [2005] O.J. No. 3370, 66 W.C.B. (2d) 333 (C.A.), affg [2005] O.J. No. 474, 13 C.E.L.R. (3d) 156, 63 W.C.B. (2d) 593 (S.C.J.)
Statutes referred to
Architects Act, R.S.O. 1990, c. A.26
Building Code Act, 1992, S.O. 1992, c. 23, s. 8(1) [as am.]
Occupational Health and Safety Act, R.S.O. 1990, c. O.1, ss. 12(1)(c), 14(1)(c) [rep. S.O. 1997, c. 16, s. 2(6)], 25 [as am.], (1)(e) [as am.], 31(2), 69
Ontario Water Resources Act, R.S.O. 1990, c. O.40, s. 94
Power Corporation Act, R.S.O. 1980, c. 384, s. 93(11)
Professional Engineers Act, R.S.O. 1990, c. P.28
Provincial Offences Act, R.S.O. 1990, c. P.33, s. 76(1)
Rules and regulations referred to
R.R.O. 1980, Reg. 691, ss. 61, 139

MOTION to dismiss charges as statute-barred. [page519]

D. McCaskill and S. Succi, for prosecution.

N. Keith, for defendant City of Guelph.

M. Sandler, for defendant L. Alan Grinham.

R. Cooper, for defendant Larry Argue.

EPSTEIN J.: --

Introduction

[1] The Corporation of the City of Guelph is charged between the 25th day of June 2003 and the 16th day of June 2009, with failing, as an employer, to ensure that a wall or other part of a workplace was capable of supporting all loads to which it may be subjected, without causing the materials therein to be stressed beyond the allowable unit stresses established under the Building Code Act, 1992, S.O. 1992, c. 23, at a workplace located at 25 Poppy Drive, Guelph, Ontario, contrary to s. 25(1)(e) of the Occupational Health and Safety Act, R.S.O. 1990, c. 0.1 (the "OHSA"), as amended.

[2] L. Alan Grinham is charged that between the 25th day of June 2003 and the 16th day of June 2009 he committed the offence, as an architect, as defined in the Architects Act, R.S.O. 1990, c. A.26 of providing negligent or incompetent advice, which endangered a worker, at a workplace located at 25 Poppy Drive, Guelph, Ontario, contrary to s. 31(2) of the OHSA.

[3] Larry Argue is charged that between the 25th day of June 2003 and the 16th day of June 2009, he committed the offence, as an engineer as defined in the Engineers Act [Professional Engineers Act, R.S.O. 1990, c. P.28], of providing negligent or incompetent advice, which endangered a worker, at a workplace located at 25 Poppy Drive, Guelph, Ontario, contrary to s. 31(2) of the OHSA.

[4] All defendants entered pleas of not guilty. By agreement of counsel, at the outset of the trial, the court heard a motion by all defendants to dismiss the charges on the basis

that the charges were laid outside the applicable limitation period and that there was no evidence of endangerment to a worker as defined in the OHSA.

[5] For the purpose of the preliminary motion, an agreed statement of fact was filed as exhibit #1.

[6] The Ministry opposed the motion and takes the position that the relevant offences are continuing offences and were laid well within the limitation period. In the alternative, it is the position of the Ministry that the court should consider that the applicable limitation period does not commence until the discovery of [page520] the alleged breaches of the OHSA. Finally, the Ministry argues that workers were endangered in the circumstances of this case.

Factual Background

[7] The statement of facts agreed to by the parties for the purpose of the preliminary motion can be summarized as follows:

(1) In 2003, the City of Guelph undertook a project in one of its parks to erect buildings containing washrooms, utility rooms and shower and change rooms.

(2) During the design phase, the defendant Grinham was the architect for the project and the defendant Argue was the professional engineer for the project.

(3) Construction commenced in accordance with the drawings for the project which were prepared and approved by the defendant Grinham and the structural design prepared and approved by the defendant Argue.

(4) The project was substantially completed on June 18, 2004.

(5) On November 11, 2005, the defendant Argue sent a letter to the firm of the defendant Grinham confirming that the engineering firm had done "several reviews" of the project and that all structural work was "complete" and "satisfactory".

(6) On October 5, 2007, the defendant Grinham sent a letter to the City of Guelph confirming that his firm had "conducted regular site visits" to the project "during the construction period, in order to ascertain compliance with construction documents as prepared by this office". Grinham went on in the letter to advise the City of Guelph that his

firm was of the opinion that the work had been done in general compliance with the construction documents submitted by the City for the purpose of obtaining the building permit for the project and submitted that the buildings were "suitable for the intended use and occupancy".

