

ONTARIO COURT OF JUSTICE

CITATION: *Ontario (Ministry of Labour) v. 614128 Ontario Ltd. (Trisan Construction)*,
2018 ONCJ 168
DATE: 2018 03 14
COURT FILE No.: Barrie 13-1885

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant/Respondent to the Cross-Appeal

— AND —

614128 ONTARIO LTD. O/A TRISAN CONSTRUCTION

Respondent/Appellant by Cross Appeal

Before Justice C.M. Harpur
Heard on January 9, 2018
Reasons for Judgment on Due Diligence released on March 14, 2018

David McCaskill.....counsel for the Crown
Norman Keith..... counsel for 614128 Ontario Ltd.

On appeal from the directed verdict and judgment of Justice of the Peace G. Solursh dated, respectively, June 2, 2015 and March 22, 2016 acquitting the Respondent/Appellant by Cross-Appeal.

HARPUR J.:

I. Background

[1] For reasons released on October 20, 2017 I gave judgment on an appeal by Her Majesty the Queen in Right of Ontario (Ministry of Labour) (“Ontario”) from the directed verdict of acquittal of Justice of the Peace G. Solursh of 614128 Ontario Limited o/a Trisan Construction (“Trisan”) dated June 2, 2015 and from the judgment of acquittal of Trisan by J.P. Solursh dated March 22, 2016 on charges under *The Health and Safety Act*, R.S.O. 1990 C.O.1 (the “OHS Act”). I allowed the appeals in part. However, rather than directing a new trial, I indicated my intention to decide the one outstanding issue – Trisan’s due diligence – myself on the basis on the evidentiary record placed before J.P. Solursh.

[2] Although the issue of due diligence had been argued before J.P. Solursh and was referred to in his reasons for decision, I did not regard the reasons as sufficient to permit meaningful review. I did regard the trial record as comprehensive and, apart from the issue of the reliability of witness Wahhab Tariq subsequently referred to at paragraph 47, not involving any assessments of weight in respect of the due diligence issue; what was and is in dispute between the parties is not the facts but, rather, whether the facts establish due diligence. I requested counsels' assistance in my consideration of the issue in light of my findings on appeal that (i) Trisan did not, on September 10, 2012, have in its yard in Schomberg, Ontario a signaller who was not performing any other work, contrary to Regulation 213/91 of the *OHSA* (the "Regulation") s. 106(1)); and (ii) Trisan did not, at that time, have in its yard a signaller in full view of Mr. Tariq, the driver of a reversing truck in the yard, contrary to the Regulation, s. 106(2)(b).

[3] Mr. McCaskill for Ontario and Mr. Keith for Trisan have filed factums and briefs of authorities on this remaining issue. They presented oral submissions on January 9, 2018. I reserved my decision until today.

II. The Accident

[4] The essential facts relating to the accident and death on September 10, 2012 of Trisan's employee Kenneth Campbell are common ground. He was killed when struck by the slowly-reversing dump truck driven by Mr. Tariq in Trisan's yard.

[5] The yard contained a large pile of fill. The source of the fill was excavation from a Trisan work site elsewhere. Dump trucks such as Mr. Tariq's brought the fill from the other site to the yard and dumped it at the base of this pile.

[6] Mr. Campbell was the operator of a bulldozer in the yard on September 10, 2012. His responsibility was to maintain the pile. He was also responsible that day for signalling truck operators such as Mr. Tariq as they backed their trucks to the pile. Mr. Campbell was a very experienced employee of Trisan and was regarded as a skilled bulldozer operator. He had worked for many years in the yard without incident carrying out both his responsibilities as a bulldozer operator and as a signaller for backing trucks.

