IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: Nova Scotia (Environment and Labour) v. Nova Scotia (Transportation and Public Works), 2006 NSPC 39

Date: 20060810
Docket: 1528569
1528570
1528571
1528572
1528573
1528574
1528575

Registry: Sydney

Her Majesty the Queen
(Department of Environment and Labour)

v.

Her Majesty the Queen
(Department of Transportation and Public Works)

Case:	Application by Defendant (Department of Transportation and Public Works) alleging a s. 8 Charter violation and seeking a s. 24(2) remedy.
Judge:	The Honourable Judge Anne S. Derrick
Heard:	July 10, 11, 12, 13, 2006, in Sydney, Nova Scotia
Written decision:	August 10, 2006
Counsel:	Mr. Ralph Ripley, for Her Majesty the Queen, Department of Transportation and Public Works
	Mr. Peter Craig, for Her Majesty the Queen, Department of Environment and Labour

By the Court:

INTRODUCTION:

[1] On February 15, 2006, in a written decision (**Department of Labour v. Department of Transportation and Public Works** [2006] NSPC3), I granted the Department of Transportation and Public Works (DTPW) standing to invoke section 8 of the *Charter*, and pursue a remedy under section 24(2) should its application alleging a section 8 violation be successful.

[2] In support of its section 8 application, DTPW filed the affidavits of Francis Smith and Arnold Baxendale dated February 15 and 17, 2006, respectively. No cross examination was conducted on those affidavits. The Department of Environment and Labour (DEL) called *viva voce* evidence from Milton Cooke, Henry King, and Gail Whalen. Counsel for DTPW and DEL filed briefs and casebooks of authority.

[3] This is my decision on DTPW's application for *Charter* relief.

OUTLINE OF CASE:

[4] On February 12, 2004, there was an accident at Victoria Bridge, Cape Breton County. John MacLeod, a member of the Steel Bridge crew of the Department of Transport and Public Works fell from scaffolding onto the ice and was severely injured. Health and safety officers from DEL were dispatched to the scene and began the process of looking into the cause of the accident. On March 2, 4 and May 26, DEL officials took possession of pieces of equipment and also during this period, obtained documentary material. Some of the equipment was subsequently tested by an engineering firm retained by DEL.

[5] On April 4, 2005, DEL charged DTPW with seven offences under the *Occupational Health and Safety Act*, including violations of the *Fall Protection and Scaffolding Regulations*. The trial is scheduled to be heard on October 10 - 20, 2006.

[6] It has been stipulated by DEL that all the seized items and the items that are part of DEL file are potential exhibits at DTPW's trial. DEL and DTPW have agreed that certain items were seized without warrant by DEL from

DTPW. It is the seizure of these items that gives rise to the application by DTPW for a *Charter* remedy. DTPW asserts that DEL was engaged in an investigation at the time of the seizures, not merely an inspection, and that DEL's failure to obtain prior judicial authorization or DTPW's informed consent violated DTPW's rights under section 8 of the *Charter*.

[7] DEL has submitted that the seizures occurred in the context of an inspection to determine the cause of the accident and, as a consequence, DTPW's section 8 protections were not engaged. Determining whether DTPW's section 8 rights have been violated first requires me to review the facts as they were presented in evidence and then apply the legal principles that are relevant in this regulatory context.

FACTS:

The Seizures by DEL from DTPW

[8] On February 12, 2004, Sheldon Shepherd, the safety officer at the Sydney DEL office, was assigned to go out to the scene of the accident at Victoria Bridge and asked Milton Cooke to accompany him. At this time Sheldon Shepherd was the lead officer on the case. Mr. Shepherd and Mr.

Cooke took a series of photographs depicting the bridge and the area on the ice where Mr. MacLean landed after falling off the bridge. Mr. Cooke also took pictures of a clamp that had fallen onto the ice, and the suspended scaffolding, hanging vertically, apparently as a result of one end having given way.

