COURT FILE No.: Ottawa-Carleton No. 4111 999 00 00080

ONTARIO COURT OF JUSTICE

02 218 008

B E T W E E N :	
HER MAJESTY THE QUEEN	**Bruce Arnott & Wes Wilson Ontario Ministry of Labour, for the Crown**
— AND —	
GRANT FOREST PRODUCTS INC.	**Cheryl A. Edwards, for the defendant(s)**
	HEARD: July 23-27, 2001

BÉLANGER, J.:

[1] The defendant, a major manufacturer of wafer board with a large plant in the Township of Evanturel, Ontario, is charged with 3 offences under the Occupational Health and Safety Act, R.S.O 1990, c.0.1. arising out of events which occurred at that plant on the 20th of February, 2000. The first count of the information particularises an offence under S. 25(1)(c) of the statute, by failing, as an employer, to ensure that measures and procedures prescribed by section 25 of Regulation 851, R.R.O. 1990 were carried out at a workplace, namely that the defendant is alleged to have failed to ensure that a machine, known as the "trim line #1", which had an in-running nip hazard, was properly guarded to prevent access to a pinch point resulting in injury to a worker.

[2] The second count particularises an offence under the same section, by failing, as an employer, to ensure that the measures and procedures prescribed by section 75 of Regulation 851, R.R.O. 1990, were carried out at a workplace, namely that the defendant failed to ensure that the same machine was not adjusted or repaired before any motion

that may endanger a worker was stopped and/or the parts stopped were blocked to prevent motion resulting in injury to a worker.

[3] The final count particularises an offence under S. 25(2)(a) of the Act by failing, as an employer, to provide information, instruction and supervision to a worker to protect the health and safety of the worker at a workplace. Specifically, the defendant is alleged to have failed to instruct a worker in the hazards of adjusting a roller while the equipment was still operational resulting in injury to a worker.

THE MANUFACTURING PROCESS AT THE AREA IN QUESTION

[4] It is sufficient for the purposes of these reasons to refer only to that part of the process of manufacturing wafer board, which immediately precedes and follows the location where injury occurred to a worker, Mr. Nicky Lepage.

[5] 4 x 8 wafer board sheets come out of a press onto a conveyor belt, which takes the product to a line of steel rollers running at 90 degrees to the belt. These rollers which are powered by a chain drive take the sheets to a tongue and groove machine, where they take their final form before packaging and expedition.

[6] At the relevant time, some wafer board sheets had to be taken off the line on a recurring basis to hand plane imperfections, which occurred when a foreign object was introduced in the press, resulting in a depression in the press roller. This depression caused a mirror image protrusion in some of the boards, which had to be removed.

[7] To achieve this purpose, a hydraulic mechanism alternately described as a jump roll or dump roll, activated by a control switch, was set up to lift boards from the steel rollers and to send them to a dump table parallel to the rollers. It was on this table that a worker used an electric hand plane to remove the imperfection. He would then physically re-insert the boards back into the assembly line. While the dump rolls rose hydraulically

to remove a board, they normally fell back to their resting position by gravity upon activation of a second switch.

[8] It was the failure of one of these rolls to fall back that led the worker in question on the 20th of February, 2000 to climb up on to the dump table either to force the roll back down by hand or to push on a board. In doing so, he appears to have slipped or otherwise inadvertently to have gotten his hand caught in the roller chain drives mechanism. He lost three fingers in the process.

THE WORK STATION

[9] The diagram (exhibit two) and the photographic exhibits illustrate the workstation in question. It consists of a table (the dump table) which has a width of 13'2" and a depth of 4'3". It is on this table that wafer board sheets were dumped by the jump rolls in order to plane off imperfections. The top of the table was 34" from the floor. The table faced an angled flip gard, the top of which was 22" from the top of the table. Housed within this gard were a long series of chains and sprockets connected to transfer rolls (the axes of which were perpendicular to the flip gard) which in the normal course directed twin sheets of the product into the tongue and groove machine. At the relevant time, an opening at the top of the flip gard 2 ¼ to 2 ½ inches wide and running the entire length of the flip gard was uncovered and unprotected. Also unprotected and uncovered (until after the accident) was the very last sprocket connected to the last transfer roll. (at the north end or the left most roller as one faces the table). The upper surface of this sprocket as well as the chain, which drove it, would not have been more than 56" off the ground.