[7] In order for Mr. Tariq to reach the earth pile once he was in the Trisan yard, it was necessary for him to manoeuvre his truck to a position from which it would be reversing, initially, straight back toward a wall in the yard to the right of the earth pile as one moved toward it, and then to swing the rear of the truck approximately ninety degrees to the left to aim it at the pile. In the accident, Mr. Tariq failed to make the swing to the left as soon as he needed to. He did proceed back toward the wall. Mr. Campbell had positioned his bulldozer beside the wall. It was thus in the path of Mr. Tariq's reversing truck if Mr. Tariq did not make the swing to the left. The evidence suggests that Mr. Campbell was outside the cab of the bulldozer on one of its tracks when Mr. Tariq's truck backed into him and the bulldozer. Mr. Tariq did not see Mr. Campbell as he reversed. Mr. Campbell received fatal injuries in this collision.

[8] A post-mortem examination carried out subsequent to September 10, 2012 disclosed that, on that date, Mr. Campbell had tetrahydrocannabinol (“THC”), the principal psychoactive ingredient of cannabis, in his blood at the time of the accident. The Crown accepts as a fact on this appeal that the THC in Mr. Campbell’s blood is likely to have had an effect on his perception and his motor skills. Mr. Campbell’s use of cannabis on or before September 10, 2012 was unknown to Trisan.

III. The Issues

[9] The remaining issue in this appeal is whether, notwithstanding Trisan’s violation of their obligations to cause Mr. Tariq to be assisted by a signaller performing no other duties and to cause Mr. Campbell to be in full view of Mr. Tariq as Mr. Tariq reversed his dump truck, Trisan has proven that it took all reasonable precautions to ensure that these conditions would obtain.

[10] Trisan’s submission is that it had created, distributed to its employees and regularly monitored for effectiveness a safety policy which encompassed proper signalling as required by the Regulation. Trisan attributes the accident and Mr. Campbell’s death to what it describes as Mr. Tariq’s failure to wait for Mr. Campbell to act as his signaller, to Mr. Tariq’s failure to make the necessary ninety degree turn while reversing and to Mr. Campbell’s failure, as a result of his probable impairment by a drug, to move to safety. Trisan says that these are exceptional circumstances which it could not have foreseen and for which no additional safety precautions ought reasonably to have been taken.

[11] The Crown’s submission is twofold: (i) properly interpreted, s. 106(1) of the Regulation requires the use of a dedicated signaller – that is, one not alternating between signalling and other tasks, such as operating a bulldozer – and that Trisan concedes that the use of such a dedicated signaller was not part of its safety policy or its procedure on September 10, 2012; and (ii) alternatively, even if the Regulation can be interpreted as permitting a person to act alternately as signaller and equipment operator, Trisan has not established that its creation, dissemination and monitoring of its safety policy was sufficient for the purpose of ensuring that a signaller such as Mr. Campbell would, when dealing with a truck reversing to the dirt pile, relinquish altogether his role as equipment operator and focus entirely on signalling.

IV. The Due Diligence Evidence

[12] At trial five witnesses gave evidence relevant to due diligence: Trisan Yard Supervisor William Scholten, Trisan equipment operator Alessandro Milani, Mr. Tariq, Trisan truck driver David Williams and Trisan Health and Safety Coordinator Melissa McCCasey. I would summarize that evidence as follows.

a. William Scholten

[13] In September 2012 Mr. Scholten was supervisor of, among other things, the activities in Trisan’s yard in Schomberg, Ontario. On September 10, 2012 Mr. Campbell was operating the bulldozer maintaining the pile of dumped fill in the yard.

[14] Mr. Campbell had been employed by Trisan for many years as a bulldozer operator. He was a capable employee. On September 10, 2012 he had been told by Mr. Scholten to continue to add to the already existing pile of fill. Mr. Campbell's role was to tell truck drivers where to drop their loads and to bulldoze the dumped fill as required to maintain the pile.