(7) The building which included the women's washroom was periodically cleaned and served by cleaning staff employed by the City of Guelph and was, at the material time, a workplace within the meaning of the Occupational Health and Safety Act.

(8) On June 16, 2009, Isabel Warren, a 14-year-old, grade-9 student, was killed by blunt force trauma when a concrete [page521] block privacy wall in the women's washroom at the park fell apart.

(9) Miss Warren and another student had entered the washroom to use the facilities and while waiting for a stall to become vacant Miss Warren turned her back to the wall and, placing her hands behind her, began to hoist herself onto the ledge of a change table affixed to the wall. The wall leaned forward and collapsed on Miss Warren.

(10) At the time of the incident, no City workers were engaged in any workplace activity in the washroom where the fatal accident occurred.

The Relevant Provisions of the Occupational Health And Safety Act

[8] Section 25 of the OHSA reads as follows:

Duties of employers

25(1) An employer shall ensure that,

(a) the equipment, materials and protective devices as prescribed are provided;

(b) the equipment, materials and protective devices provided by the employer are maintained in good condition;

(c) the measures and procedures prescribed are carried out in the workplace;

(d) the equipment, materials and protective devices provided by the employer are used as prescribed;

and

(e) a building, structure, or any part thereof, or any other part of a workplace, whether temporary or permanent, is capable of supporting any loads that may be applied to it,

(i) as determined by the applicable design requirements established under the version of the Building Code that was in force at the time of its construction,

(ii) in accordance with such other requirement as may be prescribed, or

(iii) in accordance with good engineering practice, if subclauses (i) and (ii) do not apply.

[9] Section 31(2) of the OHSA reads as follows:

Architects and engineers

31(2) An architect as defined in the Architect's Act, and a professional engineer as defined in the Professional Engineers Act, contravenes this Act if, as a result of his or her advice that is given or his or her certification required under this Act that is made negligently or incompetently, a worker is endangered. [page522]

[10] Section 69 of the OHSA reads as follows:

Limitation on prosecutions

69. No prosecution under this Act shall be instituted more than one year after the last act or default upon which the prosecution is based occurred.

Position of the Parties

[11] The defendants Grinham and Argue are aligned in their positions. They apply for a dismissal of the charges at the outset on the basis

(1) that the prosecution is out of time and statute-barred in that the charges were laid in excess of one year after "the last act or default upon which the prosecution is based occurred", thereby contravening s. 69 of the Occupational

Health and Safety Act; and

(2) that the advice given by them did not, in law, "endanger a worker", an essential element of the offences as charged under s. 31(2) of the Act.

[12] It should be noted that the preliminary arguments in this case do not in any way constitute an admission by these defendants that they provided negligent or incompetent advice in relation to this construction project.

[13] The Corporation of the City of Guelph applies, at the outset, for a dismissal of the charge it faces on the basis of the limitation period set out in s. 69 of the Act.

[14] The Ministry of Labour submits that s. 25(1)(e) and s. 31(2) of the OHSA are continuing offences and, as such, the limitation period set out in s. 69 of the Act does not begin to run until the collapse of the wall on June 16, 2009, less than one year prior to the charges being laid. Moreover, the principle of discoverability applies to these offences according to the Ministry position. The Ministry submits that a determination that these offences are continuing offences is supported by a purposive interpretive approach to the OHSA. Furthermore, it is argued by the Ministry that workers were "endangered" as that word is used in s. 31(2) of the Act.

Analysis

The applicability of s. 69 OHSA in relation to the defendants Grinham and Argue

[15] All parties have made reference in their arguments to the leading cases of R. v. Rutherford, [1990] O.J. No. 136, 75 C.R. (3d) 230 (C.A.) [page523] and R. v. Pickles, [2004] O.J. No. 662, 237 D.L.R. (4th) 568 (C.A.). Interestingly, both sides urge that the proper interpretation of these cases supports their diametrically opposed positions.

[16] In Rutherford, the appellant was convicted of two counts of an offence under the Power Corporation Act, R.S.O. 1980, c. 384 relating to his work as an electrical contractor.

[17] The charges were as follows:

that, [he]

Being a contractor who made an electrical installation at the premises located at: Lot 35, concession 5, Darlington Township, Durham Region, Ontario, did neglect to comply with Ontario Regulations 183/84 in that he did install a 100 ampere service with less than a 24 circuit panelboard, contrary to Rule 8-108(1)(b) of the said Ontario Regulations, and did thereby commit an offence under s. 93(11)(b) of the Power Corporation Act, R.S.O. 1980, Chapter 384, as amended.