[10] A removable mesh gard (the dimensions of which were never clearly established) was designed to fit into two pockets at the end of the transfer rolls. Even when in proper position, it did not likely cover the sprocket and chain mentioned above. The evidence was vague regarding this aspect, despite my suggestion to counsel during trial that measurements could easily be obtained.

[11] The dump rolls were designed to move vertically in the interstices between the rollers. They were activated upwards by up and down switches located to the right of the dump table. As previously mentioned, they rose under hydraulic power, but fell back into their resting position by gravity. It is significant to note at this point that immediately after the accident, a mesh guard was installed over the end sprocket and in front of its vertical axis and that subsequently, the occupational Health and Safety officer for the Ontario Ministry of Labour issued a compliance order mandating the installation of guards along the whole length of the flip guard. Also, a modification to the operation of the dump rolls causes them now to power down.

[12] The photographic exhibits show the hand planer to have been located at the left end of the dump table. Once the defective board was planed, it (and its companion) were physically flipped back over the flip gard to the transfer rolls by the dump table worker.

STAFFING AND PERSONEL AT THE TIME OF THE ACCIDENT

[13] Tem-Ron Contracting Incorporated provided temporary staffing to Grant Forest Products Inc. on an as-needed basis. Gregory Wells was one of the Tem-Ron supervisors who was contacted by Dale Rooney, then a trim line/finishing sub leader for the Defendant Company. Mr. Rooney required Tem-Ron to provide labour to plane boards at the location previously mentioned. For this purpose, Wells called up 3 Tem-Ron employees, Lepage, Barry Frederick and Mark Tomlinson.

[14] At the time of the accident, Shane Toye was the shift foreman. Two forklift operators (Scott and Cadieux) were responsible for the receiving end of the line, which included the area of the dump rolls.

DECISION

Count 1 (Guarding)

[15] In coming to a conclusion about the defendant's exercise of due diligence in relation to the manufacturing process in issue, I find:

1. That the evidence is clear that it was not difficult to climb up upon the dump table. At a height of 34" from the ground, it was lower than the height of an average kitchen cabinet, slightly higher than a desk. There is evidence from some workers that climbing on the dump table was indeed quite easy.
2. That numerous persons, both contract and temporary staff, had on a number of occasions prior to the accident, climbed upon the dump table. Once a worker was on the table, unguarded pinch points extending the entire length of the flip guard would be below him, constituting a proximate and evident hazard.
3. In addition, that there was no guarding at the point where the cog and chain driving the leftmost roller (as one faces the table) were situated. This was an obvious hazard accessible from floor level, which would clearly have been accessible when the removable mesh guard was off its mounting brackets. Indeed, even when that guard was on, I find that it was likely, in view of its construction, not to have covered the driving end of the roller. I also find that that mesh guard was frequently removed while machinery was in operation. Immediately after the accident, a mesh guard was installed over this area as soon as the hazard was observed, even if the accident had not occurred at this precise location.
4. That Mr. Vottero, the environmental Health and Safety leader for the defendant testified that Canadian Standards Association standards for safeguarding of machinery provide that in determining whether or not a particular physical barrier offers appropriate guarding protection, a barrier of less than 1000 millimetres in height (or 39 inches) is considered insufficient to restrict movement of the body towards a hazard, as it can easily be climbed.
5. That despite a recommendation by Timothy Merla, an engineer with the Ministry of Labour, in a report dated December 13, 1999, that a thorough guarding audit be

performed in relation to Line 1, none had been done in relation to the relevant location (1206 – Jenkins) at the time of the accident.

[16] I find that the absence of protective meshing at the point where the accident occurred constituted an obvious hazard easily observable upon ordinary inspection and that the presence of workers at that location was not difficult to anticipate. Reasonable inquiries on its part would have revealed the potential for danger. On an objective view of the situation, which prevailed on the 20th of February, 2000, access to the danger was minimally impeded. Indeed, at the point of the drive for the last roller, it was chest high and most likely totally unimpeded even when the mesh guard was in position. I agree with the Crown submission that it is no defence simply to tell workers to stay away or to assert that they were not expected to be there, particularly in circumstances when the Defendant's own staff, to whom the contract employees had been referred for assistance, were climbing on the table.