[9] On February 16, Mr. Shepherd issued a Compliance Order requiring DTPW to secure, in a locked area, all the equipment that had been involved in the accident and requesting copies of training records for everyone involved in the accident, all records of inspections on the equipment, all written procedures in relation to the suspended scaffolding and a copy of the investigation report of the accident.

[10] Francis Smith, the senior supervisor of the Victoria Bridge project, deposed in his Affidavit to Mr. Shepherd having discussed with him at Victoria Bridge on February 12 the secure storage of the scaffolding and other equipment in a DTPW shed at Kempt Head Road. There was no indication, Mr. Smith said, from Mr. Shepherd that DTPW was under investigation.

[11] On February 24, Gail Whalen was assigned by her superior, Vincent

Garnier, to take over the file as Sheldon Shepherd had gone on a leave of absence. On March 2, Ms. Whalen and Henry King, another officer with the OHSA division of the DEL, visited the DTPW garage site where equipment from the bridge was being stored in a locked container. They anticipated seeing the equipment listed in Sheldon Shepherd's Compliance Order. In the garage itself was a mock-up of Victoria Bridge with a bridge chord (steel beam) on which a clamp was attached, and a smaller version of the swing stage (scaffolding).

[12] At the Kempt Head Road garage, Mr. King observed a rust colored anchor that appeared to him to be a modification of an original anchor. It looked to him as though someone had wanted to extend the anchor point. Mr. King noted in his evidence that a modified anchor would have to be manufactured to engineer's standards, with instructions, to conform to Regulations under the *Occupational Health and Safety Act*.

[13] Mr. King acknowledged that the photographs taken by Mr. Cooke on February 12 showed the anchor modification and that prior to March 2 he was aware of the engineer's plans related to the anchor point. He agreed it was

likely he thought there were extensions in use and that if such extended anchor points were found, they would be seized.

[14] The storage container at Kempt Head Road was unlocked by Francis Smith at Ms. Whalen's request. Ms. Whalen and Mr. King inspected the equipment and took photographs of various pieces.

[15] At some point during the examination of the equipment, Ms. Whalen informed Mr. Smith that they would be taking it to a locked storage facility on Keltic Drive in Sydney to be secured by DEL. Both Mr. King and Ms. Whalen testified that this was done so that it could be inspected professionally, in the condition in which it was found. Mr. King described the storage as being for "continuity and inspection purposes." Ms. Whalen testified that in her mind, the equipment had already been detained by DEL under Sheldon Shepherd's Compliance Order.

[16] Ms. Whalen stated that when she went to the Kempt Head Road site on March 2 it was as though she was "stepping into Sheldon Shepherd's shoes, he detained pieces on February 12 under section 48(2); I did not have

reasonable grounds [to believe an offence had occurred] so we wanted to detain [the equipment] further to determine if an offence had been committed." She did not consider getting the DTPW' s consent to search before accessing the storage locker because she "...went there not to seize those things, I went to inspect them."

[17] Before going to the DTPW garage at Kempt Head Road, Ms. Whalen had compared Sheldon Shepherd's February 12 photographs of the anchor clamp with a drawing he had obtained from DTPW to see if there was conformity. If not, Ms. Whalen had concluded, they would take the equipment to have it examined further. She said once she saw the items she knew they would need someone with expertise to assess them.

[18] On March 2, Francis Smith located for Ms. Whalen, a hard hat, and a lanyard (a piece of the fall arrest equipment), in the back of a DTPW truck. These items were also taken into DEL possession.

[19] Ms. Whalen acknowledged in her evidence that there may have been some discussion with Mr. Garnier about seizing items on March 2, although Mr. King recalls no discussion with Ms. Whalen, before the storage container

was unlocked, about such a possibility. There is nothing in Mr. King's notes to indicate that either he or Ms. Whalen gave any notice to DTPW employees on March 2 that equipment might be seized. No Consent to Search form or warrant was used.

[20] On March 4, having realized that an anchor was missing from what had been seized on March 2, Ms. Whalen went back to the Kempt Head Road site with Mr. King and took the anchor which at that time was on the mock-up in the DTPW garage. Ms. Whalen says she took the anchor on the basis of it being "in plain view."

