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ONTARIO

SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTION APPEAL COURT

B E T W E E N:	)	
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HER MAJESTY THE QUEEN	)	A. Mersereau, for the Crown
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- and -	)	
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	)	
CANADA BRICK LTD.	)	D. Crocker, for the Respondent
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	)	**HEARD:** August 5, 2004; January 4, 6, 2005
	)	

REASONS FOR JUDGMENT

[On appeal from the judgment of LeDressay J.
dated May 27, 2003]

HILL J.

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INTRODUCTION

[1] On March 8, 2000, a brickworker, Frank Aquino was crushed by a dehacker machine at the Burlington plant of Canada Brick (the company). He survived his injuries but never worked again.

[2] As a result of the industrial accident, Canada Brick was charged under a provincial regulatory statute:

> Canada Brick Limited/Briques Canada Limitee, 5155 Dundas Street West, Burlington, Ontario L7R 3X4 about the 8th day of March, 2000, at the City of Burlington, in the Central West Region in the Province of Ontario did commit the offence of failing, as an employer, to take every precaution reasonable in the circumstances for the protection of a worker at a workplace, located at Dundas Street West, Burlington, contrary to section 25(2)(h) of the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1.
>
> Particulars: The Defendant failed to take the reasonable precaution of implementing interim safety measures to prevent access to the exposed moving parts of the "A" dehacker machine while completing steps to comply with an inspector's order for guarding on the said machine. A worker, Franceso Aquino, sustained injuries.

[3] When the respondent was acquitted after a seven-day trial, the Crown appealed advancing these grounds:

> 1. The learned trial judge erred in law by placing the onus on the Crown to prove a lack of due diligence in the circumstances rather than placing the onus on the accused to prove due diligence in the circumstances.
>
> 2. Having found that the *actus reus* had been proved beyond a reasonable doubt the learned trial judge erred in law by failing to properly apply the test as to whether a reasonable man would have foreseen that guarding techniques should have been implemented as a means of dealing with the hazard in question.
>
> 3. The learned judge having concluded that the area where the accident occurred was "an area where care had to be diligently exercised by workers because of the movement of the dehacking machine" erred by also finding that "the area where the accident occurred was not an obvious hazard to which guarding principles would normally apply".

[4] In response to the government appeal, Canada Brick filed a Notice of Constitutional Question (the notice) and described itself as an "Appellant on the cross appeal". However, the respondent conceded on the appeal, in light of the dismissal of the charge at trial, that no jurisdiction existed to found a cross appeal. The substance of the argument in the notice though was available otherwise to the respondent in its effort to support the correctness of the trial court's verdict. The notice submitted that in the context of the government response to the Aquino accident:

> (1) an Ontario Ministry of Labour inspector violated Canada Brick's s.8 *Charter* right to be secure against unreasonable search and seizure by misusing statutorily conferred warrantless inspection powers to conduct an evidence-gathering investigative search
>
> (2) the inspector breached right to silence and fairness interests of Canada Brick employees protected by s.7 of the *Charter* as well as employees' s.8, 9 and 10(b) *Charter* rights through unauthorized compulsion to provide documents and information to the government inspector
>
> (3) the government inspector's conduct amounted to an abuse of process warranting a stay of proceedings.

[5] Of these arguments, only the first and third submissions of an abusive and unconstitutional warrantless search were ultimately advanced on appeal.

THE PRE-TRIAL *CHARTER* MOTION

(1) Canada Brick's Evidence

[6] In March of 2000, Mr. Leavitt was the worker representative on the Health and Safety Committee at Canada Brick set up under the requirements of the *Occupational Health and Safety Act*, (*O.H.S.A.*). Acting as the Safety Coordinator for the plant, Mr. Leavitt set up monthly safety meetings and conducted employee safety training.

[7] On March 8, 2000, Mr. Leavitt notified the Ministry of Labour (M. of L.) as soon as the Aquino accident occurred. Within a short time, M. of L. Inspector Burke arrived at the company premises and after "general conversation" issued a stop work order for the dehacker A machine stopping its operation until it was at a minimum temporarily guarded.

[8] Later, in the afternoon of March 8, with the dehacker A pathway guarded by a chain (with a lock) across the entryway and the training required in the order completed, Inspector Burke lifted the stop work order.

[9] Mr. Leavitt testified that after the date of the accident, Insp. Burke asked him for employees' names and addresses and "told" him to set up appointments for various employees to be interviewed and in the witness' words: "I done what he told me to". Canada Brick provided one of its offices for the government

interviews. Mr. Leavitt considered that there was some flexibility as to the timing of the employee interviews.

[10] Larry Leavitt told the trial judge he believed Insp. Burke abused his powers and took advantage of him – he thought the inspector was in the Canada Brick premises to check out the premises and "find out what the problem was" not to investigate to take the matter "to court". The witness believed "that when they (the M. of L.) come in the plant you had to do what they say":

> Q. You indicated to my friend that you provided Mr. Burke with everything that he asked for. Why did you do that?
>
> A. I thought I had to, I thought that's what – the Ministry of Labour comes in, I'm under the impression that they had the power to get whatever they wanted.

[11] Mr. Leavitt testified that had he known there was no requirement to comply with Burke's post March 8 requests or directions he would have first notified a supervisor such as the plant manager – "I think I should have been told that it was going to go to court".

[12] Mr. Leavitt agreed that he did not hesitate to speak to Insp. Burke. Burke never suggested that if he didn't answer questions he would be charged. Mr. Leavitt provided the inspector all the information he requested.

[13] Mr. Leavitt recalled that Insp. Burke was provided a number of documents including minutes of safety meetings, a sketch of the dehacker

machine created by MS Electric (an electrical contractor of Canada Brick), a Form 7 sent to the Spills Action Centre describing the accident, a written description of the accident including names of employees present at the time – a form the company was "required by law to submit on notification of the accident". Mr. Leavitt testified that the description of the accident he forwarded to the inspector was based on information from the other employees which he compiled.

[14] Kevin Joncas, a supervisor in the Canada Brick packaging department in July of 2002, testified that he was "told" by Larry Leavitt he "had to speak to Inspector Burke" – "I was just told that I had to be there to give the statement at a certain time, on a certain date". The witness spoke to the inspector the day following the accident. Mr. Joncas testified he was unaware when giving his statement he could have a lawyer or a Canada Brick management representative present – he would have preferred to have someone present. Mr. Joncas answered the inspector's questions honestly as he would if someone else had been present.

[15] Mr. Joncas was aware that documents were turned over to the inspector because, in his view, "we believed we had no choice and were required by law to provide them to Douglas Burke".

[16] During his statement to Insp. Burke, according to Mr. Joncas, he tried to be helpful and in response to his question as whether "something could happen" to him, the inspector replied that there was the possibility of a fine and/or a jail term. As a result, Mr. Joncas thought the interview "could determine whether or not [he] was fined or jailed for this particular incident".

(2) Inspector Burke's Testimony

[17] On March 8, 2000, Insp. Burke was doing "regular inspection duties" at other locations when he was paged to attend the Canada Brick premises in Burlington to "investigate that accident". The witness described his initial actions:

> When I arrived at the plant I started my investigation off by speaking to a number of people there, including those in management and workers. I visited the site of the accident, took pictures, I took notes, and issued a field visit report.

[18] At the outset, the inspector received assistance from Larry Leavitt and others. Within two hours, the inspector determined the dehacker machine as it had been allowed to operate "was an imminent danger to workers". As a result, he issued a stop work order on the machine in these terms:

> Pursuant to Section 57(6)(b) of the *Occupational Health and Safety Act/90*, the employer shall ensure that the A and B dehacker machines located in plant B are not used until adequate interim precautions are provided and used and this order is lifted by an inspector.

[19] In cross-examination, Insp. Burke agreed that s.57(6)(b) of the *Act* provided:

> When an inspector makes an order under subsection (1) and finds that the contravention of this *Act* or the Regulations is a danger or hazard to the health or safety of [a] worker, the inspector may order that the work at the workplace as indicated in the order shall stop until the order to stop work is withdrawn or cancelled by an inspector after an inspection.

[20] The inspector testified that his order made reference to "interim" precautions only because on March 8 he was informed by personnel at Canada Brick that they were in the process of installing permanent controls, including a photoelectric-eye system, for the dehacker machine.

[21] Pressed in cross-examination as to whether, when he issued the stop work order, he had reasonable and probable grounds to believe a contravention had occurred, Insp. Burke responded:

> Q. Okay, is it fair to say then, that when you issued this stop order, you had reasonable and probable grounds to believe that a violation of the *Act* or the *Regulations* had occurred?
>
> A. When I issued that order…that day, I was focused on taking what I believed to be a dangerous piece of equipment out of service so as to prevent any further workers from being injured, and I was really focusing on preventing that machinery from continuing operation until corrective measures had been put in place.
>
> Q. Right, and I don't dispute that for a second. What I'm suggesting to you however, is that your jurisdiction for issuing an order, is your belief that the *Act* or the *Regulation* has been violated?
>
> A. I would agree with that to the extent the machine was not properly guarded, nor were there any interim controls in place.

> Q. So just to be clear, you would agree with me that the jurisdiction that you have for issuing that order, is that it is your belief that a violation of the *Act* or the *Regulations* has occurred?
>
> A. Yes.

[22] Insp. Burke testified that he lifted the stop work order later on March 8 because he was satisfied "there were adequate interim precautions taken to allow the machine to be put back into service without the likelihood of endangerment of workers".

[23] The inspector agreed that he had returned on several days to the Canada Brick premises to interview several employees of the company between March 8 and March 30, 2000. Insp. Burke testified that he "told" Larry Leavitt he "needed to speak to a number of people". The witness recalled no discussion with company employees about charges being laid – just that the "investigation" was ongoing. Insp. Burke had no recall of saying anything in his interviews regarding the interviewees having a choice to speak to him or not.

[24] Insp. Burke could not recall if he told Mr. Joncas that he could be fined or imprisoned as a result of the accident. The witness testified:

> I remember indicating to Mr. Joncas that it was just part of my ongoing investigations and that no final determination had been made in the matter.

[25] The inspector testified that in conducting employee interviews and seeking document production he was exercising powers under s.62 of the *Occupational Health and Safety Act*.

[26] The inspector acknowledged in his testimony receiving documents from Canada Brick personnel including a list of medical contacts and the names of doctors who dealt with Mr. Aquino, a sketch of the dehacker machine prepared by Mr. Leavitt at the inspector's request, minutes of safety meetings, the Workplace Safety Insurance Board Form 7, an Industrial Accident Prevention Association report, and letters of March 10 and 14, 2000 to the Ministry of Labour which the inspector requested from Leavitt. Insp. Burke testified that the sketch requested of Mr. Leavitt was to permit him to "get a better idea - explanation and overview of where the accident occurred".

[27] In re-examination, Insp. Burke further described his investigative activities after the March 8 accident:

> Q. And can you tell us, at that time when you were conducting your investigation, how did you generally arrive at a decision, and when did you arrive at a decision as to whether charges would be laid?
>
> A. Well during the initial part of the investigation, I try to focus certainly on making sure all the equipment involved with the accident is properly guarded, so it doesn't pose an imminent threat or danger to any workers in the work place, and then what I do, I continue on with my investigation through various mechanisms, like taking pictures, taking notes, taking measurements, taking statements from witnesses, and what I do after I collate or gather

all this information together, pieces of the larger picture so to speak, I make a determination following that.

Q. Okay, and I take [it] then you would recommend in some circumstances, that charges be laid?

A. Yes, what happens in some situations, I recommend charges be laid and that report goes on to my District Manager and onto the Legal Services Branch of the Ministry of Labour after that.

. . .

Q. How did you normally conduct your investigations in terms of making inquiries of workers?

A. I inform the workers, the people I'm taking statements from, that it's part of my ongoing investigation, whatever the case may be, and that I'll be asking them numerous questions with respect to the incident – accident in question.

Q. And when you were investigating this incident on March the 8th, 2000, were you aware of the legislative powers you had at that time to make inquiries and so on?

A. Yes, I was.

Q. And when you conducted your investigations at that time, did you turn your mind to the question of when you had reasonable and probable grounds to lay a charge?

A. No, I didn't turn my mind to that. What I was focusing on initially – during the initial part of the investigation, was making sure this piece of equipment that had already injured a worker, couldn't hurt any other worker in there.

Q. And why was it that you didn't turn your mind specifically to whether you had reasonable and probable grounds to lay a charge?

A. Because I tend to focus on imminent hazards in the work place, which is one of my functions as being an inspector with the Ministry, to ensure that imminent hazards are controlled, whether it be through taking them out of service, or requiring other corrective measures be put into place.

Q. Okay, have you changed the way that you function now, in terms of your investigations?

A. Yes.

Q. And how do you operate now?

A. There's been recent training given to inspectors to proceed differently during investigations, in terms of obtaining search warrants and so forth.

Q. And when would you obtain a search warrant?

A. When you have reasonable and probable grounds to initiate a charge under the *Health and Safety Act.*

. . .

HIS HONOUR: Sir, I just have one question. When was it in your mind then, that you felt you had reasonable and probable grounds to lay the charges before the Court?

THE WITNESS: Your Honour, to be honest with you, I can't really pin it on a specific date, but it definitely would have been after my initial - I started my initial investigation on March 8th. In my mind I took statements from the associated people, the witnesses, and what I do, Your Honour, afterwards I sit down with my report and I try to piece it together and put it all as coherently as I can, together, and it would have been some time during that – I'm sorry, like I said, I can't put a specific date on it.

HIS HONOUR: I'm sorry, did I understand you to say it would have been after you had taken all the witness statements?

THE WITNESS: Yes, sometime after that, after I get all the statements, I put them all together in my report binder.

HIS HONOUR: All right, so it would have been after you had all the statements then, and the documents as well?

THE WITNESS: Yes, after all the statements, maybe not the documents. I can't in my mind, remember when I got all the documents. Some documents came to me at different stages.

. . .

CROWN COUNSEL: Some of the documents that you received, we've heard were minutes of safety meetings. What would be the purpose of getting those documents.

A. Sometimes one of the functions of the Health and Safety Committee is to identify hazards in the work place, and sometimes they are often put into the minutes of these meetings, and I was interested in seeing if this was identified as such a hazard – when I say, "This," I mean the A dehacker.

Q. Okay, so had it been identified as a hazard, would that have increased the likelihood of laying charges?

A. If there would have been some indication in the previous minutes of the Health and Safety Committee meetings that there was

concern about guarding – or more correctly, lack of guarding of the dehacker, and management had not responded to those concerns, yes, it would have been increased concern for me.

Q. And you're aware of the term, "Due diligence"?

A. Yes, I am.

Q. And would you agree with me that the health and safety minutes more properly go to due diligence issues, whether there's a defence to the charge?

A. Yes.

Q. And is that something historically – I'm not talking about now, but before when you were deciding whether to lay charges, would you look at all the circumstances including due diligence issues?

A. Yes, I look at everything…

[28] Insp. Burke testified that when he returned to the Canada Brick plant on May 14, 2000 with Don Caskie, a M. of L. engineer, he observed the dehacker machine properly guarded by a photoelectric guard.

(3) The Section 8 *Charter* Ruling

[29] In dismissing the Appellant's *Charter* motion alleging a breach of its s.8 right to be secure against unreasonable search and seizure, the learned trial judge held:

(1) The onus was on Canada Brick "to establish on a balance of probabilities that a breach of the *Charter* occurred".

