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Citation: *R. v. The Meaford and District Fire Department*, 2012 ONCJ 573

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN (MINISTRY OF LABOUR)

— AND —

THE MEAFORD AND DISTRICT FIRE DEPARTMENT, A DEPARTMENT OF THE CORPORATION OF THE MUNICIPALITY OF MEAFORD

Before Justice of the Peace Thomas Stinson
Heard on September 26, 27, 28, 29, December 5, 6, 7, 8, 9, 2011,
April 30, May 1, 2, 2012
Reasons for Judgment released on August 7, 2012

Daniel Kleiman ..... **for the prosecution**
Norman Keith ..... **for the defendant**

JUSTICE OF THE PEACE STINSON:

[1] The Meaford and District Fire Department, a department of The Corporation of the Municipality of Meaford, was on trial for three charges contrary to section 25(2)(h) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (hereinafter referred to as the "OHSA") as a result of two of its firefighters being injured while fighting a fire at Reeds Restaurant in Meaford, Ontario, on September 9, 2009. After nine days in September and December 2011 of hearing the crown's case, as well as the defendant's motion for a directed verdict, the court reserved its decision with respect to the directed verdict.

[2] On February 23, 2012, the court released its decision, now reported at [2012] O.J. No. 1011, on the motion for a directed verdict. The defendant was successful with respect to two of the three charges it was facing.

[3] The trial resumed on April 30, 2012 to allow the defence to present evidence on the one remaining count, being count #1 on the information. The specific wording of this count is that the defendant, contrary to section 25(2)(h) of the OHSA, committed 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 27 Nelson Street, Meaford, Ontario". The particulars of count #1 are that the defendant

"failed to take the reasonable precaution of activating an accountability system to track firefighters entering a burning structure."

[4] There are no relevant sector-specific regulations pursuant to the OHSA. There is, however, the *Guidance for Improving Health & Safety in the Fire Service* (hereinafter referred to as the "Section 21 Guidelines"), prepared by the Ontario Fire Service Health and Safety Advisory Committee established under section 21 of the OHSA.

[5] As outlined in the ruling on the motion for a directed verdict, the Crown called a total of twelve witnesses. Seven of these are, or were, volunteer firefighters with the Meaford and District Fire Department at the time of the fire at Reeds Restaurant. These were Robert Pilon and Bryan Gibbons, who were the two firefighters injured in the fire; James Marshall and Mark Young, who were the firefighters who rescued firefighter Pilon; Ryan Knight and Brett Dunlop, who were among the firefighters who rescued firefighter Gibbons; and A.J. Shortt. Other Crown witnesses were Robert Isbester, a paramedic with Grey County Emergency Medical Services, Wendy Donaldson, the records manager with the Hanover Police Service, Karen Hanna, the facilitator of the Ontario Fire Service Health and Safety Advisory Committee, Dan Shaw, the deputy chief of the Meaford Fire Department at the time of the Reeds fire, and Gerald Pritchard, a Fire Investigation Coordinator with the Office of the Fire Marshal (hereinafter referred to as the "OFM").

[6] During the third week of the trial, the defence called three witnesses. These were Barry Malmsten, the Executive Director of the Ontario Association of Fire Chiefs, Steve Nickels, the chief of the Meaford Fire Department at the time of the Reeds Fire, and Mike Molloy, then a volunteer captain with the Meaford Fire Department and now its chief.

The Events of September 9, 2009

[7] Early on the morning of September 9, 2009, at approximately 6:02 a.m., a bystander calls 911 to report a fire at Reeds Restaurant, at 27 Nelson Street, Meaford. The caller thinks that there might be someone within the burning building. Hanover Police dispatch, which handles 911 calls from the Meaford area, immediately began paging the Meaford Fire Department.

[8] Within minutes of receiving the pages, several Meaford firefighters, including Rob Pilon, James Marshall, Bryan Gibbons, Dan Shaw and Terry Turner, attend at the Meaford fire hall. These five men board Pumper 5, which is the first fire department vehicle to arrive on the fire scene.

[9] Pilon and Gibbons immediately grab a hose and head to the back corner of the building where the fire is burning. Pilon states that, at this time, he radios to the incident command-

er, Deputy Chief Dan Shaw, that they wish to check inside the upstairs apartment and that he receives authorization to do so. Shaw, in his testimony, does not remember giving Pilon and Gibbons the authority to enter.

[10] The two firefighters enter the building and go up to the second storey where they encounter very heavy smoke. They radio for a thermal imaging camera to assist in helping locate people within the smoke-filled building. This all occurs within approximately three minutes, from 6:13 a.m. to 6:16 a.m.