[21] On March 4 Ms. Whalen generated a "Report of Workplace Inspection" with Mr. King indicated as the co-officer. Under a heading "Details of the Inspection", the report listed the items seized and functioned as an official receipt for the equipment that was removed from the DTPW garage on March 2. Ms. Whalen also issued on March 4 a total of twelve Compliance Orders for DTPW and delivered them to Francis Smith. The Affidavits of Francis Smith and Gail Whalen (dated January 6, 2005) indicate that Ms. Whalen seized Mr. MacLean's fall arrest harness from the Kempt Road site on March 4 when she

took possession of the anchor.

[22] By March 4, Ms. Whalen, had sufficient information to necessitate obtaining a further statement from Francis Smith, which she took as a cautioned statement because she thought he could incriminate himself.

[23] On March 10, Ms. Whalen issued four more Compliance Orders directing DTPW to ensure that equipment such as anchor points, suspended scaffolding, its components and attachments and fall arrest systems were being used in a safe and approved manner throughout the Province.

[24] On May 26, Ms. Whalen obtained from DTPW Mr. MacLean's D-ring sling, provided to her by Stanley MacDonald of DTPW after she asked where it was. The D-ring sling was part of the components that Mr. Shepherd had, by way of a Compliance Order, directed DTPW to secure on February 12, 2004. Ms. Whalen's receipt of the sling indicates it was seized "under section 48 of the OHS Act."

[25] Ms. Whalen acknowledged that during this time the difference between an inspection and an investigation had not been clear in her mind. She said she felt she was involved in an inspection, "gathering information". On May

26, Mr. Smith's statement, which revealed certain infractions of the *Occupational Health and Safety Act* and its Regulations, was the only statement Ms. Whalen had. She wanted to take statements from four other DTPW employees that day whom she had not yet had the opportunity to speak with.

Forming Reasonable and Probable Grounds

[26] It was Mr. King's evidence that up to March 2, he did not think he had reasonable and probable grounds to believe an offence under the *Occupational Health and Safety Act* or regulations had been committed on February 12, 2004. Mr. King noted he had not been at the accident and had to keep an open mind until he had spoken to people and looked at the equipment used on the bridge. He said that unless and until he and Ms. Whalen formed a belief based on reasonable and probable grounds that an offence had been committed, they were not in an investigative mode. Mr. King testified that under section 47 of the *Occupational Health and Safety Act* he had the power as an occupational health and safety officer to seize items in plain view without a warrant if acting in an inspection mode.

[27] Where engaged in an inspection, DEL officers would derive their powers and obligations from section 47 of the *Occupational Health and Safety Act*, which provides:

> **Powers of officers**
>
> 47 For the purpose of ensuring compliance with this Act and the regulations and any order made thereunder, an officer may
>
> (a) at a reasonable hour of the day or night enter and inspect a workplace, conduct tests and make such examinations as the officer considers necessary or advisable;
>
> (b) require the production of records, drawings, specifications, books, plans or other documents in the possession of the employer that relate to the workplace or the health and safety of employees or other persons at the workplace and remove them temporarily for the purpose of making copies;
>
> ©) require the production of documents or records that may be relevant to the investigation of a complaint pursuant to subsection 46(1), and remove them temporarily for the purpose of making copies;

(d) take photographs or recordings of the workplace and any activity taking place in the workplace;

(e) make any examination, investigation or inquiry as the officer considers necessary to ascertain whether there is compliance with this Act and the regulations and any order made under them;

(f) inspect, take samples and conduct tests of samples, including tests in which a sample is destroyed, of any material, product, tool, equipment, machine or device being produced, used or found at the workplace for which the officer shall be responsible, except for a sample that has been destroyed, until the material, product, tool, equipment, machine or device is returned to the person being inspected;

(g) examine a person with respect to matters pursuant to this Act or the regulations;

(h) for the purposes of an investigation, inquiry or examination made by the officer pursuant to this Act or the regulations, summons to give evidence and administer an oath or affirmation to a person;

> (l) in an inspection, examination, inquiry or test be accompanied and assisted by or take with the officer a person having special, expert or professional knowledge of any matter;
>
> (j) exercise such other powers as may be necessary or incidental to the carrying out of the officer's functions pursuant to this Act or the regulations. 1996, c. 7, s. 47.

