

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Eagles, 2009 NSPC 49

Date: November 6, 2009

Docket: 1715571, 1715572, 1715573

Registry: Halifax

Between:

Her Majesty the Queen

v.

Eric Eagles

Judge: The Honourable Judge Theodore K. Tax

Heard: December 8 - 12, 2008 in Dartmouth, Nova Scotia
January 29, 2009 in Dartmouth, Nova Scotia
And March 24, 2009 in New Glasgow, Nova Scotia

Written decision: November 6, 2009

Charges: Section 17(1) and 74(1)(a) of the **Occupation Health and Safety Act** X 3

Counsel: Peter Craig, for the Crown
Donald Murray, Q.C., for the Defence

INTRODUCTION:

[1] On Monday, September 25, 2006, Keith Myles, a mason by trade and an employee of Darim Masonry Limited, went to the company's work-site at the Downsview Plaza, 752 Sackville Drive, Lower Sackville, Nova Scotia. Mr. Myles arrived early and waited for the company laborers to erect the scaffolding in the area in which he would be working that day. Once the scaffolding was erected, Mr. Myles and another mason met with their supervisor and foreman, Mr. Eric Eagles, to discuss their work for the day.

[2] Shortly after 8:00 AM, Mr. Myles began laying bricks under a steel I-Beam supporting the roof of the overhang covering a concrete sidewalk at the Downsview Plaza. As he reached to secure his level or "block line" to level his next line of bricks, Mr. Myles placed one foot on the plank of the scaffolding and the other on the edge of the false ceiling suspended under the roof. The false ceiling gave way, and Mr. Myles fell approximately 13 feet onto the sidewalk below. He suffered serious injuries, and shortly thereafter, he died as a result of those injuries. Mr. Eric Eagles was charged with three offences for failing to ensure compliance with specified provisions of the Nova Scotia **Occupational Health and Safety Act** and the Fall Protection and Scaffolding Regulations arising out of this incident. The question is whether the Crown has proven beyond a reasonable doubt that Mr. Eagles failed to

Page: 3

ensure compliance with the regulatory requirements specified in the three charges before the court, and if so proven, whether Mr. Eagles has established a defence on a balance of probabilities that he exercised due diligence.

THE CHARGES:

[3] Nova Scotia Department of Labour officials were immediately called to the scene of the accident and they conducted an investigation. Following that investigation, Mr. Eric Eagles was charged with three offences under sections of the Fall Protection and Scaffolding Regulations (“the Regulations”) and the **Nova Scotia Occupational Health and Safety Act** (the “OHS”).

[4] Mr. Eagles was charged, **as an employee**, for:

(1) failing to ensure that a guardrail was installed at the perimeter or open side of the work area where a person was exposed to the hazard of falling, as prescribed by Section 7(1) of the Fall Protection and Scaffolding Regulations, and thereby committed an offence contrary to section 9(1)(b) of the Fall Protection and Scaffolding Regulations, section 17(1) and 74(1)(a) of the Occupational Health and Safety Act;

(2) failing to ensure that a guardrail was constructed or installed as required by Section 9(2)(d) of the Fall Protection and Scaffolding Regulations, and thereby committed an offence contrary to section 9(2)(d) of the Fall Protection and Scaffolding Regulations, section 17(1) and section 74(1)(a) of the Occupational Health and Safety Act;

(3) failing to ensure that a work platform was securely fastened in place so as to prevent movement by cleating or wiring or such other means of fastening as provides an equivalent level of safety as prescribed by Section 20(1) of the Fall Protection and Scaffolding Regulations and thereby committed an offence contrary to section 20(1) of the Fall Protection and Scaffolding Regulations, section 17 and section 74(1)(1)(a) of the Occupational Health and Safety Act.

ISSUES and POSITIONS of the PARTIES:

[5] The Crown's position is that all three counts contained in the Information are strict liability offences which do not require the Crown to prove the existence of *mens rea*, that is, some positive state of mind such as intent, knowledge or recklessness. The Crown maintains that they have established that Mr. Eagles failed to comply with the specified statutory requirements of the Fall Protection and Scaffolding Regulations. As a result, they say that they have established a *prima facie* case by proving the *actus reus* or prohibited act of each count beyond a reasonable doubt .

[6] The Crown acknowledges that Mr. Eagles can avoid liability by proving, on a balance of probabilities, that he exercised due diligence by taking all reasonable precautions in the circumstances or reasonably believing in a mistaken set of facts which would, if true, render an act or omission, innocent. The Crown says that Mr. Eagles did not exercise due diligence and there was no mistake of fact in this case. Furthermore, the Crown maintains that, once they have established a *prima facie* case, they have no procedural or substantive requirement to prove that Mr. Eagles did not exercise due diligence in all the circumstances of this case.

[7] On the other hand, the Defence position is that the Crown has not established a *prima facie* case with respect to counts #1 and #3 of the Information. With respect to those counts, the Defence maintains that the Nova Scotia Fall Protection and

Page: 5

Scaffolding Regulations do not contain a closed list of what is required for “fall protection.” Defence Counsel submitted that the Nova Scotia Regulations allow a person to exercise judgment and provide an alternate means of fall protection which provides a “level of safety equal to or greater than a fall arrest system”: see section 7(1)(c)(v) of the Regulations. In the case of a work platform, the platform may be securely fastened by cleating or wiring or “such other means of fastening as provides an equivalent level of safety”: see section 20(1)(c) of the Regulations.

[8] The Defence position with respect to counts #1 and #3 is that the Crown had the onus of proving that what Mr. Eagles did to comply with the Regulations was not within the range of what was reasonable, in order to establish a *prima facie* case. The Defence noted that where the Regulations spell out a closed list of alternatives, then if there is noncompliance with those Regulations, the Crown can rely on that fact in order to establish their *prima facie* case. However, where the Regulations are worded in such a way as to provide an equivalent standard of safety, then the Defence position is that the Crown also has an onus to establish that the measures put in place did not provide an equivalent standard of safety.

[9] With respect to count #2 of the Information dealing with the failure to install an intermediate railing or “mid-rail” as part of the guardrail system as required by section 9(2)(d) of the Regulations, the Defence admits that the Crown established a *prima facie*

case. With respect to this count, and in the alternative to their position on counts #1 and #3, the Defence says that Mr. Eagles exercised due diligence in all of the circumstances of this case. Their position is that Mr. Eagles took every precaution that was reasonable in the circumstances to ensure the health and safety of the persons at Darim Masonry's Downsvew Plaza project. The Defence position is that the death of Mr. Myles was the result of a tragic accident and that his death after falling from the work platform of the scaffolding is not determinative of whether due diligence was exercised by Mr. Eagles. They maintain that Mr. Eagles should be acquitted on all three counts before the court.

THE FACTS:

[10] Most of the essential elements contained in the three count Information sworn December 4, 2006, are not in dispute. Mr. Eric Eagles was, at all material times, an employee of Darim Masonry, who was the foreman and supervisor on-site at the company's masonry project at the Downsvew Plaza, located at 752 Sackville Drive, Lower Sackville, Nova Scotia, on September 25th, 2006.

[11] Shortly after 8:00 AM on September 25th, 2006, Nova Scotia Department of Labour, Occupational Health and Safety investigators received a call that there had been a workplace accident at the Downsvew Plaza. They immediately attended at the scene and saw Mr. Keith Myles lying on the cement sidewalk of the Plaza, directly

Page: 7

below the scaffolding at that location. Mr. Myles suffered serious injuries as result of the fall, and despite being rushed to hospital in an ambulance, he died a short time later. Mr. Myles was 61 years old at the time of his death.

[12] Mr. Barry MacDougall, a Nova Scotia Department of Labour investigator, testified that Mr. Myles had fallen from a work platform constructed of wooden 2" x 10" planks on a metal scaffolding system. He observed that there were no guard rails at the end of the scaffolding and work platform from which Mr. Myles fell approximately 13 feet to the cement sidewalk below. Mr. MacDougall testified that according to the Fall Protection and Scaffolding Regulations, there should have been a "top rail" installed between 36 inches and 42 inches from the work platform and a "mid-rail" installed halfway between the top rail and a "toe board" which should have been around the perimeter of the work platform. Mr. MacDougall pointed out that the toe board prevents tools from falling or a foot slipping off the work platform.

[13] Mr. MacDougall also stated that the wooden planks of the work platform were not secured by wire to the scaffold to prevent movement. In addition, he said that there was either no "cleating" to prevent movement of the planks or that the "cleating" was in the "wrong place" on the bottom of the wood planks to prevent their movement.

[14] On September 25, 2006, Mr. MacDougall served four (4) Compliance Orders on Darim Masonry Ltd. and Avondale Construction Ltd. [the general contractor] for

the Downsvew Plaza project. Those Orders prohibited any additional work being performed until the scaffolding was inspected by a “competent person.”

[15] On cross examination, Mr. MacDougall confirmed that the Compliance Orders were lifted on October 5, 2006 after Mr. Kent Connell made an inspection of the scaffolding at the Downsvew Plaza. Mr. Connell was approved by the Department of Labour as a “competent person” for the purposes of the OHSa inspections. Mr. MacDougall did not go back to the worksite to check whether the scaffolding erected by Darim Masonry employees had been altered in any way by Mr. Connell.

[16] Mr. MacDougall agreed that Mr. Myles’ fall off the work platform was not due to any movement in the wooden planks of the work platform. He also confirmed that no one said that any of the planks on the work platform had moved.

[17] A second Labour Department inspector, Mr. Chris Kavanaugh, testified that he inspected and photographed the scaffolding utilized by Darim Masonry employees, on the morning of September 25, 2006. Mr. Kavanaugh prepared a report [Exhibit 7] and a series of sketches with measurements [Exhibit 8] in which he observed that standard end frames of scaffolding were used, vertical cross bracing was in place and the scaffold was plumb and level on a firm foundation. The work platforms were a combination of manufactured aluminum decking and wooden planks. The wooden planks were of 2" x 10" dimensions, supported by cantilevered [“Outrigger”] brackets

Page: 9

which were attached to the scaffolding end frames. There was horizontal bracing at the base, “push bars” on the building side of the scaffolding to prevent the scaffolding from falling into the building and tie or guy wires to the building to prevent the scaffolding from falling away from the building. So-called “pigtails” were used to vertically secure the end frames of the scaffolding. These requirements for the scaffolding structure were all “done well” in the opinion of Mr. Kavanaugh.

[18] However, in Mr. Kavanaugh’s view, the wooden planks of the work platforms were either not “cleated” or the cleats were not in the “proper place” to prevent movement. In his view, the cleats must be parallel to the rail of the scaffold to prevent movement. In addition, he also stated that the wooden planks were not secured at an overlap by nailing or wiring them together to prevent movement. A further “deficiency” noted was that there were no “toe boards” around the outside perimeter of any of the work platforms.

[19] Mr. Kavanaugh testified that another “deficiency” in his view was that at the TD Bank end of the scaffolding under the roof overhang of the Downsview Plaza, there were no guardrails - either a mid-rail or a top rail, clamped to the end of frame of the scaffolding structure. He was of the view that guardrails were required under the Fall Protection and Scaffolding Regulations because the work platform was about 13 feet above the concrete sidewalk of the Downsview Plaza. Mr. Kavanaugh did point out

that, at the other end of the work platform next to the Nova Scotia Liquor Commission (the “NSLC”) store, there were guardrails which were clamped to the scaffolding at 38 inches above the work platform and at 9 inches above the work platform

[20] Mr. Kavanaugh noted that the end-frame of the scaffolding near the TD Bank had to be bent back to abut a steel I-beam supporting the roof overhang and the false ceiling over the sidewalk. As a result, the scaffolding abutted the steel I-beam, but the work platform itself extended beyond the end frame and outrigger supporting the work platform. Mr. Kavanaugh did not measure the distance that the work platform extended beyond the end frame and under the steel I-beam.