[11] Pilon exits the building, obtains the camera and re-enters the building. By the time firefighter Pilon exits the building to retrieve the camera, the second fire truck, Rescue 3, has arrived. It brings Molloy, Shortt and Young to the scene. Shortt and Young were volunteer firefighters. According to the radio transcript, Rescue 3 leaves the fire hall at 6:12:05 a.m. Molloy recalls still being en route at 6:15:09 a.m. when he hears Pilon, over the radio, ask for the camera. The first action of Molloy upon arrival is to obtain the thermal imaging camera and give it to another firefighter, who in turn provides it to Pilon.

[12] Upon arrival, Shortt takes a hose from Pumper 5, drags it and attaches it to a fire hydrant on the other side of Highway 26. It takes him a couple of minutes to do this. Marshall and Young assist him. Once this is accomplished, Shortt returns to the fire scene. He obtains the accountability board from Rescue 3, having been assigned as the accountability officer by Deputy Chief Shaw, and proceeds to set it up in front of Pumper 5 which was parked in front of the Reeds building.

[13] Shortt only receives identification tags from one other firefighter, Mark Young, and he obtains these while they were en route. Upon assuming the responsibility of accountability officer, Shortt begins looking around to see who else is on site and also looks for tags of firefighters. He is obviously aware that Molloy and Young are on scene, since he arrived with them, and Shortt sees Dan Shaw on scene as he is setting up the accountability board. Captain Molloy does not receive tags from any firefighters.

[14] The third fire department vehicle to arrive at the scene of the fire is the pumper tanker. On board it are Captain Rolly Wilkie and firefighters Brett Dunlop, Ryan Knight and Darren McCausland.

[15] Once back upstairs, Pilon and Gibbons receive a radio communication from Captain Mike Molloy, outside the building, that apparently there is someone inside the building. Molloy testifies that he is approached by a distraught, excited female who advises him, incorrectly as it turns out, that her boyfriend, the restaurant owner, is trapped in the building.

[16] Upon receiving this communication from Molloy at 6:19:09 a.m., Pilon and Gibbons proceed into an office. Gibbons tells Pilon that there is a strange noise coming from Pilon's air cylinder. Pilon checks his air supply and sees, to his shock, one blinking red light, which indicates that he is completely out of air.

[17] At 6:23 a.m., Pilon radios that they will be exiting the building with a low air

alarm. He does not receive a response. Pilon and Gibbons begin to leave, but they inadvertently end up in the dining room, rather than the stairwell. Pilon makes another radio call, a minute later at 6:24 a.m., and asks for a rapid intervention team (hereinafter referred to as a "RIT") to be activated.

[18] Pilon, by this time, is having trouble breathing, so Gibbons takes Pilon's radio, as Gibbons does not have one, to begin making radio transmissions. They continue to try to exit the building. Gibbons begins to share his air regulator with Pilon. Pilon indicates, by this time, that he could hear the RIT inside the building. Firefighter James Marshall finds Pilon and leads him to safety. A second RIT goes in to rescue Gibbons. Thankfully, both firefighters substantially recover from their injuries suffered in this incident.

Count #1

[19] As stated earlier, count #1 alleges that the defendant failed to take the reasonable precaution of activating an accountability system.

[20] The concept of the accountability system was explained by several witnesses, including Pilon, Gibbons, Shortt and Shaw. Former Chief Nickels also testifies about accountability, though he himself was not present for much of the Reeds fire. Briefly, accountability involves setting up a system at a central location at a fire scene, where one firefighter is specifically assigned to the position of accountability officer. It is that firefighter's job to know exactly which firefighters are on scene and what they are doing. This is often accomplished by physically displaying this information on what is known as an accountability board. Firefighter Gibbons confirmed that in all cases of structure fires, in his experience as a Meaford volunteer firefighter, there is always an accountability officer eventually in place.

[21] There is no specific legislative requirement for a fire service to set up an accountability system at a fire scene. However, the importance of such a system is discussed in Section Five of the Section 21 Guidelines, titled "*Personnel Accountability*". Guidance Note #5-1, subtitled "*Firefighter Accountability and Entry Control*" states:

> *"The employer must ensure that whenever the incident command system is utilized that it contains provisions for firefighter accountability and entry control at the emergency scene. It is recommended that employers establish written policies and operational guidelines for personnel accountability and entry control in accordance with the provision of their own incident command systems."*

[22] Nothing within the remainder of Guidance Note #5-1 states anything specific with respect to the timing of the set-up of an accountability system, nor does it reference the numbers of firefighters required or any methodology to be followed. This Guidance Note, only one page long, is quite general.

[23] Guidance Note #5-1 goes on to acknowledge that:

"The accountability system may be adapted to individual fire department resources."

[24] Any accountability system set up must, among other things, account for the location and function of all personnel at an incident, and it must provide a means for extraction of firefighters from the interior of a hazard zone when conditions present an immediate life hazard.

[25] When Pilon and Gibbons arrive in the first fire truck, accountability is not set up. The accountability board and the accountability officer arrive in the second truck. Firefighter Gibbons, while unable to recall the specific events of September 9, 2009, agrees that Meaford's usual procedure is that the individual who acts as accountability officer does not usually arrive on a fire scene in the first fire truck.