[and further that he]

Being a contractor who made an electrical installation at the premises located at : Lot 35, Cencession 5, Darlington Township, Durham Region, Ontario, did neglect to comply with Ontario Regulations 183/84, in that he did fail to install proper electrical grounding on the service switch, contrary to Rule 10-204 of the said Ontario Regulations, and did thereby commit an offence under s. 93(11)(b) of the Power Corporation Act, R.S.O., chapter 384, as amended.

[18] Subsection 93(11) of the Power Corporation Act provided, in part:

> 93(11) Every . . . individual
>
> . . . . .
>
> (b) refusing or neglecting to comply with . . . any regulation . . . is guilty of an offence and on conviction is liable to a fine of not less than $25 and not more than $500 for each offence;
>
> (c) refusing or neglecting to comply with any order issued by the Corporation under subsection (5) [which permits the Corporation to issue corrective work orders] is guilty of an offence and on conviction is liable to a fine of not less than $100 and not more than $500 and a further fine of not less than $100 and not more than $500 for each and every day upon which such refusal or neglect is

repeated or continued.

[19] The applicable limitation period was set out s. 76(1) of the Provincial Offences Act, R.S.O. 1990, c. P.33 as follows:

Limitation

76(1) a proceeding shall not be commenced after the expiration of any limitation period prescribed by or under any Act for the offence, or where no limitation period is prescribed, after six months after the date on which the offence was, or is alleged to have been, committed. [page524]

[20] The work done by Rutherford was completed on August 23, 1985. The work was inspected on February 16, 1986 and the charges were laid some 14 and a half months after performance and nearly nine months after inspection. The prosecution contended that these were continuing offences as alleged in the information "between August 1985 and September 23, 1986".

[21] In determining whether the offences charged in Rutherford were continuing offences, the Court of Appeal focused on the exact nature of the prohibited acts or omissions. The court, at p. 232 C.R., emphasized the importance of appreciating "exactly what it was that the appellant did that brought about the charges". It was found that the appellant "installed an improper panel board and provided improper grounding on the service switch at the [named] premises". This work had all been completed by August 23, 1985. During the time period set out in the charges, the faulty work had not been corrected notwithstanding repeated demands to remedy the defects.

[22] In speaking for the majority, Grange J.A. found that the offences were not continuing offences. He found that the faulty installation, which was the act complained of, had been completed on August 23, 1985 and that the limitation period then began to run.

[23] In Rutherford, the prosecution, in support of its contention of continuing offences, had relied on a passage from

R. v. Bell, [1983] 2 S.C.R. 471, [1983] S.C.J. No. 83, at p. 488 S.C.R. as follows:

> A continuing offence is not simply an offence which takes or may take a long time to commit. It may be described as an offence where the conjunction of the actus reus and the mens rea, which makes the offence complete, does not, as well, terminate the offence. The conjunction of the two essential elements for the commission of the offence continues and the accused remains in what might be described as a state of criminality while the offence continues.

[24] With reference to this argument by the prosecution, Grange J.A. said, at p. 234 C.R.:

> It is submitted that so long as the faulty installation remains in place, the offence of "refusing or neglecting to comply" continues.
>
> This argument overlooks the fact that the "refusal or neglect to comply" is particularized in the charges by the words "in that he did install a 100 ampere service with less than a 24 circuit panelboard . . ." and "in that he did fail to install proper electrical grounding on the service switch . . .". It is the manner of the installation that is the complaint. While there may be continuing ill effects of the improper installation, there is no continuing offence after August 23, 1985, when the work was completed.

[25] Grange J.A. went on in his analysis in Rutherford, at pp. 235-36 C.R., as follows: [page525]

> The offences here are clearly not of the first type. Nor do I think they are of the second. The duty imposed on this appellant is not a continuing one. There is nothing further he has to do. If he were obliged to remit money to a government authority (see R. v. Sakellis, [1970] 1 O.R. 720 (C.A.) or failed to make payment of wages (as in R. v. Industrial Appeals Court, supra, and Dressler v. Tallman Gravel and Sand Supply (No. 2), [1963] 2 C.C.C. 25 (Man. C.A.)) . . . the offence might well be considered continuing

because he continued to fail to do what was required of him. As Smith J. put it in a concurring opinion in R. v. Industrial Appeals Court, supra, at p. 623:

> The distinction is between, on the one hand, an offence which, once committed, is complete and concluded and exists only in the past, and, on the other hand, an offence constituted by a continuing breach of a duty to take action to put an end to a forbidden state of affairs, ...
>
> It is considerably easier to find a continuing offence where the statute provides for a penalty for every day that the corrective work is not done or the offending activity continues to be done. Such a provision is found in s. 93(11)(c) of the Act, which relates to continued disobedience of an order made under s. 93(5). The juxtaposition of this provision in s. 93(11)(c) to the absence of such a provision in s. 93(11)(b) is significant. Under s. 93(11)(b) there is no mention of a continuing contravention and on the facts of this case, the appellant was engaged to perform specific electrical work. The performance was far from perfect; indeed, in the course of it he has committed two offences but after the completion of the contracted work his offences are complete. Saving an order issued under s. 93(5) or a notice under rule 2-018, he has no more connection with the work than has a stranger. As his last connection was more than six months before the proceedings were commenced, he is protected from prosecution by the limitation section of the Provincial Offences Act.