[21] Mr. Kavanaugh stated that the top of the work platform furthest from the wall of the building was 40 inches from the bottom of the steel I-beam. At the wall itself, the measurement was 47 inches from the top of the outrigger, the top of the work platform to the bottom of the steel I-beam. The difference in measurements was due to the fact that the steel I-beam sloped away from the building at an 11° angle.

[22] Mr. Kavanaugh testified that Mr. Myles would have to had lay two “courses” of bricks under the steel I-beam, and that a level line would be needed to ensure that the bricks laid were level. In order to put the level line in the proper place to run the next two courses of bricks, he believed that a person would have had to work on the TD Bank side of the steel I-beam. According to his measurements, the brickwork done

Page: 11

prior to September 25, 2006, extended 32 inches under the overhang from the front edge of the steel I-beam. However, on cross examination, Mr. Kavanaugh confirmed that when the brickwork was finished in early October, 2006, bricks were only laid 8 inches past steel I-beam.

[23] In response to questions concerning the overlapping wooden planks, Mr. Kavanaugh agreed that several of those wooden planks on the scaffolding on were material platforms. As such, the weight of the bricks would hold them in place and agreed that no guardrails were required for material platforms.

[24] Mr. Kavanaugh agreed that the wooden planks did fit properly on the outrigger for the work platform at the NSLC end of the scaffolding. He acknowledged that there was a slight overlap of the planks at the TD Bank end of the scaffolding on the outrigger, because the building turned at that location. Mr. Kavanaugh conceded that there would be a low likelihood of someone falling down the front of the work platform because there was only a couple of inches between the planks and the brick wall. He also agreed with the suggestion that toe boards are not uniformly used, but since they were required by the Regulations, Labour Department Officers “encouraged” people to use them.

[25] Mr. Kavanaugh stated that the TD Bank end of the scaffolding should have had guardrails in place to show the perimeter of the work platform. However, he

acknowledged that the guardrails are not walls and that people can crawl through them. He suggested that guardrails show the perimeter of the work area and prevent a worker from slipping or backing off a scaffold.

[26] Mr. Leonard Samson, a 63-year-old laborer with Darim Masonry arrived at the Downsvew Plaza work site around 6:00 AM on Monday, September 25, 2006, and met Mr. Myles and a fellow labourer, Alan Blakney. It was his first day at this work site, but he had worked with Darim Masonry for eight or nine years and had worked extensively with Mr. Eagles. Mr. Samson said that Mr. Eagles had called on Sunday night to tell him to tear down the scaffolding under the overhang and add it to the scaffolding next to the NSLC building. On cross examination, he did not recall Mr. Eagles mentioning anything about guardrails during the Sunday evening phone call or on Monday morning when they met at the work site.

[27] Mr. Samson said that because the roof overhang came out at an angle from the building, he had to swing the end frame of the scaffolding closest to the TD Bank out at an angle. Mr. Samson and Mr. Blakney took about 30 minutes to dismantle the staging under the overhang and add it to scaffolding next to the NSLC building. On cross examination, he believed that Mr. Eagles had assisted them. He recalled using 2" x 10" wooden planks on the scaffolding and placing the "cleats" over the rails of the scaffolding to prevent sliding.

[28] Mr. Samson testified that the company had regular "Tool Box Meetings" to

Page: 13

discuss safety issues at the work site. However, September 25, 2006 was a Monday, and there was no tool box meeting that day because Darim Masonry's weekly meetings were usually held on Thursday or Friday. Mr. Samson also indicated that he had never taken courses on erecting or dismantling scaffolding, either through the company or as a member of the Laborers Union. He had learned how to erect and dismantle scaffolding through his work experiences over the years.

[29] Mr Samson was in the process of finishing to erect the scaffolding at the NSLC building when Mr. Eagles arrived at that work site. Mr. Eagles came up the scaffolding and Mr. Samson heard him tell the bricklayers [Mr. Myles and David Hood] that the brickwork had to go under the ceiling of the roof overhang near the TD Bank as there had already been 3 to 4 courses of bricks laid under that roof. He believes the scaffolding was finished when the bricklayers started their work.

[30] Shortly after that conversation, Mr. Samson saw Mr. Myles take his block line and bend down to go under the I-beam to hook his block line to a brick. He saw Mr. Myles put his left foot on the ceiling under the roof overhang and when he put some weight on the ceiling, it gave way. He saw Mr. Myles fall to the sidewalk below. Mr. Samson testified that Mr. Myles was at the very end of the work platform, and that there was no guardrail at that end.

[31] Mr. Samson stated he was aware of what a "top rail" and "mid-rail" were, and agreed that neither one was installed where Mr. Myles fell. He was not aware of the

term, “toe board,” or what it was designed to do. Mr. Samson did not recall whether Mr. Eagles had inspected the scaffolding after he and Mr. Blakney had erected it. He also confirmed that no one was wearing a harness or a lanyard, or any fall arrest system.

[32] Mr. Samson did not recall whether Mr. Eagles had discussed or identified any hazards with the bricklayers or the laborers that morning. He did recall that Mr. Eagles was up on the scaffolding and told the bricklayers “what they had to do” that morning. Although he could not recall what Mr. Eagles had specifically said to the bricklayers, after reviewing the statement that he gave to the Labour Department investigators, he believed that Mr. Eagles had said that the brickwork should be extended by a couple of courses and to go 3 or 4 feet past the I-beam.

[33] On cross examination, Mr. Samson confirmed that he had been a labourer in the construction business for approximately 40 years. Mr. Samson confirmed he was not aware of what a “toe board” was, and once explained, he indicated that he had never built one. He also confirmed that he had taken courses on fall arrest programs and understood that guardrails would be required if the scaffolding was over 10 feet above the ground. Mr. Samson agreed that while some of the wooden planks had cleats and others did not, he believed that they were still solid and did not move because of the way they overlapped or that they were material platforms and were held down by the weight of the bricks.

Page: 15

[34] During the cross examination, Mr. Samson was reminded of his previous testimony at the Darim Masonry trial regarding the issue of whether or not Mr. Eagles had instructed him to place a guardrails on the scaffolding. He acknowledged that it was “quite possible” that Mr. Eagles had told him to install guardrails on the scaffolding, including the area where Mr. Myles was working, but he did not really recall that conversation then or during this testimony. He went on to say that “if he [Mr. Eagles] said it, then he was telling the truth.”

[35] As for his earlier statement that he did not install guardrails because there was not enough tubes and clamps available, Mr. Samson agreed with Defence counsel that, in several photographs of Exhibit 2, surplus tubes and clamps were clearly visible around the scaffolding. Mr. Samson also acknowledged that it was quite possible that Mr. Eagles handed him a tube to use as a guardrail, but he did not really remember whether that had, in fact, occurred.

[36] Regarding the lack of guardrails at the end of the scaffolding where Mr. Myles was working, Mr. Samson said that it was his decision not to put a guardrail at the roof overhang end of the work platform. He said he knew that Mr. Myles had to work under the overhang and he was certain that Mr. Myles would have taken off the guardrail, otherwise “how was he going to go inside if that railing was there.” Mr. Samson heard the bricklayers say that the brickwork had to go under the roof, but he did not ask Mr. Eagles or anyone else whether he should not install the guardrails at

that end of the work platform. Mr. Samson did say that if Mr. Eagles told him to put the guardrail on, he would have done so or he would have been sent home. However, he added that, on many occasions in the past, bricklayers told him to take off the guardrail if it was in their way and they had to get in under a roof overhang like that.

[37] Mr. Alan Blakney, a labourer with Darim Masonry, testified that he had worked at the Downsview Plaza the previous week when the brickwork was installed under the steel I-beam. Mr. Eagles called him prior to work on September 25, 2006, told him to tear down the scaffolding under the overhang and add it to the scaffolding next to the NSLC building. When Mr. Eagles arrived at the Downsview Plaza work site around 7:00 AM, he informed Mr. Blakney and Mr. Samson that no guardrails had been in place the week before, and Mr. Eagles specifically told them that the first thing to do was to put guardrails on the scaffolding. Mr. Blakney believed that guardrails or handrails needed to be attached at heights of 16 inches and 48 inches above the work platform. He confirmed that Mr. Eagles wanted those guardrails on the outer edges of the scaffolding structure.

[38] Mr. David Hood, a mason with over 30 years experience testified that he worked at the Downsview Plaza on September 25, 2006, and that he had also worked there a week or two before Mr. Myles' accident. When he and Mr. Myles went up the scaffolding to start their work, Mr. Eagles and Mr. Samson were already up there. Mr. Hood stated that Mr. Eagles met with the two masons and said that the bricks should

Page: 17

be laid to be flush with the I-beam. Mr. Hood suggested that they should go past the I-beam at least one brick. He said that Mr. Myles was standing right beside Mr. Eagles and himself when this conversation occurred, but did not say anything. After installing the vapour barrier on the NSLC building, Mr. Myles and Mr. Hood began the work necessary to lay two courses of bricks under the I-beam.

[39] Mr. Hood testified that after Mr. Eagles went down the scaffolding, Mr. Hood handed a block line and hook to Mr. Myles. Mr. Hood was backing up and unrolling the line as Mr. Myles went the other way. He did not see Mr. Myles fall off the work platform. Mr. Hood also confirmed that Mr. Myles had been on the scaffolding for about 15 to 20 minutes before he fell off the work platform to the sidewalk below.

[40] On cross examination, Mr. Hood believed that if the work platform on scaffolding was over 10 feet above the ground, then a top rail and a mid-guardrail were required. His practice is to look and see if the work area is safe and if not, he tells someone to fix it before he starts work. In this case, he felt that the I-beam was shoulder height and did not think that a guardrail was required because you “had to bend way down to get under the I-beam.” Mr. Hood said that the brickwork done prior to September 25, 2006, was at least 2 ½ bricks to the left of the I-beam. Mr. Hood felt that a mason could reach and do the brickwork past the I-beam by standing on the scaffolding, since it was tight to the I-beam. On redirect, Mr. Hood reiterated that Mr. Eagles had told the masons to lay bricks on the TD Bank side of the steel I-beam.

[41] Mr. Hood stated that the false ceiling under the roof overhand was only held up by wires and it could not support any weight. He indicated that this fact is well known in the construction industry, and in any event, that side of the ceiling was open and visible to Mr. Myles. He also felt that there was no need for Mr. Myles to step onto the false ceiling to attach his block line to a brick, as he could have attached the block line to the mortar.

[42] The final Crown witness was Ms. Alma Jerrett, the safety officer of Darim Masonry. The Labour Department investigators issued Compliance Notices to Darim Masonry and Ms. Jerrett provided information on training taken by Alan Blakney, Eric Eagles, David Hood, Leonard Samson as well as the company policy on safe work practices for using and erecting scaffolding.

[43] Ms. Jerrett also indicated that she had done site inspections at the Downsview Plaza project on September, 21 and 22, 2006. The hazard identification form for September 22, 2006 identified hazards, namely, working at heights and that priority number one was that the scaffold be erected properly, with all guardrails in place, tied in at 15 feet and planks cleated. She said that Mr. Eagles was the “site supervisor” and as such, he was responsible for having safety manuals at the site and taking action as identified or required.