[26] Prior to the arrival of the second vehicle, when accountability has yet to be established, it is up to the incident command officer to know where each firefighter was. The incident command officer at the Reeds fire was then-Deputy Chief Dan Shaw.

[27] The court heard from several witnesses, including A.J. Shortt, that he acts as accountability officer for a period of time at this incident. Upon being relieved of traffic directing responsibilities, Shortt returns to the scene and retrieves the accountability board from the Rescue 3 fire truck. He estimates that he does this within seven minutes of arriving on scene. As he is the passenger in the second fire vehicle to arrive on scene, he sets up the accountability board, as this is the customary responsibility of the firefighter in that position. Shortt places the board in front of Pumper 5.

[28] The tags of two firefighters, Chief Nickels and Deputy Chief Shaw, are eventually attached to the accountability board. No tags, or any written names of firefighters, are found in the section of the board designated for RIT.

[29] As stated earlier, Shortt obtains one tag from firefighter Mark Young. This is the yellow tag, indicating that he is on scene. Firefighters would generally give their second tag, a green one, to the accountability officer when they enter into a fire.

[30] Shortt attempts to establish who is on scene by visual observation and by actively searching for tags. He agrees, in cross-examination, that the firefighters who had already entered the building prior to his arrival on scene as accountability officer would be unable to provide their tags directly to him, but he testifies that they should have given their tags to someone else, such as the incident commander or another officer who, in turn, could give them to the accountability officer once that system was set up. At the time he is setting up the accountability board, Shortt does not know which firefighters, if any, had been assigned to be a RIT.

[31] Dan Shaw does not provide Shortt with any tags from the firefighters who had entered the building. Marshall believes that he left his tags with Deputy Chief Shaw, though he is unable to recall specifically having done this. Firefighter Dunlop admits to having given his tag to someone, but he is unsure who that was. Firefighter Young has his tags

with him, and gives them to the passenger in the front seat of Rescue 3 who would then, in due course, place them on the appropriate spot on the accountability board.

[32] Firefighter Knight has his tags with him when he arrives on the scene, but does not provide them to anyone, because he recalls still having them with him when he returns from the hospital after having accompanied Pilon there. Knight does not recall seeing an accountability officer on scene. He confirms, as does Deputy Chief Shaw, that Meaford's usual practice was that whoever was riding in the passenger seat in Rescue 3 would be the accountability officer. Knight also states that the regular practice en route would be to give tags to the senior person, who is generally the front passenger in a truck. Accountability, at least to start with, is thus through the senior officer in each vehicle.

[33] It was Dan Shaw's evidence that accountability is set up upon arrival, he thinks by Shortt, but Shaw acknowledges that he orders Shortt, because of the shortage of manpower, to assist in hooking up one of the hoses.

[34] Perhaps as soon as one minute after he sets up the accountability board, Shortt is advised that firefighter Pilon is in distress. Shortt then leaves the accountability board, assists Pilon until Pilon is taken to the hospital and then Shortt actively fights the fire. Shortt does not return to the accountability board.

[35] Standard Operating Guideline (hereinafter referred to as "SOG") 207 of the Meaford Fire Department on the subject of *"Accountability System"* states, with respect to its firefighters, that:

> *"When their duties and sectors have been assigned, they will leave their name tag with the accountability officer for placement on the board before departing for their sector assignments."*

[36] Pilon admits that he did not follow this procedure. He does not have his nametags with him, as they had been inadvertently sent out for cleaning with his regular bunker gear. Shortt also testified that this procedure outlined in SOG 207 is not followed on this occasion.

[37] SOG 207 concludes with the statement that:

> *"THIS POLICY/PROCEDURE IS NOT EXPECTED TO SUBSTITUTE FOR GOOD JUDGMENT AND EXPERIENCE OF A FIRE OFFICER UNDER UNUSUAL CONDITIONS".*

[38] In his testimony, Chief Steve Nickels comments that this statement is included to cover circumstances where the fire department might not have an ideal number of personnel on scene, but a need still arises to extract someone from a burning building. This concluding statement in SOG 207 gives the department the flexibility to adjust its response to the number of available personnel.

[39] Gerald Pritchard, the OFM inspector, observes the accountability board when he

arrives on the scene later that day, after the fire is extinguished. He describes it as being not in operation at that time, with no obvious accountability officer present. On scene, Pritchard locates the accountability tags of firefighters Marshall and Gibbons hanging on a hook in the back of the cab of Pumper #5.

[40] It is also clear that Molloy, the entry control officer, is well aware that Pilon and Gibbons were inside the building, both because he heard their initial radio transmission requesting the thermal imaging camera and because he had also seen the charged hose leading up to the second storey of the building.