[15] Although Mr. Scholten did not see any loads of fill dumped on September 10, 2012, the typical procedure for a driver arriving at the yard to dump fill was for the driver either to meet a Trisan employee at the entrance to the property and receive directions or for the driver to call one of three numbers posted on a sign at the yard entrance to receive advice as to where to dump. The sign indicated that a driver was not to dump without either form of direction. Once the truck driver had approached the area of the pile of fill, the bulldozer operator on the pile would come down from it to meet the arriving truck and then to signal to the driver as to where the dumping should be done. Once the fill was dumped, the bulldozer operator would bulldoze the fill up into place. No persons other than the truck driver and the bulldozer operator were typically involved in the dumping of a truck-load of fill in the yard; it was "a pretty self-contained operation". Trisan did not use independent spotters or signallers in the fill pile area in the yard.

[16] Every Monday morning Mr. Scholten would give to the men who worked in the yard or in the shops in the yard a "toolbox talk". These talks included the subject of "backing up hazards" and the need for signallers. Every year during the six Mr. Scholten had been the supervisor at Trisan he attended Trisan's "spring training" in safety for supervisors. He had done so on April 30, 2012. In March 2012 he had attended a two day "Basics of Supervising" course put on by Trisan and the Construction Safety Association of Ontario.

[17] Over his years as Mr. Campbell's superior, Mr. Scholten had ensured that Mr. Campbell had been instructed on how to carry out the duties of a signaller and had observed that Mr. Campbell did so "on a regular basis".

[18] No one working in the yard, including Mr. Campbell, had ever complained to Mr. Scholten of not being familiar with the safety rules applicable there.

b. Alessandro Milani

[19] Mr. Milani had been a Trisan employee for approximately two years in September 2012. One of his jobs was periodically to operate a bulldozer in Trisan's yard. The regular bulldozer operator was Mr. Campbell. Mr. Milani had learned to operate a bulldozer in 2002. He operated one consistently after that time. Mr. Milani's supervisor was Mr. Scholten.

[20] The routine for trucks arriving at the Trisan yard with fill to dump was for the driver to meet a Trisan person at the entrance to the yard or to call a number on the sign posted there. The driver would proceed to the dump site to which he was directed, stop and wait for the bulldozer operator to "come down to the bottom of the pile and give them further instructions". When the bulldozer operator came down from the pile to give instructions he would position the bulldozer off to the side of the pile.

[21] There were times when Mr. Milani was operating the bulldozer that he also acted as the signaller. On some occasions, when a number of trucks were arriving in the yard at the same time, Mr. Milani would act as signaller only, that is, another person would act as bulldozer operator. When performing both duties his procedure as signaller was to park the bulldozer away from the pile close to a wall of concrete barriers, to walk to the rear driver's side of the waiting truck, to establish that he was seen by the driver in the driver's mirror, and to signal the driver back to the pile through hand and arm signals and voice. Mr. Milani was initially trained in this procedure by the King volunteer fire department years before he joined Trisan. He was shown the procedure again by Trisan when he began to work with the company in 2010.

[22] When Mr. Milani acted as signaller he did no other work and focused on his signaller's role, things which were required by Trisan's safety policy.

[23] During his time with Trisan, Mr. Milani had never seen a situation where no signaller was present for the dumping of a load of fill.

[24] Mr. Milani regarded Mr. Campbell as a good teacher and a good operator. He had observed Mr. Campbell acting as a signaller. Mr. Campbell seemed to Mr. Milani "to be familiar with the signaller's role".

c. Wahhab Tariq

[25] In September 2012 Mr. Tariq worked as a truck driver for an individual who provided trucking services to companies such as Trisan. He had acquired his licence to drive dump trucks, and driven dump trucks, only since the summer of 2012. September 10, 2012 was Mr. Tariq's first day attending at the Trisan yard. He attended twice. The accident occurred during his second attendance.