(2) All the statements that were obtained by Insp. Burke, and the documents obtained by him "could have been compelled

under the various sections of the *Occupational Health and Safety Act*".

(3) Reasonable and probable grounds must exist in both a subjective and an objective sense to lay an *O.H.S.A.* charge.

(4) Insp. Burke's recall was that he reached the conclusion of having reasonable and probable grounds "only after the completion of his investigation".

(5) Issuance of the stop work order by Insp. Burke on March 8 "is not determinative of whether reasonable and probable grounds existed to lay a charge" – reasonable and probable grounds should not be imputed from the time of issuance of the stop work order.

(6) In order for the inspector to reach a conclusion regarding reasonable and probable grounds as to the existence of an offence contrary to s.25(2)(h) of the *Act*, "it was necessary for some inquiry to be made regarding what if any precautions had been taken in these particular circumstances".

(7) "Requiring statements from witnesses regarding the accident itself and the precautions in place at the time, was in my view, necessary before any proper, or reasonable and probable grounds could be reached".

(8) Insp. Burke "was consistent and reasonable regarding the subjective component of reasonable and probable grounds regarding his subjective belief as to when he had the necessary reasonable and probable grounds. His reservation of that conclusion until his investigation was complete, was a fair and reasonable way of dealing with things particularly in the circumstances of this case."

(9) "In this case therefore, I am satisfied beyond a reasonable doubt that the Occupation Health and Safety officer, Mr. Burke, did not have reasonable and probable grounds until his inspection and investigation was complete and he had the

> opportunity to review the totality of the information, both the statements and the documents that he had gathered.
>
> He did not therefore, improperly use the inspection powers provided in Section 54 of the *Occupational Health and Safety Act*, and therefore I find that no breach of Section 8 has been established in this case, so the motion will be dismissed."

TRIAL OF THE S.25(2)(h) *O.H.S.A.* ALLEGATION

(1) The Aquino Accident

[30] Sixty-two-year-old Francesco Aquino testified that on March 8, 2000 he was employed on a sorting line for bricks at the A dehacker machine in Canada Brick. He had been employed at Canada Brick for thirty-three years. As the conveyor belt advanced, he was responsible for inspection of the bricks and for hand-picking "bad" bricks out of the line – those which were cracked or marked. Mr. Aquino also raked the bricks into uniform rows with a small metal hoe for the large grips of the dehacker machine to pick the bricks up to carry them to another platform or table.

[31] According to Mr. Aquino, the machinist who operated the dehacker machine controls would leave the control panel at times, with the dehacker left in automatic mode, to assist with the raking.

[32] Mr. Aquino described his accident in these terms. His shift started at 11:00 p.m. on March 7, 2000. He had managed, with a small piece of bent wire, to unjam the belt on a couple of occasions during his shift when small bits of broken brick impeded its operation. On the third occasion, he called out to a passing "maintenance guy" asking him to fix the belt. Then, according to Mr. Aquino:

> The third time I called the maintenance, I told him, "Come and check because the belt has stopped three times," so he came to look at it. I had gone to pick up this piece of wire and it's like a stick, and I told him what I had had to do the other two times to loosen up the belt. When I stepped back two paces because it was tight like this – indicting the width of the - - so I turned - - I turned this way and I didn't see the machine and I walked forward, because the machine was already on top of me - - when I turned and saw that the machine wasn't coming, I started going to grab this piece of steel. That's when the machine hit me in the back. I can't say any more, I can't say anything. It suffocated me right away.
>
> . . .
>
> It hit me right across here - - pointing at my back, above - - between the shoulder blade - - and it pushed me this wa - - indicating forward - - and in front, there was this steel and it squeezed me, and the machine kept going and it dragged me into nine inches of space. I was lucky that my head was out of this piece that was there.
>
> . . .
>
> The machine was coming this way, it was coming towards this table, so the machine was coming from my back, pushing forwards towards this table, and when the machine stopped, there was nine inches between the machine and the table, and it was going forward. After that I don't remember, I passed out.

[33] Mr. Aquino recalled that at the time of the accident a co-worker, Johnny Piedade, was at the controls. Mr. Aquino had his back to Piedade. The witness described Mr. Piedade's duties:

> Q. Mr. Aquino, when you were injured, John Piedade was the operator of the A dehacker machine?

A. He was the person in charge of operating the machine.

Q. And the machine could be operated on manual, or also operated by the controller himself, so it could have been operated by Mr. Piedade himself?

A. The machine would operate automatically, it would come there, it would grab the bricks and start moving and put it towards the table. He would look at the machine to make sure that it didn't miss the load. When it had grabbed the load and it would lift, he had the other machine to go and look at, and once he had inspected the other machine and if he had time, he would also go to rake bricks.

[34] The dehacker machine struck Mr. Aquino from behind and pushed him forward against a solid frame into a space of only inches. In his words: "The machine was loaded with bricks" as it moved toward the table. He did not see the machine raised above him and moving in his direction.

[35] In the narrow passage where Mr. Aquino was standing when hit, "between the end of the dehacker and the table", there was nothing stopping him from standing at that location.

[36] Mr. Aquino was cross-examined as to the machinery which struck him:

Q. Okay. Mr. Aquino, it's the whole dehacker machine which moves, isn't it, and it was the machine that hit you?

A. What do you mean, it moves?

Q. Well - -

A. Of course the machine moves, the machine goes back and forth to get some bricks.

Q. Thank you. And there are also internal parts of the machine which move, the grips and other things?

A. It's logic, because those are attached to the machine and they're what grabs, but it wasn't the grabbing that got to me - - to me - - what hit me was the machine

> going to the other side, and it had already grabbed the bricks and was putting them on the other table.

[37] Mr. Aquino informed the court that he was hospitalized with eight broken ribs, a cracked elbow and a broken bone in his neck. Physiotherapy followed release from hospital. Testifying at trial in August of 2002, Mr. Aquino had not returned to work on account of his injuries.

[38] Mr. Piedade, a 36-year employee of Canada Brick, retired on August 14, 2000. The witness testified to his recall of the events of March 8, 2000. He was operating the controls for the A and B dehacker machines which were picking up bricks. The machines work automatically – when he started them, “they work on their own”. The witness also raked bricks. Mr. Piedade also described the dehacker machine as a device that picked up bricks with grips moving them onto a sorter table.

[39] On March 8, 2000, according to Mr. Piedade, he was raking bricks on the B dehacker machine while Mr. Aquino was raking at the A dehacker which was in automatic mode. Mr. Piedade believed everyone was aware of this fact. The witness did not see his co-worker struck. He knew Mr. Aquino was talking to the maintenance worker. He heard Tom Moralis yell for him to stop the A dehacker. As he did so by returning to the control panel, he observed Mr. Aquino pinned against a beam by the dehacker where the machine unloads bricks to the table.

Mr. Piedade testified that by shutting down the machine he prevented his co-worker from being crushed further in the space of only a few inches into which he had been pushed. On his evidence, Mr. Aquino was talking to the maintenance worker, with his back to the dehacker, when he was struck. To get to the point where he had been standing, Mr. Aquino did not have to pass through any gates or barriers.

[40] Inspector D. Burke of the Ontario Ministry of Labour responded to a call to the Canada Brick premises on March 8, 2000, arriving at 9:44 a.m.

[41] Insp. Burke described the A dehacker machine in this way:

> A. Okay, so this is - - this diagram shows part of the packing department, in which bricks are packaged up in preparation for sale, and specifically in this diagram, there's two dehacker lines, A dehacker line on the top, and B dehacker line on the bottom, and the flow of bricks is such that they come down on a trolley system down the dehacker area, being A dehacker in this particular example, and the dehacker machine is an overhead conveying system, which employs the use of grippers - - we might consider them the tongs that come down on top of the load of bricks, pick the load of bricks up and carry them over to the defacer and place them down on a defacer machine, and the process basically goes from dehacker to the defacer, and then from the defacer, down to the sorting table…
>
> . . .
>
> …the work area around the dehacker and the defacer machines basically is elevated on a work platform, so you have to go up the stairs to access the work areas.
>
> Q. Okay, and how are the bricks brought in to be raked and - -
>
> A. They come along each dehacker line on a little trolley system on a platform, on rails on the floor, so they just roll into place there.
>
> . . .
>
> HIS HONOUR: Can you explain what you mean by the bricks being raked?

THE WITNESS: They take tools to basically - - as the bricks come along down the trolley, Your Honour, they're not perfectly aligned up, and so if the dehacker was to lift them up, it wouldn't be efficient and it may not do it in the first place, so what they have to do is take these rakes and just straighten them up on the trolley, so the dehacker grips can conveniently grab them and lift them up.

. . .

HIS HONOUR: I'm sorry, what's the dehacker head? Can you just briefly - -

THE WITNESS: The dehacker head is the device, Your Honour, that moves back and forth over top of the bricks and it's got an accordion like feature that allows the grips to go down and pick the bricks up and lift them up, and then take down to the defacer table. It conveys the bricks.

. . .

So that dehacker head would move towards the panel, pick up loads of bricks - - pick them up and move along to the defacer machine, which is shown underneath the dehacker in this picture.

. . .

…this dehacker moves along A line in this situation, so the dehacker comes along, picks the bricks up, moves overhead, and the railing is approximately - - approximately right here - - it goes over top of that railing, places the bricks down onto the defacer, and from there they go down - - the dehacker is through its job by then, it goes back for another load of bricks - - and the bricks from there, go down to the defacer, to the sorting table.

. . .

So that railing, at least in that picture, is approximately along the one side of the A defacer, and the dehacker moves over top of it with a load of bricks, and when it's unloaded, it would be empty of course, as it is in that picture. So it moves right over top of that railing, and there's walkways along this side, along this side - - at least at the time of the accident there were - - and also a walkway between both of those sides, and that's how the workers can gain access to the other side.

[42] From his investigation, Insp. Burke determined that at a point in time when there were troubles keeping the dehacker conveyor operating, "the dehacker head", "when it was carrying a load of bricks along", struck Mr. Aquino:

This shows the approximate location where Frank Aquino was reportedly standing, right in this area here, Your Honour, when the dehacker head with the load of bricks underneath it, was moving downline and struck him. You can see the - - I think I have a better picture of it - - you can see the metal tubing, which surrounds the defacer machine, and that is part of the metal tubing against which Mr. Aquino was pinned by the dehacker head.

. . .

> …the dehacker - - A dehacker approached him and pinned him between the dehacker with the load of bricks carried by the dehacker head, and the metal tubing surrounding the A defacer At the bottom, Your Honour, you can see this is part of the walkway that goes across to the other side.

[43] Insp. Burke, at trial, repeated his *voir dire* testimony that he issued a stop work order, an order for proper guarding of the A dehacker, and ordered worker training. In wording he had used on other occasions, Insp. Burke issued the guarding order in these terms:

> Pursuant to section 24 of O. Reg. 851/90, the employer is ordered to provide a guard or other device that will prevent access of any worker to all of the exposed chain drives and moving parts of the A and B dehacker machines located in plant B1.

The guarding order was necessary:

> Because it was not guarded. There was no guards or precautions taken to prevent worker access to the moving dehacker head.

[44] Informed on March 8 that the company was in the process of installing permanent controls, a photoelectric-eye system, for guarding the dehacker machines, Insp. Burke's companion order for "at least the most rudimentary interim controls" to be taken read:

> Pursuant to Section 57(6)(b) of the OHSA/90 the Employer shall ensure the A & B Dehacker machines located in Plant B1 are not used until adequate interim precautions are provided and used and this order is lifted by an inspector.

On the subject of the company's intention to install the photoelectric-eye system, and its relation to Order No. 3 issued by M. of L. Inspector Parco seven months earlier, Insp. Burke gave this evidence:

> Q. And…were you informed that…they [Canada Brick] were taking those steps as a result of an order that Tom Parco issued?
>
> A. Yes.

Such a system shuts down the machine's operation when a worker steps into the path of the light curtain or beam of light guarding an access point.

[45] On March 8, Insp. Burke discovered that Canada Brick "did not have any lock-out procedures with respect to the A and B dehacker machines regarding their regular operation". There also remained one exposed chain drive on the A dehacker machine.

[46] Under cross-examination by defence counsel, Insp. Burke stated that in his attendance of March 8 he was concerned about "a very large moving part" of the machine and specifically the ability of the A dehacker head to move back and forth through the area where Aquino had been standing – an unguarded walkway. The witness agreed that other moving parts of the machine included the grips or tongs picking up the bricks which would have "pinch points".

[47] Asked to comment on Order No. 3, described more fully below, Insp. Burke testified that the dehacker head was “a very large moving part… It’s pretty hard to miss that”. The witness informed the court that despite the absence of any order for interim guarding “it would have been reasonable to provide at least the most rudimentary of interim controls” to protect workers.

[48] Having imposed the stop work order in the morning of March 8, 2000, Insp. Burke left Canada Brick at about 2:00 p.m. having discussed with Canada Brick personnel various guarding options. At 4:00 p.m. of the same date, he returned to Canada Brick at which time he removed the order after inspecting the installation of some interim guarding capable of preventing accidents – chains had been welded across each end of the walkway between the path of the dehacker machine and the defacer table “to prevent inadvertent worker access” to the walkway where Mr. Aquino was injured. The inspector considered the guarding to have an interim quality because of the information he received of the company’s intention to install a photo-electric eye system as a permanent guard. In addition, Canada Brick put lock-out procedures in place with use of a lock-out key allowing the A dehacker operator to lock-out or prevent operation of the machine when a worker “was in its path”. On his return to the plant, the inspector found as well that “training and instruction” had been given to the workers “in

these interim measures" including provision for the dehacker operator to lock-out "every time he left" the control panel.

[49] On March 8, 2000, when Mr. Caskie, an engineer with the Ontario Ministry of Labour, March 8, 1999 attended at Canada Brick he did not see the dehacker machine in operation. The witness observed the dehacker working on a subsequent date. Mr. Caskie described the dehacker in this way:

> The dehacker is a - - is a machine that grabs a pile of bricks with a clamp, clamping device, and it moves the pile of bricks and puts them on another pile. So it moves from horizontally along a line taking bricks from point "A" and moving them to point "B". There is a walkway in the line of travel, and that's where the worker was standing with his back - - or he was not able to see the dehacker head coming beside him, and he was hit by the dehacker head.
>
> . . .
>
> Q. Now, you had the accident described to you, and you've told us you did see the "A" dehacker machine operating. Did you see a moving part on the "A" dehacker machine which would endanger a worker standing where you understood Mr. Aquino to have stood?
>
> A. I saw a part that would normally moving. It wasn't moving at the time that I was there, because the machine wasn't operating. But there was a part that would normally move the dehacker head and could have struck a worker who was standing on the walkway.

[50] To Mr. Caskie's recall, on March 8, 1999, a representative of MS Electric was present. That is the electrical company hired "to install light curtains" at the entrances to the location of Mr. Aquino's accident.

[51] In re-examination, Mr. Caskie gave this evidence:

> Q. …Is it ever the Ministry responsibility to ensure that a particular workplace complies with the *Occupational Health and Safety Act*?

A. No, it's the employer responsibility. We just audit it, and if we find a contravention of the *Regulations* we have the power to issue an order for the correction of the contravention.

Q. So I take it if no one had been to visit Canada Brick in August of 1999, that accident in March of 2000, would it be the Ministry's position that it was still the employer that was responsible for compliance with the *Act*?