[26] In Pickles, the Court of Appeal adopted its decision in Rutherford. In that case, Pickles had been charged with building a dock without a permit, contrary to s. 8(1) of the Building Code Act of Ontario. The relevant statutory provision provided that it was an offence to "construct . . . a building . . . unless a permit had been issued therefor by the building official". Under the Building Code Act, there was a one-year limitation period from "the time when the subject matter of the proceeding arose". The information was sworn 13 months after the completion of the dock but within a few days of the discovery by the township that the dock had been built.

[27] It had been argued by the prosecution that this constituted a continuing offence. In rejecting this argument, the Court of Appeal adopted and emphasized the wording of Grange J.A. in Rutherford. In drawing a comparison to Rutherford, MacPherson J.A. said, at para. 22:

> In my view, Wilson J. was correct to rely on Rutherford in the present case. The nature of the offences in the two cases is similar. In both cases, there was a specific act -- faulty installation of electrical equipment and construction of a dock without a building permit. In both cases, the consequences of the specific act continued in a sense -- the electrical equipment was not [page526] repaired and a building permit was never obtained. However, in Rutherford this court held that the completion of the specific act triggered the commencement of the limitation period. As Wilson J. correctly recognized, the same interpretation, and result, should follow in the present case.

[28] MacPherson J.A. went on, in para. 23, to comment favourably upon the observation by Grange J.A. in Rutherford that it was considerably easier to find a continuing offence where the statute provided for daily penalties during the time when corrective work remained uncompleted.

[29] The defendants all made reference in their materials and in submissions to the case of R. v. Unicrane Inc., [1991] O.J. No. 3776, 1991 CarswellOnt 2955 (C.A.). This report was simply an appeal book endorsement by Houlden J.A., a portion of which is as follows [at para. 1]:

> Sections 61 and 139 of Regulation 691 under the Occupational Health and Safety Act R.S.O. 1980. C 321, as charged in this case, did not, in our judgment, create continuing offences: See R. v. Rutherford, unreported decision of this court dated February 5, 1989. The learned appeal judge did not have the benefit of the Rutherford case at this (sic) time that she heard the appeal.

[30] It was the position of the Crown that this endorsement

was of no assistance in the case at hand since it was devoid of meaningful context, explanation or analysis and even failed to identify the precise charges being considered.

[31] Since argument on this matter was heard, Mr. Sandler provided the court with further details of Unicrane which it had been thought were forever lost as a result of file damage occasioned by a flood. The court now has the information, reasons for conviction, the sentencing hearing and the endorsement of the summary conviction appeal judge in Unicrane, all of which add context to the Court of Appeal endorsement.

[32] One of the three charges against Unicrane was dismissed at trial and is of no import here. One of the charges held by the Court of Appeal not to constitute a continuing offence was that Unicrane, as an employer, failed to ensure that the protective measures and procedures prescribed in s. 139 of Reg. 691, R.R.O. 1980 were carried out in the workplace, contrary to s. 12(1)(c) of the OHSA. The particulars were that the defendant failed to ensure that a Kroll crane was set up, assembled or extended so as to conform with s. 139 of the Regulations.

[33] The second charge held by the Court of Appeal not to constitute a continuing offence was that Unicrane, as an employer, failed to ensure that the measures and procedures prescribed in s. 61 of Reg. 691, R.R.O. 1980 were carried out in the workplace, contrary to s. 14(1)(c) of the OHSA. The particulars were that the [page527] defendant failed to ensure that platforms located on a Kroll crane conformed with the requirements of s. 61 of the Regulations.

[34] The crane in that case had been erected about eight weeks prior to a fatal accident involving the crane operator. The charges were laid one year less one day after the accident but more than one year after the erection of the crane. The manufacturer's specifications had not been followed in the erection of the crane. There is no suggestion in the materials filed that the appellants remained on the site or had any presence there after the crane was erected. It is implicit in the endorsement of the Court of Appeal that the charges in that

case related to faulty erection of the crane by an employer and a supervisor and that any failure on their part was complete on the date of erection. There was nothing in the charging sections to provide for a penalty for each day that corrective work was not undertaken or the offending activity continued. Nor did the regulation provide that the obligation to erect a crane in accordance with the manufacturer's specifications continued beyond the date of erection.