[44] The only defence witness called in this case was Mr. Eric Eagles. Mr. Eagles testified that he was 47 years old and had about 23 years of experience in the

Page: 19

construction business, mostly as a bricklayer. He joined Darim Masonry in 1994 as a mason, and since 1999, he has been one of their foremen or supervisors. As a foreman, he is usually responsible for more than one work site, unless there is one large job occupying the majority of the workers. He has worked with Leonard Samson at different masonry businesses for almost 16 years.

[45] Over the years, Mr. Eagles testified that he has taken many courses in such areas as first aid, fall arrest, erecting scaffolding, etc. In addition, he has a “scaffolding ticket” certifying his training through the Nova Scotia Construction Safety Association. This “ticket” is not a requirement for masons, but it allows him to set up and inspect scaffolds. He stated that he inspects the scaffolds used by his crew, at a minimum, on a daily basis.

[46] On September 25, 2006, Mr. Eagles was the site foreman and supervisor and his crew for the Downsview Plaza project that day was David Hood and Mr. Myles as masons, with Alan Blakney and Leonard Samson supporting them as labourers. Mr. Eagles said that Mr. Blakney had been an employee of Darim Masonry for about four or five years and he felt that Mr. Blakney was competent and required minimal supervision. Mr. Samson had worked with Mr. Eagles for many years and given his extensive knowledge and experience in erecting and tearing down scaffolding, Mr. Eagles was of the opinion that Mr. Samson required minimal supervision. Since both Mr. Hood and Mr. Myles were very competent and experienced masons, Mr. Eagles

felt that they only required minimal supervision.

[47] On Friday, September 22, 2006, Mr. Eagles told Mr. Hood, another mason and Mr. Blakney, who had worked at the Downsview Plaza project, that on the following Monday, they would finish the brickwork under the roof overhang by the TD Bank and then complete the brickwork on the NSLC building. Mr. Eagles called Mr. Samson on Sunday night and told him to be at the Downsview Plaza the next day and that he would start at 7 AM. He also told Mr. Samson that the first thing to do was to tear down the “redundant” scaffolding and add it to the three lifts next to the NSLC building. He also phoned Mr. Blakney early on Monday, September 25, 2006, to remind him of the work to be done that morning.

[48] Mr. Eagles arrived at the Downsview Plaza work site shortly after 7:00 AM on September 25, 2006 and met with the two labourers. They started erecting the new scaffolding, with Mr. Samson and Mr. Eagles working on the TD Bank side of the scaffolding attaching planks and guardrails, while Mr. Blakney worked on the NSLC side of the staging.

[49] Mr. Eagles testified that he told Mr. Samson to put a “lower” guardrail at 18 inches from the work platform. He handed a tube up to Mr. Samson and told him to install a guardrail where the masons would be working. Clamps to secure the tubing were already available on the work platform. Since Mr. Eagles was on the ground at that point, he gave the scaffolding a visual inspection by scanning the base and the

Page: 21

sidewalk to ensure all legs had jacks, there were “gooser” bars for horizontal bracing, the staging had legs with “pigtailed” and “X” braces. In addition, where the staging abutted the steel I-beam on an angle, Mr. Eagles checked to see that the scaffolding had secure tubes and clamps in place, and he looked to see if the wooden planks had “cleats” at the edge. In addition, he looked at the staging next to the wall of the building to ensure that it was tied to the building by wires and that there were also “push-off tubes” in place. Mr. Eagles confirmed that the “upper” and “lower” guardrails were in place on the NSLC side of the staging and when he looked to the TD Bank side of the staging and he saw that Mr. Samson was on his way up to install the other guardrail.

[50] Once he did his visual inspection of the scaffolding structure, the masons arrived and Mr. Eagles met them on their work platform. Mr. Eagles initially told the masons that brickwork was not necessary under the I-beam, but then said that they should go one brick or 1.5 bricks beyond the steel I-beam. Mr. Myles was standing close to Mr. Eagles, but did not say anything. On cross examination, Mr. Eagles agreed that the bricks under the I-beam appeared to run past the wooden planks of the work platform and he estimated that the wooden planks of the work platform extended 12 to 14 inches beyond the steel I-beam.

[51] After discussing the brickwork to be done by the masons, Mr. Eagles went down the scaffolding to assist Mr. Blakney with the preparation of the mortar. As he

descended, he saw a Mr. Samson climbing up the end of the scaffold with a tube in his hand and he also noticed another tube laying at the top level of the scaffolding. Mr. Eagles then left the work area in his truck, for a short time, to get water for the preparation of the mortar.

[52] Mr. Eagles had just returned to the Darim Masonry work area, when he heard some noise and saw some false ceiling panels falling to the left of the scaffolding. He ran over to that area and realized immediately that Mr. Myles had fallen. He put Mr. Myles in the “recovery position,” checked his pulse and applied pressure to stop the bleeding from his nose and temple. He called 911 and then reported the accident to the general contractor’s on-site superintendent.

[53] Mr. Eagles was allowed to go up on the scaffolding to retrieve some tools from the work platform, but did not otherwise change any of the scaffolding. When he looked towards the steel I-beam, Mr. Eagles noticed that the guardrail “was not where it was supposed to be” but tubing was laying on one of the end frames of the scaffolding. Mr. Eagles testified that he “expected the guardrail to be installed 18 inches above the mason’s walk” and clamped to the end frame of the scaffolding. Mr. Eagles felt that the steel I-beam would serve as the top rail, even though it had a slight angle. He did not think it would be a problem, because the I-beam was at the right height of around 42 inches from the platform and could withstand more than 200 pounds of weight.

[54] After the accident, a stop work and compliance order was put in place by the Department of Labour until the scaffolding was inspected by a “competent person” to meet the requirements of the Fall Protection and Scaffolding Regulations. Mr. Eagles said that about one week after the accident, he met with the “competent person,” Mr. Kent Connell of Steeplejack Services. On the NSLC side of the scaffolding, Mr. Eagles raised the lower guardrail to a height of 18 inches and he adjusted a few planks so that the ends were even. At the TD Bank side of the scaffolding, he placed a lower guardrail on the scaffolding below the steel I-beam. Mr. Eagles was not directed to put on a “top” guard rail under the steel I-beam.

[55] Mr. Eagles testified that the planks on the work platform were cleated and secured by nails, and in his opinion, the cleats were not required to be flush to the rail of the scaffolding but could be between 6 to 12 inches from the rail. As for the “toe boards,” Mr. Eagles said that they are 1 by 4 inch pieces of wood attached to the perimeter of the work area and either nailed or wired to the plank to keep material, tools or gear from falling off the scaffolding. He testified that it was not a regular practice of Darim Masonry to utilize toe boards. He stated that Mr. Connell did not require any toeboards to be added or any adjustments to be made to the cleating of the wooden planks.

[56] Being a mason himself, Mr. Eagles explained how a mason would use a “block line” to ensure that the next course of bricks was level. Since he had told Mr. Myles

to lay one to 1.5 bricks beyond the I-beam, Mr. Eagles testified that the string of the “block line” would have to be attached to the wall on the other side of the I-beam. However, he believed that there was “no reason for any employee to be to the left of the I-beam.”

[57] Before Mr. Eagles’ cross examination commenced, he advised the court that he had reflected on his direct testimony overnight and there was a matter that he wished to clarify. Since Defence counsel had completed his examination, the court ruled that the cross examination would proceed and if Mr. Eagles had not clarified his testimony during the Crown’s cross examination, then he would be allowed to make a statement at the conclusion of the questioning.

[58] Mr. Eagles confirmed that he had been the foreman for Darim Masonry since 1999 and that he was one of the people responsible for completing Darim Masonry site inspections and hazard identification forms in the company safety manual. Mr. Eagles acknowledged that he was familiar with the Fall Protection and Scaffolding Regulations and that he had taken training on them. While he knew that his crew was very experienced, he conceded that he did not know exactly what training courses they had taken.

[59] Mr. Eagles acknowledged that he had received a site orientation on September 13, 2006 from the site superintendent for the general contractor [Mr. Greg Parker of Avondale Construction Ltd.]. A part of the site orientation was the identification of

Page: 25

potential hazards and a document was completed by Ms. Jerrett on behalf of Darim Masonry on September 22, 2006. Mr. Eagles stated that, on September 25th, 2006, he had not seen the document prepared by Ms. Jerrett.

[60] Mr. Eagles acknowledged that on September 25, 2006, he was the only one at the Downsview Plaza worksite who was authorized to do a Darim Masonry hazard assessment. Mr. Eagles agreed with the suggestion that it is the foreman's responsibility to ensure that the scaffolding was erected correctly. He confirmed that, in his conversation with Mr. Samson, he only told him to put a guardrail at the 18 inch level and to put the end frames of the scaffolding structure up against the steel I-beam. Mr. Eagles agreed that there was room to attach a guardrail to the end frame of the scaffolding. He also confirmed that he did not measure the distance between the bottom of the steel I-beam and the top of the mason's work platform.

[61] When asked about his conversation with the masons, upon reflection Mr. Eagles clarified an answer from the preceding day's testimony. Mr. Eagles now recalled that as he was going down to assist Mr. Blakney with the mortar, he saw Mr. Samson going up to the mason's platform on the TD Bank side of the scaffolding, but Mr. Samson did not have a tube in his hand. However, Mr. Eagles said that he had handed Mr. Samson a tube and told him to install a guardrail under the I-beam on the TD Bank side. Mr. Eagles pointed to a tube at the top of the scaffolding (in photo #03 of Exhibit 2) which he believed to be the one that he handed to Mr. Samson.

[62] Mr. Eagles agreed that he did not tell Mr. Myles or Mr. Hood to stay off the scaffolding until the mid-rail had been installed on the TD Bank side of the scaffolding by Mr. Samson. Mr. Eagles did, however, say that he believed the guardrail installation was in process when the masons went up and started installing the vapour barrier on the NSLC side of the scaffolding structure.

[63] Mr. Eagles confirmed that the mason's work platform did not move as a result of Mr. Myles' fall. The wooden planks on the mason's work platform remained secure.

[64] On cross examination, Mr. Eagles confirmed that he did a visual inspection by scanning the scaffolding shortly after the masons went up the scaffolding and Mr. Samson was in the process of putting on the mid-rail. Mr. Eagles "assumed" and "expected" that the guardrail would be installed by Mr. Samson. Looking back, he now knows that the mid-rail was not installed, but he "asked for it to be installed." Mr. Eagles agreed that he did not check to see if the guardrail was installed after speaking with Mr. Myles and Mr. Hood, and he also agreed that he knew that the masons were about to start to work in that area.

[65] During his cross examination, Mr. Eagles confirmed that he was aware of the fact that a "top rail" was supposed to be between 36 inches and 42 inches above the work surface and that any rail above that range would be too high to comply with the Regulations. He also agreed with the suggestion that there were no "toe boards"

Page: 27

anywhere on the scaffolding structure. Mr. Eagles acknowledged that he did not tell Mr. Samson that the steel I-beam would serve as the “upper rail” and that he only told Mr. Samson to put a mid-rail in place.