A. Yes.

[52] Mr. T. Rallis had been employed as a brick sorter at Canada Brick for a few months prior to the Aquino accident. He often worked at the same dehacker with Frank Aquino. This was the case on March 8. Mr. Rallis recalled Aquino speaking to someone from maintenance who was repairing a belt under the table. As he observed Mr. Aquino standing on a walkway or catwalk between the A and B tables, Mr. Aquino stepped backwards and then "the dehacker picked him up and threw him onto the table". Mr. Rallis screamed to John Piedade to stop the machine. By the time the machine's operation was stopped, Mr. Rallis saw his co-worker pinned face down over the dehacker table.

[53] In Mr. Rallis' view, in speaking of Mr. Aquino, "obviously he wasn't paying attention, otherwise he wouldn't have got hit". He thought part of the dehacker grippers holding a load of bricks struck his co-worker. The witness testified: "you have to just work safe".

[54] Don Gallant testified that on March 8, 2000 he was employed by Canada Brick in maintenance doing repairs when machinery broke down. On March 8,

according to the witness, Mr. Aquino called him to examine a problem with one of the conveyor belts. The belt had stopped. The problem, not an unusual one, involved pieces of broken-off brick jamming the belt's operation. A cleaning-out is then necessary. Mr. Gallant testified that as he bent over to examine the cause of the problem, Mr. Aquino had stepped out of the area. He heard Kevin Joncas yell to Mr. Piedade to shut down the A dehacker which, in automatic mode, had struck Mr. Aquino.

[55] Mr. Gallant testified that it was not unusual to see workers on the catwalk where Aquino was hit. Kevin Joncas, the production foreman at the Canada Brick plant, was responsible for the March 8, 2000 shift during which Mr. Aquino was injured. He too testified that workers like Aquino use the catwalk "all the time" to get around the machine for raking and sorting.

[56] Mr. Joncas' attention was directed to the use of a lock-out for the dehacker:

> Q. Was there lock-out required for any of the workers to access the catwalks around the dehacker machines on and prior to March 8, 2000?
>
> A. For normal production?
>
> Q. Yes.
>
> A. No.
>
> Q. And why was that?
>
> A. Why was that? Because it wasn't needed. It was…

Q. Why not needed?

A. Well, because you have to rake the brick in order for the machine to run. There's no - - I don't really understand. How can you lock it out?

Q. Did you see any inherent danger with the sorters or rakers walking around those machines…

A. No.

. . .

Q. Using the catwalk to access the machines, prior to March 8, 2000?

A. No.

Q. Did you see any after March 8?

A. Any after March 8?

Q. Yes. Were there any hazards that you saw after March 8 that you didn't see before?

A. No.

[57] At trial, defence counsel was permitted, without objection, to ask Mr. Joncas his opinion as to why the Aquino accident occurred. Although he considered Mr. Aquino to be a worker who generally tried to work safely, the witness expressed the belief that his co-worker was "not paying attention to the machine" when he walked into its path on the walkway:

> You know what's moving when it's moving. Frank -- Frank, first of all, he wasn't at a job station. He shouldn't have been where he was, in the first place. He should have been on the other side of that car. That is his position, that's where he should have been, and he was over talking with the maintenance guy, just to -- I don't know what they were talking about -- but, anyways, he wasn't in the right spot where he should have been.
>
> Secondly, yeah, the machine coming with a full load, you hear it coming, so he -- I don't know in his mind -- I can't guess what he was thinking or if he was preoccupied, but he definitely wasn't paying attention.

[58] Asked whether he was of the view that there were any inherent hazards for workers to use the walkway where Mr. Aquino was injured, Mr. Joncas replied:

> Q. Did you think then, and do you think now, that there are or were inherent dangers for employees proceeding along those walkways, between those machines, in order to get from work station to work station?
>
> A. No, I do not.
>
> Q. And why do you say that?
>
> A. Because I've operated like that in that department for years, and everybody is aware of the machines, and that's what the safety talks are about. If you're doing a job, you're aware of the machines, and no, I never -- I don't know. I just -- machines pick up, they go, and then you walk around. That's the way it works, that's the way it's always been there.

[59] In cross-examination, at first, Campolo stated that he was unaware "employees regularly went back and forth across" the walkway where Mr. Aquino was injured. The witness then stated he did know "they were going across". Asked what part of the dehacker machine he understood struck Mr. Aquino, Mr. Campolo identified "the dehacker clamp".

(2) August 1999 – Order No. 3

[60] Insp. Parco testified that in August of 1999 on a three-day inspection visit to Canada Brick he found the company to be "in a general state of non-compliance with a number of the regulations made under [*O.H.S.A.*] 851/90".

Finding 51 infractions, about 60 orders issued. This included Orders No. 3 and 4. According to Insp. Parco, Order No. 4 was directed to installation of a guardrail to prevent a worker falling “into a pit or off the machine altogether” given the “multiple levels” to the dehacker with work platforms at different heights – it had “nothing to do with machine guarding, which is Order No. 3” involving a “totally different concept”.

[61] The inspector recalled taking the opportunity of his attendance to undertake some training regarding guarding. Labour inspectors do not direct an employer as to how to specifically guard a hazard. Insp. Parco was confident in the view that the guarding philosophy he described was understood. Although interim precautionary measures were discussed, an October 20 compliance date was negotiated because, in the inspector’s words, “there was no physical way on earth that this employer could comply with every requirement…for every infraction that we were finding within the reasonable time period.” August 1999 training was meant to raise the workers’ “awareness” and “consciousness” regarding “hazards” – “something fast, something temporary” to be done in the nature of portable barriers, warning signs, training and instruction.

[62] Insp. Parco referred to s.24 of O. Reg. 851/90 relating to “Machine Guarding”:

> Where a machine or prime mover or transmission equipment has an exposed moving part that may endanger the safety of any worker, the machine or prime mover or transmission equipment shall be equipped with and guarded by a guard or other device that prevents access to the moving part.

[63] Recognizing that various guarding options may be available in any given situation, Insp. Parco expected the employer to "come up with something equal to or better than the intent of the legislation". In the witness' view, the options are almost "endless" – pressure mats, infrared laser devices, etc. Insp. Parco testified that the Ministry compliance form left with "the client", requiring two signatures, is based "on the honour system".

[64] While issuing Orders 3 and 4 respecting the dehacker machines, the inspector issued no orders for interim measures – "We don't normally make an order for interim precautions". The witness added:

> I never observed the dehacker in operation. I couldn't tell if there was any imminent hazards. If I would have observed them it may have included a plan type, or an interim type order, or maybe even a stop work type order. I didn't have the luxury of seeing the thing in operation.

When the inspector was present, with the finding of "so many contraventions", and the "stopping [of] all the large imminent hazards", the company "was closing down the machinery".

[65] Although he had no notes to assist his memory, Insp. Parco recalled discussion of interim precautions with company personnel in August of 1999

pending full compliance by Canada Brick with the dozens of orders he issued – "something less than what is required by the intent of the legislation" but sufficient to temporarily protect workers. Full compliance with the orders meant the respondent "was going to be faced with a fairly substantial task in complying with a whole bunch of guarding". Unlike Order No. 3, some of the orders issued by the witness included interim precaution orders for temporary guarding. Insp. Parco testified that he did not see the dehacker machine operating and was therefore unaware of any imminent hazards. With a short time given for Order No. 3 compliance, he felt it unnecessary to order interim precautions. The witness added that in any event with the respondent "closing down the machinery" and halting production, "all the large imminent hazards" were stopped.

[66] According to Insp. Parco, he and Mr. Caskie returned to Canada Brick on September 7, 1999 at the invitation of the Joint Health and Safety Committee for a "consultive" visit "to talk about general guarding techniques" and equivalency measures. At some point, those involved in the discussion ended up at the location of the A dehacker which was not in operation. Insp. Parco filed a Field Visit Report relating to the September 7 visit stating in part:

> …a joint visit was made with Mr. Caskie to discuss and review the guarding orders and various means to achieve compliance with their intent.

[67] Insp. Parco understood, from the text of the Compliance Form faxed September 30, that Order No. 3 would be fully complied with by the October 20 date. The witness did not reattend the Canada Brick premises to inspect the measures taken with regard to the A dehacker.

[68] The witness described guarding as a measure or device to prevent workers "from being caught up in moving parts or pieces in transmission of equipment". Are the moving parts a hazard? Do workers have access to the hazard? Could workers be hurt by exposure to the hazard? According to Insp. Burke, "if you determine the hazard exists because of exposed moving parts, then you have to take steps to prevent that, and that's primarily done through guarding". A guard may be permanent cover over moving pieces of equipment or "any sort of mechanism which prevents workers accessing the hazard area".

[69] According to the witness, whenever a labour inspector issues an order, he or she will:

> The Ministry - - when an inspector issues an order, they also leave a notice of compliance form with the work place, and this form has provisions on it for both a management and a worker representative to sign off agreement with the compliance that has been achieved, and on this compliance form, the worker representative has the option of - - there's two little boxes at the bottom that indicates they agree or disagree with the measures taken, so they have an opportunity to make it known to the inspector that they don't agree with the compliance that has reportedly been achieved, and this form would be sent to the Ministry either by FAX, mail, or sometimes they drop it off.
>
> . . .

> There's several different things we could do. When we receive a compliance form, sometimes an inspector may do a follow up visit just to verify that things are in place. Sometimes we do not do a follow up visit, we rely on the Internal Responsibility System and the worker representative agreeing with the controls, and sometimes phone calls are made to check on compliance. It really depends on the situation.

[70] Turning specifically to Canada Brick, the inspector identified Labour Ministry orders issued August 18, 1999 by Insp. T. Parco. Order No. 3 read in part:

> Order number three says, "Pursuant to section 24 of O. Reg. 851/90, the employer is ordered to provide a guard or other device that will prevent any worker access to all of the exposed chain drives and moving parts of the dehacker machine located in the plant B1."

The order was directed to be complied with by October 20.

[71] Also introduced into evidence was a corresponding notice of compliance form faxed to the Ministry and received October 20, 1999 reading:

> Four guards have been installed. Temporary guarding has been installed on the other exposed chain drives. Parts will be fabricated and will be completed by October 20th/99.

The compliance form was co-signed by Rob Campolo, General Foreman – Group Leader, and Jeff Parnell, worker representative on the Health and Safety Committee. The form signified that the signatories were of the view that the Order No. 3 requirements had been complied with. Insp. Burke testified he had not seen Parco's Order No. 3 or the compliance form prior to his March 8, 2000 attendance at Canada Brick.

[72] In cross-examination, Insp. Burke was referred to Insp. Parco's October, 1999 Order No. 4 which he had also not seen prior to March 8, reading:

> Pursuant to section 13(1) of O. Reg. 851/90, the employer is ordered to provide a guard rail at all of the open sides of all of the work platforms and decks of the dehacker machine located in plant B1.

The corresponding Compliance Form relating to Order No. 4 read:

> A guard-rail at all open sides of all the work platforms and decks of the dehacker has been installed. An extension has been granted allowing us to install new electrical panel. Panel is on order. We will inform you of completion.

[73] Mr. D. Caskie was called to testify by the prosecution. On consent, the witness was qualified by the court as an expert respecting the guarding of machinery and the enforcement of the provisions of the *Act*. Mr. Caskie attended the workplace inspection of Canada Brick on August 17, 1999 at the request of Insp. Parco. He did not see the dehacker in operation. The "particular types of guards" available were discussed. The witness testified that his normal presentation about guarding is to explain the general philosophy – "the guarding triangle":

> One of the main questions that is of interest to workplace parties is how to determine whether something should be guarded or not, and also how to provide guards, what is the function of a guard, and so the way I address that is by means of a triangle, I call it the "guarding triangle."
>
> As you can imagine, there's three sides of a triangle. The first side, it's the existence of a pinch point, or a moving part.
>
> The second part of the triangle is the possibility of accessing that pinch point or moving part.

> And the third part of the triangle is the consequences of accessing that pinch part or moving part, is it likely to endanger you?
>
> . . .
>
> Whether it's likely to endanger. For example, if something was 10 feet in the air and it was unguarded, if it were to have a pinch point, the pinch point would endanger you if you could access it because it's 10 feet in the air. So that's guarding by distance.
>
> . . .
>
> I also explained that the Regulations for guarding, s.24 and 25 of the Industrial Regulations requires that:
>
> > If there is a pinch point or a moving part that can endanger you, as it is accessible, a guard or other device has to be provided to prevent access to that pinch point.
>
> Now, "to prevent access" means you'd have to physically prevent a worker from accessing a point of hazard. I also explain that procedures are not classified as guards.
>
> . . .
>
> Written procedures, "Don't put your hand in this machine"; yellow lines painted on the floor, "Don't cross this yellow line". They're not classified as guards, because they do not prevent access. There is no physical barrier to prevent access.

[74] According to Mr. Caskie, while options are discussed, to avoid the problem of officially induced error, he never gives advice to employers as to how to guard a particular machine. Mr. Caskie related to the court that the applicable statutory regime provides for "equivalency":

> …for example, the Regulation provides that it is to be guarded, there has to be a physical device that the employer could substitute for that guard, that would provide the same degree of protection.

[75] While Mr. Caskie did not see the dehacker in operation, by just looking at the equipment arrangement and "how the dehacker head would travel, …it was not really necessary…to start it up for a demonstration". The witness reported his experience that interim precautions may be ordered but not in all cases. He

also stated that in his experience "it was very unusual to issue orders for interim precautions". Addressing the August, 1999 situation involving the dehacker, Mr. Caskie understood no interim precaution order was necessary because "the employer voluntarily stopped work on the piece of equipment". The witness testified that:

> …we explain to the employer, or we generally explain to the employer that we have identified a hazard. We're giving them time to comply. We have two options. We can shut down the machinery until the hazard is rectified by guarding, for example, or we can given time to comply. But even though there's time to comply, it doesn't suspend the requirements to the *Occupational Health and Safety Act* and the *Regulations*. The employer still has a duty to protect the workers in the interim, whether we use the words "interim precautions" or "risk reduction", there is still some requirements on the employer to ensure that workers are not endangered.

Counsel for the respondent agreed with the witness saying "That's absolutely true". Mr. Caskie testified that training alone was not a sufficient interim guard for the dehacker walkway. In his March 8, 2000 notes, the witness recorded: "At the time of inspection, the worker was endangered by access to the moving dehacker carriage and it was found that both the dehackers 'A' and 'B' were unguarded in this respect".

[76] Mr. Caskie understood the Compliance Form returned in response to Order No. 3 of August 1999 to mean that while the guarding compliance was not completed as of the date of transmission of the form it was represented that full compliance was forthcoming. Mr. Caskie recalled that on March 8, with the

orders which issued, Canada Brick "voluntarily stopped work" on the dehacker. No stop work order was necessary. The witness was not surprised that Insp. Parco had not ordered interim measures to properly guard the dehacker:

> Because the order is for compliance with the Regulation. I believe that when an inspector goes in and observes a contravention, the employer is now aware of a hazard. The fact that the inspector gives time for compliance doesn't take away the responsibility of the employer to ensure that the worker is not endangered by that contravention or by that hazard in the time that it takes to comply with the order. So it's the employer's responsibility to make sure that there are adequate precautions in place to protect the worker, otherwise those machines should not be used. It's an identification of a hazard that the employer is now aware of. But we normally do not issue orders for interim precautions.

[77] Mr. Caskie testified that Order No. 4 related to s.13 of the Regulations which governs guardrail issues. The witness did not understand the reference in the Order No. 4 Compliance Form to installation of new electrical panels given the scope of s.13.

