Citation: *Yukon (Director of Occupational Health and Safety) v. Venture Elevator Inc.,* 2022 YKTC 50

Date: 20221208
Docket: 19-05381
19-05382
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

IN THE MATTER of the *Occupational Health and Safety Act,*
RSY 2002, c. 159

DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY

v.

VENTURE ELEVATOR INC. and
PAUL BENTLEY

Appearances:
Amy Porteous and Kelly McGill — Counsel for the Territorial Crown
Andre Roothman and Leanne Rapley — Counsel for the Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): The defendant Venture Elevator Inc. ("Venture") is in the business of installation, service, repair, modernization, and maintenance of elevating devices in British Columbia, Alberta, and the Yukon. Venture is owned by Paul Bentley, the co-accused, and his spouse.

[2] On October 24, 2018, Fungai Taranhike, an employee of Venture, was working on a platform at or near the top of the elevator shaft at a new building under

construction in Whitehorse, Yukon, when the platform fell approximately 25 feet to the bottom of the shaft. Fortunately, the accident did not result in any deaths; however, Mr. Taranhike suffered significant spinal and knee injuries. After several months of recovery and a successful knee surgery, Mr. Taranhike has regained much of his mobility and is able to walk unassisted.

[3] On October 24, 2019, Venture was charged with failing to ensure that Mr. Taranhike was given the necessary instruction and training and was adequately supervised, contrary to s. 3(1)(c) of the *Occupational Health and Safety Act*, RSY 2002, c. 159, (the "*Act*"). Mr. Bentley was charged as a supervisor for failing to ensure Mr. Taranhike was given proper instruction and that his work was performed without undue risk, contrary to s. 7(a) of the *Act*. It should be noted that the *Act* in force at the time of the accident has since been repealed and replaced with the *Workers' Safety and Compensation Act*, SY 2021, c. 11.

[4] Both parties entered not guilty pleas on June 26, 2020. Trial proceeded with evidence from a number of witnesses being called over a two-week period in January 2022.

[5] The parties provided written submissions, with final oral argument proceeding on September 16, 2022. The matter is now before me for decision.

Facts

[6] The evidence presented in this case was extensive. While all of it has been considered at length, for the purposes of this decision, an exhaustive review is

unnecessary. Rather, I will focus on those facts that are essential to the issues to be determined. These include the circumstances surrounding the accident and the evidence relating to the training and supervision of Mr. Taranhike over the course of his employment with Venture.

The Accident

[7] On an unspecified date in 2018, which Mr. Taranhike believed to be sometime in August, Mr. Taranhike undertook his first independent installation of an elevating device into a four-story new construction build on Hawkins Street known as the MEL. The device in question was a Limited Use/Limited Application elevator, commonly referred to as a LULA, which includes both a hydraulic piston and wire ropes.

[8] Mr. Taranhike had the part-time assistance of Milton Mugadza as a mechanic's helper who had no previous experience with elevators or mechanics. His role was primarily to assist with heavy lifting as required. Mr. Taranhike was otherwise on his own. Evidence indicates that Mr. Taranhike contacted Garaventa Lift Canada ("Garaventa"), the manufacturer of the LULA, on several occasions with various questions, but did not contact anyone from Venture for assistance.

[9] In October 2018, Mr. Taranhike noted a problem with the travel distance of the piston. Specifically, the elevator travel stopped even with the top floor of the installation. Code requires the elevator to travel a few inches beyond the top floor. He did not contact anyone from Venture or Garaventa, nor does he appear to have consulted the LULA manual, in determining how to correct the problem.

[10] Mr. Taranhike had encountered a similar problem on a previous hydraulic elevator installation he had been involved in under the supervision of a certified mechanic. He says the solution adopted was to remove the platen plate to add additional layers to it as a means of increasing the travel distance. He decided to do the same thing at the MEL in an effort to meet the height requirement.

[11] The platen plate is the mechanical connection between the piston and the sheave assembly, which houses the pulley mechanism along with the ropes that attach down to the platform.

[12] On October 24, 2018, Mr. Taranhike raised the platform to its full extension, then placed a ladder on top of it so that he could reach the platen plate. He planned to remove the plate so that it could be used as a template to fabricate a thicker platen plate. Mr. Taranhike removed the bolts securing the platen plate.

[13] With the removal of the bolts, there was nothing securing the sheave assembly to the piston. The evidence is unclear whether additional steps were taken by Mr. Taranhike to move the sheave assembly off of the platen plate and piston, but the evidence is all too clear that the assembly did indeed fall, causing the platform, and Mr. Taranhike with it, to plummet four stories to the bottom of the elevator shaft.

[14] Staff from Evergreen Construction, the building contractor, including the finishing foreman, Eric Palourde, rushed to Mr. Taranhike's aid and remained with him until Emergency Medical Services arrived to transport him to the hospital. The MEL construction site was shut down pending investigation.