Possible Methods of Reaching a Decision in this Case

[41] There are a number of paths the court could take in reaching its decision with respect to this charge faced by the defendant. It could convict the defendant, on the basis that the Crown has proved its case beyond a reasonable doubt, and that no possible applicable defences were established by the defendant. Alternatively, the court could conclude that the Crown has proved its case, but that the defendant has established one or more of the defences available to it. These would include either branch of the due diligence defence, or the defence of necessity. There is also the possibility that the charge could simply be dismissed, if the court concludes that the Crown did not prove all essential elements of the *actus reus*.

[42] As a further alternative available to this court, the defendant, prior to the beginning of the trial, brought an application to stay the charges on the basis of an abuse of process and violations of the defendant's rights under the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter referred to as the "*Charter*").

[43] While counsel for the defendant urged consideration of the application for a stay prior to considering the case on its merits, the court declines to do so for three reasons.

[44] First, the case of *R. v. Scott*, [2002] O.J. No. 2180, 95 C.R.R. (2d) 322 (C.A.) holds that it is often appropriate to decide a case on its merits before dealing with any *Charter* applications. The Court of Appeal states, at paragraph 7, referring to the trial judge's stay of the charge prior to ruling on its merits:

> *"He should have dealt with the merits first and then proceeded to the question of whether the proceedings should be stayed....If the Crown had not proved the case against the respondents they were entitled to an acquittal, and not just a stay of proceedings."*

[45] Second, as noted earlier, there are no sector-specific regulations under the authority of the OHSA that deal with actions of firefighters. In the absence of any such legislation, this court believes that its comments regarding possible defences might be of some use both to the Crown and to fire departments who could find themselves, in the future, facing

charges under the OHSA.

[46] Third, and similarly, there is very little case law regarding prosecutions of fire services in Ontario. The defence has provided the court with a copy of *R. v. Port Colborne (City)*, [1992] O.J. No. 2555 (hereinafter referred to as "*Port Colborne*"), a decision of a judge of what was then the Provincial Division of the Ontario Court of Justice. Defence counsel advised the court that this was the only case of which he was aware in Ontario in which a fire department had been charged pursuant to the OHSA. Again, because of the shortage of case law regarding this profession, this court is of the opinion that another judgment of such a case on its merits would be useful.

[47] In coming to this decision, the court is well aware that, because of the specific circumstances of this case, as outlined in its second and third points immediately above, it is coming to the opposite conclusion than the court did in the case of *R. v. Loblaw Properties Inc.*, [2002] O.J. No. 4324. In that case, Greco J. granted a stay, stating, at paragraph 22, as follows:

> *I have already considered the interest that would be served by granting the stay, that is to say, the reputation of the administration of justice as opposed to any interest specific to the respondents. I have considered that interest against the interest that society has in having a final decision in this particular case, based on the merits. I find that in this case, the balance weighs heavily in favour of the societal interest that the administration of justice not be thrown into disrepute; that that interest far outweighs the societal interest in seeing to the final adjudication of this case. I hasten to point out that my decision might have been different here, if the charges brought against the respondents and the facts surrounding their commission of the offences alleged were more serious than they are..."*

[48] Later in this judgment, the court will make some brief comments with respect to the defence's application for a stay.

Does the fact that the defence's motion for a directed verdict has failed mean that the Crown has proved its case beyond a reasonable doubt?

[49] In its decision on the motion for a directed verdict, this court considered, to some extent, the strength of the Crown's case with respect to what is now the only remaining charge before the court. However, in concluding that there was sufficient evidence which, if accepted, could result in a finding of guilt, pursuant to the Supreme Court of Canada's decision in *United States of America v. Shephard*, [1977] 2 S.C.R. 1067 and other cases, this court has not automatically concluded that the Crown has indeed now proven its case beyond a reasonable doubt.

[50] This court reviewed, in some detail, the current state of the law on directed verdicts in paragraphs 83 to 88 of its decision on the defence's motion for such a directed verdict in this case, and it is unnecessary to repeat it in full in this judgment.

[51] As this court stated in its decision on the motion, much of the jurisprudence on directed verdicts specifically addresses the context of preliminary hearing judges committing accused persons to trial wherein their guilt or innocence will be decided by a jury.

[52] This is a trial held in front of a justice of the peace pursuant to the provisions of the *Provincial Offences Act,* R.S.O. 1990, c. P.33, (hereinafter referred to as the "POA") and the OHSA, and there is no jury. It would perhaps be helpful if courts, such as this one, where the justice who will be the eventual trier of fact is one and the same as the justice who hears a motion for a directed verdict, could be given the flexibility to conclude a matter without the defendant providing evidence, if it is satisfied that, at the close of the Crown's case, notwithstanding some evidence in support of its case, the Crown has not proven its case beyond a reasonable doubt. Obviously, current case law, developed within the context of jury trials, does not permit this.

Has the Crown proven its case beyond a reasonable doubt?