[17] I therefore conclude that the Defendant has failed to prove, on the balance of probabilities, that it did everything reasonable in the circumstances to avoid the situation which led to the injuries and that it has failed to show due diligence in accordance with the tests enunciated in *R. v. City of Sault Ste. Marie* (1978), 85 D.L.R. (3d.) 161 (S.C.C.)

Count 2 (Preventing Motion):

[18] While Lepage was not cleaning, oiling or repairing equipment when he jumped up on the table, there can be no doubt that he was adjusting it either by pushing down on the dump rollers or by pushing on a board to achieve his purpose of lowering them. The dictionary definition of the expression "adjust" includes "...to put in proper order or position". (Compact Edition of the Oxford Dictionary – under heading 4.) He did not know how to stop the line. I accept as proven that those to whom he had been referred in order to provide guidance and assistance had performed this particular adjustment without stopping the equipment. The witness Frederick confirms that he saw a forklift operator "hit it with a crosser" as the equipment was operating.

[19] It appears to me that the defendant had an obligation not only to instruct the contract worker to call regular staff if a problem occurred, but that if it was to rely on this delegated method of assistance, it had an obligation to ensure that its own employees would not resort to inappropriate methods to correct it. I agree with the crown contention that oiling by maintenance staff ought to have alerted supervisors to the existence of a situation which could lead to further problems at that location. The lubrication was a perfunctory solution to what could have been (and indeed was) a more fundamental problem which was neither investigated nor documented in such a way as to trigger supervisory attention. No inquiry was made to determine if the problem had arisen previously.

[20] In view of the very limited training given the Tem-Ron employees, it is hardly surprising that an inexperienced worker, faced with an accumulating pile-up of boards, would have panicked and resorted to the easy expedient of climbing upon the table to knock down the sticking roll as he had seen others do. It is one thing to elicit in cross-examination the admission that Lepage was told to report the problem and to lock the equipment out before touching it but it is quite a different matter when one considers the tense situation, which prevailed when the accident occurred.

[21] I find that to demonstrate that there was due diligence by the Defendant with respect to this aspect of the case, the Defendant would have had to show that it gave lock-out instructions specific to the work site to the employee or that it had taken steps to ensure that its own personnel took appropriate safety measures while adjusting equipment when coming to his assistance. There is no evidence that it did either.

Count 3 (Training):

NICKY LEPAGE'S AND OTHER TEM-RON EMPLOYEES TRAINING

[22] All employees and contractors received a yearly Grant Forest Product safety course. These courses did not relate to a specific piece of equipment but rather related to

general industrial precautions e.g. not to work on operating equipment until it was shut down and locked out, protective clothing, etc.

[23] Training for work to be performed at the workstation itself was brief, cursory and incomplete. Lepage states that the only training he received was from Greg Wells who told him to see the person he was replacing, Mark Tomlinson. Tomlinson, "stayed with me for a little bit while I started and then he went home". The instructions, he says, lasted for "not quite five minutes". Tomlinson confirmed that he had trained Lepage after Wells had brought him over and asked him to show Lepage how to do the job and that the two were left alone for this purpose.

[24] Tomlinson himself states that he had been trained by Wells and someone from the defendant and that the training lasted for "fifteen minutes maximum". Barry Frederick, the third Tem-Ron employee testified that his training lasted "a couple of minutes".

[25] Greg Wells contradicted the 3 Tem-Ron workers by saying that Mr. Gerry Parent trained them. However, he could not say how long the training lasted. Whatever training was received was not overheard by Wells. Gerry Parent was not called to corroborate or refute Well's evidence. Barry Bakhuis, another shift leader with the defendant could only state that Parent had trained the Tem-Ron workers "and stuff" but could add little beyond the fact that they had been trained.