[35] It is the position of the defendants that the charges in the instant case are indistinguishable from the nature of the charges held not to be continuing offences in Rutherford, Pickles and Unicrane.

[36] Essential to the analysis of this issue is a determination, as contemplated by both Rutherford and Pickles, of exactly what it is that the defendants did that brought about the charges. Regarding Grinham and Argue, it is clear that the allegation is that they provided negligent or incompetent advice which endangered a worker. The Crown has submitted that Rutherford is simply a case about faulty installation and Pickles about construction and that, therefore, they are similar to each other. However, it is argued, the charging section in the case at hand identifies the prohibited act or default as consisting of two elements: first, the giving of negligent or incompetent advice; secondly, as a result of that advice, a worker remains endangered. It is suggested by the Crown that the time when the advice is given is of no relevance since the offence is only crystallized when a worker is endangered as a result. The relevant time for the limitation period is the time when workers are endangered. In the circumstances of this case, it is suggested that alleged breaches of s. 31(2) continued until the date that the wall collapsed, at which point the workers were no longer endangered by it. It is the position of the Crown that this represents a significant difference from the nature of the charges in Rutherford and Pickles and that those cases are thereby distinguishable. [page528]

[37] With respect, I cannot agree. It is clear to me that the act complained of in this case is the providing of improper or

negligent advice. That occurred years before the collapse of the wall. Neither the architect nor the engineer was in any way involved with this workplace within the year preceding the laying of charges. However, it is not every improper or negligent advice that is caught by s. 31(2) of the OHSA. While there may well be civil ramifications for other improper or negligent advice, it is only such advice which endangers a worker that can be the subject of prosecution under the Act. The last day on which advice which allegedly endangered a worker was provided was years prior to the collapse of the wall. The fact that the danger may have continued does not serve to extend the limitation period in my view. This is no different from the position articulated by Grange J.A. in Rutherford, where he pointed out that just because there may remain continuing ill effects of the improper act that did not mean that the circumstances created a continuing offence. The act was complete when performed. The relevant time from which the limitation begins to run remains the last date on which the prohibited act occurred. In that sense, this case is similar to Rutherford, Pickles and Unicrane in that there is a distinct act undertaken at a specific time that gave rise to quasi-criminal liability. This court is therefore bound by the dictates of the Ontario Court of Appeal in Rutherford, Pickles and Unicrane in my view.

[38] Hearkening back to Industrial Appeals Court [R. v. Industrial Appeals Court, ex parte Barelli's Bakeries Pty Ltd., [1965] V.R. 615 (S.C. Vict., Aus.)] (which was adopted by the Ontario Court of Appeal in Rutherford and other cases), I consider again the two different kinds of crime indicated therein that are described as "continuous offences". The first is "constituted by conduct which goes on from day to day and which constitutes a separate and distinct offence each day the conduct continues". It is clear to me that this does not describe the offence alleged in this case. Neither Grinham nor Argue provided any negligent or incompetent advice for years prior to the collapse of the wall. This has been described by the defendants in their submissions as "the critical part of the actus reus" and I agree.

[39] The second type of conduct contemplated by Industrial

Appeals Court is "the kind of conduct, generally of a passive character, which consists in the failure to perform a duty imposed by law. Such passive conduct may constitute a crime when first indulged in but if the obligation is continuous the breach though constituting one crime only continues day by day to be a crime until the obligation is performed". It is my view [page529] that the circumstances in this case do not give rise to that type of continuing offence either. This is not an allegation of continuing passive conduct but one of providing negligent or incompetent advice at a fixed point in time. Even though it is alleged that their negligent or incompetent advice continued to pose a danger, it cannot be said that the architect or engineer continued to be obligated to provide advice in the years following the end of their responsibilities on the project. This is exactly the point of Rutherford, where it was found that after completion of the contracted work the offences were complete even though the work continued to be unsatisfactory.

[40] When one considers the analysis by the Supreme Court of Canada in Bell, this position is strengthened in my view. McIntyre J. spoke [at p. 488 S.C.R.] of a continuing offence being one in which the "conjunction of the actus reus and the mens rea, which makes the offence complete, does not, as well terminate the offence. The conjunction of the two essential elements for the commission of the offence continues and the accused remains in what might be described as a state of criminality while the offence continues." In the case at bar, the actus reus -- the giving of advice which endangered a worker -- took place when the wall construction was completed. There was a conjunction of the actus reus and mens rea (or, for strict liability offences such as those in this case the fault component -- i.e., negligence or incompetence) at the time the wall was constructed. It is clear, however, that the conjunction of the actus reus and the fault component did not continue as contemplated by Bell. While the danger continued, neither the act of giving advice nor the fault component of negligence or incompetence continued beyond the end of the defendant's work. Simply put, the offence did not continue to be committed each day.