[78] Asked in cross-examination about the August 1999, Ministry of Labour orders, Mr. Joncas stated: "I don't know what had to be guarded in those orders". In the witness' mind, the hazards which in general required guarding were pinch point locations such as "open sprockets, chains, [and] things of that nature". Although Mr. Joncas acknowledged in cross-examination that he could not recite the guarding regulation of the *O.H.S.A.*, he was aware it referred to "moving parts". The witness was pressed on the need to guard an area occupied by a moving part:

Q. I'm talking about any moving part where there's access and where a worker could be injured by that moving part?

A. It should be guarded.

. . .

Q. And would you agree with me that guarding and lock-out address different concerns?

A. Guarding and lock-out? Definitely.

Q. Would you agree with me that when you talk about lock-out you're talking about preventing the worker from being injured from accidental start-up of a machine, whereas with guarding you're preventing a worker from being injured by the normal operation of the machine, where there's access to a pinch point or a moving part?

A. Yes, I agree.

Q. And would you agree with me that the purpose of guarding is to prevent inadvertent access? Nobody deliberately sticks their hand into a machine, or moves in front of a moving part, but that the real purpose is to prevent inadvertent access?

A. Yes, I guess.

Q. And would you agree with me that sometimes inadvertent access is something that's hard to predict? A worker could lose their concentration for a minute, or they could be tired, or they could be distracted, and then inadvertent access can occur and a worker can be injured. Do you agree with that?

A. Yes, but that's where the training comes into it as well as far as safety talks and day-to-day…

Q. But would you agree with me that if a machine is not properly guarded it constitutes a danger? No matter how much training you have, there's a danger there if you've got a machine that requires guarding that's not guarded?

A. Okay.

Q. You agree with that?

A. Yes.

[79] Mr. Joncas acknowledged that after Canada Brick subsequently guarded the area where Mr. Aquino was hit with photo sensors, he expected no worker would be injured "by any inadvertent access with the machine still moving".

[80] Tony Campolo, the Canada Brick plant manager, testified that in 1996 there was a government inspection of the Canada Brick plant. The witness could not recall what type of inspector attended – an industrial or mining inspector. Mr. Campolo could not recall if the machines were running during the inspection. No contraventions were identified during the inspection.

[81] Mr. Campolo testified that he was responsible for overseeing compliance with the Ministry August, 1999 orders respecting the company plant No. 1. It was the witness' idea "to install electric eyes around the dehacker machine". This came about after Mr. Campolo authorized the installation of such a system at the location of a different type of machine in the plant and then considered the possibility of broader use of the technology. Mr. Campolo understood the requirement of compliance with Order Nos. 3 and 4 by the set compliance dates. In his view, the company had complied with these orders prior to the accident. Despite monthly tours of the plant by the joint Health and Safety Committee, the problems identified by Insp. Parco were not previously identified in-house.

[82] Prior to Mr. Aquino's accident, according to Mr. Campolo, the design for a photoelectric-eye fence to guard the outside perimeter of the dehacker machine had been discussed with MS Electric. That plan, on the witness' evidence, would

not have guarded "the interior of the equipment". After Mr. Aquino's accident, the photoelectric system was redesigned and installed to provide extra guarding:

> That extra guarding now is here, as the car moving in between the truck, as you get, as you're getting close to the movement parts, anywhere, now the photo-switch is blocking and stopping the machine.

[83] In cross-examination, Mr. Campolo was asked about guarding generally:

> Q. And in your experience, when would you say guarding is necessary?
>
> A. Guarding is necessary on every movement parts of the equipment, pinch point, avoid pinch point and guarding, railing.
>
> Q. So guarding is necessary when there's a moving part or a pinch point?
>
> A. Yes.

[84] Mr. Campolo testified regarding the walkway that he "never considered a hazard with the dehacker":

> Q. So you had never identified what happened to Frank Aquino as a possible hazard?
>
> A. Definitely not. I would never thought Frank Aquino he would have got hurt at the position what he did.

[85] The witness acknowledged with respect to the unguarded walkway in the path of the dehacker head: "after the accident, yes, we understood there is a hazard there".

[86] Mr. Campolo testified that one of Insp. Parco's August 17, 1999 orders requiring guarding of a Dyno machine by August 31 was accomplished by the

installation of temporary guarding measures within the prescribed time period followed by installation of the photoelectric-eye system. In the witness' view, the Dyno was a more sophisticated machine than the dehacker with "ten times more moving parts" requiring guarding with "something much better, much safer".

[87] Tony Szwalek, the vice president of MS Electric, testified that in 1999 his company was contracted to assist in guarding a Dyno machine at the Canada Brick premises in Burlington "to provide limited access or provide operators accessing areas to keep them away or not to access parts of the moving machinery on the Dyno". The approach involved both physical barrier gating and optic or photo-eye sensor technology where, if a light beam is broken by a person or object, the machine stops operating.

[88] To Mr. Szwalek's recall, the guarding of the fully automated Dyno was completed in the fall of 1999. On the witness' evidence, at "about the same time" discussions took place regarding perimeter photo-eye sensor guarding of the dehacker machines. It appears that initial concept drawings identified by the witness did not guard the walkway where the accident later occurred. After the accident, that walkway, originally zoned out or not included, was protected by MS Electric installing its photo-eye sensor guard.

[89] Mr. Parnell testified that he was surprised in August of 1999 when Insp. Parco issued in excess of 50 orders. Asked if he agreed with the circumstances of those orders, the witness provided this evidence:

> Q. And why were you surprised?
>
> A. Because I didn't think the place was – could have been that unsafe. It opened my eyes.
>
> Q. In hindsight looking back, do you think from – just from your perspective, that all of the orders were warranted?
>
> A. Um, what do you mean by "warranted"?
>
> Q. Well were there hazards in all of those cases that needed to be responded to by the company?
>
> A. Um, in my opinion, no, but legally they probably were.

[90] Mr. Parnell understood that Order No. 3 required the company to "guard all the pinch points, the sprockets, the pistons, the moving parts". Mr. Parnell recalled no discussion of interim guarding measures for the dehackers with Insp. Parco at the time the August, 1999 orders issued although such discussions occurred regarding other machinery sites. The witness believed from speaking to Tony Campolo that Canada Brick had "an extension for the inside of the dehacker" to allow for installation of a photo-eye system.

[91] Mr. Parnell believed, when he signed off on the Compliance Forms relating to the Parco orders that compliance had been achieved. He believed the dehacker machine had been properly guarded.

[92] In cross-examination, Mr. Parnell was questioned as to his specific knowledge of the operation of the dehacker machine:

Q. Did you have much involvement with the dehacker machine, yourself?

A. No.

. . .

Q. No. So the dehacker machine wasn't part of your job at all?

A. No, it wasn't.

. . .

Q. Okay. So when you signed off with respect to order number three for guarding of the dehacker, you were basically signing off that, to the best of your knowledge, that the dehacker had been properly guarded?

A. Yes.

Q. And where would you get that information that it had been guarded?

A. Um, just from the, the Safety Committee and the maintenance guys looking at all the hazards around the machine.

Q. Okay. Now in particular, in relation to the dehacker machine and order number three, did you yourself go to the machine and look at it to see whether it had been guarded?

A. Yes.

Q. You did. And you were satisfied that it had been guarded, I take it?

A. Yes.

. . .

Q. Now did you understand guarding to be required whenever there was a moving part that a worker could have access to that could endanger a worker?

A. Yes.

Q. And were you aware of the fact that workers went back and forth on the catwalk behind the dehacker machine?

A. Not while it was running, no.

Q. Were you aware of the fact that it was possible for a worker to go on the catwalk when the machine was running?

A. I am now, yes.

Q. At the time you weren't aware of that?

A. It didn't occur to me, no.

[93] Rob Campolo, a general supervisor at the Canada Brick Burlington plant, testified that he understood Order No. 3 required the company "To provide guards on any chain-driven or piece of equipment". The witness understood the dehacker's chain drives and "moving parts" to be "over head" in the ceiling inaccessible to anyone on the platform around the machine.

[94] Mr. Campolo testified that the company could not see anything "on the actual dehacker that you can actually guard" and, in his words, "we assumed…we obviously understood it [the order] to be that there were other machines in and around the dehacker that all had these chain-driven pieces of equipment that had to be guarded". Therefore, according to the witness, "we guarded all those pieces of equipment there on both A and B dehackers".

[95] Mr. Campolo testified that Insp. Parco did not discuss any interim measures to be put in place before the compliance dates set out in the orders relating to the dehacker machines. The witness believed Order No. 3 had been complied with.

[96] In cross-examination, Mr. R. Campolo was asked about his understanding of the philosophy of guarding:

> Q. And what was your understanding of the hazard triangle in relation to guarding?
>
> A. Well to me the way I understand it, if there's any pinch points or any area that's accessible for a worker to get injured, we have to protect that area to avoid any, any injury to the worker.
>
> Q. How is that a triangle?
>
> A. Well you've got to – you just got to see the situation, see if there is any pinch points there and, and, and then you've got to obviously look at the situation, and then determine if there is in fact a pinch point there, then you've got to do everything you can to, to avoid anybody entering into that, into that area and possibly getting hurt.

(3) Safety Training

[97] Mr. Aquino testified that he commenced the brick raking job at Canada Brick in 1993-4. Asked about any training received from the employer, the witness said he had been trained. There was "no upgrading or anything" but the "boss [Kevin Joncas] would say to me, "Now we'll tell all the new people, 'Be careful of the machine'"". On his evidence, he had never been given an instruction not to do what he did on March 8 – "I always did it that way". Mr. Aquino added: "I had been doing that from the first day that I worked, until the last day". Mr. Aquino had no concerns about the safety of the job he was performing. The witness acknowledged in cross-examination that he had been told, and himself had told others, "Be careful of the machine, because the

machine goes up and down". Mr. Aquino agreed that he told Insp. Burke after his accident that his "supervisor came around all the time to ensure" he worked in a "safe manner".

[98] As to his own circumstances on the day of the accident:

> Q. How could you be careful of the machines if you backed into it?
>
> A. I don't know…I don't know how that happened.

[99] Mr. Aquino agreed that the company held monthly safety meetings which included "warnings to be careful about the machines".

[100] Asked in cross-examination whether he believed there were safety hazards in his job, Mr. Aquino responded: "It's logic, it was a dangerous place…and I was careful…it was a place to be careful".

[101] Mr. Aquino testified that he did not have a key to lock-out the A dehacker machine nor did he have a lock. He was unaware whether Mr. Piedade had a lock.

[102] Mr. Piedade considered that on March 8, 2000, the supervisor "was primarily responsible for safety". He considered Mr. Aquino to be "generally a careful employee".

[103] Mr. Piedade testified that when he started he had been trained as to the company's safety procedures. Kevin Joncas "every now and then" would train the workers. Monthly safety meetings were held and one topic discussed was slowing the pace down when sorting bricks. Asked in cross-examination whether there was ever any talk about "guarding" at the safety meetings, Mr. Piedade replied:

> These machines worked on their own, so we didn't have to sort of pay attention to them.

The witness recalled however discussion about preventing access to the moving parts when the machine was operating.

[104] According to Mr. Piedade, Mr. Joncas talked about safety "all the time when he walks around" and reminded the witness to be "careful of the machines".

[105] Mr. Piedade testified that prior to Mr. Aquino's accident he was trained in lock-out procedures for the dehacker machine. The witness' testimony indicated that only after the accident were locks given to the relevant workers.

[106] Insp. Burke testified to the existence of occupational health and safety committees in the workplace:

> …Essentially, the Internal Responsibility System involves every work place adhering to the *Health and Safety Act* and its requirements through their own enforcement, of the

> requirements of the *Act*, typically through a joint health and safety committee. In most larger work places there's a requirement for a joint health and safety committee to exist, and on that committee there would be at least one worker representative, who has - - one of his or her responsibilities would be to inspect the work place on a regular basis and identify any hazardous, or potentially hazardous situations that need to be addressed.

[107] Mr. Joncas testified that he had taken several I.A.P.A. (Industrial Accident Prevention Association) courses. The witness conducted monthly safety meetings with staff. Safety topics such as identifying safety hazards are discussed. At trial, he identified the revised Canada Brick Safety Manual (Exhibit #29) and the Company Corporate Policy on Health and Safety and Environmental Matters (Exhibit #30). The company's safety coordinator instructs on safety issues during new employee orientation including "hazards". When an employee joins Mr. Joncas' department he undertakes safety training specific to the area where the employee will be located and also directs him to watch an experienced operator for a day. Mr. Joncas testified that apart from safety meetings, on a day-to-day basis he talks about safety and gives reminders in the workplace.

[108] Mr. Joncas testified that on March 8, 2000, the company had lock-out procedures – "lock-outs are given to repair machines when they're down, if there's a problem with the machine". The witness noted that sometimes a problem with machinery can only be identified with the machinery running. Then a lock-out and repair could be effected.

[109] The Safety Manual describes a hazard classification system to identify a "condition or practice" with the risk for loss of life or permanent disability, potential for serious injury, etc. Inspection findings are coded and presented as Committee recommendations to the Management Committee for consideration and appropriate action. The Manual states:

> Recommendations are to be considered objectively on the basis of:
>
> 1) Classification of hazard.
> 2) Probability of occurrence.
> 3) Cost of control.
> 4) Degree of control.
> 5) The extent of application.
>
> . . .
>
> All recommendations are to receive immediate attention. When extensive funding, shortage of manpower or availability of materials delay permanent solutions, intermediate corrective action must be taken. Priority will be assigned as per Hazard Classification. "Worst First".

[110] Mr. Joncas testified that he had trained Mr. Aquino about lock-out procedures. He recalled Mr. Aquino attending monthly safety meetings. As well, Mr. Joncas identified Certification of Job documents signed by Mr. Aquino at points of retraining indicating:

> I have seen and understand the job hazards concerning my machine or areas of work…
> . . .
>
> I have received the Plant indoctrination program involving the plant rules and safety hazards…

[111] Mr. Joncas testified that a safety topic he addressed with workers on his shift was the need not only to look out for oneself but also for fellow employees:

> The reason being is because, you know, as time goes on people start relaxing a little bit more and not concentrating so much, and I'm trying to emphasize the fact that even though they're working safely themselves, just to basically keep an open eye and watch others around them. If they see others doing something that appears to be unsafe, then they could walk over and talk to them and suggest, and let me know as well, so that I can also have a talk with them. It's basically just helping each other out to work safely.

[112] In 1999 and 2000, Jeff Parnell was the certified workers' representative on the Canada Brick joint Health and Safety Committee. Mr. Parnell's training for this position included the topics of accident prevention as well as machine guarding. According to the witness, the Committee routinely performed inspections in the plant for hazards and situations which might cause accidents. Mr. Parnell agreed that "all moving parts" of machinery are "dangerous".

[113] Testifying on May 1, 2003, Mr. Parnell stated that, in his opinion, Canada Brick's attitude toward safety had changed in the prior four or five years to become a "pretty healthy" approach. The witness considered the plant is a "much safer place" than in August of 1999 and that since that time "safe guarding awareness changed considerably at Canada Brick".

[114] Insp. Burke was asked this question of interpretation:

> Q. Okay, and it could possibly be that that electrical panel included the electrical eye, which ultimately was installed around that dehacker, as the permanent guarding system, correct?
>
> A. Possibly, yes.