[26] In the result, it is clear to me that Lepage:

1. Never received specific instructions about what to do about sticking dump rollers.
2. That on at least one occasion, he observed a Grant Forest product employee kick a roller down with a boot after jumping up on the dump table. This was one of the forklift drivers to whom Lepage had been directed to seek guidance and assistance in the event of a problem.
3. That no one had instructed him on how to shut down the line. He ignored the function of most buttons on the control panel.

4. That he panicked when the boards started to build up.

[27] Tomlinson confirmed that the extent of his instructions about the control panel involved only how to bring the jump rollers up and that he figured out for himself how to kick the rollers back down. He also confirmed that he was told not to do anything if a problem occurred but to report to the forklift operators. Frederick added that it was frowned upon for contract employees to use the controls to stop the rollers. He did not know how to lock out the line. He saw a Grant forklift operator jump on the dump table to hit a sticking dump roll by hitting it with a length of wood.

[28] I conclude that the Defendant's training and instruction relating to operations to be performed at the dump table were perfunctory and deficient. Training was delegated to other contract employees and was extremely brief. No significant effort was made to determine either the content, the extent or the quality of the information, neither was there any evidence of significant efforts made to determine the employee's comprehension of his duties, apart from a brief period of observation. Generic, annual safety training did not exempt the defendant from providing careful instruction specific to the process in which the employee was involved. No written procedures existed. I find that the Defendant's practices relating to this aspect of the case were clearly deficient. No defence of due diligence has been made out.

The Constitutional Issue

[29] The Defendant has filed a Notice of Constitutional question challenging the constitutional validity (or applicability) of Section 1(1) of the Occupational Health and Safety Act, R.S.O. 1990, and specifically the definition of "employer" within Section 1(1) of that Act, and claims alternative remedies under subsection 24(1) of the Canadian Charter of Rights and freedoms.

[30] The issue of the present *Charter* challenge involves the question of whether the definition of "employer" in section 1 of the *Occupational Health and Safety Act* is so

overbroad that it violates s. 7 of the *Charter* because it unnecessarily encompasses the activities of all "employers" who may contract for the services of one or more workers. The Defendant submits that the legislative history of the Act shows that the Legislature unintentionally eliminated (or neglected to provide for) the ability of an industrial workplace owner acting as "employer" to choose whether to take charge of and control of its workers or contractors or to, in appropriate circumstances, retain or contract a third party to control the work and take responsibility for safety. The legislation, it argues, ought to have extended to an owner the same choice that it affords in a construction project, i.e. delegation of responsibility to a constructor. Absent such an option, hypothetical situations could arise where an employer could be held responsible even when it has no control over the workplace. It gives rise to confusion and uncertainty because of the potential for dual responsibility. It is insufficient to answer, it says, that the defence of due diligence is available as the Crown cannot rely on a defence to make reasonable a definition that is overreaching.

[31] Section 1 of the *Occupational Health and Safety Act* provides the following definitions of "employer" and "constructor":

> "employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;"
>
> "constructor" means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by himself or by more than one employer;"

[32] Generally speaking, the scheme of the legislation is that contracting out of liability for workplace safety is not available to employers but available to a work site owner who contracts a construction project to a constructor.

[33] If the legislation is overly broad, the applicant submits that the appropriate remedies are to either:

1. sever the phrase "or contracts for the services of one or more workers" from the definition of "employer" in section 1 of the *Act* or
2. strike down, or declare the legislation of no force and effect.

[34] The Crown submits that the applicant has not established any *Charter* violation. The Crown submits that section 7 interests are not engaged and that the applicant is asking the Court to narrow the applicability of the regulatory scheme as a whole. Furthermore, the Crown submits that if the Court does find that section 7 interests are engaged, any deprivation is in accord with the principles of fundamental justice, and therefore no *Charter* infringement has been established.

[35] Both parties are in agreement that the applicant has standing to invoke section 7 of the *Charter* to challenge the constitutionality of the definition of "employer" in section 1 of the *Occupational Health and Safety Act.* Section 52(1) of the *Constitution Act, 1982* provides:

> "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect".