GENERAL PRINCIPLES - STRICT LIABILITY OFFENCES & DUE DILIGENCE:

[66] It was acknowledged by both Crown and Defence Counsel that the sections of the **Occupational Health and Safety Act**, S.N.S. 1996, c.7 and the Fall Protection and Scaffolding Regulations, made under the Occupational Health and Safety Act in O.I.C. 96 – 14, N.S. Regulations 2/96 with which Mr. Eagles was charged, create strict liability offences. However, during the course of argument, there was a difference of opinion between counsel as to what facts the Crown was required to prove beyond a reasonable doubt in order to establish a *prima facie* case where regulatory offences have been alleged in an Information. Both counsel agreed that if the *actus reus* was proved beyond a reasonable doubt, then a *prima facie* case was established by the Crown, and it would be open to the defence to avoid liability by proving on a balance of probabilities, that the accused had exercised due diligence.

[67] The principles of law which are applicable to strict liability offences have been set forth in the unanimous Supreme Court of Canada decision in the case of **R. v. City of Sault Ste. Marie**, [1978] 2 SCR 1299 where Mr. Justice Dickson (as he then was) stated at page 1325-26.

“The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to **Pierce Fisheries** and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence...

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act; the defendant must only establish on a balance of probabilities that he has a defence of reasonable care.

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima face imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may be properly called offences of strict liability.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.” (Emphasis is mine)

[68] In **R. v. Chapin**, [1979] 2 SCR 121, Mr. Justice Dickson delivered the judgment of the Court and provided some further clarification on the due diligence defence to a charge under the Ontario Occupational Health and Safety Act. Dickson J. stated at page 134:

“In my view, the offence created by section 14(1) is one of strict liability. It is a

classic example of an offence in the second category delineated in the **Sault Ste. Marie** case. An accused may absolve himself on proof that he took all the care which a reasonable man might have been expected to take in all the circumstances or, in other words, that he was in no way negligent. (Emphasis is mine)

[69] In the case of **R. v. Wholesale Travel Group Inc.**, [1991] 3 SCR 154, the Supreme Court of Canada reiterated that these general principles relating to strict liability offences did not infringe either s.7 or s.11(d) of the **Charter** where the charge relates to a regulatory offence. The Crown must still prove the *actus reus* of regulatory offences beyond a reasonable doubt, and once established, the Crown is presumptively relieved of having to prove anything further. The Court held that neither the absence of the *mens rea* requirement nor the imposition of a reverse persuasive onus on the accused to establish due diligence on a balance of probabilities offended the **Charter** rights of those accused of regulatory offences. Mr. Justice Cory speaking for a majority of the court on this issue observed at page 218:

The **Sault Ste. Marie** case recognized strict liability as a middle ground between full *mens rea* and absolute liability. Where the offence is one of strict liability, the Crown is required to prove neither *mens rea* nor negligence; conviction may follow merely upon proof beyond a reasonable doubt of the proscribed act. However, it is open to the defendant to avoid liability by proving on a balance of probabilities that all due care was taken. This is the hallmark of the strict liability offence: the defence of due diligence. (emphasis is mine)

[70] The Supreme Court of Canada has referred to the *actus reus* as either the “particular event”, “prohibited act” or the “proscribed act ” in its decisions. In my view, there is no doubt that the Court was referring to the same “act,” or “event” and I conclude that this is, in reality, a statutorily defined *actus reus*, arising from an

accused's failure to comply with the specific statutory provisions referred to in the particular offence(s) charged. The Crown has the onus to establish, beyond a reasonable doubt, that the accused failed to comply with the requirements of the regulatory legislation. The Crown has no obligation to prove *mens rea* or negligence on the part of the accused. If the Crown's *prima facie* case is established, it is then open to the accused to avoid liability by tendering evidence to establish, on a balance of probabilities, that either he or she reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent or that he or she exercised due diligence.

WHAT IS THE CROWN REQUIRED TO PROVE FOR THE *ACTUS REUS*?

[71] Defence counsel submitted that the foregoing principles do not apply where the statute leaves some discretion to those who are bound by the legislation, and that the Crown has the onus of proving as part of the *actus reus*, that what the accused did actually do, was not within the range of measures that a reasonable man might have been expected to take in the circumstances. In his submission, the statutory provisions relating to counts #1 and #3 above, are examples of legislation where an accused person could exercise some discretion and counsel submits that, without that evidence being adduced by the Crown, the accused should be acquitted.

[72] The Crown disagreed and submitted that the general principles involving strict liability offences are well-established; the Crown has no obligation whatsoever to

prove *mens rea* or negligence. Crown counsel submitted that the points raised by Defence counsel are not part of the Crown's case, but rather, they actually form the substance of the reverse persuasive onus that the accused has to meet on a balance of probabilities in raising a due diligence defence.

[73] As a starting point, the Supreme Court of Canada's position has been clearly established in both **Sault Ste. Marie**, *supra*, and **Wholesale Travel Group Inc.**, *supra*, that the Crown must prove the *actus reus* beyond a reasonable doubt. In both cases, the Court observed that the government can, as a practical matter, do no more than demonstrate that it had set reasonable standards to be met by persons in the regulated sphere and to prove beyond a reasonable doubt that there has been a breach of those standards by the regulated defendant. As Mr. Justice Cory stated in **Wholesale Travel Group Inc.**, *supra*, at page 248: "fault is presumed from the bringing about of the proscribed result, and the onus shifts to the defendant to establish reasonable care on a balance of probabilities."

[74] The issue raised by Defence counsel in this case, was canvassed by the Ontario Court of Appeal in the case of **R. v. Timminco Ltd.**, (2001), 153 CCC (3d) 521, where the Court also clarified the meaning of its "endorsement" judgment in the case of **R. v. Grant Paving & Materials Ltd.**, 1996 CarswellOnt 3996. The provisions in issue on the **Timminco** appeal were s.25(1)(c) of the Ontario Occupational Health and

Safety Act and s. 185(1) of Regulation 854, which provided as follows:

Section 25(1) - An employer shall ensure that,

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

Regulation 185(1) - a prime mover, machine, transmission equipment or thing that has an exposed moving part that may endanger the safety of any person, shall be fenced or guarded unless its position, construction or attachment provides equivalent protection.

[75] The trial judge concluded that the Crown was required to lead, but did not lead, “evidence of apparent danger” and based his decision on an interpretation of the Ontario Court of Appeal decision in **R. v. Grant Paving & Materials Ltd.** The issue in **Grant Paving**, *supra*, was whether prior knowledge of the hazard is an essential element of the offence charged. The trial judge in **Timminco** held that there was no evidence to establish the *actus reus*, and that this was a “wholly unexplained tragic accident.” The decision was overturned by the Summary Conviction Appeal Court and Timminco Ltd. appealed to the Ontario Court of Appeal.

[76] In the **Timminco** case, Mr. Justice Osborne ACJO wrote the unanimous decision of the Ontario Court of Appeal, dismissing the company’s appeal. Citing the cases of **Sault Ste. Marie (City)** *supra* and **R. v. Wholesale Travel Group Inc.**, *supra*, the Ontario Court of Appeal ruled, in paragraph 26, that to impose an obligation on the Crown to prove the mental element on a strict liability offence would impede the adequate enforcement of public welfare legislation. In the court’s opinion, clear

Page: 33

language would be required to create a *mens rea* offence in a public welfare statute. Mr. Justice Osborne noted that words like “wilfully,” “with intent,” “knowingly,” and “intentionally” are conspicuously absent from section 25(1)(c) of the Occupational Health and Safety Act. Moreover, the use of the word “ensure” in the section suggested that the legislature intended to impose a strict duty on the employer to make certain that the prescribed safety standards were complied with at all material times.

[77] The Court also noted, however, that since the statutory provision utilized the phrase ‘an exposed moving part “may endanger” a worker,’ , Osborne ACJO said at paras. 27-28:

“However, in my view , there is no requirement that the Crown show that the employer in fact knew of the danger... The words “may endanger” clearly suggest that there can be violation of s.185(1) of the Regulations where there is a *potential* endangerment of a person by an exposed moving part, even if it is not established that any particular person was *actually* endangered by the exposed moving part.

28. The foreseeability of a hazard is properly to be considered as part of the due diligence defence.”

[78] The Ontario Court of Appeal stated in **Timminco** that judgments given by “endorsement,” contain reasons which are mainly directed to the immediate parties, and that its endorsement judgment in **Grant Paving** should only be taken as authority for the proposition that the appeal judge erred in not deferring to the trial judge’s findings of fact. In paragraph 35 of **Timminco**, Osborne ACJO said that,

“given the manifestly limited scope of the endorsement, **Grant Paving** is not authority for the proposition that the Crown must prove knowledge of a hazard in prosecutions under the *Occupational Health and Safety Act* and its Regulations.”

[79] While the decision of the Ontario Court of Appeal in **R. v. Timminco**, *supra*, is not binding upon me, it is certainly a persuasive authority in Nova Scotia. I conclude that the proof of the *actus reus* of a strict liability offence does not include proof of a mental element, negligence or actual knowledge of a hazard. The foreseeability of a hazard is properly to be considered as part of the due diligence defence.

[80] I also conclude that the duty to comply with the provisions of the **Occupational Health and Safety Act** arises from their very existence, and not from the potential of harm from their breach. In order to establish a *prima facie* case, the Crown must prove the *actus reus* beyond a reasonable doubt, that is, that the accused failed to comply with the minimum statutory provisions of the **OHS Act** or its Regulations.

[81] However, the court must still carefully consider the wording of the specific statutory provision that forms the substance of the offence charged in order to determine whether the Crown has adduced some evidence on each essential element of the charge. In referring to the essential elements of the charges in **R.v. J.R. Eisner Contracting**, [1994] N.S.J. No. 672 (NS Prov. Ct) Gibson J. determined at paragraph 27 that:

“27. I conclude that the Crown need not prove that the trench actually exposed the workers or others to a harmful situation or that the walls of the excavation were about or likely to collapse. The Crown must prove beyond a reasonable doubt that the accused committed the prohibited acts of creating an excavation unsupported by adequate shoring or bracing. The Crown must also prove beyond a reasonable doubt

that none of the exceptions set out in section 91 of the Regulations existed so as to exempt the accused from the requirements of section 90 of the Regulations.”

[82] Depending on the specific wording of the regulatory provision, the *prima facie* case may be established by the Crown proving that the accused committed the “prohibited act” itself. For example, by polluting the river or selling adulterated pet food. But, in other cases, the statutory provision may be worded in such a way as to require the Crown to lead some evidence on all of the essential elements of the offence. In **Timminco**, for example, the Court held that the Crown was required to lead some evidence that (1) Timminco was the employer, (2) Timminco had a machine with an exposed moving part that “may endanger” a person, and that (3) the machine’s exposed moving part was not “fenced or guarded”, or constructed in such a way that would provide equivalent protection.

[83] In this case, Defence counsel has acknowledged that the Crown has established a *prima facie* case with respect to count #2 outlined above. Based on the foregoing discussion, a detailed review of the specific regulatory provision alleged to have been breached in counts #1 and #3 is required in order to ascertain whether the Crown has led some evidence on all of the essential elements in order to establish its *prima facie* case for those two charges.

STANDARD OF CARE & FORESEEABILITY:

[84] In any given case, once the Crown has proved its *prima facie* case, the question

is not whether the accused exercised some care, but whether the degree of care exercised was sufficient to meet the objective standard which a reasonable person might have been expected to take in all of the circumstances. In **Sault Ste. Marie**, the Supreme Court of Canada referred to this standard of care in several ways - “due diligence,” “without negligence,” or “took all reasonable care” and at page 1326, *supra*, the Court stated that the object of the due diligence or reasonable care is not the prevention of the harm actually done, but rather, the steps taken to avoid the “particular event” which forms the subject matter of the offence.