[53] The evidence provided to the court with respect to count #1 can be summarized as follows. The Section 21 Guidelines, specifically Guidance Note #5-1, require that whenever the incident command system is used, there must be provisions for firefighter accountability and entry control. The court heard that Deputy Chief Dan Shaw was the incident commander, that firefighters A.J. Shortt and Tammy Kean acted, at various times, as accountability officers, and that Captain Mike Molloy was the entry control officer. SOG 207 requires all firefighters, once their duties and sectors have been assigned, to

> *"leave their name tag with the accountability officer for placement on the board before departing for their sector assignments."*

[54] Meaford Fire Department's SOG 811, headed *"Accountability and Entry Control"*, mandates a slightly different procedure, in that it specifically states that:

> *"All personnel on arrival at the scene shall don their equipment and fasten their ID tag to the left side (accountability) of the Accountability Board."*

[55] The SOG provides further instructions with respect to the second tags, stating:

> *"All firefighters entering the affected area shall first check-in with the Entry Control Control [sic] Officer by providing their second ID tag, which shall be fastened to the right side of the Accountability Board using the Velcro attachment."*

[56] At the Reeds fire, these SOGs were not fully followed. Pilon did not have his name tags. The only firefighter to provide his tags directly to accountability officer Shortt was Mark Young. The picture taken of the accountability board at the scene shows tags from only the chief and deputy chief. As mentioned earlier, firefighter Marshall thinks he left his tags with Shaw, but does not specifically recall doing so. Firefighter Dunlop gave his tags to someone, but is unsure who that was. Firefighter Knight does not give his tags

to anyone, as he still has them with him upon returning from the hospital later that day. Pritchard, the OFM investigator, locates the tags of two of the active firefighters in the back of the cab of Pumper #5.

[57] But it is also clear that neither the OHSA nor any regulation pursuant to it specifically addresses the issue of fire departments' accountability systems. The relevant Guidance Note within the Section 21 Guidelines, #5-1, is brief and it acknowledges that it can be adapted to different situations. Given the inherent unpredictability of fire scenes, this makes sense. The Meaford Fire Department's own internal procedures as set out in SOGs 207 and 811 were not fully followed. That is abundantly clear. But these SOGs set out much higher and more detailed standards than do the Section 21 Guidelines.

[58] The court needs to decide whether such apparent non-compliance with internal guidelines of the Meaford Fire Department can provide a sufficient basis for a conviction on a charge pursuant to section 25(2)(h) of the OHSA. At this point, it is appropriate to review again the specific allegations of the charge against the defendant. The charge alleges, according to its particulars, that the defendant:

> *"failed to take the reasonable precaution of activating an accountability system to track firefighters entering a burning structure."*

[59] It is important to note that the particulars do not allege that the defendant failed to implement fully an accountability system, or that it failed specifically to follow any of the Section 21 Guidelines or any of its own SOGs. The particulars bluntly allege that the defendant did not activate an accountability system.

[60] Precision with respect to particulars is important. Section 25(6) of the POA requires particulars to provide *"sufficient detail"* of exactly what is alleged.

[61] As this court discussed in its ruling on the motion for a directed verdict, particulars form part of the charge. The Supreme Court of Canada makes this very clear in the case of *R. v. Saunders*, [1990] 1 S.C.R. 1020, 56 C.C.C. (3d) 220 where McLachlin, J., as she then was, states at page 223 [C.C.C.]:

> *"It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved."*

[62] She continues later, on the same page, as follows:

> *"The Crown chose to particularize the offence in this case... Having done so, it was obliged to prove the offence thus particularized."*

[63] Therefore, in order for the Crown to succeed, it needs to prove, beyond a reasonable doubt, that an accountability system was not activated. Accountability as a general concept, as outlined earlier, is a system which facilitates the knowledge of which firefighters are on scene and what they are doing. But to activate something is a very clear, defined thing. The basic meaning of the verb "to activate" is to start something, to put it in motion,

to make it active. The deficiencies in what did occur with respect to accountability have been noted earlier in this decision. However, the court finds that the following events which positively speak to the establishment of an accountability system did, in fact, occur. This accountability system directly relates to Pilon and Gibbons, the firefighters who enter the burning structure that day.

[64] First, Pilon and Gibbons advise Deputy Chief Shaw of their intention to enter the building. The dispatch transcript shows Pilon, at 6:13:45 a.m. stating: *"Command we are going to come back and check the apartment, it's really rolling back here."* This appears to be acknowledged by Shaw, the incident commander, who immediately responds: *"Ya, 10:4."* Crown counsel, in his able submissions, questions whether this was, in fact, a direct order from Shaw to Pilon to enter the building. He is correct in that it may not have been an overt order, but clearly, the plain meaning of the phrase *"Ya, 10:4"* given by the incident commander is, at the very least, implied permission. While Shaw may not recall having given this permission, and may doubt that he did, in fact, give it, the court finds, as a fact, that permission was given by Shaw to Pilon and Gibbons in this instance to enter the building.