[36] It is settled law that if hypothetically, a real person charged under the impugned legislation would succeed on a *Charter* challenge, then a corporation may benefit from any remedy under section 52(1) of the *Constitution Act, 1982* that would result from such a successful challenge. *R. Vs. Big M Drug Mart LTD (1985), 18 D.L.R. (4th) 321 (S.C.C.) at 335-337; R. v. Wholesale Travel Group Inc. (1991), 84 D.L.R. (4th) 161 (S.C.C.) at 176-178 and 197; Canadian Egg Marketing Agency v. Richardson (1998), 166 D.L.R. (4th) (S.C.C.) at 19-22.*

[37] Section 7 of the *Charter* provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

In *Reference re Motor Vehicle Act (British Columbia)* S. 94(2), [1985] 2 S.C.R. 486, Lamer J (as he then was) wrote at paragraph 74:

> "Obviously, imprisonment... deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment... be made mandatory".

Section 66(1) of the *Act* provides the penalties under the *Act:*

> "Every person who contravenes or fails to comply with,
>
> a) a provision of this Act or the regulations;
> b) an order or requirement of an inspector or a Director; or
> c) an order of the Minister,
>
> is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than twelve months, or to both."

[38] Provisions in the *Occupational Health and Safety Act* set out responsibilities, duties and requirements for any "employer" under section 1 of the *Act.* Since section 66(1) provides imprisonment as a possible penalty under the *Act,* I find the definition of "employer" engages the section 7 interests of real persons that are employers.

[39] To succeed in the *Charter* challenge as framed in the present case, the applicant must demonstrate that the definition of employer is so overbroad that it offends the principles of fundamental justice.

[40] Legislation may deprive the life, liberty and security of the person if such a deprivation is in accordance with the principles of fundamental justice. The principles of fundamental justice are not a protected interest, but rather, a qualifier of the right not to be deprived of life, liberty and security of the person. *Reference re Motor Vehicle Act (British Columbia) S. 94(2)* [1985] 2 S.C.R. 486 at para 23.

[41] Although in *R.v.Heywood,*[1994] 3 S.C.R. 761, overbreadth was treated as an independent principle of fundamental justice, the analysis in *Heywood* should not be divorced from the context of that case.

Heywood dealt with that part of Canadian criminal legislation that had the purpose of protecting children from becoming victims of sexual offences. Under that legislation, an offence was made out when an individual convicted of earlier sexual assaults was found loitering in a prohibited area, regardless of intent. The prohibition on loitering directly restricted the freedom of movement of individuals aimed by the law, and engaged their liberty interest under section 7 of the *Charter.* Using hypothetical examples, the Court concluded that the law prohibited loitering in areas where children were not likely to be found, such as in the vast wilderness. In such cases, the goal to protect children from becoming victims of sexual offences would not be advanced. Consequently, the law went too far, and was declared overbroad because in some cases, the law restricted the freedom of movement of an individual for no reason. The law offended the principles of fundamental justice because it applied without prior notice to the accused, to too many places, to too many individuals, for an indefinite period with no possibility of review. It restricted liberty far more than necessary to accomplish its goal. The Supreme Court of Canada concluded that the law infringed section 7 of the *Charter* because it deprived individuals of liberty in a manner that was not in accordance with the principles of fundamental justice.

In *Heywood*, the overbreadth of the legislation was balanced against the liberty interest of the individual at stake. Similarly, in the present case, the inquiry should focus on the extent to which any alleged overbreadth deprives an individual of his liberty under the *Act*, and whether the extent of that deprivation is in accordance with the principles of fundamental justice.

[42] On the issue of overbreadth, Gonthier J wrote in *R.* v. *Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606:

> "In all these cases, however, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the Charter. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the Charter. As will be seen below, overbreadth is not at the heart of this case, although it has been invoked in argument."

[43] When an overbreadth analysis involves a constitutionally protected "free-standing" right, such as the right to freedom of expression under section 2(b) of the *Charter*, the ambit of the provision touching upon the protected right is compared with concepts such as the objectives of the State under section 1 analysis *R. v. Sharpe*, [2001] 1 S.C.R. 45 However, when an overbreadth analysis involves life, liberty and security of the person, the ambit of the provision touching upon the life, liberty and security of the person is balanced against the principles of fundamental justice. If a law is found not to offend the principles of fundamental justice, it appears to me unnecessary to enter into a discussion of the minimum impairment test under Section 1 of the *Charter*.