[26] On the first attendance Mr. Tariq was unsure where he should proceed with his load. He stopped his truck after entering the Trisan property and spoke to a person he encountered, Ms. McCCasey. She directed him to the area of the pile of fill. Other trucks were also in the yard with loads to dump. Mr. Tariq waited his turn. Then the operator of an excavator working on the pile of fill gave him directions. The operator remained seated inside the excavator when giving these directions. The directions were given by hand signals and honking. Mr. Campbell was also present at the pile in his bulldozer during this first visit. He too gave directions to Mr. Tariq, encouraging him verbally to continue backing up at a point when Mr. Tariq was concerned about his truck getting stuck in the pile. Mr. Campbell was in his bulldozer and it was positioned approximately halfway up the pile when he gave his directions. Mr. Tariq made this first dump without incident.

[27] On his second visit on September 10, 2012 Mr. Tariq knew where he was to go. He proceeded to the pile area. He saw Mr. Campbell in his bulldozer on top of the pile. Mr. Tariq stopped his truck, got out and walked toward Mr. Campbell. Mr. Campbell remained where he was in the bulldozer and waved at Mr. Tariq to bring on his load. It seemed to Mr. Tariq from Mr. Campbell's gestures that Mr. Campbell felt he, Mr. Tariq, was wasting time. Mr. Tariq got back in his truck and began to reverse very slowly. He looked in his mirrors and saw nothing behind him. He anticipated that Mr. Campbell

had remained on top of the pile in his bulldozer. As he backed up, Mr. Tariq was conscious of the need to avoid an excavator parked on the driver's side of his truck. He knew this excavator would be a factor when he made his turn toward the pile when reversing.

[28] Mr. Tariq felt "a little contact". He stopped and moved slightly forward. He exited the truck and saw that Mr. Campbell and his bulldozer were immediately behind his truck. Mr. Campbell was standing with one leg in the cab of the bulldozer and the other between the cab and the track of the bulldozer closer to Mr. Tariq's truck. Mr. Tariq ran to Mr. Campbell. Mr. Campbell fell to the ground. He said to Mr. Tariq "why did you hit me" to which Mr. Tariq responded "I'm sorry, I didn't see you. I thought you were on top of the hill". Mr. Campbell asked Mr. Tariq to seek help and Mr. Tariq did so.

d. David Williams

[29] Mr. Williams had been a licenced truck driver for four years when he began driving a dump truck as a Trisan employee in early 2012. In September 2012 the yard supervisor was Mr. Scholten. Mr. Campbell was a machine operator who "cleaned up the piles".

[30] On September 10, 2012 the job on which Mr. Williams had been working for approximately one week involved his attending in his empty dump truck at a Trisan excavation site some distance from Trisan's yard. There he would join the line of trucks waiting to be filled. He would be backed to the excavator by a person who "would walk along the side of the truck making sure that we're not hitting anything and that we have a clear run back and nobody is in our way". The person at this site provided signals to the truck drivers by way of their driver's side mirrors.

[31] The general procedure for dumping fill at Trisan's yard was to proceed slowly to the area of the yard where the fill pile was located, stop, remove any protective tarp from the load and look to locate the operator of the machine on the pile. Then a driver would ascertain by speaking to the operator where on the pile the load was to be dumped. Having received that information, "we would hit the horn and then proceed to put it in reverse, wait for the reverse beeper to go and then we would slowly proceed onto the hill with the direction in the mirror of either Kenny [Mr. Campbell] or Alex [Mr. Milani] backing us up". To Mr. McCaskill's follow-up question "where would they be when they were backing you up?", Mr. Williams said "Ah, if they were in the excavator, they'd still be at the top of the hill in the machine. If they were in the dozer, they would pull off into in front of the construction barrel signs."

[32] As at September 10, 2012, approximately eight to ten trucks would engage in this procedure each day at Trisan's yard, which operated from 7:00 a.m. to 5:00 p.m.