[28] Mr. King testified that the issue of due diligence was relevant to the assessment of whether an offence had been committed. The fact that the extended anchor point had been engineer-approved, which was confirmed on April 23, 2004, established some basis for a finding that due diligence had been exercised by DTPW.

[29] Ms. Whalen testified that it was necessary to review all of the materials being requested by way of the Compliance Orders prior to formulating a belief as to reasonable and probable grounds that an offence had been committed. She said she had no such belief on March 2 when the Kempt Road storage container was opened. The bulk of the information requested in the Compliance Orders of March 2 was not in DEL's possession and Ms. Whalen had no

reasonable and probable grounds to believe an offence had been committed at the point when she issued those Orders.

[30] The information requested by Ms. Whalen's March 2 Compliance Orders included:

> >Any and all information and instruction provided to John MacLean (as well as other DTPW employees) related to the suspended scaffolding and its components involved in the February 12 accident;
>
> >All training records provided to employees based on the professional engineer's design, for the suspended scaffolding;
>
> >Site specific inspections, tool box meeting minutes and supervisor's notes relating to the Victoria Bridge project;
>
> >Copies of:
>
> >>The manufacturer's specifications for the complete suspended

scaffolding system and its components, used at Victoria Bridge on February 12;

>>DTPW's Occupational Health and Safety Program;

>>The current drawings of Victoria Bridge;

>>Engineer's designs for the erection, use, operation and maintenance of the anchor points used at the Bridge on February 12;

>>The safe work practice for the safe means of access and egress to the suspended scaffold, used at the Bridge on February 12.

[31] The engineering tests and examinations on the seized equipment were conducted on October 26, 2004 by an engineering firm from Ottawa. The final engineering report was received by DEL in February, 2005. Ms. Whalen testified that the conclusions reached by the engineering firm are reflected in the informations that were sworn against Mr. Smith and DTPW.

The Report to Justice and Detention Order Requirements

[32] The *Summary Proceedings Act*, RSNS 1989, c. 450, section 2E provides that a report to a justice (Form 7) must be filed where anything is seized by a person "in the execution of that person's duties under any enactment..."and is being detained. Section 2F of the *Summary Proceedings Act* sets out the powers of a justice with respect to detention and return of seized items.

[33] Ms. Whalen testified that on March 9, 2004, she produced a Form 7 relating to the seizure of items on March 2 and 4 at Kempt Head Road. Ms. Whalen testified that this Form 7 was filed with the Provincial Court, although the original documents have not been located.

[34] On May 27, 2004, Ms. Whalen generated a second Form 7 reporting that 19 items were seized from the Kempt Head Road site. This Form 7 recites the same 18 items referenced in the first Form 7 with the addition of a 19th item, Mr. MacLean's D-ring harness, seized on May 26. Ms. Whalen testified that she filed the second Form 7 with the Provincial Court on May 27.

[35] Although the Form 7's or some of them have not been located in the Sydney Provincial Court Administration files, DEL's "Inspection to File" computer entries show the form 7's were filed.

[36] On August 24, 2004, Ms. Whalen prepared a third Form 7. This Form 7 lists the same items as Exhibit 18. Ms. Whalen subsequently prepared a Notice of Application for the continued detention of items listed in the three Form 7's. A hearing was scheduled for January 17 and then set over by the Court to April 22, 2005. DTPW was charged on April 4, 2005 and, as a consequence, the application for continued detention did not proceed.

[37] In Ms. Whalen's January 26, 2005 Affidavit filed in support of the detention application, she recited the seizure of equipment from DTPW on March 2, 2004 as having occurred under section 48 of the *Occupational Health and Safety Act.* She testified that when she swore her Affidavit she believed it was section 48 that authorized her to take items into her possession.