[15] In the wake of the accident, Engineer, John Lee, was retained by the Yukon Government to provide an opinion as to the cause of the accident. Mr. Lee's company Vinspec Ltd. ("Vinspec") holds a contract to inspect every elevating device in the Yukon, including initial acceptance inspections for alterations and new construction. In these proceedings, Mr. Lee was qualified as an expert to give evidence in relation to the installation, inspection, and safety of elevating devices.

[16] Mr. Lee ruled out any mechanical failure and determined that Mr. Taranhike's efforts to remove the platen plate was the direct cause of the accident because the platform was actually suspended from the ropes over the sheave assembly. Accordingly, severing the mechanical connection between the piston and sheave assembly, thereby causing the sheave assembly to fall, meant there was no longer anything holding up the platform. Mr. Lee further noted that the safeties, designed to prevent the platform from freefalling in such circumstances, were not connected, even though he estimated the LULA installation to be 75% to 80% complete, long past the point when the safeties should have been installed and operable.

[17] In Mr. Lee's opinion, Mr. Taranhike's action in removing the platen plate showed a stark misunderstanding of how the LULA system operates. Essentially, he testified, Mr. Taranhike pulled the rug out from under himself.

[18] Mr. Lee's opinion was corroborated by the Accident Investigation Report prepared by Rob Murphy, Product Manager from Garaventa, which is included in the joint book of documents filed as exhibit 1. In addition, virtually every witness with elevator installation experience, including defence expert Douglas Guderian and the

defendant, Mr. Bentley, concurred with Mr. Lee's opinion about the cause of the accident. Furthermore, each of the witnesses, knowledgeable in elevator installation, all indicated that there was a relatively easy fix to correct the problem with travel distance, which could be performed with the elevator on the ground floor, namely that tightening the shackles to shorten the ropes would raise the platform to the required height.

[19] For his part, Mr. Taranhike testified that based on his prior experience installing hydraulic elevators, he believed that the piston was also holding up the platform, in addition to the ropes, and that it would prevent the platform from falling. He indicated that he had disengaged the safeties as they were rubbing into the rails. He believed the safeties to be a redundancy that was unnecessary in light of the piston. Indeed, he was so certain that he did not do a Job Hazard Assessment ("JHA") as he did not believe there was any risk in what he termed a "simple task" that he was undertaking.

[20] Mr. Taranhike's decision to remove the platen plate and the resulting accident raise obvious questions about both his grasp of the operation of the LULA and the importance of safety devices.

[21] It is on the basis of these apparent deficiencies in Mr. Taranhike's knowledge that the defendants have been charged.

The Issues

[22] The parties are agreed that the offences before the Court are strict liability offences. Pursuant to the oft-quoted decision of the Supreme Court of Canada in *R. v. Sault Ste. Marie*, [1978] S.C.R. 1299, the Crown need not prove *mens rea* or

intent. The burden that rests on the Crown is to prove the essential elements of the *actus reus* or prohibited act. Should the Crown prove the prohibited act to the requisite standard of proof beyond a reasonable doubt, the burden shifts to the defendants to establish the defence of due diligence on a balance of probabilities. Due diligence can be established in one of two ways: firstly, reasonable belief in a mistaken set of facts which, if true, would render the act or omission innocent; and secondly, that the defendant took all reasonable steps to avoid the particular event.

[23] Based on this framework, the issues to be determined in this case are as follows:

1. Was Mr. Bentley Mr. Taranhike's supervisor?

2. Is the phrase "so far as is reasonably practicable" in s. 3(1) of the *Act* an essential element that must be proven by the Crown?

3. Did Venture fail to ensure that Mr. Taranhike was given the necessary instruction and training and was adequately supervised?

4. Did Mr. Bentley fail to ensure that Mr. Taranhike was given proper instruction and that his work was performed without undue risk?

5. If the Crown is successful in proving the prohibited act in relation to either or both of the defendants, did the defendants reasonably believe in a mistaken set of facts that, if true, would render the act innocent?

6. In the alternative, did the defendants take all reasonable steps to avoid the type of event that occurred in this case?

Issue 1: Section 7, Supervisor

[24] Turning to the first issue, Mr. Bentley is charged pursuant to s. 7 of the *Act*, which sets out a supervisor's duties under the *Act*. Accordingly, one of the essential elements which must be proven is whether the evidence establishes that Mr. Bentley meets the definition of supervisor in the *Act*. While the defence did not advance an argument suggesting Mr. Bentley did not meet the definition, as the evidence on this point was somewhat equivocal, it must nonetheless be addressed for the purposes of this decision.

[25] Mr. Taranhike testified that he could not really point to someone as his supervisor. If he was on a job with a mechanic, the mechanic would be in charge of the project. He indicated that roles were assigned by Scott Tobin in British Columbia, and by the General Manager in Alberta, but that Mr. Bentley oversaw everything. When asked who he would be accountable to if something went wrong, Mr. Taranhike said "most likely Mr. Bentley as pretty much all decisions were run by him".

[26] Mr. Bentley confirmed that on a job, it is always the mechanic who supervises any helpers or mechanics in training ("MIT"). As the CEO of Venture, Mr. Bentley said that he had backed out of day-to-day operations, which were handled by Scott Tobin, who he referred to as the overall supervisor; though Mr. Bentley indicated his door remained open to assist with any technical questions.