[33] On September 10, 2012 Mr. Williams was waiting for Mr. Tariq to dump his load before proceeding to dump his own. Mr. Campbell was the person at the pile directing where the loads were to be dumped, the usual function of the person operating the machine on the pile. Mr. Williams did not see the accident occur.

e. *Melissa McCCasey*

[34] Ms. McCCasey began work with Trisan in January 2010. She became the company's Health and Safety Coordinator. She continued to hold that position at the time of trial. Her job was to ensure that Trisan complied with the OSHA and its regulations. Ms. McCCasey was not, of course, herself involved in the hiring or training of Mr. Campbell who had joined Trisan years before she did. She had spoken with Mr. Campbell "a few brief times" between the commencement of her employment in January 2010 and the accident in September 2012.

[35] Mr. Campbell was an equipment operator. He performed that role primarily in Trisan's yard in Schomberg but on occasion would be required to go to another site where Trisan was working to run equipment there. She described him as "a really good worker...born on equipment".

[36] Ms. McCCasey conducted health and safety orientations for new employees, annual spring health and safety orientations which were mandatory for all employees, meetings with Trisan's Health and Safety Committee, and annual meetings among Trisan management concerning health and safety. The annual spring orientations were refresher courses of Trisan's safety program. They were conducted in the yard and in the shop and at job sites. Ms. McCCasey would also conduct a drive-through in the Trisan yard at least two times per month. On some of these she would speak to the head mechanic or a yard worker or an equipment operator.

[37] The Health and Safety Program at Trisan included a written "Employee Handbook" distributed to management, foremen and project managers. They would maintain a copy at job sites as well as at Trisan's head office and at the shop in the yard. The 2012 version of the handbook said the following under the title "Safe Operating Procedure" and the subtitle "Heavy Operated Equipment and Vehicles": "Look before you reverse equipment or trucks; use a signaller at all times. Make sure all workers are clear of the machine before moving. Use horns signals prior to backing up." Under the subtitle "All Employees Working around Moving Equipment", it said: "always keep alert around moving equipment" and "never bend down around moving equipment or lose sight of the operator".

[38] With respect to this part of the handbook, Ms. McCCasey said that, when a Trisan worker is acting as a signaller for reversing trucks in the yard, he is not allowed to be performing other work at the same time. She said this was "because you need to be 100 percent focused on the vehicle you are backing up and 100 percent focused that you're backing them up to the correct spot, so you can't be distracted with other work." She said yard employees who acted as signallers were so instructed, as well as instructed that they must ensure that the driver of a reversing truck could see them when reversing.

[39] Trisan created and provided to its foremen and supervisors a health and safety binder comprising more than one hundred pages. Mr. Scholten had a copy at the Trisan yard on September 10, 2012.

[40] Trisan provided to its traffic control persons, its foremen and its supervisors a booklet produced by the Construction Safety Association specifically designed for traffic controllers. Ms. McCasey did not have a copy with her at trial but felt it contained advice that a traffic controller should ensure that he is “not doing any other job at the time”.

[41] All Trisan employees were required to attend weekly “Tool Box Talks” with their supervisor at which safety for the day or week generally, and particular safety issues, were reviewed.

[42] The Health and Safety Committee was made up primarily of workers, including yard workers. It met once monthly. The Committee would carry out inspections of the workplace during some of the meetings. One was carried out on May 17, 2012. A checklist of this inspection was completed. Under the heading “Traffic Control”, it indicated “training traffic controllers” and “not needed unless equipment”. Ms. McCasey said the first of these phrases indicated that anyone working in the yard was trained properly in traffic control and knew when a controller was required. She said the second indicated the traffic controllers were only required in the presence of reversing equipment or vehicles.

[43] Trisan underwent a WSIB audit in June 2011 and received a score of 84.7%.

[44] In 2006 Mr. Campbell signed a “Safety Acknowledgement Form” indicating that he had read and understood Trisan’s safety policy. Ms. McCasey assumed that he was trained in 2006 as a traffic controller. She never observed him acting as a signaller in the yard.

[45] After January 2012 and prior to the accident, Ms. McCasey received no report from any Trisan employee to the effect that Mr. Campbell was a “dangerous or reckless or sloppy” worker, nor any reports by Mr. Campbell of an unsafe condition preventing him from working.