[38] Ms. Whalen's Affidavit indicated her belief that DTPW had committed infractions of the *Occupational Health and Safety Act* and the *Fall Protection and Scaffolding Regulations*. She stated her opinion that charges would be recommended against DTPW and that "the equipment and material seized to date provide an integral part of this investigation and evidence."

[39] Ms. Whalen confirmed that when she prepared, in the period of March 9, 2004 to February 24, 2005, the first three Form 7's, the Notice of Application and a fourth Form 7, she believed she was acting under section 48(1) of the *Occupational Health and Safety Act*. These documents all cite section 48(1) of the *OHSA*. The information to obtain an investigative warrant under the *Summary Proceedings Act,* sworn by Ms. Whalen on October 14, 2004, was completed following Mr. Garnier's review and input and also references section 48(1) of the *OHSA*. A *Summary Proceedings Act* Investigative Warrant was issued on October 18, 2004. Ms. Whalen's executive summary also refers to section 48 of the *OHSA*.

[40] In addition to the Form 7's and related documents, certain other documents generated by DEL make reference to "investigation" or

"investigative." One such document is an intake form for the contact tracking system which lists "investigation" under "action requested" and "action taken". Ms. Whalen's testified there was no policy in February 2004 about how to enter intake information into the contact tracking system. The information contained in the intake form was entered by Sara Jean Petrie, an administrative clerk with DEL, who was not a field officer, nor involved in inspections or investigations.

[41] Both Ms. Whalen and Mr. King were able to identify two policy manuals, as being policies that were circulated to them at DEL, and served as directives that staff were meant to follow. The manuals included a policy on search and seizure. The effective date on the search and seizure policy was January 1, 2004.

SUMMARY OF ARGUMENTS:

[42] DTPW has argued that the documentary evidence generated by DEL establishes that DEL was engaged in an investigation of DTPW following the

February 12 Victoria Bridge accident, requiring the use of warrants, and compliance with the principles of informed consent to search (the locked storage container) and the “plain view” doctrine to seize the D-ring sling. DTPW pointed to the references in the documents generated by Ms. Whalen and other DEL personnel and urged the drawing of an inference that DEL was in an investigative mode when it was looking into the accident.

[43] DTPW further argues that section 47 of the *Occupational Health and Safety Act*, which DEL now says it was acting under, does not use the term "seize" and only refers to temporary removal. DTPW argues that such language is too vague to permit DEL the power to seize equipment and documents, especially in light of the express powers of seizure under section 48. DTPW also points to the policy directives in one of the planning policies where the references are to "production", not seizure, except where section 48 is discussed.

[44] DTPW says DEL’s failure to get detention orders in relation to the seized items is in itself a sufficient basis for a section 24(2) remedy.

[45] DEL responds by arguing that there are significant differences in search and seizure requirements where a regulatory agency is acting in an inspection versus investigative mode. DEL refers to the purposes of the *Occupational Health and Safety Act*, arguing that some of the principles emerging from criminal cases, such as informed consent and the plain view doctrine, do not have an identical application to a case involving regulation under public welfare legislation. DEL argues that, notwithstanding the absence of express language, seizure is authorized under section 47 of the *Occupational Health and Safety Act* as part of the powers afforded regulators by the legisature for ensuring compliance with health and safety legislation.

[46] DEL says reasonable and probable grounds for a belief that the DTPW had been involved in a violation of the *Occupational Health and Safety Act* began to be formulated when DEL got the engineering reports. DEL submits there is no evidence prior to that of a subjective or objective basis for reasonable and probable grounds to believe the DTPW had committed an infraction of the *Occupational Health and Safety Act.* Without reasonable and probable grounds, a warrant could not have been obtained under the *Summary Proceedings Act* by DEL for any seizures.