[65] In any situation where Dan Shaw's testimony differs from that of another witness, whether Crown or defence, this court finds the evidence of the other witness to be more reliable. All witnesses, except for Dan Shaw and Bryan Gibbons, had clear recollections of the events of September 9, 2009 and were able to recall their actions with a credible and reliable degree of precision. By his own frequent admissions throughout his testimony, Shaw's memories are hazy, and his recollections unclear. It would therefore be inappropriate for this court to place much, if any, reliance on Dan Shaw's testimony.

[66] Second, the fact that Molloy hears Pilon's request over the radio for the camera indirectly establishes that some accountability exists. Molloy, the entry control officer, knows that there are firefighters in the building the minute he arrives on scene, because he immediately gets the camera to pass along to them.

[67] Third, firefighter A.J. Shortt, as the front passenger in the second fire vehicle on scene, takes up, within several minutes of his arrival, the customary responsibility of a Meaford firefighter in that position and acts as accountability officer, retrieving the accountability board from its regular location within the Rescue 3 fire truck.

[68] Fourth, when Pilon and Gibbons enter the burning building, they take with them a charged fire hose that it is clearly and plainly visible throughout their time in the burning building.

[69] Fifth, the court finds that the key factors in causing the entire emergency situation, and therefore the main causes of the injuries to both Pilon and Gibbons, did not involve any shortcomings in the accountability system that was in place, but were the still unexplained equipment failure of Pilon's self-contained breathing apparatus, and the subsequent wrong turn that Pilon and Gibbons took that resulted in them not returning immediately to the stairwell.

[70] In several different forms, therefore, an accountability system is in fact activated by the Meaford Fire Department at the scene of the Reeds fire. For all these reasons, and in light of the findings of fact made above, the Crown has not proven the *actus reus* of count #1, as it is worded, beyond a reasonable doubt. Therefore, the remaining charge against the defendant is dismissed.

The Possible Defences

[71] As indicated earlier, the defence had outlined several possible defences to this charge, if indeed the court had concluded that the Crown had proved its case. As all charges pursuant to the OHSA are strict liability offences, this was entirely appropriate for the defence to do. As a result of this court's conclusion that the Crown has not proven the *actus reus* of the remaining charge against the defendant beyond a reasonable doubt, it is not necessary for the court to consider or opine on these possible defences. Indeed, in its submissions, the Crown respectfully urged the court not to do so.

[72] Normally the court would likely be inclined to agree with the Crown. However, many of the circumstances surrounding this matter lead the court, in this particular instance, to make some comments regarding the possible defences, though the court acknowledges that these comments are clearly *obiter dicta*.

[73] The court does so for the same reasons that led it, as outlined earlier in this judgment, to consider the facts on their merits prior to addressing the question of whether the charge should be stayed on the basis of an abuse of process. The absence of sector-specific regulations under the authority of the OHSA that deal with actions of firefighters and the lack of case law regarding prosecutions of fire services in Ontario lead the court to comment on the possible defences. As there may also be appellate review of this decision, it might be of some use to a reviewing court to have this court's thoughts on the possible defences, in the event that this court's conclusion that the Crown has not proven the *actus reus* of the remaining count is found to be incorrect.

The Defence of Due Diligence

[74] The Supreme Court of Canada, in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 and more recently in *Levis(City)v. Tetreault*, [2006] 1 S.C.R. 420, outline the defence of due diligence that is available to defendants in strict liability cases, which include those pursuant to the OHSA. The *Levis* case, at paragraph 15, elegantly speaks to the fact that an accused

> *"has both the opportunity to prove due diligence and the burden of doing so."*

[75] As Dickson J., as he then was, stated in *Sault Ste. Marie* at p. 374 [C.C.C.], with respect to strict liability offences:

> *"[T]he 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*."

Mistake of Fact

[76] The defence of mistake of fact, one of the branches of the due diligence defence, is available to a defendant who believed in a mistaken set of facts, which, if reasonable, would render the act or omission innocent. Defence counsel points to the three facts which led the firefighters to the ultimately mistaken belief that there was someone inside the building. These were the initial call from the bystander who reported the fire, the presence of a car parked in the driveway, and the frantic pleas of the woman who approached Captain Molloy. Defense counsel, however, properly points out that this third factor was not evident until after Pilon and Gibbons had already entered the building.

[77] Crown counsel, in closing argument, makes the point that the mistake of fact must relate to the charge being faced. In this case, he agrees that there was a mistake of fact that a civilian was inside the burning building, but argues that there was no mistake of fact as to the status of the accountability system in place at the Reeds location.

[78] However, as each firefighter, whether a Crown or a defence witness, testified that the primary objective of firefighters is to save lives, it is reasonable to think, in the future, that there will be other fire services in a similar situation as the Meaford fire fighters on the day of the Reeds fire, reacting quickly to an unknown situation, and who could possibly and reasonably rely on the defence of mistake of fact.