[41] While it is not determinative of the issue, I take guidance from the statement of Grange J.A. in Rutherford, as noted by MacPherson J.A. in Pickles, that it is easier to find a continuing offence when the statute provides for a penalty for every day of default. The Court of Appeal made reference to the same consideration in R. v. Newton-Thompson (2009), 97 O.R. (3d) 112, [2009] O.J. No. 2161, 2009 ONCA 449 when determining that a statutory provision in the Child and Family Services Act requiring teachers to report, forthwith, suspicion of harm to a child did not constitute a continuing offence. Feldman J.A. stated, at para. 27:

> There is no language that states that the duty to report forthwith continues until the report is made. Nor does the CFSA provide a penalty that is incremental until a report is made. In contrast, for example, where an [page530] offence is committed under s. 206 of CFSA in respect of the provision of residences and residential care, an offender is liable to pay a fine for each day that the offence continues.

[42] In the case at hand, it is observed that the relevant provisions of the OHSA provide for no such incremental penalties.

[43] The Crown urges a generous interpretation of s. 69 of the OHSA and suggests that the wording "last act or default" connotes continuing offences under the Act. With respect, I disagree that this terminology has the effect of rendering s. 31(2) a continuing offence. A prohibited act or default can occur at any point during the performance of an obligation by a person subject to the provisions of the OHSA. All that is meant by the wording of the section in my opinion is that it is the last act which determines when the limitation period begins to run. So, for instance, in Pickles, while the offence may have commenced when the construction of the dock began without a permit, it was the last act of completing the dock which triggered the limitation period. In Rutherford, it was the last act of the electrical installation that was germane not the exact date on which the offending behaviour occurred. Similarly, in Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc., [2010] O.J. No. 1504, 93 C.L.R. (3d) 145

(S.C.J.), where it was found that the appellant had failed to locate an underground natural gas pipeline prior to an excavation project, the last day of the default was found to be the day on which the excavation began since the obligation on the appellant was to provide locates prior to the excavation commencing. This was so even though the incorrect locate had been provided outside the limitation period. The court determined that the "last act or default" took place the moment the correct locate could no longer be provided, i.e., when the excavation began. The charge in Enbridge was not found to be a continuing offence. Leave to the Court of Appeal was denied [[2011] O.J. No. 24, 2011 ONCA 13].

Purposive interpretation of OHSA

[44] The Crown has urged a purposive interpretation of the OHSA in order to best give effect to the intention of protecting workers in the work place over the long term. This approach has been recognized by the Court of Appeal in R. v. Hamilton Health Sciences Corp. (2000), 51 O.R. (3d) 83, [2000] O.J. No. 3929 (C.A.) and R. v. Newton-Thompson, supra.

[45] It is clear that the OHSA is a public welfare statute aimed at protecting the health and safety of workers. As stated in Ontario (Ministry of Labour) v. Hamilton (City) (2002), 58 O.R. (3d) 37, [2002] O.J. No. 283 (C.A.), at para. 16: [page531]

> When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

[46] However, nothing in these decisions suggests that plain and unambiguous words in a statute are to be given anything other than their ordinary meaning. Where there is an ambiguity in the wording and where the words used in the statute give

rise to two or more interpretations, then the interpretation which best gives effect to the objects of the legislation must prevail. This was the approach taken by Feldman J.A. in Newton-Thompson, where she said, at para. 28:

> Applying the same test as was applied by this court in Hamilton Health Sciences, to the extent there may be any ambiguity in the wording of the offence in s. 72(1) of the CFSA, to best achieve the purpose of protection of children, should the court place emphasis on the duty to make a report, or on the timeliness of that report being made forthwith?

[47] In Enbridge Gas Distribution Inc., the Superior Court decision made reference to Newton-Thompson, saying, at para. 61:

> The Ontario Court of Appeal recently issued an important decision on limitation periods. In R. v. Newton-Thompson, 2009 ONCA 449, 97 O.R. (3d) 112 ("Newton-Thompson"), the court held that any ambiguity as to whether legislation creates a continuing offence for the purpose of a limitation period should be resolved in a way that best achieves the purpose of that legislation.

[48] With respect, it is my view that the wording of s. 31(2) and s. 69 of the OHSA is clear and unambiguous. No matter how generous a purposive interpretation is applied, the fact remains that the allegations against Grinham and Argue relate to specific acts at specific points in time and are, therefore, subject to the limitation period. I am in agreement with the position taken by these defendants that if the interpretation of the Crown is accepted it would make virtually every offence in the Act a continuing offence no matter how much that intention is contraindicated by the actual wording used. This result runs contrary to the jurisprudence.