[47] On the detention order issue, DEL asserts that the Form 7's were filed in a timely fashion, with it not being fatal that Ms. Whalen failed to seek a detention order as required in early June and December 2004. DEL points to Ms. Whalen's good faith in attempting to rectify the problem as soon as it was brought to her attention by a Crown Prosecutor. The fact that the hearing date for the detention application was adjourned to April 22, 2005 was no fault of Ms. Whalen's. DEL asserts that at most, the failure to obtain detention orders with respect to items that had a reduced expectation of privacy, was a technical breach, in a regulatory context, of section 8.

ISSUES TO BE DECIDED:

[48] There are two broad issues to be decided: (1) Was DEL engaged in an inspection or an investigation when it seized items from DTPW on March 2 and 4 and May 26, 2004; and (2) What is the significance of DEL's failure to obtain detention orders?

LAW AND FINDINGS:

[49] In *R. v. Canada Brick Ltd., [2005] O.J. No. 2978* (Ont. Sup. Ct. of Justice), where the pertinent principles relating to search and seizure in a regulatory context such as occupational health and safety are comprehensively discussed, Hill J. held that the "bright line" for delineating inspection and investigatory function, lies at the point when "an adversarial relationship crystallizes" between the "subject of government scrutiny and the government officials." The crystallizing of the adversarial relationship occurs "when the predominant purpose of an official's inquiry is the determination of penal liability...." Assessing this requires an examination of the "totality of the circumstances" with it being necessary to consider "all factors that bear on the government inquiry." (*Canada Brick, at page 50*)

[50] The formulation of reasonable and probable grounds for a belief that the legislation has been contravened (the point where "credibly-based probability replaces suspicion") will usually be the point when the investigative function is triggered, but as Hill, J. notes in *Canada Brick*, "there may, in a given case, come a point where continuation of the warrantless inquiry

becomes constitutionally unreasonable." In other words, constitutionally sound conduct can be rendered unconstitutional by a change in purpose on the part of the government officials. However, as Hill J. observes in *Canada Brick* at page 51: "Prolonged attendance, inquiries, inspection, questioning and even seizures by government officials may prove necessary to effect abatement and timely compliance in the interests of public welfare and protection." In *Canada Brick*, it was held that the government, "in furtherance of its statutory mandate to monitor safe workplaces, was obliged to straightaway determine the circumstances of the reported industrial accident in order to ascertain whether it was the result of non-compliance with the Act or Regulations and if so, to take the necessary and timely steps to protect other workers from a similar mishap." In *Canada Brick*, on the day the accident occurred, the government inspector accordingly "exercised the panoply of warrantless powers conferred by [Ontario's Occupational Health and Safety Act] in an effort to learn how the accident occurred, whether it was the product of a preventable hazard and what remedial action, if any, was required." (*Canada Brick*, paragraph 158)

[51] In my view, this description parallels what DEL was doing in response to the Victoria Bridge accident. I find that DEL was obliged to look into how the

accident occurred and determine what caused it. Doing so required an examination of the equipment that Mr. MacLean had been using just before he fell, and the safety training and practices related to that equipment. It is clear from the evidence of Gail Whalen and Henry King that they were aware they might reach the point of having reasonable and probable grounds to believe the *Occupation Health and Safety Act* or Regulations had been contravened, but when the seizures of March 2 and 4 and May 26 occurred, they had not formulated that belief nor was there an objective basis for them doing so. Mr. King said he needed to examine the equipment, talk to witnesses and consider the issue of due diligence. An early indicator, the engineer approval on the extended anchor plans, suggested due diligence had been exercised by DTPW. Ms. Whalen wanted the equipment examined by expert engineers, which necessitated the seizure and the removal of the equipment. I find that Ms. Whalen and Mr. King had the power, derived from section 47 of the *Occupational Health and Safety Act*, to do what they did, including seize equipment, and exercised that power in the context of an inspection of the equipment and documentary material relating to the accident.