[44] In the context of the principles of fundamental justice, Lamer J (as he then was) wrote in *Reference re Motor Vehicle Act (British Columbia) S. 94(2), supra:* "A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice". In *R. v. Heywood, supra,* Cory J wrote: "If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. In *Rodriguez v. British Columbia (Attorney General), supra,* Sopinka J wrote: "where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose (emphasis added).

[45] For a law to be found so overbroad that it offends the principles of fundamental justice, it must deprive life, liberty and security of the person without reason, or in a manner unrelated to the State's interest in enacting the legislation. That is the legal test that must be satisfied to find a law overbroad to the extent that it infringes section 7 of the *Charter.*

[46] The parties are in agreement that the *Occupational Health and Safety Act* sets out a comprehensive scheme for the regulation of workplace activities relating to the health and safety of workers. At paragraph 241 of its written submissions, the applicant does not dispute that the legislature has attempted to craft the legislative provisions which protect workers as broadly as possible to achieve the extremely important and laudable purpose of protecting the health and safety of workers in Ontario.

[47] The purpose of the *Occupational Health and Safety Act* is to protect and promote the health and safety of workers in the workplace in Ontario. Workers are vulnerable and at the mercy of the workplace conditions created by their employers.

[48] In *Rodriguez v. British Columbia (Attorney General), supra,* the Supreme Court of Canada upheld a law that prohibited assisting a person to commit suicide

notwithstanding the fact that it directly deprived an individual of the right to security of the person. The purpose of the legislation was to preserve life and protect the vulnerable. In that case, Sue Rodriguez did not have to resort to the use of hypothetical examples for her *Charter* challenge. She was terminally ill, mentally competent, but unable to commit suicide on her own. She argued that the law was over-inclusive because suicide itself was not unlawful, and that she was not one of the vulnerable individuals that the legislation aimed to protect. The issue addressed by the court was whether the existence of a criminal prohibition on assisting suicide for one in the situation of Sue Rodriguez was contrary to the principles of fundamental justice. Sopinka J cited McLachlin J (as she then was) from *Cunningham v. Canada,* [1993] 2 S.C.R. 143:

> "The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally."

At paragraph 141, Sopinka J wrote:

> "Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. (as he then was) in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 512-13, are as follows:

> "Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.
>
> ... the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots"....
>
> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves."

[49] In *Rodriguez*, the preservation of human life was acknowledged to be a fundamental value of our society. The prohibition against assisted suicide served that purpose. Sopinka J concluded at paragraph 174:

> "In upholding the respect for life, it may discourage those who consider that life is unbearable at a particular moment, or who perceive themselves to be a burden upon others, from committing suicide."

[50] In the present case, the purpose of the legislation is also concerned with upholding the respect for life. Its purpose is to protect and promote the health of safety of vulnerable workers that are at the mercy of the working conditions created by their employers. By enforcing occupational health and safety standards with penalty provisions, and extending accountability to employers that contract for services of one or more workers, the legislation prevents the avoidance of responsibility by contracting out. The definition of "employer" in section 1 of the *Act* motivates stronger communication and coordination between employers and third-party employers and promotes their compliance with the *Act*. By making both the employer and the third party employer accountable for the safety of a worker, the purpose of the legislation is furthered.

The "wrong" that the legislation seeks to address, it seems to me, is the failure of an owner employer to take supervisory, pro-active and safety-related measures even when control has essentially been entirely given over to a third party. It creates the necessity for astucious, careful and discerning effort in the choice of that third party and imposes a continuing responsibility to verify that the third party does the work in a manner that protects workers.