[85] In **R. v. Wholesale Travel**, *supra*, Cory J stated at page 238, that the conduct of the accused is measured on the basis of an objective standard and where negligence forms the basis of liability, the question is not what the accused intended, but rather whether the accused exercised reasonable care.

[86] As Mr. Justice Hill pointed out in **R. v. Canadian Tire Corp.**, [2004] O.J. No.3129 (Ont. S.C.) at paragraph 85, accidents or innocent breaches of a regulatory offence inevitably occur, and in assessing the efficacy of a due diligence defence, the court must guard against the correcting, but at times distorting, influences of hindsight. In considering the defendant’s efforts, the court does not look for perfection, nor some “superhuman effort” on the defendant’s part. The key question is not whether the defendants exercised some care, but whether the degree of care exercised was

Page: 37

sufficient to meet the objective standard which a reasonable person might have been expected to take in all of the circumstances.

[87] In **R. v. Canada Brick Ltd.** [2005] O.J. No. 2978 (Ont. S.C.) Hill J. noted in paragraph 128 of the decision, that an employer is not legally bound to provide the “safest imaginable workplace.” The Occupational Health and Safety Act requires compliance with those regulations which shape a reasonably healthy and safe work environment. Concerning the standard of care, in **Canada Brick**, *supra*, Mr. Justice Hill concluded, in paragraph 129, that:

“Generally, with a regulatory offence, it falls to the prosecution only to prove beyond a reasonable doubt the defendant’s commission of the prohibited act. Negligence is assumed without the necessity of further proof by the Crown. It is open to the defendant to avoid liability by establishing, on a balance of probabilities, that a defence of due care is available - that no negligence exists because the defendant took, not some, but all due care, all reasonable steps in the circumstances, to avoid or prevent the occurrence of the prohibited act.” (Emphasis is mine)

[88] I agree with Mr. Justice Hill’s assessment of the standard of care or due diligence that a defendant or accused must establish on a balance of probabilities, if I am satisfied that the Crown has first established its *prima facie* case beyond a reasonable doubt.

[89] In **R. v. General Scrap Iron and Metals Ltd.**, 2002 Carswell Alta 869 (Alta.Q.B.), Mr. Justice Watson, commented on what is reasonably practicable in assessing a due diligence defence and he said, at paragraph 99, that:

“Reasonable practicability refers to a set of circumstances where the employer does everything that could be reasonably expected to be done to avoid harm under the

limits of those circumstances. It is not a test of business efficiency or profitability. Reasonable steps refers to the steps which the employer could perform to avoid harm if the employer thought through the issues reasonably. It is not a test as to whether the steps were rational, but whether a reasonable person could do them and they would be reasonably sufficient for the objective. The Appellant's conduct did not reveal that it had taken every reasonable precaution nor that it was not reasonably practicable to do more." (Emphasis is mine)

[90] While there is no doubt that the issue of due diligence raises questions of fact, in addressing the legal test for risk and its foreseeability, Watson J. in **General Scrap Iron**, *supra*, said at paragraph 101, that it is important not to confuse issues of reasonable foreseeability with reasonable likelihood, nor to confuse either of those with reasonable care to avoid harm. As he pointed out, the duty on the Appellant in that case was to "ensure" that the harm did not occur to the extent that it was reasonably practicable to do so. This he said, connotes more than thinking it is not a problem, and doing little about it.

[91] In the case of **R. v. MacMillan Bloedel Ltd.**, [2002] BCCA 510, the majority stated, at para. 49, that in the context of the defence of due diligence in relation to strict liability offences, the harm is not injury to a neighbor, but the contravention of the relevant statute. The focus of the due diligence test is the conduct which was or was not exercised in relation to the "particular event" giving rise to the charge, and not a more general standard of care. This approach has also been endorsed by the Ontario Court of Appeal in **R. v. Brampton Brick**, [2004] O. J. 3025 (CA) , at paragraph 28, where the court said that the defendant "must show it acted reasonably with regard to

Page: 39

the prohibited acts alleged in the particulars, not some broader notion of acting reasonably.”

[92] I conclude that the standard of care is not based upon the foreseeability of the particular accident itself or the specific way in which the accident occurred. In my view, the standard of care is based on whether the defendant took all, not just some, steps that a reasonable person would have taken to avoid committing the “prohibited act,” that is, the contravention of the minimum statutory requirements to ensure the health and safety of persons in the workplace.

PHILOSOPHY OF THE NOVA SCOTIA OHS A:

[93] The foundation of the NS **OHS A** is the Internal Responsibility System which is based upon the principle that employers, contractors, and employees and self-employed persons at a workplace and the owner of a workplace, supplier of goods share the responsibility for the health and safety of persons at the workplace: See subsection 2(a). Another major principle of the Internal Responsibility System is that it assumes that the primary responsibility for creating and maintaining a safe and healthy workplace belongs to all of the parties listed in subsection 2(a), to the extent of each party’s authority and ability to do so.

[94] These major principles which form the basis of the philosophy of the **OHS A** are also highlighted in subsection 23(2) of the **Act**. That section states that where the Act

or Regulations imposes a duty or requirement on more than one person, the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement. The element of control was noted as being one of the cornerstones of the policy framework of “public welfare” legislation in **Sault Ste. Marie**, *supra*, by Mr. Justice Dickson at page 1322:

“The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control.”

[95] Speaking to the philosophy behind this type of legislation, the Court observed in **Sault Ste. Marie**, *supra*, that “public welfare offences” involved a shift of emphasis from the protection of individual interests to the protection of public or social interests. On the same point, the majority of the Supreme Court of Canada (per Cory J.) in **Wholesale Travel**, *supra*, stated at page 219 that “regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.”

[96] The Ontario Court of Appeal in **Timminco**, *supra*, stated in paragraph 22 that the Occupational Health and Safety Act is a public welfare statute and the Act should be interpreted in a manner consistent with its broad purpose. The “broad purpose” was described in the Ontario Court of Appeal’s decision in **Brampton Brick**, *supra*, at

paragraph 22, as the protection of workers by requiring employers to conform to certain minimum health and safety standards in and about the workplace. Given its remedial purpose, the Court added that the legislation is not to be given a narrow technical interpretation, but should be interpreted in a manner consistent with its broad purpose.

[97] In **General Scrap Iron & Metals**, *supra*, at paragraph 81, Watson J. referred to Dreidger, *On the Construction of Statutes*, in order to highlight the “appropriate interpretation” that courts should give to remedial legislation, such as the Occupational Health and Safety Act:

“There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.”

[98] As a result, I conclude that the terms of the **OHSA** and regulations applicable to each count are to be interpreted in their entire context and in their grammatical and ordinary sense, consistent with the scheme and object of the Act, as well as the intention of the legislature. They are not to be given a narrow technical interpretation, but should be interpreted in a manner consistent with the **OHSA**'s broad purpose.

ANALYSIS:

[99] The Nova Scotia **OHSA** and Regulations establish a regulatory framework to ensure that there are safe and healthy workplaces across Nova Scotia. The **OHSA** and the Regulations create statutory obligations under the Internal Responsibility System to maintain a regulated level of health and safety in the workplace.

[100] Each of the three counts in the Information sworn December 4, 2006, are based upon different sections of the **OHSA** and the Fall Protection and Scaffolding Regulations. There is no doubt that the **OHSA** and its Regulations are examples of “public welfare” legislation and if a breach of that legislation is alleged in a regulatory prosecution, it is a strict liability offence. As such, the Crown must prove the essential elements of each charge beyond a reasonable doubt in order to establish their *prima facie* case.

[101] Defence counsel has acknowledged that the Crown’s *prima facie* case was established beyond a reasonable doubt with respect to count #2. As a result, a detailed analysis of counts #1 and #3 is required to determine whether the Crown has established the *actus reus* beyond a reasonable doubt.

[102] As a starting point, it is not disputed that the “work area” and “work platform” upon which Mr. Myles was working just before he fell to his death were 3 metres or more above the nearest “safe surface.” The uncontradicted evidence of the two Labour Department inspectors confirmed that the “work platform” or planks upon which Mr.

Page: 43

Myles was working were approximately 13 feet or 3.96 metres above a concrete sidewalk. I find that Mr. Myles and his co-workers were exposed to the hazard of falling from a work area that was 3 metres or more above a safe surface, and that therefore, the provisions of Part II of the Fall Protection and Scaffolding Regulations required “fall protection.” Therefore, I conclude that Mr. Eagles, as the Darim Masonry site supervisor and foreman, was required to provide or install some form of “fall protection” under section 7(1) of the Regulations for the employees working under his direction.

[103] Section 7(1) of the Regulations defines situations where “fall protection” is required and that section provides a list of the “fall protection” alternatives that are available where there is a hazard of falling from a “work area.” Fall protection under section 7(1) of the Regulations may be provided by way of a “fall arrest” system (the details of which are contained in section 8); a “guardrail” system that meets the requirements of section 9; a personal safety net (section 10); a temporary flooring system (set out in section 14); or a means of a “fall protection” that provides a level of safety equal to or greater than a “fall arrest system.”

[104] In this case, I accept that, on September 25, 2006, Mr. Eagles instructed his Darim Masonry labourers to tear down scaffolding that had been used the week before, and he instructed them to add it to scaffolding at the side of the NSLC building, so that the masons could complete the brickwork in that area. Mr. Eagles and Alan Blakney

have a clear recollection that the issue of guardrails was discussed on the morning of Monday, September 25, 2006. Mr. Samson did not specifically recall whether the topic of guardrails was discussed that morning. Given Mr. Samson's difficulty in recalling specific details of this discussion with Mr. Eagles, I accept the evidence of Mr. Blakney and Mr. Eagles on this point.

[105] In addition, the evidence of Ms. Jerrett, the Safety Officer of Darim Masonry, established that she had prepared a hazard identification form on September 22, 2006 regarding the Downsview Plaza work location. In that form, Ms. Jerrett identified the hazards of working at heights and the need for the scaffolding to be erected properly, with all guardrails in place. From this and other testimony as well as exhibits tendered at trial, I find that Mr. Eagles, as the Darim Masonry supervisor on site, opted to install a guardrail system in order to provide the means of "fall protection" required by the Regulations for the Darim Masonry employees who he was supervising and directing on September 25, 2006.

[106] Section 9 of the Regulations stipulates the specific requirements that must be met when guardrails are utilized as the means of fall protection. That section sets out the details of when, where and how a guardrail is to be constructed or installed. In this case, manufactured metal tubing was used as the guardrails in the locations where guardrails were actually installed by the Darim Masonry labourers.

[107] For the purposes of this case, the relevant parts of section 9 of the Regulations

read as follows:

9(1) A guardrail shall be provided,

(a) around an uncovered opening in the floor or other surface;

(b) at the perimeter or other open side of

(i) a floor, mezzanine, balcony or other surface, and

(ii) a work area,

where a person is exposed to the hazard of a fall described in subsection 7(1).

(2) A guardrail shall be constructed or installed

(a) with posts that

(i) are spaced at intervals of not more than 2.4 metres and

(ii) are secured against movement by the attachment of the posts to the structure under construction or that is otherwise being worked on, or by another means that provides an equivalent level of safety;

(b) with a top railing that is between 0.91 and 1.06 metres above the surface of the protected working area and that is securely fastened to posts secured in compliance with subclause 9(2)(a)(ii);

(c) with a toeboard, securely attached to the posts and the structure to which the posts are secured, extending from the base of the posts to a height of 102 mm; and

(d) with an intermediate railing on the inner side of the posts midway between the top railing and the toeboard.