[46] No one was acting exclusively as a signaller on September 10, 2012. The presence of an exclusive or dedicated signaller in the yard was “not always necessary”.

V. Analysis

a. Mr. Tariq’s Direction by Mr. Campbell

[47] I accept as correct the only evidence presented at trial as to Mr. Campbell’s and Tariq’s actions in the directing of Mr. Tariq by Mr. Campbell during Mr. Tariq’s second visit to the yard. That evidence was given by Mr. Tariq. Trisan has submitted that Mr. Tariq was a witness who was hostile and disrespectful to the court process, so much so that his evidence is suspect. Having reviewed the trial transcript, I am not persuaded that this is so, at least as regards the second visit to the yard. Mr. Tariq was put through an extensive and aggressive cross-examination by Mr. Keith. He responded with some hostility. However, he was not unduly argumentative and not evasive in his answers. Nor, in my view, was the content of his testimony necessarily at odds with the inherent probabilities of the circumstances he described. Certainly I saw nothing in the

transcript providing a basis to disregard his testimony about the second visit, particularly when it was undisputed.

[48] Thus, I find that, as Mr. Tariq said, on his second visit to Trisan's yard he drove to the area of the pile, saw Mr. Campbell in his bulldozer on top of the pile, stopped his truck, got out and approached Mr. Campbell. I find that what then occurred was not in keeping with the signalling procedure described as the proper one by Mr. Milani and Ms. McCCasey and described as the one used at the Trisan job site where Mr. Williams picked up the fill he brought to Trisan's yard on September 10, 2012, that is, placing one's self in the view of the truck driver by means of his mirrors and maintaining that visual contact throughout the backing up process. Rather, from the bulldozer while still positioned at the top of the pile, Mr. Campbell gestured impatiently to Mr. Tariq to begin his backing up. Mr. Tariq did so. He thought Mr. Campbell was still on top of the pile. He did not initially see Mr. Campbell in his rear view mirror because Mr. Campbell was in the process of moving his bulldozer off the pile to a position close to the wall directly behind the initial reversing path of Mr. Tariq's truck. For reasons which remain unclear, Mr. Tariq did not see Mr. Campbell's bulldozer or Mr. Campbell as he continued to back up and failed to make the necessary ninety degree turn to the left from his initial path.

[49] On these facts there existed an opportunity for Mr. Campbell to cause Mr. Tariq to delay his backing up until Mr. Campbell was in position in sight of Mr. Tariq through the driver's-side truck mirror - Mr. Tariq was out of his parked truck and awaiting direction. Instead, Mr. Campbell gestured for Mr. Tariq to begin without first positioning himself in Mr. Tariq's mirror view. Had Mr. Campbell taken up that position, as the evidence of Mr. Milani and Ms. McCCasey says he should have, it seems clear the accident would not have occurred.

[50] Did Mr. Campbell's failure to put himself in Mr. Tariq's view occur despite Trisan's due diligence? For the reasons which follow I find that that it did.

b. Mr. Campbell's Training

[51] The record concerning Mr. Campbell's training by Trisan as a signaller and the company's oversight of him in that role is quite thin. It includes some circumstantial evidence: the documents distributed by Trisan to, among other places, the yard shop, at least as at 2012, contained a warning to employees working around moving equipment never to lose sight of the operator of such equipment ("visibility"); as a traffic controller, Mr. Campbell may have received a Construction Safety Association booklet about the safe operation of equipment advising that signallers should not be engaged in any other work when acting as signallers ("exclusivity"); and Trisan's training of traffic controllers included training on both visibility and exclusivity.

[52] No evidence was presented concerning how Mr. Campbell in particular was trained initially or subsequently by Trisan, other than his acknowledgment of having read Trisan's safety policy in April, 2006.