Reasonable Precautions

[79] The second branch of the due diligence defence, dealing with reasonable precautions, would allow a fire department defendant to prove, again on a balance of probabilities, that there was a program in place and implemented to deal with the relevant health and safety issues. In this case, the court was provided with extensive training records of each and every Meaford firefighter, outlining the many training sessions that had occurred, both in house and at the Ontario Fire College in Gravenhurst.

[80] An important part of any health and safety training program is to deal with the unexpected. This is even more so for the training program of a fire department. By its very nature, as an unpredictable and rapidly changing workplace, a fire scene is difficult to predict and the specific dangers may be hard to foresee. Perfection, therefore, is an absolute that cannot be expected to be achieved. In discussing the reasonable precautions test, the

Provincial Court in Alberta, in the case of *R. v. Syncrude Canada Ltd.*, [2010], A. J. No. 730, [2010] 12 W.W.R. 524 (Prov. Ct.) states, at paragraph 99:

> *"To meet the onus, Syncrude is not required to show that it took all possible or imaginable steps to avoid liability. It was not required to achieve a standard of perfection or show superhuman efforts. It is the existence of a "proper system" and "reasonable steps to ensure the effective operation of the system" that must be proved. The conduct of the accused is assessed against that of a reasonable person in similar circumstances."*

[81] While there was evidence before the court that some of the Meaford Fire Department's training records may not have been fully completed at the time such training occurred, there is no evidence before the court that any relevant or required training did not, in fact, occur. As much of the training was based on the curriculum established by the Ontario Fire College, any other fire department in the province facing similar charges would likely be able to provide similar records of the training of its members.

Defence of Necessity

[82] The defence of necessity is available to a defendant whose non-compliance with the law is potentially absolved by an emergency or justified by the pursuit of a greater good. The leading case in Canada on the defence of necessity is the Supreme Court of Canada's decision in *R. v. Perka*, [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385. A subsequent important case is *R. v. Latimer*, [2001] 1 S.C.R. 3, 150 C.C.C. (3d) 129 which clarifies the three elements that must exist for such a defence to succeed. There must be imminent peril or danger. The accused must have had no reasonable legal alternative to the course of action undertaken. Finally, there must be proportionality between the harm inflicted and the harm avoided. For a defence of necessity to succeed, all three elements must be present. As the Supreme Court stated in *Latimer*, at paragraph 36:

> *"For the necessity defence, the trial judge must be satisfied that there is evidence sufficient to give an air of reality to each of the three requirements. If the trial judge concludes that there is no air of reality to any one of the three requirements, the defence of necessity should not be left to the jury."*

[83] In this case, defence counsel argues that necessity is available as a defence because of the urgency in determining whether there was someone inside the burning building. Counsel draws the court's attention to cases such as *R. v. Desrosiers*, [2007] O. J. No 1985 (Ont. C.J.) and *R. v. S.R.M.*, [2010] S.J. No. 377 (Prov. Ct.) in which courts allowed the defence of necessity even when it resulted in impaired driving. As defence counsel put it, these are cases where the actions were far less socially appropriate than the actions undertaken by the firefighters at Reeds Restaurant. The court was also provided by defence counsel with the case of *R. v. Hunziker*, [2000] Y.J. No. 40 (Terr. Ct.) in which the presence of an automobile near a building raised sufficient fears of someone being in the building

that the defence of necessity was successfully raised against a charge of driving without a licence.

[84] The presence of a car is one of the three factors which defence counsel raises in our case as providing the necessary factual underpinning for a defence of necessity to be raised on the basis that there was an urgent need to determine whether someone was indeed in the burning building. The other two, as outlined earlier, in paragraph 76 of this decision, are the initial comments from the 911 caller, and the distraught woman on scene.

[85] Both in this case and in other scenarios involving emergency responders, a defence of necessity may be far more likely than in other occupational health and safety cases that concern accidents or injuries occurring at more predictable, less dynamic, workplaces. This would appear to be a conclusion similar to that reached by Girard Prov. Div. J. in *Port Colborne* when he states, towards the end of his decision:

> *"The Occupational Health and Safety Act certainly does not appear to be flexible when it comes to this type of situation since, in my view, it was enacted for employers and it is difficult to reconcile the wording of the statute if it was intended when it was created that it apply to emergency situations by bodies such as ambulance, police and fire fighters."*

[86] In the previous paragraph of this decision, His Honour had stated:

> *"There is some difficulty in reconciling the applicability of the Occupational Health and Safety Act to firefighters in action when attempting a rescue in that by their very nature rescues involve risk."*

[87] The Crown's position, as outlined in its closing arguments, is that the court should not focus on the necessity of a fire department performing search and rescue; it should concern itself with the necessity of the department performing search and rescue without, in its opinion, activating an accountability system. Again, each fact situation will need to be considered, but the court believes that a defence of necessity might well be raised by a fire department facing charges arising out of a search and rescue situation.