[115] Mr. Rallis testified that it was "not uncommon" ("every shift") during a workday for Mr. Aquino to walk in the location where he was struck – "we all walk in between". The witness informed the court he had never been instructed not to walk in that location but simply "to be aware" when he did so. Mr. Rallis was only familiar with the dehacker being locked-out at a break or at lunch. At the time of the accident, according to Mr. Rallis, the dehacker operator would not lock-out otherwise:

> Q. But when you or Frank would go on the catwalk, as you said you did every day, you wouldn't?
>
> A. No. No, there's no reason to.
>
> Q. No reason to lock-out when you're going on the catwalk?
>
> A. No, there's nothing, there's no - - all the machines are running, so there's no reason to lock-out.

(4) Reasons for Judgment

[116] The trial judge found as a fact that although Frank Aquino was trained for the job he performed at Canada Brick, the worker's "own carelessness" on March 8, 2000 was a factor in the accident in which he was seriously injured.

The court recognized however “that one of the purposes of the *Occupational Health and Safety Act* is to protect workers in hazardous industries from their own negligence”.

[117] On the subject of training, the trial judge held that:

> (1) the respondent’s safety manual was not updated sufficiently to comply with the requirements of the *O.H.S.A.* – a deficiency unrelated to the accident
>
> (2) the formal safety training of the respondent’s plant manager, general supervisor and production foreman “was not extensive and left room for improvement” – this deficiency too had no causal relation to the Aquino accident
>
> (3) the Joint Health and Safety Committee met and undertook inspections on a regular basis to identify hazards and to try to prevent accidents; it’s recommendations generally met with positive responses from the company – there was no evidence of any deficiency in the Committee or with the respondent’s internal responsibility system
>
> (4) monthly departmental safety meetings were conducted with employees
>
> (5) the respondent had reasonable training programmes in place for its employees.

[118] The trial court held that the prosecution had established the *actus reus* “of the offence beyond a reasonable doubt” in “the totality of the circumstances” on the basis of these facts:

> Canada Brick was an employer pursuant to the definition in the *Occupational Health and Safety Act*. The injured worker, Mr. Aquino, was employed by Canada Brick. A very serious accident occurred as described in the findings of fact, which resulted in significant injuries to Mr. Aquino. In particular, the accident took place as a result of the moving "A" dehacker machine crushing Mr. Aquino against the square tubing table frame of the defacer machine. This occurred in an area that if it had been properly guarded would have prevented the accident. The responsibility to properly guard this machine and to ensure the safety of its workers rested squarely with Canada Brick. It was a reasonable precaution for Canada Brick to have implemented interim safety measures, by way of guarding, which would have prevented this accident.

[119] The court acknowledged that the purpose of guarding under the *O.H.S.A.* "is to prevent inadvertent access" by a worker to a hazardous circumstance. The trial judge noted that:

> Therefore, I am satisfied that the walkway where the accident occurred was an area that was recognized as an area where care had to be diligently exercised by workers because of the movement of the dehacking machine. This was reinforced with the workers on a regular basis.

[120] On the issue of the particularization of the *O.H.S.A.* charge faced by the respondent, the court stated:

> The particulars of the charge in this case reflect the wording of the charge itself, which in turn reflects the wording of section 25(2) (h) of the *Occupational Health and Safety Act*. I refer specifically to the words "reasonable precaution" enunciated in the particulars. These words are simply a rephrasing of the words "every precaution reasonable in the circumstances" which are found in the charge and also in the statute itself. The law is clear that the prosecution is bound by stated particulars. However, the stipulated particulars in this case do not change the essential nature of the charge.

[121] The court accepted that "Safety is clearly the responsibility of the employer". The trial judge was satisfied that the respondent had established, on a balance of probabilities, the defence of reasonable care, having taken "all the care which a reasonable man might have been expected to take in all the

circumstances" – "the defendant was in no way negligent". In finding the defence was established, the court considered the following factors:

(1) Citing *R. v. Rio Algom Ltd.* (1988), 66 O.R. (2d) 674 (C.A.), at p.682 for the proposition that foreseeability of a hazard is properly to be considered as part of the due diligence defence, the trial judge itemized these matters in para. 46 to 48 and 52 of the reasons for judgment:

> [1] Until the accident, the dehacker operated since 1974 without any guard for the walkway where Mr. Aquino was injured.
>
> [2] There was no history of prior accidents in the area where Mr. Aquino was struck.
>
> [3] Prior to 1999, labour inspectors had attended the respondent's B1 plant and had not "specifically identified [the walkway] as a hazard that should be guarded.
>
> [4] When Order No. 3 was made in August of 1999, a "general guarding order" no order for interim guarding was made – "If a hazard of this magnitude, which could be eliminated by proper guarding, an interim order would have been obligatory".
>
> [5] "Canada Brick took reasonable care in attempting to comply with order number three and yet did not recognize the walkway as a place where guarding was required".
>
> [6] "Some other guarding was put in place regarding the dehacker machines after considerable consultation as to what was necessary to comply with order number three"; "They improved the guarding of the dehacker machines in areas more traditionally recognized as places that required guarding, such as exposed chain drives and moving parts within the machine itself" – the worker representative on the Joint Health and Safety Committee "signed off on the Notice of Compliance" believing that compliance had been achieved respecting Order No. 3 with the dehacker machine properly guarded.
>
> [7] Notwithstanding regular safety inspections the Joint Health and Safety Committee did not foresee "the hazard as one that could be alleviated by guarding".
>
> [8] "Even after the Joint Health and Safety Committee requested and received further instruction about guarding principles, the hazard was not foreseen as an area where

> guarding principles applied" – "They were provided only with general guarding principles, not specifics".
>
> [9] "The workers who knew this area of the plant best did not foresee it… Management did not foresee it".
>
> [10] "Even when consulting about an additional electric eye perimeter fence for the entire area to block access to the dehacking machines this specific hazard was not identified as an area that required guarding".

(2) "…the area where the accident occurred was not an obvious hazard to which guarding principles would normally apply".

ANALYSIS

(1) The Crown Appeal

[122] The philosophy of the *Occupational Health and Safety Act*, as a regulatory scheme, provides important context to this appeal:

(1) the *Act* is a remedial public welfare statute whose broad purpose is to provide a reasonable level of protection for workers by requiring employers to conform to certain minimum safety standards in the workplace

(2) having regard to its remedial purpose of protecting worker health and safety, the legislation is not to be given a narrow technical interpretation but should be interpreted in a manner consistent with its broad purpose.

See *R. v. Brampton Brick Ltd.,* [2004] O.J. No. 3025 (QL) (C.A.), at para. 22; *R. v. Timminco Ltd.* (2001), 153 C.C.C. (3d) 521 (Ont. C.A.), at p.528; *R. v. The Corporation of the City of Hamilton* (2002), 58 O.R. (3d) 37 (C.A.), at pp.43-4; *R. v. Cancoil Thermal Corp. and Parkinson* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.),

at p.298; *R. v. Ellis-Don Ltd.; R. v. Morra; R. v. Indal Furniture System; R. v. Helmer Pederson Construction Ltd.* (1991), 61 C.C.C. (3d) 423 (Ont. C.A.), at pp.430, 436, 439, 449. At page 439 of the *Ellis-Don* case, Carthy J.A. (in dissent in the result) stated:

> …the pressing and substantial objective of the *Act*, generally, [is] to prevent accidents in the work place… The *Act* is directly focused on accident avoidance through measures taken in advance of mishaps and because it applies to a segment of commercial society where there is necessarily a dependence upon profits, measures are needed to assure that workers' safety is not forgotten. The *Act* is also directed to industries that are prone to a wide variety of dangers.

[123] Having regard to "the fact based nature of the charges" under the *Act*, an appellate court must be mindful of "the high standard of deference afforded to a trial judge's findings of fact": *R. v. Brampton Brick*, at para. 27; see also: *H.L. v. Canada*, [2005] S.C.J. No. 24, at para. 55-6, 69-76; *Housen v. Nikolaisen*, [2002] S.C.R. 235, at pp.245-6. That said, in appropriate cases a reviewing court has authority to interfere with a trial verdict where the verdict is unreasonable or unsupported by the evidence; relevant evidence is ignored or misapprehended; or the charge, *Act* or *Regulation* is misinterpreted (*R. v. The Corporation of the City of Hamilton*, at p.43; *R. v. Cancoil Thermal Corp. and Parkinson*, at pp.300-1); or the court errs as to the meaning of a word in a statute or a statutory regulation (*R. v. Cancoil Thermal Corp. and Parkinson*, at p.301); or where the court applied the wrong test in considering the due diligence defence: *R. v. Rio Algom Ltd.* (1988), 46 C.C.C (3d) 242 (Ont. C.A.), at pp.250-1.

[124] The charge in this case alleged a violation of s.25(2)(h) of the *Act*. That provision must, however, be read in the context of the entire scope of s.25:

> 25. (1) An employer shall ensure that,
> . . .
>
> (c) the measures and procedures prescribed are carried out in the workplace;
>
> . . .
>
> (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
> . . .
>
> (h) take every precaution reasonable in the circumstances for the protection of a worker…

[125] Measures and procedures are *prescribed* where "prescribed by a regulation" made under the *Act*: s.1 *O.H.S.A.* ("prescribed"); *R. v. Wyssen c.o.b. Jake Wyssen Enterprises* (1992), 10 O.R. (3d) 193 (C.A.), at p. 195. A safe workplace is one reasonably free from danger or risks of injury. What cannot be tolerated is an environment which intolerably exposes workers to harm, risk or peril. To this end, the provincial regulatory scheme prescribes certain measures, for example relating to machine guarding, to define the standard of care to be met by an employer designed to eliminate or minimize the potential for harm. At the time of the Aquino accident, s.24 of *Regulation 851/Industrial Establishments*, passed pursuant to the *Act*, read:

> MACHINE GUARDING
>
> 24. Where a machine or prime mover or transmission equipment has an exposed moving part that may endanger the safety of any worker, the machine or prime mover or

> transmission equipment shall be equipped with and guarded by a guard or other device that prevents access to the moving part.

[126] In *R. v. Cancoil Thermal Corp. and Parkinson*, at p.301, the court stated:

> A guard is a protective device designed to prevent personal injury to the operator of a machine which is potentially dangerous because of the presence of an exposed moving part. Such a guard or protective device must be capable of preventing any intentional or inadvertent physical access to the potentially dangerous moving part.

In these circumstances, as related by Mr. Caskie (see paras. 73 and 74), it is necessary to *physically* prevent a worker from accessing a hazard – written procedures or a painted line on the floor are not classified as guards. In *R. v. St. Lawrence Cement Inc. (c.o.b. Dufferin Construction Co.)*, [1993] O.J. No. 1442 (QL) (Gen. Div.), at para. 32, the court stated:

> It is not enough for the accused to orally order the workers to conform to certain safety procedures and send them pamphlets that repeat and reinforce that order. If that were so, the accused could fulfil their obligation under the *Act* by holding meetings and distributing pamphlets.

[127] In describing the predecessor statutory provision to s.25 of the *Act*, the court in the *Wyssen* case stated at page 198:

> Here the definition of "employer" must be considered in context with the enforcement provisions in **s. 14(1) and (2) [s. 25(1) and (2)**]. These underline the intention of the legislature to make an "employer" responsible for compliance with the *Act* and *Regulations*. **Section 14(1) imposes on an employer what s. 14(2) properly describes as a "strict duty"**. 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 ed.) 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**.
>
> The duty imposed by s. 14(2)(g) [s.25(2)(h)] is even more sweeping, requiring an employer "to take every precaution reasonable in the circumstances for the protection of a worker". **The duties imposed on an "employer" by s. 14(1) and (2) are undeniably strict** and, in my opinion, non-delegable. **The legislature clearly intended to make an "employer" responsible for safety in the "workplace"**. (emphasis added)

[128] An employer is not legally bound to provide the safest imaginable workplace. While it may strive to do so, what the *Act* requires is compliance with those regulations which shape a reasonably healthy and safe work environment. Certain minimally prescribed standards seek to prevent accidents on account of worker inadvertence. The employer owns and controls the workplace and is statutorily obligated to maintain the minimally reasonable level of safety described in the regulations. It is recognized that “where the hazard in question is caused by equipment that the employer has a special knowledge and control over, it is appropriate that the employer bear the burden of proving a defence”: *R. v. Timminco Ltd.*, at p.529. Also at page 529, the court stated:

> As a policy consideration, where the hazard in question is caused by equipment that the employer has a special knowledge and control over, it is appropriate that the employer bear the burden of proving a defence. On this subject, Dodge J. in *R. v. Lake Ontario Cement Ltd.* (1990), 5 C.O.H.S.C. 192 (Ont. Ct. (Prov. Div.)), aptly stated at p.195:
>
> > In this case the employer controls the machine in question; he establishes and he controls the manufacturing process in the plant and he directs and supervises the employee in his duties. The very nature of the machine, how it works and the risks it poses to the worker are all matters within the employer’s special pool of knowledge. Consequently, the employer and those he engages to supervise the worker have a special responsibility for his safety that is recognized and defined in the *Occupational Health and Safety Act*.

[129] Generally, with a regulatory offence, it falls to the prosecution only to prove beyond a reasonable doubt a 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: *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.), at pp.373-4, 377; *R. v. Rio Algom Ltd.,* at pp. 249, 252; *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 (C.A.), at p.428. In *R. v. Sault Ste. Marie*, at p.374, the court described both this "all reasonable steps" route to avoidance of liability as well as the reasonable mistake of fact situation:

> Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* 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 properly be called offences of strict liability.

[130] There was no suggestion by the respondent at trial or on appeal that it held a reasonable belief in a mistaken set of facts relating to the hazardous circumstances of the unguarded walkway in the path of the moving head of dehacker machine. This is not surprising given the narrow scope for this prong

of the reasonable care defence as described in *R. v. Rio Algom Ltd.*, at page 249:

> **A defence to a strict liability offence put forward on the basis of a reasonable belief in a mistaken set of facts cannot prevail where an accused simply proves that he was mistaken in believing there was no danger of injury to any employee as a result of a failure to ensure equipment or protective devices were maintained in good condition or that every precaution reasonable in the circumstances was taken for the protection of a worker unless such failure or failures were based on a reasonable belief in a mistaken set of facts which, if true, would render the act or omission innocent**. There was no evidence in this case that the respondent through its employees, servants, agents or officers had any belief in any mistaken set of facts. **The facts were known to them. They simply failed to consider the potential danger to employees which might result from the correct facts which were known to them or were mistaken as to the harm which might be suffered by employees as a result of the facts concerning the existence of which there was no mistaken belief on the part of the respondent's supervisory personnel**. (emphasis added)

[131] "Ordinarily, mistake of law cannot be successfully raised as a defence to a criminal or quasi-criminal charge or regulatory offence", for example, error as to whether a thing constitutes a "guard or other device that prevents access to the moving part": *R. v. Cancoil Thermal Corp. and Parkinson*, at pp.301, 304.

[132] Section 66(3) of the *Act* as it stood in March of 2000 read:

> 66(3) On a prosecution for a failure to comply with,
> (a) subsection 23(1);
> (b) clause 25(1)(b), (c) or (d); or
> (c) subsection 27(1),
> it shall be a defense for the accused to prove that every precaution reasonable in the circumstances was taken.