[51] It appears to me that the Ontario Court of Appeal in *R. v. Wyssen at pp. 196-199* clearly speaks to lower courts when it commented on the legislation sought to be impugned by the Defendant: "...in my opinion, the legislature in the definition of "employer" used the words "contracts for services" in their technical sense to differentiate them from contracts of employment. In doing so, it intended to impose upon the respondent, as the employer of an independent contractor, the responsibility of compliance with the Act". "The replacement of the former restrictive definitions of "employer" by the expansive definition of the Act reflects the *clear intention* (my emphasis) of the legislature to make employers responsible for ensuring safety in the workplace. This is consistent with the literal interpretation of the Act." In *Ontario vs. Canadian Pacific Limited*, [1995] 2 S.C.R. Chief Justice Lamer stated at pp. 1050-1 "The presumption that a statute's literal meaning, as construed in the context of the statute as a whole, best reflects legislative intention is valid in ordinary circumstances. However, the presumption is not irrebuttable. In cases where special circumstances exist, these circumstances can lead a court to conclude that a statutory provision's apparent literal meaning does not, in fact, provide an accurate reflection of the legislature's intention, and that an alternative understanding of the words in the statute would be more appropriate..."

[52] With respect, it is an exercise in futility for the defence to argue before me that the Court of Appeal "missed the point" that the legislature in 1978 unintentionally eliminated a long-standing distinction between the industrial employer in charge and control of the work place who had obligations for contractors, versus an industrial workplace owner acting as "employer" who may not fully have charge and control of the

workplace. The Court of Appeal, says the Defendant, interpreted the legislation without the benefit of legislative facts before it showing the history of the predecessor *Industrial Safety Act.* Whether or not the careful and detailed historical analysis put forward by the defendant is correct is irrelevant to this Court in the sense that I am bound by the appellate court's statutory interpretation. I am not free to disregard it in favour of my own interpretation even if I felt that I was better informed about the legislative history and therefore that my view is preferable. Neither am I free to disregard the Court of Appeal's unanimous opinion in favour of the *obiter dicta* of one of its judges. The Defendant's argument will have to be re-iterated at the appellate level. In any event, none of the "special circumstances" referred to by Lamer J. in *Ontario vs. Canadian Pacific* come through the Defendant's analysis to allow me to conclude that the legislation is not an accurate reflection of the legislature's intention. It has often been asserted that resort to legislative history in a determination of legislative intention is, at best, a risky endeavour for a court to undertake. I cannot agree that absence of reference in debate, throne speech, statement of principle or object or ministerial memoranda to a change in legislative approach or philosophy reasonably leads to the conclusion that the change was unintentional and undesired. We are not dealing here with conflicting alternative interpretations leading to the necessity of resort to extrinsic aids to clarify legislative purpose. The sections in question are unequivocal. I cannot resist the comment that if the legislation did not reflect legislative intention, surely the Ontario Legislature in the past 24 years has had the opportunity to correct the situation.

[53] Mr. Justice Finlayson, in *Wyssen* (supra) stated in *obiter* "...I do not think that the Crown can rely upon a defence to make reasonable a definition that is overreaching." Underlying that statement appears to be an assumption that any analysis of legislation for the purpose of determining overbreadth must be restricted to an analysis of the legislation itself, without regard to context or statutory or jurisprudential safeguards. In that respect, I make two observations: First, while the legislation has penal consequences, defending cases of this nature imposes, unlike the situation in criminal cases, a positive obligation upon a defendant to prove a defence. These are strict liability regulatory offences and public welfare legislation (*R. vs. City of Sault Ste. Marie, supra*). Secondly, appellate

scrutiny at the highest level has referred to the means available to the subjects of legislation to resort to safeguards in an analysis of legislative overbreadth. (See *Winko v. British Columbia (Forensic psychiatric Institute)* [1999] 2 S.C.R. 625 (S.C.C.) Mr. Justice Cory in *Heywood* spoke of the absence of a review process in lifetime prohibition cases. *Budreo* refers to the procedural safeguards of a hearing in cases under s. 810.1. And see *R. v. Parker* (2000) 49 O.R. (3d) where Mr. Justice Rosenberg discusses the practical unavailability of a defence in a determination of whether or not legislation infringes the principles of fundamental justice. And of course, the Supreme Court's comments in *Sharpe* on the existence of statutory defences and their impact on an analysis of constitutional validity.