Abuse of Process

[88] As noted, since this court has concluded that the Crown has not proven its case beyond a reasonable doubt with respect to the one remaining charge faced by the defendant, the defendant is entitled to an acquittal, and it is therefore unnecessary to consider the defendant's application for a stay. Briefly, however, and keeping in mind the Supreme Court of Canada's comments in *R. v. Jewett* (1985), 47 C.R. (3d) 193, [1985] 2 S.C.R. 128 at page 202 [C.R.], that a stay is "*a power which can be exercised only in the 'clearest of cases'*", this court wishes to comment on the defendant's two main arguments which it raised on this issue.

[89] First, the defendant is concerned that, in the absence of any specific legislation, it has been charged under the general duty clause in section 25 of the OHSA. While this is certainly permitted, as is indicated by the Ontario Court of Appeal decision in *R. v. Brampton Brick Ltd.*, [2004] O.J. No. 3025, the defendant takes issue with the fact that the Section 21 Guidelines state clearly, in the forward [*sic*] that:

> *"It should not be taken to be a statement of the law or what is necessary to comply with the law. A person with legal duties may or may not agree with this Guidance and there is no legal requirement to follow it. It is for each such person to decide what is necessary to comply with the OHSA and its regulations."*

[90] The court appreciates that crafting regulations that deal with emergency responders might be difficult for the government to accomplish, especially given the fluid, dynamic and unpredictable nature of the work of such responders. However, the government has had nearly two decades since the *Port Colborne* matter to grapple with these issues. This court, as indicated, is not deciding if this case does fit within the narrow category of the "*clearest of cases*" that warrant a stay. It would expect, though, that any future volunteer fire service defendant facing similar charges under the general duty section of the OHSA, based only on the Section 21 Guidelines, and any local SOGs flowing from them, would make a similar application for a stay.

[91] The defence's second argument in support of a stay might also warrant serious consideration by another court if a similar situation presents itself. This concerns the defence's evidence, as relayed through former Chief Nickels and current chief Molloy, that Charles Nixon, the Ministry of Labour investigator, had given an undertaking to the Meaford Fire Department that charges would not be laid. This court did not hear from Mr. Nixon. The defendant, along with other cases it provided to the court, relies on the Court of Appeal's decision in *R. v. Abitibi Paper Co. Ltd.* (1979), 24 O.R. (2d) 742, 99 D.L.R. (3d) 333, where it held that the conduct of the Crown in breaching an undertaking by one of its senior officers not to prosecute was vexatious, unfair, oppressive and constituted such exceptional circumstances to warrant a stay of the proceedings as an abuse of process.

[92] In his arguments, Crown counsel urges the court to consider, in this case, whether any undertakings given by Mr. Nixon were relied upon by the Meaford Fire Department to its detriment. The Crown also provided case law to the court, including *R. v. I.C.* (2010), 249 C.C.C. (3d) 510 (Ont. Sup.Ct.) and *R. v. Nixon* (2011), 271 C.C.C. (3d) 36, a recent decision of the Supreme Court of Canada, that show that it is open to the Crown to recoil from a plea bargain agreement without it amounting to an abuse of process. Similarly, in the case of *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 168 C.C.C. (3d) 97, the Supreme Court of Canada held, in paragraph 32, in a decision jointly written by Iacobucci and Major JJ.:

> *"The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution."*

As indicated earlier, however, this court, because it is not necessary to do so, is not deciding whether it would grant a stay on the grounds of abuse of process.

Conclusion

[93] This court's review of these possible defences would indicate that they may well be applicable, relevant and successfully relied upon by fire departments who might, in the future, find themselves charged under the general duty sections of the OHSA. It is obviously not meant to imply in any way whatsoever that fire departments should have absolute immunity from such prosecutions. The *Port Colborne* case held that volunteer firefighters are workers within the context of the OHSA, and, as such, they clearly deserve the protections that workers are provided pursuant to that statute. If circumstances warrant, charges can and should be laid, assuming that the Crown also concludes that it is in the public interest to do so.

[94] This court merely wishes to point out that, because of the inherent unpredictable and dangerous nature of firefighting, defences such as mistake of fact and necessity may well be more easily relied upon by fire departments than they might by other defendants in workplace injury cases that occur, for example, on an assembly line in a factory.

[95] Court time had been reserved for Friday, September 7, 2012, if it were necessary for the court to hear submissions either with respect to the sentencing of the defendant, had it been convicted of the remaining charge it faced, or with respect to costs to be awarded to the defendant, had it been successful in having the remaining charge against it stayed. As this court has dismissed the remaining charge against the defendant, neither of these results has transpired, and the court will no longer convene on that date.

[96] The court wishes to thank both Crown and defence counsel for their thoughtful and thorough arguments in this matter.

Released: August 7, 2012

Signed: "Justice of the Peace Thomas Stinson"