[108] Given the very specific requirements as to when, where and how a guardrail is to be constructed or installed, it is also important to note some key words or phrases that are defined in section 3 of the Regulations, which is the definition or Interpretation section:

3(o) “fall arrest system” means that system of physical components attached to a person that stops a person during a fall;

3(s) “guardrail” means a temporary system of vertical and horizontal members that warn of a fall hazard and reduce the risk of a fall;

3(at) “work area” means a location at the workplace at which an employee is, or may be required or permitted to be, stationed and includes a work platform;

3(au) “work platform” means a temporary horizontal working surface that provides access and support to a person at the workplace.

ISSUE ANALYSIS:

Count #1 - Fail to install a guardrail at perimeter of work area:

[109] In this count, the Crown alleges that Mr. Eagles, as an employee, failed to ensure that a guardrail was installed at the perimeter or open side of a work area as required by section 7(1) of the Fall Protection and Scaffolding Regulations, and thereby committed an offence contrary to section 9(1)(b) of the Regulations and sections 17(1) and 74(1)(a) of the **OHSA**.

[110] In my view, the Crown was required to lead some evidence in order to establish the essential elements of this count that:

- 1) Mr. Eagles was an employee, who while at work, was required to comply with the provisions of section 17(1) of the **OHSA**;
- 2) Fall protection was required under section 7(1) of the Regulations;
- 3) Since Mr. Eagles chose to use guardrails as the means of fall protection, the guardrail system provided did not meet the requirements of section 9(1)(b) of the Regulations;

[111] I find that the evidence established beyond a reasonable doubt that Mr. Eric Eagles was an employee of Darim Masonry at all material times, and that he was the site supervisor and the foreman of the Darim Masonry employees working at the

Page: 47

Downsview Plaza, on September 25, 2006.

[112] Pursuant to section 17(1)(a) and 17(1)(c) of the **OHSA**, I find that Mr. Eagles, as an employee, was required to take “every reasonable precaution in the circumstances” to protect his own health and safety and that of other persons at or near the workplace and to “ensure” that protective devices and equipment required by the **OHSA** or the Regulations were used or worn. I also note that every employee shares the responsibility for the health and safety of persons at the workplace (see sections 2 and 17(1) of the **OHSA**). However, section 23(2) of the **OHSA** states that where a duty or requirement contained in the Act or Regulations is imposed on more than one person, then that duty or requirement is “meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement.” Based on the facts of this case, I conclude that Mr. Eagles had the “greatest degree of control” and that therefore, he had the primary responsibility to ensure compliance with the duties and requirements imposed by the **OHSA** and the Fall Protection and Scaffolding Regulations at the Darim Masonry workplace at the Downsview Plaza on September 25, 2006.

[113] I have previously found that the Darim Masonry employees working at the Downsview Plaza on September 25, 2006 were exposed to the hazard of a fall from a work area described in subsection 7(1) of the Regulations and that the evidence

established beyond a reasonable doubt that some form of fall protection was required pursuant to section 7(1) of the Regulations.

[114] In my view, the last essential element for the Crown to prove beyond a reasonable doubt in order to establish their *prima facie* case, relates to the guardrail provisions contained in section 9(1)(b) of the Regulations. While most of the focus of the arguments advanced by counsel related to the “top” guardrail mentioned in section 9(2)(d) of the Regulations, the particulars of count #1 which are set out above, allege that a guardrail was not installed in accordance with section 9(1)(b) of the Regulations, at the “perimeter” or open side of a “work area.”

[115] The phrase “work area” is a defined term in section 3(at) of the Regulations and it means “a location at the workplace at which an employee is, or may be required or permitted to be, stationed and includes a work platform.” Obviously, what constitutes a “work area” is a question of fact in each case. The Defence argues that Mr. Myles did not have to go to the end of the work platform to do the brickwork under the I-beam. While this may be a possible argument, there was no evidence that Mr. Eagles instructed either of the masons as to how they should do their brickwork. I find that the evidence established beyond a reasonable doubt that Mr. Myles was actually working at the end of the work platform, just before he fell to his death. Therefore, I conclude that Mr. Myles was either required or permitted to be stationed at the end of the work platform, that is, beyond the steel I-beam in order to complete the brickwork in that

area and that he was stationed in a “work area.”

[116] There is no doubt that Mr. Myles was working on a “work platform” or floor and having found that the Crown has established that Mr. Myles was in a “work area,” the next issue to determine is whether a guardrail was installed on the “perimeter or other open side” of that “work area” as required by section 9(1)(b) of the Regulations. While “perimeter” is not a defined term in the Regulations, the definition of “perimeter” contained in the *Canadian Oxford Dictionary*, Oxford University Press, Canada, 2001 is “the outer edges of an area.”

[117] Although the two Labour Department investigators did not measure how far the work platform which was being supported by “outriggers” actually extended beyond the steel I-beam, their photographs established that the work platform did extend some distance beyond the end-frame of the scaffolding structure and the steel I-beam. Mr. Eagles estimated that the work platform extended beyond the steel I-beam by about 12 to 14 inches.

[118] The evidence also established that the TD Bank side of the work platform was “open” in the sense that it was not up against a solid surface which closed in that side and thereby prevented the hazard of a fall. I conclude that guardrails were therefore required to be installed or constructed at the “perimeter” or outer edge of the “work area” which I find to have been approximately 12 to 14 inches beyond the end frame of the scaffolding and the steel I-beam. If Mr. Eagles wished to restrict the “work

area” and restrict where an employee was required or permitted to be stationed on the open side of the work platform, then a guardrail system should have been installed or constructed at that location. I find that no “guardrail” was, in fact, installed at the perimeter or open side of the work area on the TD Bank side of the scaffolding structure as a “temporary system of vertical and horizontal members that warn of a fall hazard and reduce the risk of a fall” (see section 3(s) of the Regulations).

[119] In his closing submissions, Defence counsel urged the court to adopt an alternative interpretation for the phrase “work area” in terms of where a guardrail shall be provided according to paragraph 9(1)(b)(ii) of the Regulations. Although the evidence led by the Crown established beyond a reasonable doubt that no “temporary system of vertical and horizontal members” was actually installed on the TD Bank side of the scaffolding structure, nor were toe boards installed anywhere, Defence counsel submitted that the “work area” should not extend to the end of the work planks. Instead, he submitted that the “work area” should only extend to where the guardrails “ought to be” based on Mr. Eagles’ intentions and his direction to Mr. Samson. Counsel argued that the steel I-beam would function as the top rail and the mid-rail should be considered to be located where Mr. Eagles had intended and directed Mr. Samson to install it on the scaffolding structure.

[120] I am not persuaded by this submission for several reasons. First, the Regulations, for obvious reasons, provide detailed requirements as to when and where

Page: 51

guardrails shall be provided and how they shall be constructed or installed. The Regulations stipulate the minimum safety requirements for health and safety in the workplace and if interpreted in the manner suggested by Defence counsel, I find that they would be vague and unenforceable, and completely contrary to the philosophy, framework and purpose of the **OHSA**. I find that this is not an “appropriate interpretation” which can be justified after examining all of the factors to be considered in determining the legislative meaning of the provisions. Secondly, without the guardrails actually being installed and attached to the scaffolding structure as a temporary system of vertical and horizontal members, by definition and in fact Mr. Myles was either required or permitted to be stationed at the perimeter or outer edge of the wood planks or “work area”, and there was no warning of the fall hazard. Finally, as Cory, J said in Wholesale Travel, supra, at page 238, in a strict liability offence where the conduct of the accused is measured on an objective standard, it is not a question of what the accused intended, but whether the accused exercised reasonable care in all of the circumstances of the case.

[121] During his closing submissions, Defence counsel also submitted that section 7(1)(c)(v) of the Fall Protection and Scaffolding Regulations permitted Mr. Eagles to exercise some judgment in providing “a level of safety equal to or greater than a fall arrest system.” He further submitted that if Mr. Eagles provided an alternative method of “fall protection,” then the onus would be on the Crown to prove beyond a reasonable

doubt that the method employed by Mr. Eagles did not actually provide a level of safety equal to or greater than a fall arrest system. Defence counsel submitted that the steel I-beam was within the acceptable range for where a top rail was required to be placed at the outside edge of the work platform and although it sloped up at an 11 degree angle to be 5 inches outside that range on the inside edge of the work platform (next to the wall of the building), it would still be sufficient to meet the requirements of the Regulations for a “top rail” and the definition of a “guardrail.”

[122] I have carefully reviewed this argument in light of the general principles applicable to strict liability offences, the definitions and specific requirements contained in the Regulations as well as the philosophy and framework of the **OHSA**. I have previously noted that the onus upon the Crown is to establish the *actus reus*, that is, the “prohibited act” beyond a reasonable doubt. I have found, as a fact, that there was no “top rail” at the perimeter of the “work area” and that the Crown established that fact beyond a reasonable doubt as the evidence of the “prohibited act.” [123] In addition, looking at the principles of statutory interpretation, I cannot agree with the Defence counsel’s interpretation of section 7(1)(c) of the Regulations. The four specified means to provide “fall protection” are listed in that paragraph and the detailed and very specific requirements relating to each form of fall protection are set out in the sections 8, 9, 10 and 14 of the Regulations. I therefore conclude that, if a person chooses to use some other means of fall protection, the onus would be on him or her

Page: 53

to establish that he or she provided a level of safety equal to or greater than a “fall arrest system” (which is itself a defined term in section 3(o) of the Regulations).

[124] After carefully reviewing the evidence in light of the specific requirements of the Regulations and the applicable legal principles, I find that Mr. Eagles did not comply with the provisions of section 9(1)(b) of the Regulations. With respect to count #1, I find that the Crown has established the *actus reus* beyond a reasonable doubt, and therefore, it is open to the defence to establish, on a balance of probabilities, that Mr. Eagles was duly diligent or operated under a mistake of fact.

Count #2 - Fail to install intermediate (“mid”) guardrail:

[125] This count in the Information alleged that Mr. Eagles, as an employee, failed to ensure that an intermediate or “mid” guardrail was installed as required by section 9(2)(d) of the Regulations. The evidence established that no intermediate or “mid” guardrail was installed and attached to the posts of the scaffolding structure, and Defence counsel conceded that the Crown had proven the *actus reus* and their *prima facie* case on this count beyond a reasonable doubt. For this count in the Information, Defence counsel conceded that Mr. Eagles had the onus to establish, on a balance of probabilities, that he had exercised “due diligence” in all of the circumstances.

Count #3 - Fail to secure work platform to prevent movement:

[126] This count in the Information alleged that Mr. Eagles, as an employee, failed to ensure that the work platform was securely fastened in place so as to prevent

movement by cleating or wiring or such other means of fastening as provides “an equivalent level of safety” as prescribed by section 20(1) of the Fall Protection and Scaffolding Regulations. In my view, the essential elements of this offence which the Crown would have to prove beyond reasonable doubt in order to establish their *prima facie* case are that:

- 1) Mr. Eagles was an employee, who while at work, was required to comply with the provisions of section 17(1) of the **OHSA**;
- 2) The work platform was not securely fastened in place so as to prevent movement by cleating or wiring or such other means of fastening to provide an equivalent level of safety.

[127] I have already found under count #1 that Mr. Eagles was an employee, who while at work, was required to comply with the provisions of section 17(1) of the **OHSA**.