[53] However, there were several pieces of evidence in the record which were not contradicted and which in my view, in combination with the aforementioned circumstantial evidence, enabled Trisan to meet its burden of proof:

(i) Mr. Milani described Mr. Campbell as “familiar with the signaller’s role” and described visibility and exclusivity as part of that role;

(ii) Although the evidence of Trisan truck driver David Williams was not entirely clear on the matter of Trisan’s procedure for yard traffic control, the portion of his evidence I have quoted at paragraph 31 of these Reasons, with its reference to “the direction in the mirror of either Kenny or Alex”, strongly suggests that the feature of visibility was part of the established procedure at Trisan. I interpret his subsequent remark about the placements of the operating equipment on and to the side of the hill as meaning their placements prior to an operators taking up a place in a driver’s mirror as signaller; and

(iii) Mr. Scholten’s evidence was that he had instructed Mr. Campbell on how to carry out the duties of a signaller and observed him doing so consistently. Although Mr. Scholten was not asked about and did not describe those duties in his evidence, I am satisfied on the basis of Mr. Milani’s and Mr. Williams’ testimonies that visibility and exclusivity were part of the duties to which Mr. Scholten was referring.

[54] Thus, Trisan has shown that its health and safety protocol, including its preparation, distribution of information to its employees and its monitoring, was an effective precaution to ensure that an employee called upon to signal a reversing truck in the yard would do so to the exclusion of all other jobs and ensuring that he was seen throughout the reversing process. I find that Mr. Campbell knew of that manner of signalling and that he normally engaged in it.

c. Trisan’s Legal Obligation

[55] As indicated earlier in these Reasons, Ontario’s position is that s. 106(1) of the Regulation prohibited the traffic control system employed by Trisan in the yard on September 10, 2012, that is, assigning to one employee the duties of bulldozer operator and signaller between which he would alternate as required. Ontario relies on the decision to this effect in *R. v. Briscoe*, [1993] O.J. No. 2265 (O.C.J.) and the principle of statutory construction which would favour a liberal interpretation of the *OHSA* advancing its purpose to protect the health and safety of workers in the workplace. The argument is that the health and safety of workers is best served by an interpretation of s. 106(1) which prohibits a person who will perform signalling duties during a period of work from assuming any other duties during that period.

[56] Trisan urges an interpretation of s. 106(1) which would permit an employee to assume duties in addition to those of a signaller during a period of work, so long as the employee acts exclusively as a signaller when signalling is required. This interpretation, it is suggested, adequately addresses worker’s safety while at the same time permitting employers to avoid substantial periods when signallers would otherwise necessarily be idle.

[57] While the question is not free from doubt, and with respect for the contrary view expressed in *Briscoe*, I agree with Trisan’s interpretation. Clearly, there is a need for a sharp division between engaging in work as a signaller and that same person carrying

out any other employment responsibilities. However, as the evidence in this record shows, that division could be and, with the exception of September 10, 2012, was maintained under Trisan's system. I am inclined to think that employees properly trained to act as signallers are not lacking in an understanding of the hazards of the role for themselves, their fellow workers and the persons being signalled, nor of the necessities of focus and visibility, regardless of whether they have been assigned only the job of signaller.

[58] Trisan's interpretation finds some support in the decision of *Ontario (Ministry of Labour) v. Hamilton (City)*, 58 O.R. (3d) 37 (O.C.A.), a decision to which I made reference in my earlier Reasons in this matter on October 20, 2017. In *Hamilton*, the Court of Appeal dealt with a directed verdict of acquittal in the Ontario Court of Justice which had been upheld in the Superior Court. As in this case, in *Hamilton* a signaller had been killed when struck by a reversing dump truck. The signaller was acting as both signaller and spreader of crushed stone. There was some evidence that he was not exclusively signalling when he was struck and, rather, may have been distracted by his stone-spreading duties. The lower courts accepted that, the defendant having been charged solely with reference to s. 104 of the Regulation – failing to provide a signaller – and the presence of a person assigned the duties of a signaller having been proven in the Crown's case, a directed acquittal must follow. That the signaller in question may have lacked the "exclusivity" feature referred to s. 106(1) was not seen as a factor since that section of the Regulation had not been referred to in the charge. The Ontario Court of Appeal disagreed and sent the matter back for re-trial. Sharpe, J. for the court held that the signaller referred to in s. 104 is a signaller possessing the characteristics set out in s. 106 and that an absence of any of the characteristics set out there precluded the purported signaller from being so regarded in law. The decision of Merredew, J. in *Briscoe* is referred to in *Hamilton*. However, Sharpe J. does not affirm *Briscoe* in his description of the nature of the offence. Rather, he states the following at page 46 of the report:

[29] Quite apart from s. 106 and its use to explain or amplify the extent of the duty created by s. 104, it seems to me that there was some evidence of an offence under s. 104 alone. I would read the charges against the respondent as relating to a specific moment in time, namely, the point at which the dump truck was reversing with the driver's view of the intended path of travel obstructed when the fatal accident occurred. If there had been a signaller assigned to the job that day who had gone off for a break while the truck was reversing without watching to make sure the movement could be safely made, surely the respondent would have been in breach of s. 104. The respondent was required, at that precise and critical moment, to have a signaller directing the reversing dump truck. In my view, there is no meaningful distinction between the example I have just given and the situation where the signaller ceases to act as signaller and turns his attention to spreading the stone. The driver's evidence was that while the deceased signalled him to

reverse the truck, as he reversed, he could see no one behind the truck. This amounted to some evidence that at the precise moment the accident occurred, no one was acting as the signaller. In my view, it was open to a properly instructed trier of fact to make a finding on that evidence that the employer failed to live up to its duty to provide a signaller as required by s. 104.

[59] The Court of Appeal’s emphasis of “a specific moment in time”, “that precise and critical moment” and “the precise moment the accident occurred” is language suggesting a narrower interpretation of s. 106(1) than that endorsed in *Briscoe*.

[60] Again, I accept that narrower interpretation. Accordingly, Trisan’s admitted failure to implement a procedure in its yard on September 10, 2012 whereby Mr. Campbell, as designated signaller, was prohibited from carrying out any other duties does not preclude proof by Trisan of its due diligence. The issue is whether Trisan was duly diligent in its effort to ensure that, at *Hamilton’s* “precise and critical moment”, there was present a signaller possessing all s. 106(1) characteristics.

[61] For the reasons previously set out, my view is that Trisan has met its burden of proof. Despite some jousting on the point in their factums, Ontario and Trisan seem to agree that one can safely look to the Supreme Court of Canada decision in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, and its appellate progeny for a description of the law of due diligence applicable here. In these cases one finds the well-known alternative analytical tests: (i) reasonable mistaken belief in a set of facts which, if true, would render the act or omission innocent; or (ii) the taking of all reasonable steps to avoid the particular event. The “act or omission”/“particular event” in this case is the failure of a signalling of Mr. Tariq by Mr. Campbell in which Mr. Campbell was visible to Mr. Tariq in the truck’s rear view mirrors. The preponderance of the due diligence evidence in the record, limited as that evidence is, is that Mr. Campbell understood the visibility and exclusivity requirements of a signaller’s role and had, prior to September 10, 2012, never been seen not to observe those requirements. Thus, in terms of the tests in *Sault Ste. Marie*, I am persuaded that Trisan is properly seen both as reasonably mistaken as to whether Mr. Campbell would ensure that he was seen by Mr. Tariq in the truck’s mirrors when signalling on September 10, 2012 and as having taken all reasonable precautions to ensure that he would do so. Mr. Campbell’s failure to observe proper signalling procedure that day is not something which Trisan could reasonably have foreseen.

VI. Conclusion

[62] For these reasons Ontario’s appeal of the trial court’s finding of due diligence is dismissed. Trisan is not guilty of the offences with which it is charged.

Released: March 14, 2018
Signed: Justice C.M. Harpur