[133] Unlike the text of most regulatory offences, s.25(2)(h) of the *O.H.S.A.* itself incorporates a reasonableness standard – whether the employer failed "to take every precaution reasonable in the circumstances for the protection of a

worker". Accordingly, the prosecution is obliged to prove the defendant did not use every precaution reasonable in the circumstances. During argument of the appeal, in light of the language of the charging provision, I expressed doubt as to whether a statutory or common law due care defence applied to the s.25(2)(h) offence. It would appear somewhat curious if the Crown has succeeded in such proof to then afford the defendant a due care defence to liability – has the defendant established that it took all reasonable care in the circumstances to take every precaution reasonable in the circumstances for worker protection? Subsection 25(2)(h) is apparently excluded by s.66(3) from the statutory conferral of a due care defence. However, both counsel on appeal submitted that by virtue of the common law, and, with s.25(1)(c) of the *Act* and s.24 of the *Regulations* as the underpinning for the s.25(2)(h) charge, the reasonable care or due diligence defence was available to the respondent. Because the parties' approach is supported by *R. v. Brampton Brick*, at para. 28, this case proceeded on the basis of availability of the defence.

[134] "Due Diligence is in law the converse of negligence": *R. v. Ellis-Don Ltd.*, at p.428. The *Act* "does not impose a duty on the accused to anticipate every possible failure, but only to exercise reasonable precaution": *R. v. St. Lawrence Cement Inc.*, at para. 32. In *R. v. Canadian Tire Corp.* (2004), 9 C.E.L.R. 248 (Ont. S.C.J.), at para. 85-7, the court stated:

> Accidents or innocent breaches of a regulatory offence inevitably occur. An absolute liability offence is not at issue here. 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" (*R. v. Safety-Kleen Canada Ltd.* (1997), 114 C.C.C. (3d) 214 (Ont. C.A.) at 224) nor some "superhuman effort" on the defendant's part (*R. v. Courtaulds Fibres Canada* (1992), 76 C.C.C. (3d) 68 (Ont. Prov. Ct.) at 77). If the facts suggest a discoverable causative flaw "could readily" have been remedied, due diligence will fail: *R. v. Rio Algom Ltd., supra* at 249, 252. In this regard, in the regulation of the environment, it was observed in *R. v. Alexander*, [1999] N.J. No. 19 (C.A.) at para. 16, that: "As a matter of principle, it should be observed that arguments based on the expense associated with compliance cannot generally be sustained".
>
> In any given case, the question is not whether the defendant has exercised some care, but whether the degree of care exercised was sufficient to meet the objective standard properly imposed. Therefore, a corporate defendant may absolve itself by showing it took all the care which a reasonable person might have been expected to take in all the circumstances: *R. v. Chapin* (1979), 45 C.C.C. (2d) 333 (S.C.C.) at 343-4…
> . . .
>
> As well, in testing the due diligence defence, it is often appropriate to ask what, in the circumstances, the defendant ought reasonably to have known taking into account the activity involved and the degree of tolerable risk in light of the nature and gravity of the potential harm at issue. In *R. v. Gulf of Georgia Towing Co. Ltd*., [1979] 3 W.W.R. 84 (B.C.C.A.) at 87, the court stated:
>
> > I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake.

[135] In *R. v. Inco Ltd.*, [2001] O.J. No. 4938 (QL) (S.C.J), at para. 39, the court quite properly approved the following analysis:

> Justice Stewart in *R. v. Gonder* (1981), 62 C.C.C. (2d) 326, [Yukon Territorial Court], addressed the parameters of the defense of reasonable care and made the following observations at page 331:
>
> > The approach consists of two stages. First, the existence of any general standard of care common to the business activity in question, must be determined. Is there a standard of practice of care commonly acknowledged as a reasonable level of care and did the accused act in accordance with that standard? The second stage examines any special circumstances of the case which might require a different level of care other than the level suggested by the standard practice. Evidence of a standard practice is only one important component of that test. The ultimate test is the degree of due diligence required in the circumstances of each case.

And at page 332:

> Reasonable care implies a scaling of caring. The reasonableness of the care is inextricably related to the special circumstances of each case. A variable standard of care is necessary to ensure the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each factual setting. The degree of care warranted in each case is principally governed by the following circumstances:
>
> a) gravity of potential harm;
> b) alternatives available to the accused;
> c) likelihood of harm;
> d) degree of knowledge or skill expected of the accused;
> e) extent of underlying causes of the offence are beyond the control of the accused.
>
> ... The greater the potential harm for substantial injury, the greater the degree of care required.

[136] Two matters of some importance to the Crown's argument on appeal emerge from the applicable jurisprudence:

(1) the role of foreseeability in establishing a due diligence defence

(2) the necessity that the employer defendant must show it acted reasonably with regard to the prohibited act alleged in the particulars.

[137] Turning first to the foreseeability issue, subjective foresight of a defendant respecting a hazard is *a* factor for consideration in a due care defence presentation but not to the exclusion of the overarching approach of an objective assessment of the reasonableness of the foresight of circumstances of harm or a potential accident. "Negligence…measures the conduct of the accused on the basis of an objective standard, irrespective of the accused's subjective mental

state": *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193 (S.C.C.), at p.252 *per* Cory J. In other words, liability exists where a defendant knew, *or ought to have known*, of the dangerous work conditions. In *R. v. Rio Algom Ltd.*, at pages 250-1, the court stated:

> I am not prepared to say that every failure to comply with the provisions s. 14(1)(b) [s.25(1)] of the *Occupational Health and Safety Act* will result in a conviction thereunder. In applying the principle espoused by Dickson J. in *Chapin* quoted above, it is my view that the reasonable foreseeability of danger resulting from an act or omission which constitutes *prima facie* proof of the offence alleged is one of the factors to be considered in deciding whether an accused took all the care which a reasonable man might have been expected to take in the circumstances. If that is what the trial judge purported to do he was correct in so doing.
>
> **The trial judge, however, appears to have focused his attention on the fact that none of the witnesses foresaw "this type of accident happening" and that "no one had foreseen the happening of what happened on September 3rd".** In my view, in purporting to determine whether the respondent had taken the care which a reasonable man might have been expected to have taken in the circumstances, he applied the wrong test. **The test which should have been applied was not whether a reasonable man in the circumstances would have foreseen the accident happening in the way that it did happen, but rather whether a reasonable man in the circumstances would have foreseen that an "overswing" of the gate could be dangerous in the circumstances and if so whether the respondent in this case had proven it was not negligent in failing to check the extent of overswing in order to consider and determine whether it created in any way a potential source of danger to employees and in failing to take corrective action to remove the source of danger.**
>
> **I am further of the view that the trial judge erred in fact and in law in reaching his conclusion that the accident which happened was not reasonably foreseeable by a reasonable man on the ground the 11 witnesses had not foreseen this type of accident happening and accordingly there was no negligence attributable to the respondent**. (emphasis added)

[138] Turning to the second point, proof of due diligence requires the employer to demonstrate, not its general safety record, but whether it took all reasonable steps "to avoid the particular event": *R. v. Sault Ste. Marie*, at page 374. Put differently, "The employer must show it acted reasonably with regard to

the prohibited act alleged…not some broader notion of acting reasonably": *R. v. Brampton Brick*, at para. 28; *R. v. Kurtzman*, at p.429; *R. v. Imperial Oil*, [2000] B.C.J. No. 2031 (QL) (C.A.), at para. 23, 28. In *R. v. Rio Algom Ltd.*, at p.252, the court stated:

> I note that the trial judge appears to have been satisfied that the respondent, in the operation of the mine where the accident took place, has kept safety foremost in its corporate mind at all times and has a good inspection and reporting system in effect to accomplish this purpose. Those are relevant facts to be kept in mind with respect to sentence. They do not, however, assist the respondent to avoid responsibility for the lack of care on its part which resulted in the unfortunate fatal accident. The respondent has failed to prove it was not negligent with respect to the circumstances which caused the fatal accident.

[139] The trial court found the following facts which were fully supportable on the evidence:

(1) **The walkway where Frank Aquino was injured "was recognized as an area where <u>care had to be diligently exercised</u> by workers <u>because of the movement of the dehacking machine</u>"** (emphasis added) (*Reasons*, para. 48).

This is not only a matter of common sense but the respondent's own evidence at trial established that workers at the dehacker machine were warned to be careful of the hazard of walking in the path of the machine moving bricks to the defacer table. The machine generally operated in automatic mode with workers raking the bricks routinely using the walkway where Aquino was injured to cross to the other side of the machine. Lock-outs appear to have been reserved only for equipment maintenance situations.

(2) **Frank Aquino was seriously injured when the dehacker machine crushed him against the rigid framework of the defacer table. This "occurred in an area that <u>if it had been</u>**

> **properly guarded would have prevented the accident"** (emphasis added) (*Reasons*, para. 40).
>
> There was no suggestion at trial it was too difficult or expensive to guard the walkway in question. The respondent chose to opt primarily for reliance on cautioning and training of workers as opposed to using, in the words of s.25(2)(h) of the *Act*, "every precaution reasonable in the circumstances for the protection of a worker", i.e. installation of a guard "or other device that prevents access to the pinch point".
>
> (3) **"It was a reasonable precaution for Canada Brick to have implemented interim safety measures, by way of guarding, which would have prevented this accident"** (emphasis added) (*Reasons*, para. 40).
>
> This third finding of fact respecting *interim* safety measures, together with the trial judge's recognition that the prosecution was required to prove the charge as particularized, and the court's stated conclusion that the *actus reus* had been proven by the Crown beyond a reasonable doubt, necessarily means that the prosecution proved that the interim measures were required of the respondent "to prevent access to the exposed moving parts of the 'A' dehacker machine while completing steps to comply with an inspector's order for guarding" the dehacker.

[140] In this case, the appellant has discharged the burden of demonstrating error on the part of the trial court seriously calling into question the foundation for its acceptance of Canada Brick's due care defence respecting the reasonable precautions described in the charge. As discussed more fully below, the trial court erred in reasoning that the risk of injury to a worker, allowed unguarded

access to the walkway crossed by the head of the dehacker machine, was not foreseeable because:

> (1) it was the dehacker *machine* itself not an exposed *moving part* of the machine which created the danger
>
> (2) prior to the Aquino accident, the respondent and its employees did not view the walkway as a location requiring guarding for worker safety
>
> (3) in August of 1999, the Ministry of Labour did not order interim precautions be implemented to guard the walkway.

[141] At trial, and again on appeal, the respondent submitted that because Mr. Aquino was struck by the dehacker *machine* and not "an exposed moving part" of the dehacker machine, neither Order No. 3 nor any broader duty of care under the *Act* required guarding of the relevant walkway on an interim or permanent basis. There was no real grounding in the evidence for this view. While it is implicit in the trial court finding the *actus reus* of the offence had been proven that this argument was rejected, review of the totality of the reasons, and in particular the court's discussion of the due diligence defence, places the consistency of the court's reasoning in considerable question with the court making these statements:

> [1] The dehacker machine then moves to another area in the plant and deposits the bricks onto a table referred to as the defacer table (*Reasons,* para. 6)
>
> . . .

[2] Between the area where the bricks are raked and then picked up by the dehacker machine… (*Reasons*, para. 6)

[3] Access to both sides of the dehacker machine is necessary in order to properly rake the bricks into place so that the dehacker machine can pick them up (*Reasons*, para. 6)

[4] He [Mr. Aquino] was responsible for raking the bricks being picked up by the dehacker machine… (*Reasons*, para. 8)

[5] …Mr. Aquino took two to three steps backward onto the walkway over which the dehacker machine passes to deposit bricks on the defacer table. Mr. Aquino did not see the moving dehacker machine. Mr. Aquino was struck in the middle of the back by the grips of the dehacker, which was the lowest portion of the machine as it traveled overhead. The dehacker was carrying a load of bricks. (*Reasons*, para. 9)

. . .

[6] When the machine stopped, Mr. Aquino had been squeezed into a nine-inch space between the dehacker and the metal tubing frame around the defacer table. (*Reasons*, para. 11)

[7] Despite the fact that a compliance form had been sent in, nothing had been done to guard the area of the "A" dehacker machine where the accident occurred…(*Reasons*, para. 25)

. . .

[8] No one involved…envisioned the danger posed by the machine itself moving, as opposed to the danger inherent in the exposed chain drives and other moving parts within the machine. (*Reasons*, para. 25)

. . .

[9] Again, **no one had contemplated that something could happen in the area where the machine was working, by the movement of the machine itself, as opposed to the exposed chain drives or other moving parts within the dehacker machine.** (emphasis added) (*Reasons*, para. 27)

. . .

[10] …the accident took place as a result of the moving "A" dehacker machine crushing Mr. Aquino… (*Reasons*, para. 40)

. . .

[11] He was in the process of taking several backward walking steps when the dehacker machine struck him. (*Reasons*, para. 45)

. . .

[12] …responsible for the lack of recognition that the walkway area, where the accident occurred, presented a hazard that could be removed by proper guarding. (*Reasons*, para. 49)

. . .

> [13] They [the respondent] improved the **guarding of the dehacker machines in areas more traditionally recognized as places that required guarding, such as exposed chain drives and moving parts within the machine itself**. (emphasis added) (*Reasons*, para. 52).

[142] It is apparent from the evidence at trial, both the videotape and the oral testimony, that a dehacker machine has a number of component parts. Indeed, witnesses, both for the prosecution and the defence, referred to such parts as grips or grippers, clamping device, control panel, internal parts, dehacker head, sprockets, pistons, chain drives, etc. Section 24 of the *Regulation* does not limit "an exposed moving part" to a small or, as the trial court seems to have, to an internal part "within" the machinery. The dehacker machine is not akin to an overhead roof crane far above the workplace floor. The head of the dehacker's overhead conveying system directly crosses the unguarded walkway essentially at ground level. Just as "the moving index beam" in the *Timminco Ltd.* case would not be described as the crown press itself, so too the dehacker head moving with a load of bricks is not the dehacker machine but an exposed moving part potentially endangering worker safety.

[143] While some generic references to the dehacker *machine* are understandable, at no place in the reasons does the trial judge identify the dehacker head with its grippers as an *exposed moving part*. The court's references to "the moving dehacker machine", "the machine itself moving", and

"the movement of the machine itself", in apparent contradistinction to "exposed chain drives and other moving parts within the machine", involves a misapprehension of the evidence and s.24 of the *Regulation* – one, it seems, critical to the court's acceptance of the due diligence defence.

[144] The trial judge's conclusion that Canada Brick had demonstrated reasonable care was largely premised on the lack of foreseeability of a hazard at the walkway. Quite apart from the court's apparent error in finding an absence of foreseeability because the dehacker machine was not an exposed moving part, the trial judge erred in limiting his analysis of the foreseeability issue to subjective foresight alone.

[145] The trial judge found that:

(1) Canada Brick "did not recognize the walkway area as a place where guarding was required" by Order No. 3

(2) The worker representative of the Joint Health and Safety Committee signed off on compliance with Order No. 3 believing the dehacker had been properly guarded

(3) "The Joint Health and Safety Committee did not foresee the hazard as one that could be alleviated by guarding, notwithstanding regular safety inspections"

(4) "The workers who knew this area of the plant best did not foresee it"

(5) "Management did not foresee it"

(6) "…until the accident occurred, it was not foreseen by anyone that the walkway was a hazard that should be protected by guarding techniques"

(7) "I am satisfied that the walkway area where the accident occurred was not actually foreseen as a hazardous area that required guarding".

[146] The court noted as well that labour inspectors had not, before 1999, identified the passage of the dehacker head across the walkway as a hazard requiring guarding. While this too is certainly relevant to whether the company took all due care to take every precaution reasonable "in the circumstances for the protection of a worker", it is unknown whether those inspectors saw the dehacker in operation. The respondent did not suggest its conduct was the result of officially induced error. As properly recognized by the trial court, responsibility cannot be placed on the Ministry of Labour "for the safety of the area where the accident occurred" – "Safety is clearly the responsibility of the employer".