[54] The hypothetical examples proposed by the defendant are flawed, in my opinion, in that they appear to assume that "due diligence" is an inflexible concept the parameters of which are invariable regardless of the circumstances to which it applies. Surely, the requirement to demonstrate due diligence in owner-contractor relationships varies in accordance with such factors as the relative experience, expertise and competence of the contracting parties, to name but a few. In some cases, it may be satisfied by proof of the exercise of reasonable care and meaningful effort in the selection of a contractor. In others, as in the situation before the court, it may require application of the entire panoply of workplace protective measures expected of a conscientious and safety-minded manufacturer. Nowhere in the Defendant's argument is there any suggestion that the defence of due diligence, in any hypothetical situation, is removed or weakened. In *Wyssen,* the Court of Appeal did not rule that the defence of due diligence was unavailable to the defendant. Rather, it chose to order a new trial "to determine whether in fact the Act and the Regulations were breached in the performance of the work of window-cleaning by the deceased." While the distinction between constructor and owner may, admittedly, sometimes give rise to difficulties relating to the factual and legal categorisation in individual cases, there is no suggestion in argument that different statutory schemes would not suffer the same occasional predicament. Unavailability of an option to contract out of employer responsibilities does not in my opinion make the legislation overbroad. Rather, as stated above, it appears to me to re-enforce a legislative

objective to make workplace owners and employers conscious of their responsibilities to take prudent and effective measures to ensure the existence of a safe workplace environment.

[55] In my view, the answer to submissions relating to confusion is given by counsel for the Defendant herself in a report she co-authored and provided to the Court (See: "Employer Liability for Contractors under The Occupational Health and Safety Act – A Practical Guide" Carswell 2000). "...it is worth adding a final note that confusion continues to exist regarding whether a corporation that contracts for services should take a 'hands-on" (duly diligent) or "hands-off" approach to the employees of a contractor. The legal answer to this question is *absolutely clear* (my emphasis). A corporation falling under the extended definition of 'employer' can *never* properly take a 'hands-off approach by either ignoring the situation or crafting contractual terms, making the subcontractor responsible for performing the work in compliance with OHSA and the Regulations. The only situation in which contracting away is potentially available is a situation where work is 'construction' as opposed to work generally regarded as non-construction services, and where an owner is seeking to contract away responsibility to a general contractor as a 'constructor' for the work...The matter of contracting for construction projects involves separate and entirely opposite legal concepts...". I conclude from those comments that if "the distinction is the source of much confusion and misunderstanding", it arises out of a desire to avoid, ignorance or misinterpretation of legislation which is, palpably, unequivocal.

[56] In *Heywood*, Mr. Justice Cory states (at p. 793): "In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms to the *Charter*, legislature must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator."

[57] In my view, the legislation creates different schemes to address different contractual relationships and situations. What it does not do is to require contortions (to use the defendant's phrase) or artificial means to establish due diligence. What it does not do is to capture within its ambit owners and employers who have exercised due diligence in their choice and supervision of contractors and who have "done nothing wrong". Mr. Justice Blair in *Wyssen* (supra) states that "Section 14(1)...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. The duty imposed by s. 14(2)(g) is even more sweeping, requiring an employer 'to take every precaution reasonable in the circumstances for the protection of a worker'. The duties ...are undeniably strict and...undelegable...". Without doubt, the breadth of the legislation is onerous and may have negative consequences relating to cost and economic feasibility of any particular endeavour or enterprise, but it does not unfairly deprive owner/contractors of the means to advance successful defences when they have attended diligently to their responsibilities. If the intention of the legislature was to make an employer a virtual insurer of employee safety in the workplace, it does not appear to me that the legislation restricted liberty more than was necessary to accomplish that goal. Seen in that light, the legislation is neither arbitrary nor disproportionate.

[58] For those reasons, I reject the Defendant's *Charter* motion and find the defendant guilty of all counts of the information before the court.

Released: July 25, 2002

Signed: Senior Justice Paul Bélanger

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July 30, 2002

Mr. Elliot Citron
CaseLaw Editor
Law Times
240 Edward Street
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Dear Mr. Citron:

Re: R. v. Grant Forest Products Inc.

I enclose for your information a copy of the decision of Mr. Justice Belanger, dated July 25, 2002. You may be interested in publishing a summary because of the constitutional issue starting at page 9.

Thank you for your attention to this, and please do not hesitate to contact me if you have any questions.

Yours truly,

Bruce Arnott

Bruce Arnott
Counsel

Enclosure
BA/maa