[52] Unlike the inspector in *Canada Brick* who was able to identify, in a

couple of hours, the workplace hazard and issue a stop work order, Ms. Whalen and Mr. King needed more information to determine the cause of the Victoria Bridge accident. Even a stop work order does not establish that reasonable grounds "exist, or should be imputed, for believing that an offence has been committed." It may remain to be determined who is responsible for any contravention of the legislation or what constitutes "the entire scope of the unsafe work conditions...which might when known, require additional abatement directions." (*Canada Brick, at paragraph 159*)

[53] I am not persuaded the referencing of section 48 of the *Occupational Health and Safety Act* in documents authored by Ms. Whalen indicates that Ms, Whalen and Mr. King were actually engaged in an investigation, subsequently, as DTPW has suggested, re-casting their authority as deriving from section 47 of the *Act* once charges were laid and the *Charter* invoked. I accept that Ms. Whalen made the section 48 references in error and that no one caught them, not Mr. Garnier and not crown counsel in early 2005.

[54] I also find I cannot treat the references in certain DEL documents to "investigation" and "investigative" as a basis from which to draw an inference

that the real purpose of DEL's inquiries into the accident was an investigative one. I admitted into evidence, on the basis that they were business records, various documents authored by persons who did not testify, but I cannot assume what was meant by the use of the term "investigation" in these documents. Persons other than those who gave evidence prepared those documents: I do not know what they may have meant by the language they used and whether they used that language with a full, or any appreciation of its significance. Determinative in my analysis of the issues in this case is what the evidence discloses that Ms. Whalen and Mr. King were doing, not what other people may have labeled the inquiries into the accident.

[55] Ms. Whalen and Mr. King were quite clear in their evidence: they were looking into the Victoria Bridge accident to determine what happened. The formulation of a belief that there were reasonable and probable grounds to conclude an offence had been committed did not occur until some time after the seizures. From the evidence it sounds as though the "bright line" was crossed sometime in the fall of 2004, when the expert engineers' initially reported. (I note that on October 14, 2004, Ms. Whalen swore in an Affidavit in support of an Information to Obtain an Investigative Warrant under the

Summary Proceedings Act to having reasonable grounds to believe an offence had been committed.) Ms. Whalen was able to say by early January 2005 in her Affidavit in support of the detention application that she had reasonable grounds to believe offences had occurred. The recommendation that charges be laid against DTPW was contained in Ms. Whalen's Executive Summary which was completed in late January/early February 2005. Ms. Whalen testified that draft copies of the Summary would have been prepared earlier, with some of it "on hold" until she received the engineers' report. There is no evidence to suggest this was a situation where charges were "delayed improperly in order to compel the target to provide evidence against itself." (*Canada Brick*, *at page 51*) The final engineer's report was received in February 2005 but it appears to me, as I indicated above, that DEL had some months earlier tipped into an investigative mode.

[56] I am not satisfied on the evidence however that in the period of February to May 2004, when the seizures occurred, the predominant purpose of the Whalen and King inquiries was a determination of penal liability against the DTPW. The fact that by March 4, 2004 Ms. Whalen had assessed the potential for penal liability with respect to Francis Smith, such that she

cautioned him before taking a further statement, does not provide a basis for concluding that she was, by then, “investigating” DTPW. At this time, Mr. King was still considering the issue of due diligence as it related to DTPW: it was April 23 when a statement taken from DTPW engineer, Eric Marshall, about the anchor extension, with his signed document and the training records, provided some basis for a conclusion that DTPW had exercised due diligence. On March 10, Ms. Whalen prepared Compliance Orders for DTPW that dealt with ensuring anchors and scaffolding were being used safely throughout the Province, such directions emerging from the Whalen and King inspection of the equipment and their inquiries into the accident. These Compliance Orders are indicative of workplace safety inspection not investigation into penal liability.