[147] Most employers and workers do not expect an industrial accident to occur. Although not conceded at trial to be a recognized hazard, the respondent had warned its workers of the danger when on the walkway. To use the words of the *Rio Algom* case, in the absence of guarding, the respondent "simply failed to consider the potential danger to employees which might result from the correct

facts which were known" to it. The perceived danger was countered only by training and cautions not a physical guard or equivalent on an interim basis pending compliance with Order No. 3.

[148] Quite deliberately, in the interest of reducing risks to worker safety, the *Act* addresses itself not to subjective anticipation alone but to the objective standard of "every precaution reasonable in the circumstances". However, at no point in the reasons for judgment, does the trial court ever ask itself whether in the circumstances a *reasonable* man, or perhaps a *reasonable* employer, would have foreseen that unguarded access to the walkway in the path of the dehacker head could be dangerous, a potential source of harm, requiring corrective action on an interim basis and permanently. Application of this objective test would have added to the circumstances to be considered:

(1) the dehacker generally operated in automatic mode

(2) the operator was not always stationed at the dehacker control panel

(3) lock-outs were only utilized for maintenance measures

(4) the size of the moving dehacker head when carrying a load of bricks compared to the size of the walkway including its narrow width

(5) the frequency of use of the walkway

(6) the likelihood of serious injury to any worker caught in the path of the dehacker head

(7) the relative ease and inexpense of implementing a physical guarding system as an interim and then permanent response to the risk of harm

(8) even without knowledge of Insp. Parco's August 1999 orders, Insp. Burke too saw the danger of the dehacker head able to cross the unguarded walkway.

[149] The respondent argued that while there may be no reference in the court's due care analysis to the objective test or reasonable precautions, the court had this test in mind when it stated:

> …I am satisfied that it was not easily foreseeable that guarding techniques should be implemented as a means of dealing with the hazard presented by this area.

I am unable to equate what is "easily foreseeable" with reasonable foreseeability especially in light of the court's repetitive references to subjective foreseeability.

[150] Lastly, in concluding the foreseeability issue, and ultimately the due care defence, in the respondent's favour, the trial court considered as one of the significant "circumstances" that the Ministry of Labour did not impose an interim guarding order in August of 1999. The court stated:

> …the only reasonable inference that can be drawn is that the Ministry of Labour inspectors were well aware that the dehacker machines would be operating in the interim until orders number three and number four were complied with. From the orders made that relate to the dehacker machine, the time provided for compliance, the lack of any formal interim order and the lack of detail regarding the discussion of interim precautions, it is a reasonable inference that the Ministry of Labour either did not see the need for

> immediate interim precautions regarding the dehacking machines or they did not address their minds to the issue. Either way, I find that the necessity for any interim precautions for the dehacker machine was not clearly communicated to Canada Brick.
>
> . . .
>
> When the general guarding order was put in place in August 1999 no interim order was made. If a hazard of this magnitude, which could be eliminated by proper guarding, were obvious and recognized, an interim order would have been obligatory.

[151] Against the backdrop of the court's finding that it "was a reasonable precaution for Canada Brick to have implemented safety measures, by way of guarding" at the walkway, three points may be made respecting flaws in the reasoning relating to the absence of an interim guarding order:

(1) **The government did not see the need, or failed to consider the need, for interim precautions.**

The uncontradicted evidence was that Parco and Caskie did not see the dehackers operating. During the August, 1999 compliance inspection, the respondent voluntarily shut down its equipment yielding temporary or interim protection for workers. In any event, whether or not the government considered the need for interim precautions, the employer is responsible for safety in the workplace which may, in appropriate cases, require interim guarding.

(2) **The court perceived that Canada Brick's position was assisted by the government's failure to clearly communicate the necessity for interim precautions.**

Mr. Caskie testified that he generally discussed interim precautions with Canada Brick personnel. In any event, the employer, not the M. of L., is subject to the standard of care for safety in the workplace. Once subject to Order No. 3, it was for the respondent to assess whether it was a reasonable

precaution to implement interim guarding pending a permanent solution. It failed to do so.

(3) **If the walkway hazard were of such significant magnitude as to be "obvious" and capable of being eliminated by proper guarding, an interim guarding order would have been "obligatory".**

The basis for this conclusion is not apparent. There is no statutory authority to support when an interim order ought to be imposed and the government witnesses' testimony did not suggest such an order was commonplace or support the necessity for an interim guarding order in every circumstance where interim guarding was reasonably expected to be undertaken by an employer.

[152] The findings of the trial court reproduced at para. 118, 119 and 139, *supra*, fully supported by the evidence, concluded that installation of an interim guard to prevent access to the walkway crossed by the dehacker head amounted to a reasonable precaution in the circumstances to protect worker safety and that in failing to do so Canada Brick had breached s.25(2)(h) of the *Act* as charged. In other words, the Crown had proven the *actus reus* of the offence.

[153] In light of the errors in the trial court's due care analysis, described at para. 140 to 151 *supra*, the finding of a lack of negligence on the part of the respondent is not maintainable. On the record here, but for the trial court's misapprehension of evidence and of the scope of the due care defence itself, not only would the verdict not necessarily have been the same but also a finding of

negligence was inevitable in the sense that a finding of no negligence would have been an unreasonable finding. In the result, subject to the respondent's abuse of process/constitutional argument, this court ought to set aside the trial verdict and substitute a finding of guilt.

(2) The Alleged Breach of s.8 of the *Charter*/Abuse of Process

[154] The essence of Mr. Crocker's submissions alleging a breach of the company's s.8 *Charter* right may be summarized as follows:

(1) Insp. Burke exceeded the inspection powers in s.54 of the *O.H.S.A.* by continuing an "investigation" after the point at which he, objectively, had reasonable grounds to believe s.25(2)(h) of the *Act* had been violated.

(2) The trial judge erred in failing to recognize that when, on March 8, 2000, Insp. Burke issued his orders on the authority of s.57(6)(b) of the *Act* having found a "contravention of [the] *Act* or the regulation [was] a danger or hazard to the health or safety of a worker", he necessarily had reasonable and probable grounds for believing the s.25(2)(h) offence had been committed – a point when investigation continued without proper court authority.

(3) Because the prosecution is not required to prove negligence when charging the s.25(2)(h) offence, the trial court erred in concluding that after March 8, 2000 Insp. Burke properly continued his investigation to discover evidence of a lack of due care.

[155] Section 54(1) of the *O.H.S.A.* broadly provides that an "inspector may, for the purpose of carrying out his or her duties" under the *Act* and *Regulations* exercise, without warrant, a variety of powers including authority of entry to a workplace, to require production of documents, conduct tests, make seizures, make inquiries of persons in the workplace, require that equipment be operated, shut down the operation of equipment, etc.

[156] In light of Canada Brick's arguments, the following factual and legal conclusions of the trial court are relevant:

> (1) Whether Insp. Burke unconstitutionally exceeded his regulatory inspection powers, applying *R. v. Inco* (2001), 54 O.R. (3d) 495 (C.A.), may be determined by "whether or not the Occupational Health and Safety officer, Mr. Burke
>
> [1] had reasonable and probable grounds,
>
> [2] and when, those reasonable and probable grounds were determined by him".
>
> (2) A labour inspector responding to the scene of an industrial accident, "who sees an unguarded machine that could jeopardize workers' safety, is obligated by statute to order remedial measures" – issuance of an Order "is not determinative of whether reasonable and probable grounds existed to lay a charge".
>
> (3) "Without having investigated the reported accident, there will undoubtedly be a number of unanswered questions which need to be answered in order to determine whether charges should be laid".

(4) Because an element of the s.25(2)(h) *O.H.S.A.* offence is whether "every reasonable precaution" was taken, "it was necessary for some inquiry to be made regarding what if any precautions had been taken in these particular circumstances".

(5) "Requiring statements from witnesses regarding the accident itself and the precautions in place at the time, was…necessary before any proper, or reasonable and probable grounds could be reached".

(6) Concerning the "subjective component of reasonable and probable grounds", Insp. Burke's completion of his "investigation" with "reservation" of whether he had such a subjective belief "was a fair and reasonable way of dealing with things particularly in the circumstances of this case".

(7) Insp. "Burke did not have reasonable and probable grounds until his inspection and investigation was complete and he had the opportunity to review the totality of the information, both the statements and the documents he had gathered" and "therefore [he did not] improperly use the inspection powers provided in Section 54" of the *O.H.S.A.* and in turn s.8 of the *Charter* was not breached.

[157] Before turning to what I believe to be the legitimate complaints of Canada Brick respecting the s.8 *Charter* issue, a summary overview of relevant principles is warranted:

(1) For the application of s.8 of the *Charter*, "there must first be a search or seizure": *R. v. Jarvis* (2002), 169 C.C.C. (3d) 1 (S.C.C.), at p.33. In broadly defining a search or seizure for constitutional purposes, section 8 of the *Charter* protects not privacy but a *reasonable* expectation of privacy assessed on the totality of the circumstances with "particular emphasis on

(1) the existence of a subjective expectation of privacy; and (2) the objective reasonableness of the expectation": *R. v. Tessling* (2004), 189 C.C.C. (3d) 129 (S.C.C.), at p.138; *R. v. D'Amour* (2002), 166 C.C.C. (3d) 477 (Ont. C.A.), at p.495.

(2) A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable: *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.), at p.14.

(3) Once the applicant alleging a breach of the s.8 *Charter* right establishes standing, it would ordinarily have the onus of proving on a balance of probabilities it was subject to an unreasonable search or seizure – unless the applicant demonstrates the search was warrantless in which case the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable: *R. v. Collins*, at p.14.

(4) Section 8 , "like other *Charter* rights, must be broadly and liberally construed to effect its purpose": *R. v. Colarusso* (1994), 87 C.C.C. (3d) 193 (S.C.C.), at p.214. "What is reasonable, however, is context-specific": *R. v. Jarvis*, at p.33. As well, "the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful": *R. v. McKinlay Transport* (1990), 55 C.C.C. (3d) 530 (S.C.C.), at pp.542-3. Said differently, the scope of a constitutional guarantee, including the right to be secure against unreasonable search or seizure, "like the balancing of the collective and individual rights underlying it, varies with the context": *Comité Paritaire v. Potash*, [1994] 2 S.C.R. 406, at p.420.

(5) Commercial activities highly regulated by government in pursuit of public welfare and protection are a feature of modern society. The centrepiece of regulatory regimes for enforcement and ensuring compliance with established standards is generally a statutorily conferred warrantless power of entry and audit or inspection together with various ancillary powers. The need for this type of monitoring, in the absence of reasonable grounds for believing any infraction

exists, is necessary to maintain compliance including through the deterrence of random and unannounced attendances by government officials: *R. v. McKinlay Transport Ltd.*, at p.545. "While regulatory statutes incidentally provide for offences, they are primarily concerned to encourage compliance": *Comité Paritaire v. Potash*, at p.421. The standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law "will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context": *Thomson Newspapers Ltd. v. Canada* (1990), 54 C.C.C. (3d) 417 (S.C.C.), at pp.475-6; *R. v. Colarusso*, at p.204; *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509 (C.A.), at pp.511-2.

(6) A search, in the sense of government discovery of things including observations and information, without consent, may occur in a variety of contexts. And a seizure is "the taking hold by a public authority of a thing belonging to a person against that person's will": *R. v. McKinlay Transport Ltd.*, at pp.539-40.

(7) As a general rule, in highly regulated sectors of society, there is a diminished expectation of privacy in commercial premises and in respect of records and documents produced in the ordinary course of business: *R. v. Jarvis*, at p.34; *Thomson Newspapers Ltd. v. Canada*, at p.507; *Comité Paritaire v. Potash*, at p.424. That said, there is a reasonable expectation of privacy more or less, in business premises: *R. v. McKinlay Transport Ltd.,* at p.546; *R. v. Grant* (1993), 84 C.C.C. (3d) 173 (S.C.C.), at p.188; R*. v. Rao* (1984), 12 C.C.C. (3d) 97 (Ont. C.A.), at pp.121-2.

(8) Because statutory powers in the regulatory sphere, such as an administrative inspection, amount to an unwarranted intrusion by government, such an authority is properly described as a "search" for the purposes of section 8 of the *Charter*: *Comité Paritaire v. Potash*, at p.440. This "does not, however, mean that the contextual standard of reasonableness will necessarily be as strict in a matter involving the regulation of

an industrial sector as it is in criminal matters": *Comité Paritaire v. Potash*, at p.441.

(9) The conferral of a warrantless inspection authority is a "powerful…tool" in the hands of government: *R. v. Jarvis*, at p.9. Accordingly, the exercise of such a power must be circumscribed in a manner consistent with the purpose of the power within the appropriate contextual balance of regulatory enforcement and individual privacy interests. To this end, a line of separation must be drawn between the exercise of legitimate regulatory inspection and ancillary powers on the one hand and, on the other, the employ of such powers to further investigation of statutory infractions and offences. Warrantless inspection-like powers undertaken randomly or in response to a "complaint" of non-compliance do not, as a general rule, engage unreasonableness concerns:

> It may be that in the course of inspections those responsible for enforcing a statute will uncover facts that point to a violation, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection. The same is true when the enforcement is prompted by a complaint. Such a situation is obviously at variance with the routine nature of an inspection. However, a complaint system is often provided for by the legislature itself as it is a practical means not only of checking whether contraventions of the legislation have occurred but also of deterring them.
>
> (*Comité Paritaire v. Potash,* at pp.421, 453-4)

However, the government "must be careful…not to use the [inspection] power…to gather further evidence for an investigation after it has commenced": *R. v. Ling* (2002), 169 C.C.C. (3d) 46 (S.C.C.), at p.56. The investigative function is properly subject to the prior authorization model usually a warrant to search, as described in *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.), at pp.109-110. The continued use of administrative warrantless authority to further investigative interests, as described in *R. v. Colarusso*, at pp. 222-5, amounts to "a too convenient way of getting around the requirements set forth in *Hunter*", a subterfuge giving an "easy passage around the constitutional requirements for searches for purposes of…investigation", and, an improper "'back door'

without complying with the requirements of prior authorization".

(10) The bright line rule for the division of inspection and investigatory functions, in terms of the scope of s.8 *Charter* protection, occurs when "an adversarial relationship crystallizes" between the subject of government scrutiny and the government official(s). Although the government and the company under inspection may, during an inspection, be in "opposing positions", when the government "exercises its investigative function [it is]…in a more traditional adversarial relationship" attracting the more robust protection of section 8 of the *Charter*: *R. v. Jarvis*, at p.37. Accordingly, in the circumstances of any particular case, the adversarial relationship crystallizes "when the predominant purpose of an official's inquiry is the determination of penal liability" where "a liberty interest is at stake": *R. v. Jarvis*, at pp.9, 24, 37, 39; *R. v. Ling*, at p.50.

(11) The application of the "predominant purpose" test involves a case-by-case examination of the conduct of the government official(s) in the totality of the circumstances – "There is no clear formula" otherwise: *R. v. Jarvis*, at p.39. All factors that bear upon the nature of the government inquiry must be considered. While the existence of reasonable grounds to believe an offence may have occurred is not in and of itself a sufficient indicator that the state is conducting a *de facto* investigation, "In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered": *R. v. Jarvis*, at p.39. Although it cannot be said that "from the moment such suspicion is formed, an investigation has begun" (*R. v. Jarvis*, at p.40), there may, in a given case, come a point where continuation of warrantless inquiry becomes constitutionally unreasonable – in effect, "the same conduct motivated by a different purpose may interfere with reasonable expectations of privacy": *R. v. D'Amour*, at p.496.