Discoverability

[49] The Crown takes the position that s. 69 of the OHSA ought to be interpreted in a manner that imports a discoverability aspect to the default such that the limitation

period in this case would not begin to run until the alleged default came to the attention of authorities, i.e., the date that the wall collapsed. The Crown relies on [page532] Windsor Utilities Commission v. Ontario, [2005] O.J. No. 474, 13 C.E.L.R. (3d) 156 (S.C.J.), affd [2005] O.J. No. 3370, 66 W.C.B. (2d) 333 (C.A.) for the proposition that the discoverability principle applies in the realm of regulatory law. It must be noted, however, that in that case the applicable limitation period under the Ontario Water Resources Act, R.S.O. 1990, c. O.40 read as follows:

> Limitations
>
> 94(1) Proceedings for an offence under this Act or regulations shall not be commenced later than two years after the later of,
>
> (a) the day on which the offence was committed; and
>
> (b) the day on which evidence of the offence first came to the attention of a person appointed under section 5.

[50] Clearly, the wording of that limitation period provided for the discovery of the offence as being the point from which the limitation began to run. No such language is to be found in s. 69 of the OHSA. Had it been the intention of the legislature to have the discovery of offences under s. 31(2) of the OHSA trigger the start of the limitation period, then it would clearly have said so in my view.

[51] The Crown position is also completely at odds with the Court of Appeal decision in Pickles. One of the issues on that appeal was whether the doctrine of discoverability applied to the offence charged. MacPherson J.A. said, at para. 13:

> The discoverability rule is merely a rule of construction. It will apply to some limitation periods, but not to all. This fundamental point, as well as the test for distinguishing between application and non-application scenarios, were explained by Major J. in the leading case Peixeiro v. Haberman, [1997] 3 S.C.R. 549 at 564:

> In this regard, I adopt Twaddle J.A.'s statement in Fehr v. Jacob (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.) at p. 206, that the discoverability rule is an interpretive tool for the construing of limitation statutes which ought to be considered each time a limitations provision is in issue:
>
> > In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [page533]

[52] MacPherson J.A. went on in Pickles to conclude that the subject matter of the proceedings in that case was the building of a dock without a permit and pointed out that there was nothing in the nature of that act or in the wording of the charging section to suggest that the limitation period commenced when the act was discovered. He noted that it was open to the legislature to specifically build the discoverability principle into the wording of a limitation period. He went on to say, at para. 16:

> In the absence of clear legislative language importing the discoverability principle into a statute, I see no reason why the court should expand the reach of the regulatory prohibition by resort to the discoverability principle.

[53] I am in agreement with and adopt the position of the defendants outlined in their written response submissions, at para. 23:

> There is no case that imports the discoverability principle into a limitation period that governs regulatory prosecutions

absent specific statutory language to that effect. There is no case under the OHSA that suggests that s. 69 imports discoverability. Indeed, the analysis of when the last act or default occurred in these cases would be superfluous if the cases, instead, spun on when the offences were or ought to have been discovered.

[54] In light of all of the above, I find that the discoverability principle has no applicability to the limitation period in this case.

Endangerment of a worker

[55] In light of my decision concerning the effect of the limitation period in s. 69 of the OHSA on the charges against the defendants Grinham and Argue, it is unnecessary for me to deal with the submission by these defendants relating to the endangerment of workers. However, in the interests of being complete and for the assistance of any court that might be reviewing this decision, I shall deal briefly with the issue.

[56] It is the position of these defendants that there is nothing in this case to demonstrate that a worker was endangered as a result of the alleged negligent advice. Indeed, no worker was present at the time of the collapse of the wall at this workplace. However, the wall did collapse in circumstances in which it would not have been expected to. It would appear from the agreed statement of facts, and, from there being no other intervening factor since the construction of the wall, that it had been in the condition in which it was just prior to its collapse since its construction. Clearly, it was in danger of collapsing throughout this time had it been subjected to the stress that was applied to it on the date of the actual collapse. Throughout that time, it [page534] represented a danger to members of the public and to workers who were periodically present in the washroom should sufficient stress have been applied to it. The actual load imposed on the wall by the attempt of this young girl to lift herself onto the change table was not great. The wall should certainly have been able to withstand it. Any number of circumstances can be envisaged in which a worker could have applied such stress to

this wall at this workplace while engaged in his or her employment. For instance, should the change table have needed cleaning it is likely that it would have been leaned upon by a worker or perhaps had a cleaning bucket or ladder or other bit of heavy equipment set upon it sufficient to exceed the load that the wall could apparently bear. It is entirely reasonable to assume that a worker could have been present when this wall collapsed or at any other time when an act by a member of the public caused the wall to collapse. The wall represented a continuing danger to those who had access to the washroom and that included workers. Workers and the public were vulnerable to the same hazard. It was the wall's potential for failure that established endangerment. As said in R. v. EFCO Canada Co., [2010] O.J. No. 3939, [2010] ONCJ 421 [at para. 42], "[t] he endangerment lies in the potential for failure, not in failure of the structure itself. Once a standard of care is established, any departure from it in the context of a structure proximate to workers will engender endangerment".