[128] I find that in order to establish this second essential element of this count, the Crown had an onus to lead some evidence to establish beyond a reasonable doubt that either (a) the work platform was not securely fastened by cleating or wiring to prevent movement of the work platform or (b) if some other means of fastening the work platform was used to prevent movement, that it did not provide an equivalent level of safety.

[129] With respect to the presence or absence of cleating, the testimony and the photographs filed as exhibits revealed that cleating was present on the work platform. It was the Crown’s position that if cleating was used as the means to secure the work

platform so as to prevent movement, then the cleats had to be installed in close proximity and parallel to the rail of the scaffold. However, the Regulations do not contain a definition of “cleating,” nor is there any reference as to where the cleats are to be installed under the work platform so as to prevent its movement. I find that the evidence established that cleats were installed and fastened by nails under the work platform on either side of the rail of the scaffold, but that many of the cleats were not installed under the work platforms in close proximity and parallel to the rail of the scaffold. However, I conclude that since the Regulations do not specify where cleating is to be installed, the Crown has the onus to lead some evidence to prove, beyond a reasonable doubt, that if cleating was used, that the planks of the work platform were not securely fastened in a manner and at such locations so as to prevent their movement. In addition, if some other means to fasten the work platform was used to prevent movement, I find that the Crown would have to lead some evidence that the alternate means did not provide an equivalent level of safety.

[130] I find that the evidence established that the work platform did not actually move either just before or immediately after Mr. Myles fell to the concrete sidewalk below the scaffolding. The question then becomes one of whether the Crown may establish this essential element by leading some evidence of either actual movement of the work platform or potential movement of the work platform.

[131] A similar question was raised in **Timminco**, *supra*, where the Court examined

whether the Crown was required to prove actual or potential endangerment for the safety of a person from an exposed moving part of a machine. There, the Ontario Court of Appeal concluded, at paragraph 27, that the reference in the regulation to the words “may endanger” suggested that there could be a violation of that regulation where there is “*potential* endangerment of a person by an exposed moving part, even if it was not established that any particular person was *actually endangered* by an exposed moving part ”

[132] In this case, although paragraph 20(1)(c) of the Regulations does not contain wording similar to the regulation at issue in **Timminco**, the reasoning of the Ontario Court of Appeal is of assistance in interpreting the purpose and meaning of this paragraph. I conclude therefore, that the Crown is required to lead some evidence that the measures taken to secure the work platform in place were not sufficient for the purpose of preventing actual or potential movement of the planks and as a result, a person was actually exposed to or could have been exposed to the hazard of falling from a work area where fall protection was required.

[133] The evidence in this case clearly established that the work platform had several securely fastened cleats underneath the wood planks and that the wood planks were being held in place by an “outrigger” system. The evidence also established that the planks of the work platform had not actually moved either immediately before or just after Mr. Myles fell off the work platform, or that Mr. Myles’ fall from the work

Page: 57

platform was due to any movement in the wooden planks of the work platform. The Crown led no evidence on the potential movement of the planks or that the method used by Mr. Eagles to secure those planks did not provide an equivalent level of safety. As a result, I conclude that the Crown has not established the *actus reus* of count #3 beyond a reasonable doubt, and I acquit Mr. Eagles on this charge.

ISSUES RELATING TO DUE DILIGENCE DEFENCE:

[134] The principles relating to strict liability offences and the defence of due diligence were established in **Sault Ste. Marie**, *supra*, where Dickson J. stated (at page 1326) that the defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if the accused took all reasonable steps to avoid the “particular event”. I have previously concluded that the “particular event” is the failure to comply with the specific statutory provision alleged in the particular offence(s).

[135] In **R. v. MacMillan Bloedel Ltd.**, *supra*, Mr. Justice Smith of the British Columbia Court of Appeal, observed the following with respect to the “particular event” and the two branches of the due diligence defence, at paragraphs 47- 48:

“47. Thus, there are two alternative branches of the due diligence defence. The first applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard. The second applies when the accused knew or ought to have known of the hazard. In that case, the accused may escape liability by establishing that he took reasonable care to avoid the “particular event.”.....

48. The important point to be drawn from this discussion is that whether the accused

conduct was “innocent” under the first branch of the defence, or whether the accused took “all reasonable steps” under the second branch, must be considered in the context of the “particular event.”

[136] During his submissions, Defence counsel submitted that Mr. Eagle’s direction to install a mid-rail might amount to a mistake of fact because Mr. Samson did not actually install a “mid-rail” as he was directed to do. Defence counsel conceded that Mr. Samson was not directed to install a “top rail” because Mr. Eagles believed that the steel I-beam would be satisfactory for that purpose. Mr. Samson could not specifically recall whether Mr. Eagles had directed him to install the “mid-rail”, but that direction having been made by Mr. Eagles was supported Mr. Blakney. I accept the evidence of Mr. Eagles that he directed Mr. Samson to install a “mid-rail.” However, I conclude, having regard to the **Sault Ste. Marie** and the **MacMillan Bloedel** decisions, that this direction, in and of itself, does not amount to a mistake a fact which would render Mr. Eagle’s actions “innocent.” This may amount to a misplaced level of trust and confidence in an experienced employee being able to do what he was directed to do, but I find that it does not amount to a mistake of fact. In this case, I find that the “particular event,” that is, the failure to comply with the Regulations requiring the installation of top and mid guardrails did not result from some hidden hazard that Mr. Eagles did not know or could not have reasonably known of its existence. As such, I conclude that the first branch of the due diligence defence mentioned in **Sault Ste. Marie** test, that is, mistake of fact, does not apply in the

circumstances of this case.

[137] I will now turn to the second aspect or branch of the due diligence defence which is whether the accused took all reasonable steps to avoid the particular event. In a case such as this where negligence is the basis of the liability, the conduct of the accused is measured on the basis an objective standard and as stated in **Wholesale Travel, supra**, the key question is not what Mr. Eagles intended to do, but rather, whether he exercised all, not just some, reasonable care in the circumstances of the case. I conclude that, in examining whether Mr. Eagles exercised due diligence, the issue is not whether he could foresee the particular accident itself or the specific way in which the accident occurred. From my review of the authorities cited above, I conclude that the due diligence defence to a strict liability offence is based on whether the defendant exercised all reasonable care to avoid committing the offence and that any consideration of foreseeability should only relate to what a reasonable person would do, in the circumstances, to avoid the contravention of the **OHSA** or Regulations, that is, the *actus reus* of the offence.

[138] The Defence position is that Mr. Eagles took all reasonable care within his control as the foreman and supervisor of the Darim Masonry Ltd. employees at the Downsview Plaza on the morning of September 25, 2006. He submits that Mr. Eagles evaluated the adequacy of the scaffolding and instructed employees who were

experienced and competent on how to erect scaffolding in order to comply with the Regulations. Mr. Myles' fall from the work platform to his death was an unexpected and unpredictable accident that Mr. Eagles could not foresee. Mr. Myles unnecessarily ducked under the I-beam, stepped into an unsafe work location and in so doing, he did not exercise reasonable care for his own safety when he fell to his death. Mr. Myles should have waited until the scaffold construction was completed. [139] Mr. Eagles also maintains that Mr. Myles did not have to work at the end of the work platform, because he had instructed him to only place one and one-half bricks under and on the TD Bank side of the steel I-beam. Both Mr. Eagles and Mr. Hood were of the view that Mr. Myles could have stood on the NSLC side of the I-beam and reached back to place a block line and lay those bricks. Notwithstanding what Mr. Eagles and Mr. Hood believed was necessary, the uncontradicted evidence of the only person (Mr. Samson) who actually saw the fall, was that Mr. Myles was standing at the end of the work platform and when he placed one foot on the false ceiling to place his level line and it gave way, causing him to fall to the concrete sidewalk below.

[140] The Defence position regarding the guardrail requirements of the Regulations is that Mr. Eagles directed Mr. Samson to install the mid-guardrail and "expected" that it would be installed in accordance with that direction. Mr. Eagles had inspected the scaffolding and guardrails on the NSLC side of the scaffolding and then left to do other work before completing his inspection on the TD Bank side of the scaffolding.

Defence counsel acknowledges that Mr. Eagles did not direct the masons to stay off the scaffolding until the guardrails were installed, because he relied on and “assumed” that Mr. Samson would perform his duties as directed. Mr. Eagles did not believe that Mr. Samson required close supervision because he was an experienced employee. Mr. Eagles did not direct Mr. Samson to install a top rail, as he believed that the steel I-beam would be sufficient to comply with the requirements of section 9(1)(b) and 9(2)(b) of the Regulations relating to a top rail being at the perimeter of the “work area.”

[141] On the other hand, the Crown’s position is that Mr. Eagles was the supervisor and foreman of the Darim Masonry Ltd. employees on site and he was responsible for ensuring that all safety measures were in place before work commenced on September 25, 2006. Mr. Eagles acknowledged that it was his responsibility, as the foreman, to ensure that the scaffolding was erected in full compliance with the Regulations, and therefore the Crown submits that Mr. Eagles failed to properly supervise the Darim Masonry Ltd. employees and failed to inspect the scaffolding structure before work started on the TD Bank side of the scaffolding structure. The Crown maintains that Mr. Eagles’ actions did not amount to due diligence.

[142] As I mentioned previously in my analysis of whether the Crown established a *prima facie* case in respect of count #1 and #2, the particulars of these two counts both allege that Mr. Eagles failed to ensure that a guardrail was installed as prescribed by

section 9(1)(b) and failed to ensure that a guardrail was constructed or installed as required by section 9(2)(d) of the Regulations and, section 17(1) of the **OHSA**. Section 17(1)(c) of the **OHSA** requires every employee, while at work, to “take every reasonable precaution in the circumstances to ensure” that protective devices and equipment required by the employer, the Act and the regulations are used or worn. In addition, section 23(2) of the **OHSA** stipulates that where a duty or requirement of the Act is placed on more than one person, “the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement.” I have already found that Mr. Eagles was the person with the greatest degree of control for the Darim Masonry employees at the Downsview Plaza work-site, and that therefore he had the primary responsibility for ensuring full compliance with the **OHSA** and Regulations.

[143] In **R. v. Wyssen**, [1992] O.J. 1917 (Ont. C.A.), Mr. Justice Blair commented on the impact of the phrases contained in Ontario Occupational Health and Safety Act which required the employer to “ensure” that the measures and procedures prescribed are carried out in the workplace. On this point, Blair J.A. said at paragraph 14:

“An “employer” is obliged by s. 14(1) to “ensure” that the “measures and procedures” prescribed by the Regulations are carried out in the “workplace”. The relevant definition of “ensure” in the Shorter Oxford English Dictionary, (3rd edition) is “make certain”; section 14(1), therefore, puts an “employer” “virtually in the position of an insurer who must make certain that the prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors.” (Emphasis is mine).

[144] The court in **Wyssen**, *supra*, observed at paragraph 15 that the duties imposed by the Act were “undeniably strict” but clearly showed an intention of the legislature to make the “employer” responsible for safety in the “workplace.” This interpretation was based upon principles of statutory construction and reading the statute as a whole. Parenthetically, I note that the Ontario Court of Appeal was invited to revisit the majority decision of Mr. Justice Blair in **Wyssen** in the case of **R. v. Grant Forest Products**, [2004] O.J. No.2250 on the question of whether the definition of an “employer” was overly broad. In declining to do so, the Ontario Court of Appeal stated in its endorsement judgment, that there was “no reason to revisit the Court’s majority judgment” in the **Wyssen** case.