[57] In *Canada Brick*, Hill J. held at paragraph 157:

> Commercial activities highly regulated by government in pursuit of public welfare and protection are a feature of modern society. The centrepiece of regulatory regimes for enforcement and ensuring compliance with established standards is generally a statutorily conferred warrantless power of entry and audit or inspection together with ancillary powers. The need for this type of monitoring, in the absence of reasonable grounds for believing any infraction exists, is necessary to maintain compliance including through the deterrence of random and unannounced attendances

> by government officials....The standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law, " will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context." *Thomson Newspapers Ltd. v. Canada, [1990] 1 S.C.R. 425 at pp. 475-6; R. v. Colarusso, at p. 204; Re Belgoma Transportation Ltd. And Director of Employment Standards (1985), 51 O.R. (2d) 509 (C.A.), at pp. 511-2*

[58] Justice Hill went on to indicate that "...a line of separation must be drawn between the exercise of legitimate regulatory inspection and ancillary powers on the one hand and, on the other, the employ of such powers to further investigation of statutory infractions and offences." He observed that "Warrantless inspection-like powers undertaken randomly or in response to a "complaint" of non-compliance do not, as a general rule, engage unreasonableness concerns." *Uncovering facts, in the course of an inspection, that point to a violation, does not change the underlying purpose behind the exercise of the inspection powers or alter its character* although government "must be careful...not to use the [inspection] power...to gather further evidence for an investigation after it has commenced." (emphasis added) The investigative function is properly subject to the prior authorization model, usually a warrant to search, and care must be taken to ensure that the "administrative warrantless authority" is not used to further investigative

interests in the absence of compliance with the requirements of prior authorization.

[59] Having considered these principles and their application to the facts in this case, I find on all the evidence that in the early part of Ms. Whalen's and Mr. King's inquiries into the Victoria Bridge accident, they were properly exercising their warrantless powers to conduct an inspection relating to the circumstances of the accident and were not acting in a manner contrary to the section 8 *Charter* rights of DTPW.

[60] I also regard it as relevant to an assessment of the issue of DTPW's section 8 rights that, generally, there is a diminished expectation of privacy in respect of records and documents produced in the ordinary course of regulated activities. ®*. v. Jarvis, [2002] 3 S.C.R. 757 at paragraph 72; R. v. Canada Brick Ltd. at page 49*) This principle extends, in my opinion, to equipment, components and appurtenances attached to a bridge off a public highway.

[61] As for the failure by DEL to file timely Reports to Justice and obtain

detention orders in June and December 2004, I am satisfied on the evidence I heard from Ms. Whalen that this was due to mere inadvertence. There was nothing to indicate bad faith on Ms. Whalen's part or an attempt to gain an advantage over DTPW by neglecting to bring the issue of the ongoing detention of the seized items before a judge. I have considered the case of *R. v. Michelle MacNeil*, an unreported decision of Davison, J. (February 23, 1994, N.S.S.C.) and the more recent decision of *R. v. Creelman, [2005] N.S.J. No. 517* (N.S.S.C.) in which this issue was raised. The conduct of Ms. Whalen and DEL can be distinguished from the police conduct described in *MacNeil* where Davison, J. found a lack of good faith on the basis of an unlawful retention of the seized items for ten months before charges were laid, during which time the investigation stalled and the seized property was then used to build a case of fraud against the accused. It is my view that the circumstances here are more akin to the situation in *Creelman* where a similar failure was found to have been "sheer oversight" with no implications for the accused's fair trial rights.

[62] In *Creelman*, Goodfellow, J. treated the issue of failing to obtain a detention order as more properly coming under a section 24(2) analysis rather

than going to the question of whether a section 8 infringement was made out. Even if the failure to obtain the detention orders here constitutes a section 8 violation, I find it is, at most, a technical violation and not one that would justify an exclusion of the evidence. It seems clear to me that had DEL made a timely application seeking an order to detain the seized items for testing by expert engineers, it would have been granted.

[63] In summary, I am satisfied that DEL did not infringe DTPW's section 8 *Charter* rights by the seizures of March 2 and 4 and May 26 and the obtaining of any documentary material through the Compliance Orders. It follows therefore that there is no basis for excluding any of this evidence, notwithstanding a failure to obtain detention orders.

Anne S. Derrick, P.C.J.