(12) The reason regulatory inspectors have been granted powers of inspection is to determine whether an offence has been

committed requiring an immediate or near-immediate response in furtherance of public safety – "the very nature of an administrative inspection in a regulated industry [is] that it takes place *when there are no* reasonable grounds to believe that a particular offence has been committed" (emphasis of original): *Comité Paritaire v. Potash*, at pp.452-3. "There is an important distinction between having reasonable and probable grounds to believe that an offence was committed and simply having information": *Comité Paritaire v. Potash*, at p.454. On occasion, during an inspection, government discovery of non-compliance with regulatory standards warrants an instant remedial response under government direction or order. Prolonged attendance, inquiries, inspections, questioning and even seizures by government officials may prove necessary to effect abatement and timely compliance in the interests of public welfare and protection. In these circumstances, the exercise of warrantless powers does not offend our constitutional notion of reasonableness. What is offensive, however, is overholding in the use of such powers into a disguised investigation or "Quite conceivably, situations may arise in which charges are delayed" improperly in order to compel the target to provide evidence against itself: *R. v. Jarvis*, at p.40; *R. v. Chusid* (2002), 57 O.R. (3d) 20 (S.C.J.), at pp.39-41.

(13) In the instance of a public welfare offence, a strict liability offence, conviction follows upon the Crown's proof of the *actus reus* unless the defence proves on a balance of probabilities that all reasonable care was taken: *R. v. Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154, at pp.205-6, 248. In pursuit of investigation of a regulatory offence, including pursuit of information relevant to the exercise of due care, the state may intrude on an investigatory target's reasonable expectation of privacy with a warrant to search: *CanadianOxy Chemicals Ltd. v. Canada* (1999), 133 C.C.C. (3d) 426 (S.C.C.), at pp.434-5.

(14) The standard of reasonable grounds is one of "reasonable probability" (*R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.), at p.213 affirming (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), at p.

> 219) or where "credibly-based probability replaces suspicion": *Hunter v. Southam Inc.*, at pp.114-5. It is not sufficient that the agent of government believe reasonable grounds exist – it must be objectively established that such grounds exist: *Proulx v. Quebec* (2001), 159 C.C.C. (3d) 225 (S.C.C.), at p.236; *R. v. Storrey* (1990), 53 C.C.C. (3d) 316 (S.C.C.), at pp.324-5. The investigative phase is expected "to gather all relevant evidence in order to allow a responsible and informed decision to be made as to whether charges should be laid" which requires the government to consider as well reliable evidence pointing away from guilt for the offence: *CanadianOxy Chemicals Ltd. v. Canada*, at pp.434-5; *Chartier v. Attorney-General of Quebec* (1979), 48 C.C.C. (2d) 34 (S.C.C.), at p.56. Reasonable grounds does not require demonstration of a *prima facie* case: *R. v. Storrey,* at p.324; *R. v. Debot*, (S.C.C.) at p.213.

[158] The trial court correctly accepted that Insp. Burke's attendance at the Canada Brick premises on March 8, 2000 in response to notification of the Ministry of Labour concerning the Aquino accident was an inspection authorized by law. The government, in furtherance of its statutory mandate to monitor safe workplaces, was obliged to straightaway determine the circumstances of the reported industrial accident in order to ascertain whether it was the result of non-compliance with the *Act* or *Regulations* and if so, to take the necessary and timely steps to protect other workers from a similar mishap. To this end, on March 8, 2000, Insp. Burke properly exercised the panoply of warrantless powers conferred by s.54(1) of the *O.H.S.A.* in an effort to learn how the accident

occurred, whether it was the product of a preventable hazard, and what remedial action, if any, was required.

[159] In a matter of a couple of hours, Insp. Burke concluded that the unguarded walkway in the path of the moving head of the dehacker machine amounted to an unreasonably dangerous location for workers. He issued a stop work order being of the view, pursuant to ss.57(1)(6) of the *Act*, that a contravention of the *Act* or *Regulations* existed constituting "a danger or hazard to the health or safety" of workers. I do not agree with Mr. Crocker that in every case it necessarily follows that an inspector's action under s.57(1)(6) means reasonable grounds then exist, or should be imputed, for believing an offence has been committed. Simply because a provision of the *Act* or *Regulations* is being contravened does not, for example, automatically mean that the inspector knows who is responsible for the contravention or the entire scope of how the unsafe work conditions came to exist which might, when known, require additional abatement directions.

[160] However, in this case, by the afternoon of March 8, 2000, a temporary or interim guard was in place and the Ministry notified of a permanent compliance solution expected by the Ministry months earlier in compliance with the Parco order. The stop work order was lifted. Insp. Burke had become aware of the

non-compliance with the Parco order made almost seven months earlier. In these circumstances, certainly from an objective point of view, Insp. Burke had reasonable grounds for believing Canada Brick had contravened s.25(2)(h) of the *Act*.

[161] Repeatedly in his testimony, Insp. Burke acknowledged that he conducted an "investigation" – one using coercive warrantless powers, protected from interference by s.62 of the *Act*, for more than twenty days after March 8, 2000. In this way, interviews were conducted and documents produced – information and records in which the respondent had a reasonable expectation of privacy were obtained by the government. It is far from clear on the trial evidence that some of the acquired documents were imbued with any reasonable expectation of privacy. The trial court made no findings suggesting the evidence of Joncas and Leavitt was not believed when they maintained that any cooperation provided Insp. Burke was the result of compulsion or that such perception was not itself objectively reasonable.

[162] The legitimate use of warrantless, administrative authority expired on or about March 8, 2000. The predominate objective of Insp. Burke thereafter was the investigative gathering of evidence respecting liability for the regulatory infraction whether or not he would ultimately see himself as having grounds to

charge the company. This became a warrantless search no longer authorized by law. Deliberate deferral of consideration as to whether he had reasonable grounds or whether such grounds objectively existed does not alter the transparently clear dominant intent of the inspector in the three weeks following March 8. No longer exercising statutory powers toward remediation of a workplace hazard, the inspector's investigation improperly secured evidence without valid consent or any warrant to search. While Canada Brick may not have faced "penal liability" in the form of conviction and loss of liberty, the inspector's warrantless investigative endeavours under the *Act* were directed to accumulation of evidence capable of influencing the grounds for charging the company. The witness himself acknowledged in his testimony that "recent training" of labour inspectors obliged them, in circumstances similar to those which obtained in March of 2000, to apply for search warrants in the circumstances in which he found himself in March of 2000.

[163] In fairness to the trial judge, his s.8 *Charter* ruling was given on August 15, 2002, about four months before the *Jarvis*' case very clear enunciation of a "predominant purpose" test respecting the separation line between the exercise of administrative power and investigatory function. It does not appear that Canada Brick, or the trial court on its own motion, reopened the issue for re-evaluation during the ongoing trial once the *Jarvis* case was released.

[164] Canada Brick's s.8 *Charter* right was breached by the government's prolonged employ of administrative powers to gather evidence as to whether an offence had been committed. In other words, in the circumstances, the Crown could not justify Insp. Burke's ongoing warrantless search. Mr. Crocker submitted that such a conclusion should lead to a finding of an abuse of process yielding a s.24(1) stay of proceedings. A stay is the exclusive remedy sought. The defendant did not suggest any entitlement to an exclusion of seized evidence pursuant to s.24(2) of the *Charter*, the common law, or pursuant to s.24(1) (see *R. v. White* (1999), 135 C.C.C. (3d) 257 (S.C.C.), at pp. 289-91). Indeed, the respondent submitted that "this is a serious *Charter* breach which cannot be remedied by the exclusion from evidence of documents obtained during the investigation".

[165] Mr. Crocker further submitted that:

(1) a breach of s.8 of the *Charter* was established

(2) "Once a *Charter* breach has been found a subsection 24(1) remedy should follow" – "The wording of s.24(1) does not require that a breach be substantial in order to receive a remedy"

(3) the type of s.24(1) remedy properly ordered is discretionary – "such remedy as the court considers appropriate and just in the circumstances"

(4) "The *Charter* breach may not be shown to affect directly Canada Brick's right to make full answer and defence"

(5) but for the s.8 violation, the M. of L. "was in a position to lay these charges where they otherwise might not have been"

(6) "Although the trial itself may not have been impacted by the *Charter* breach, the investigation was such a flagrant breach" of Canada Brick's rights "that it was prejudicial to the administration of justice and the continuation of the proceedings constituted a furtherance of the abuse"

(7) as to the remedy of a stay:

> A stay of proceedings will be appropriate when the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome and no other remedy is reasonably capable of removing that prejudice
>
> . . .
>
> …the breach of [t]he *Charter* caused by the investigation of the MOL in this case was significant and warranted a remedy. The investigation prejudiced the administration of justice and was perpetuated through the conduct of a trial which otherwise might not have taken place. Since no other remedy is reasonably capable of removing that prejudice, a stay of proceedings is warranted.

[166] In response, Crown counsel submitted:

(1) the results of the unconstitutional seizure did not affect the fairness of the trial; s.11(d) *Charter* rights were not affected:

> The lack of prejudice caused by "the abuse" is evidenced by the fact that other than a small hand-drawn sketch of the machine involved in the accident none of the evidence obtained by the inspector subsequent to his initial attendance at Canada Brick was entered as evidence by the Crown. Neither did the Crown rely on the statements obtained to either to refresh the memories of Crown witnesses or to cross-examine defence witnesses.

> The Defendant does not have a reasonable expectation of privacy with respect to Joint Health and Safety Committee minutes because they belong to the Committee (made up of both management and workers) and not the employer. In any event, this allegedly unlawfully obtained evidence was lead by the defence as part of its case.
>
> . . .
>
> The Inspector was acting in good faith. The effect of the breach was not manifested, perpetuated, or aggravated during the trial, or by its outcome. The Defendant is not able to show that the breach had any effect on the fairness of the trial.

(2) the defence assertion that, but for the s.8 *Charter* breach, charges may not have been laid "is a highly speculative assertion":

> …in any event these charges could have been laid on the basis of the information obtained by the inspector during his initial attendance at Canada Brick along with the evidence of [M]inistry witnesses and the victim of the accident, Frank Aquino, who was first interviewed while still in hospital.
>
> The constitutionality of the information gathering on the first attendance cannot be challenged since it was prior to the inspector having gathered sufficient information to have reasonable and probable grounds…to believe that an offence had been committed, such as would enable him to obtain a warrant.

(3) because Canada Brick only pursued one remedy, a stay of proceedings, "it may not be necessary to consider other possible remedies"

(4) the actions of Insp. Burke were not outrageous, deliberate, flagrant, unjustified, in bad faith or "such as would shock the conscience of the community"

(5) "in cases where there is uncertainty which persists as to whether the abuse is sufficient to warrant the drastic remedy of a stay of proceedings a third criterion is considered which involves a traditional balancing of interests, balancing the interests served by the granting of a stay against the interest society has in having a final decision on the merits… These interests increase commensurately to the seriousness of the

charges " – here, serious injuries occurred due to a dangerous workplace hazard:

> …this case does not fall within that category of cases where the actions of the agent of the state can be characterized as flagrant, deliberate, outrageous, shocking, or actions that would violate the community's sense of fair play and decency. This is not a case where a stay must be imposed even absent any effect on the conduct of the trial.
>
> Lastly, and only if there is any uncertainty which persists on the issue, this Court may engage in a balancing of interests. It is respectfully submitted that the offence charged in this case is a serious one give that the charge arose in response to a serious workplace accident. It is also submitted that there is a strong public interest in having offences pertaining to workplace heath and safety tried on their merits.

[167] There is a vital interest in seeing charges being tried on their merits: *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 81; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 109.

[168] A stay of proceedings is a discretionary remedy, the ultimate remedy which should only be granted in the "clearest of cases": *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp.659-660.

[169] "Most often a stay of proceedings is sought to remedy some unfairness to the individual that has resulted from state misconduct": *Canada v. Tobiass, supra*, at para. 89. The court looks to whether the abuse in question was manifested, perpetuated or aggravated through the conduct of the trial or by its

outcome. In the present case, Canada Brick did not, quite properly, press an argument that fairness of the trial was affected by the unconstitutional search. This undoubtedly informed the respondent's decision not to seek exclusion of evidence pursuant to s.24(2) of the *Charter*. There was, at best, a tenuous case made respecting any reasonable expectation of privacy in many of the seized documents. The respondent did not allege, as a result of the unconstitutional search, any self-incriminatory effect arising from evidence led by the prosecution at trial. By the end of March 8, 2000, reasonable grounds, at least objectively, existed to charge the corporate entity or to secure a warrant to search for additional evidence in an ongoing investigation.

[170] As well, a stay of proceedings as a remedy for abuse of process in its common law and constitutional contexts may, in rare instances, be appropriate in a "residual category" of cases as described in the *O'Connor* case at para. 73:

> This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

In the *Tobiass* case, at para. 90, the issue was described in this way:

> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:

> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice.
>
> (*O'Connor, supra*, at para. 75.)
>
> The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future. See *O'Connor*, at para. 82. For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category. See *O'Connor*, at para. 75. The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice.

[171] Insp. Burke's unconstitutional search must be understood contextually. Although he improperly exercised warrantless search powers to further investigative efforts, there is no real support in the trial record, nor persuasive suggestion in argument on this appeal, that the state agent acted as he did knowing that he ought to have secured warrant authority. It is apparent that Insp. Burke believed he was legally justified in investigating through the use of warrantless powers conferred by the *O.H.S.A.* and deferring any consideration of the relevance of the objective existence of reasonable grounds until his evidence was gathered. He was not deliberately treating search warrant authority with contempt. On the inspector's evidence, after the time period of the Canada Brick investigation, M. of L. inspectors were trained to apply for search warrants in any investigation looking to secure evidence which might lead to a charge. Insp.

Burke acted at a point in time well in advance of the clarification of the law respecting regulatory investigations in the *Jarvis* case. The integrity of the administration of justice has not been unduly threatened. The government's actions would not shock the conscience of the community. In these circumstances, there is no established pattern of abuse or threat of future departure from constitutional compliance with s.8 *Charter* standards.

[172] The respondent has fallen short in its attempt to establish an abuse of process or to demonstrate this to be one of those clearest cases justifying a stay of proceedings. Assuming Canada Brick to be entitled to a s.24(1) *Charter* remedy for the s.8 breach, it is limited to a declaration of breach of s.8 of the *Charter*. Had the respondent sought the remedy of an exclusion of evidence, in my view, that relief would also not have been appropriate.

CONCLUSION

[173] The appeal is allowed. The acquittal is set aside and a conviction substituted.

[174] Counsel shall contact the relevant Ontario Court of Justice Trial Coordinator in order to arrange an appearance before the trial judge for the purposes of sentencing.

_____
HILL J.

Released: June 30, 2005

COURT FILE NO.: M2266/03
DATE: 20050630

ONTARIO

SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTION APPEAL COURT

B E T W E E N:

HER MAJESTY THE QUEEN

- and –

CANADA BRICK LTD.

REASONS FOR JUDGMENT

[On appeal from the judgment of
LeDressay J. dated May 27, 2003]

HILL J.

Released: June 30, 2005