[145] In this case, once Mr. Eagles, being the person with the greatest degree of control over the Darim Masonry employees and the matters that were the duties or requirements of the **OHSA** and Regulations, decided to use guard rails as the means of “fall protection,” then I find that he was required to “make certain” that those guardrails were, in fact, constructed or installed in the manner prescribed by the Regulations. This does not mean, however, that Mr. Eagles himself had to install the guardrails in accordance with the **OHSA** and Regulations, but if employees were working under his direction, then in order to establish due diligence, the onus would be on him to establish on a balance of probabilities that he took all reasonable care in

exercising his supervisory and inspection duties.

[146] While Mr. Eagles acknowledged his supervisory role and responsibility for the work crew at the work site, his answer to the responsibility to “ensure” that the scaffolding structure was properly erected with guardrails installed in place, was that he did not actually inspect the TD Bank side of the work platform before Mr. Myles started working there, because he “expected and assumed” that it would be done by Mr. Samson. As for Mr. Myles, Mr. Eagles did not believe that Mr. Myles had to stand at the perimeter of the work platform to do his work and he should have waited until the mid-rail was installed. Ultimately, Mr. Eagles’ defence of exercising due diligence comes down to the fact that he says he could not foresee the particular accident itself or the specific way in which it occurred. However, I find that neither one of the explanations provided by Mr. Eagles establish that he exercised due diligence by taking all the care which a reasonable man might have been expected to take in all of the circumstances. I find that Mr. Eagles, as the foreman and site supervisor had the greatest degree of control at the work site and an overarching duty to supervise and inspect the scaffolding and that he failed “to ensure” or “make certain” that all guardrails were installed before work was undertaken.

[147] With respect to count #1 of the Information, Mr. Eagles acknowledges that no mid-rail or top rail was installed at the perimeter or open side of the work area. His position is that he thought that the steel I-beam of the roof overhang would act as a

Page: 65

“guardrail” in this case, and because of that belief he did not instruct Mr. Samson to install a “top” guardrail. Mr. Eagles said that he believed that since the steel I-beam was only a few inches above where a top rail ought to have been installed, it was not necessary for him to ensure that Mr. Samson installed a top rail at the TD Bank side of the work platform.

[148] Therefore, the question to determine is whether or not the steel I-beam could be a substitute for the top guardrail and thereby meet a part of the requirements of section 9(1)(b) of the Regulations to install guardrails at the perimeter or open side of the “work area” where a person is exposed to the hazard of a fall. Defence counsel pointed out that a “guardrail”, as defined in section 3(s) of the Regulations does not necessarily prevent a fall, but it is designed to “warn of a fall hazard and reduce the risk of a fall.” Mr. Eagles testified that he did not specifically instruct Mr. Samson to install the top guardrail because he believed that the steel I-beam would be satisfactory for that purpose. In his closing submissions, Defence counsel focused on the purpose of the guardrail, that is, “to warn of a fall hazard and to the reduce the risk of a fall,” and he maintained that the steel I-beam provided an equal level of safety in fulfilling the purpose of a “guardrail.”

[149] I cannot agree with Defence counsel’s submissions on this point, which focused on the purpose of a “guardrail” without considering the impact of the first part of its definition, namely, that a guardrail is “a temporary system of vertical and horizontal

members.” The Regulations clearly contemplate that a guardrail is to be constructed or installed as part of the scaffolding structure, at certain heights above the surface of the “work area”. The end-frame of the scaffolding structure was placed against the steel I-beam, but the work platform was placed on “outriggers” and the “work area” extended approximately 12 to 14 inches beyond the steel I-beam. I find that the steel I-beam was a permanent structure which was a part of the building itself and it was not a temporary system of vertical and horizontal members attached to the scaffolding system. I find that the I-beam was an obstacle in the “work area” and anyone working in that location would have had to duck under it, as Mr. Myles did, to avoid hitting their head. I conclude that the steel I-beam’s sole purpose was to support the roof overhang and it had nothing whatsoever to do with being temporarily placed there to warn of a fall hazard or to reduce the risk of a fall from the scaffolding structure, nor did it in any way define the “work area.”

[150] Without actually installing or constructing a temporary system of vertical and horizontal members as guardrails at the TD Bank side of the scaffolding structure, Mr. Myles was either required or permitted to be stationed at the end of the work platform. The evidence of Mr. Samson was that Mr. Myles ducked down under the steel I-beam to get into the area at the end of the work platform to lay his bricks there. Whether Mr. Myles had to lay bricks under the I-beam as much as 3 or 4 feet or as little as 1 ½ bricks, it is evident that Mr. Myles actually believed that he had to work on the other

Page: 67

side of the I-beam in order to get his job done that day. Unfortunately, we will never know why Mr. Myles decided to fix his block line in the manner that he did. However, based upon all of the circumstances of this case, I conclude that Mr. Myles was either required or permitted to be stationed in that “work area” in order to do his brickwork.

[151] The Regulations spell out very clearly what guardrails are designed to do as well as where and how they are to be installed. The Regulations establish minimum safety requirements for health and safety in the workplace and I find that what Mr. Eagles thought might be a substitute for a part of a proper guardrail system, simply did not comply with the requirements of the Regulations. Based upon his knowledge, training and experience and his knowledge of the Act and regulations and the potential or actual dangers to health or safety associated with the assigned work Mr. Eagles was a “competent person” as defined in section 3(1) of the Regulations. As a “competent person,” Mr. Eagles was the Darim Masonry employee at the worksite who was expected to do the hazard assessment and required to do a daily inspection of the scaffolding. As such, he should have known that the steel I-beam did not meet any of the requirements for a “guardrail” and I find that he was negligent in not instructing Mr. Samson to install a top guardrail at the perimeter of the “work area.” I therefore conclude that he did not take every reasonable precaution to avoid the contravention of the **OHSA** and Regulations particularized in count #1 of the Information.

[152] As Mr. Justice Watson said in **General Scrap Iron & Metals Ltd.**, *supra*, at

paragraph 112: “ to fail to institute protective measures for a problem that the appellant did not believe existed is not, perhaps, surprising, but it is not due diligence.” Tubing was available to be installed as a guardrail and there was room to do so under the steel I-Beam. I find that Mr. Eagles’ conduct with respect to count #1 did not establish, on a balance of probabilities, that he had taken every reasonable precaution in all of the circumstances of the case.

[153] With respect to count #2 of the Information, in the final analysis, Mr. Eagles as the site supervisor and foreman had the greatest degree of control over the duties and requirements imposed by the **OHSA** and the Regulations, and he was responsible for supervising employees under his direction and for inspecting their work to ensure that the fall protection measures were properly constructed or installed before work was undertaken in that area. Even if I accept that Mr. Eagles did not have to conduct hands-on supervision because he had a very experienced crew, this does not mean that his overarching responsibility for health and safety could be completely delegated to the workers. According to sections 2(b) and 23(2) the **OHSA**, the overall responsibility for safety always remains with the person who has the greatest degree of control and authority as well as the ability to create and maintain a safe and healthy workplace. As a result, with respect to count #2, I find that the evidence established that Mr. Eagles inspected the scaffolding for its general construction and for guardrails

Page: 69

on the NSLC side November 4, 2009, but I also find that he failed to inspect the TD Bank side to “ensure” that guardrails were installed in accordance with the Regulations on that side of the work platform before Mr. Myles started to lay bricks under the steel I-beam in that “work area.”

[154] Mr. Eagles was aware of the fact that his crew would be working at heights where fall protection was required. During the previous week at the Downsview Plaza work-site, according to Mr. Blakney’s evidence, Mr. Eagles was also aware that no guardrails had been installed and therefore, he specifically instructed the labourers to install guardrails on September 25, 2006. Mr. Eagles asked the labourers to arrive approximately one hour before the masons were scheduled to start their work in order to dismantle scaffolding near the TD Bank and add it to the scaffolding next to the NSLC building. I conclude that it was clearly intended by this scheduling that the labourers would have the scaffolding and guardrails fully erected in the areas where the masons would be working that day, before the masons began their work. However, I find that Mr. Eagles failed to take the reasonable precaution of directing the masons to stay off the scaffolding or to stay away from any “work area” which did not have guardrails installed and to not start their work in that “work area” until the guardrails were installed, and he had inspected them to ensure compliance with the Regulations.

[155] I also note that sub-sections 23(1) and 23(2) of the Regulations require every scaffold to be inspected each day by a “competent person” prior to use for defects or

damage, and that the erection and dismantling of every scaffold shall be supervised by a “competent person.” Mr. Eagles acknowledged that he was the “competent person” on site for Darim Masonry and I conclude that he had the statutory responsibilities to supervise the dismantling and erection of the scaffold, and to inspect the scaffolding prior to its use on September 25, 2006. I also find that it would be a reasonable precaution for Mr. Eagles, as the site supervisor and foreman, to supervise the erection of the scaffold and to inspect the work of the labourers before the masons began their work to “ensure” or make certain that the guardrails had been installed on the scaffolding as fall protection measures.

[156] As a result, I find that Mr. Eagles was negligent in failing to properly supervise and fully inspect the scaffolding structure to “ensure” or make certain that the guardrails had been installed or constructed as fall protection measures before the masons began their work when he temporarily left the work-site to assist in the preparation of the mortar. I come to this conclusion knowing that Mr. Samson and Mr. Myles shared the responsibility with Mr. Eagles for the health and safety of persons at the workplace, and that Mr. Samson’s failure to install the mid-rail no doubt contributed to creating a hazardous situation where Mr. Myles was exposed to the hazard of a fall without any means of fall protection. However, both the **OHSA** and the Regulations clearly place the primary responsibility on the person with the greatest degree of control over the matters that are the subject of the duty or requirement. The

Page: 71

person with that on-site primary responsibility for Darim Masonry was Mr. Eric Eagles. He had that responsibility as the site supervisor and foreman for the employees working under his direction on September 25, 2006 and he had those duties and requirements by virtue of being the “competent person” on site pursuant to section 23 of the Regulations. Mr. Eagles also had the responsibility to supervise the work of his crew and to inspect the scaffolding to ensure that some form of fall protection measures were in place before people went into those work areas.

[157] I find that there were no “guardrails” or for that matter any other fall protection measures installed or utilized in the “work area” at the TD Bank side of the work platform. Moreover, I find that there was no other means of “fall protection” utilized or worn in that “work area” that provided a level of safety equal to or greater than a “fall arrest system” (as defined in section 3(o) of the Regulations). I therefore conclude that Mr. Eagles has not established, on a balance of probabilities, that he took every reasonable precaution in his control to comply with the duties and requirements of the **OHSA** and Regulations as well as the supervision of his employees and the inspection of their work. With respect to count #2, I find that Mr. Eagles’ conduct did not establish that he exercised due diligence, on a balance of probabilities, as I am not satisfied that he took every reasonable precaution in all the circumstances of this case.

CONCLUSION:

[158] For the reasons set out above, I conclude that count #1 and count #2 of the

Information sworn December 4, 2006 have been proven by the Crown beyond a reasonable doubt and that the defence of due diligence has not been established on a balance of probabilities by Mr. Eagles. I find him guilty of those two counts. With respect to count #3, I have come to the conclusion that the Crown did not establish a *prima facie* case beyond a reasonable doubt, and therefore, I acquit Mr. Eagles of that charge.

Theodore K. Tax, J.