[57] I agree with the submission of the Crown, at para. 67 of its brief, that "the Crown is not required to establish that a worker would have had to perform the exact same act as the deceased. Nor is the Crown required to establish all of the exact methods by which the endangerment could result in workers actually being harmed. The Crown need only establish that workers were endangered by the insecure structure. A concrete wall that could be so easily toppled, with catastrophic results, is a hazard in waiting. To suggest that such a hazard did not place any worker who came into its vicinity in danger, irrespective of what actions they may be undertaking, is to ignore the reality of the situation. This wall was a danger to anyone near it. This was an unsafe workplace."

The applicability of s. 69 OHSA in relation to the defendant the Corporation of the City of Guelph

[58] The defendant the City of Guelph submits that it, too, can rely on the limitation period in s. 69 of the OHSA as a bar against proceedings under s. 25(1)(e) of the Act. This defendant argues that the offence charged is not a continuing offence and [page535] that the "last act or default upon which

the prosecution is based" occurred years before the collapse of the wall. This approach, of course, assumes that the completion of construction triggered the limitation period. The position of this defendant is set out in part, at para. 98 of its written submissions, as follows:

> In the case at bar, the event that led to the charge against the defendant was the failure to comply with the proper design for allowable unit stress under the Building Code. The completion of this alleged improper construction work triggered the running of the limitation period. Therefore, it can be argued that worker protection in the form of a structurally sound privacy wall could not be provided after June 2004 when the work was completed, and the alleged last act of default took place.

[59] With respect, I disagree. The charges against the architect and the engineer were in relation to specific acts in the construction process -- the providing of advice as to the construction of a wall. Once that advice was given, the obligation of these defendants was at an end. There is nothing in the wording of the charges against them that purports to extend their obligation beyond the giving of advice. The charge against the City under s. 25(1)(e) is entirely different in nature. It does not relate to a single act. It is not tied to the construction process. Rather, it imposes a duty on the City in its role as employer to ensure that a workplace is maintained in a safe manner. This is an obligation that continues beyond any construction phase and endures for as long as the site remains a workplace. It was the duty of the City to ensure that this wall was safe for workers on the date of the collapse just as it was its duty to ensure that it was safe on the day of its construction.

[60] In R. v. Kidd Creek Mines Ltd., [1989] O.J. No. 3333, 2 C.O.H.S.C. 57 (Prov. Ct.), Caldbick J. came to the same conclusion dismissing one count under the OHSA that dealt with an allegation of a specific occurrence as falling outside of the limitation period but finding that another count of failing, as an employer, to ensure that a floor, roof, wall pillar support or other part of a workplace was capable of

supporting all loads to which it might be subjected without causing the materials therein to be stressed beyond the allowable stresses, constituted a continuing offence.

[61] I appreciate that there are no incremental penalties provided in s. 25(1)(e) of the OHSA, which is often an indicator of a continuing offence. Nonetheless, the nature of the offence and the wording used in the section are, to me, clear signals that the legislature intended that this section of the OHSA impose a continuing obligation on an employer. Furthermore, this is the interpretation which most clearly gives effect to the purpose of [page536] the legislation. Indeed, the legislative intent is frustrated completely in the event that the interpretation urged by this defendant is accepted. There would be nothing to compel an employer to ensure safety of workers in the workplace on a continuing basis.

[62] I conclude that the offence charged against the City is precisely the sort of offence contemplated by Industrial Appeals Court when defining the second kind of crime which constitutes a continuing offence; "the kind of conduct, generally of a passive character, which consists in the failure to perform a duty imposed by law. Such passive conduct may constitute a crime when first indulged in but if the obligation is continuous the breach, though constituting one crime only, continues day by day to be a crime until the obligation is performed".

Conclusion

[63] In the result, the charges against the defendants Alan Grinham and Larry Argue, having been laid outside of the limitation period provided in s. 69 of the OHSA, are hereby dismissed.

[64] The application for dismissal of charges by the City of Guelph is dismissed.

Motion dismissed with respect to one defendant and granted with respect to other defendants.