[27] As this was Mr. Taranhike's first solo installation, there was no mechanic involved at the MEL installation who could be said to have been his supervisor.

[28] Section 1 of the *Act* defines a "supervisor" as a "competent person who has charge of a workplace or authority over a worker". "Competent person" is defined as a person who,

> (a) is qualified because of their knowledge, training, and experience to organize the work and its performance;
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> (b) is familiar with the provisions of this Act and the regulations that apply to the work, and
>
> (c) has knowledge of any potential or actual danger to health or safety in the workplace.

[29] There is no doubt that Mr. Bentley would meet the definition of "competent person". The evidence confirms that he has extensive experience in the elevator industry both as a mechanic and as the owner of Venture since 2004, and that he is knowledgeable about both regulatory and safety requirements.

[30] In assessing whether Mr. Bentley, as a competent person, was in charge of the workplace or had authority over Mr. Taranhike, it was apparent that Mr. Bentley did not view himself as Mr. Taranhike's direct supervisor in relation to the MEL project. That being said, as noted in *Ontario (Ministry of Labour) v. Walters* (2004), 67 W.C.B. (2d) 838 (Ont. Sup. Ct.):

> 18 A supervisor must be someone who has hands-on authority. The test is objective, based on the individual's actual powers and responsibilities. Whether or not Mr. Walters considered himself to be a supervisor is not relevant. See: R. v. Adomako [2002] O.J. No. 3050.

[31] The only evidence that would seem to support a finding that Mr. Bentley was not Mr. Taranhike's supervisor is exhibit 12, an email exchange dated April 5, 2017, between Mr. Taranhike, Mr. Bentley, and Mr. Tobin. It begins with Mr. Taranhike

emailing Mr. Bentley regarding a "bump in wage". Mr. Tobin replies that he did not appreciate Mr. Taranhike going over his head. Mr. Bentley then responds: "[t]o be straight and fair, NO Fungai you do NOT report to me. I'm just helping out…Scott is both our bosses." However, there is no evidence as to what role, if any, Mr. Tobin played in relation to the MEL project.

[32] Conversely, the Elevating Devices Installation Permit Application for the MEL project, filed as exhibit 22, has been signed by Mr. Bentley as the Contractor Officer declaring "…that the device and the installation described herein will conform to the Safety Standards Act and Regulations and all other applicable codes". This evidence, in my view, establishes Mr. Bentley as the person ultimately responsible for the MEL installation. This, in turn, satisfies me that Mr. Bentley had charge of the MEL workplace.

[33] While strictly speaking not required as the definition of supervisor is disjunctive, I nonetheless find that I am also satisfied that Mr. Bentley meets the definition of supervisor as a competent person who had authority over Mr. Taranhike.

[34] The evidence was clear that Mr. Bentley was the ultimate decision maker for Venture. As such, he was in a position to impact every facet of Mr. Taranhike's employment with Venture. A number of the exhibits filed confirm Mr. Bentley to be in a position of authority over Mr. Taranhike. These include:

- Exhibit 14, an email from Mr. Taranhike to Mr. Bentley dated March 26, 2018, regarding the Local Representative ("LR") position in the Yukon,

sent as Mr. Taranhike believed Mr. Bentley to be in charge of the Yukon expansion;

- Exhibit 16, an email from Mr. Taranhike to Mr. Bentley dated July 30, 2015, expressing interest in the position of LR in Fort St. John. Exhibit 30 contains Mr. Bentley's response indicating his view that Mr. Taranhike is not yet ready to become an LR as he needs more training;

- Exhibit 18, a letter from Mr. Bentley to Mr. Taranhike dated February 20, 2019, terminating Mr. Taranhike's employment as mechanic in training and LR for Whitehorse and offering him alternative positions as a mechanic's helper; and

- Exhibit 31, Mr. Taranhike's profile on the Digital Action Tracking System ("DATS") that Venture used to track participation in online safety training, printed on October 25, 2018, which identifies Paul Bentley as the person to whom Mr. Taranhike reports.

[35] The cumulative impact of this evidence persuades me that Mr. Bentley meets the definition of supervisor in the *Act* in relation to Mr. Taranhike and the MEL installation.

Issue 2: Section 3(1), Essential Elements

[36] With respect to the charge against Venture, before determining whether the Crown has proven the prohibited act, defence has raised a preliminary issue with respect to the essential elements of the offence.

[37] Section 3(1)(c) of the *Act* reads:

> 3(1) Every employer shall ensure, so far as is reasonably practicable, that
>
> > (c) workers are given necessary instruction and training and are adequately supervised, taking into account the nature of the work and the abilities of the workers. [emphasis added]

[38] At issue is whether the phrase "so far as is reasonably practicable" constitutes an essential element that must be proven as part of the *actus reus*. Crown argues that it is not an essential element, but rather is merely confirmation of the availability of the due diligence defence.

[39] In taking this position, Crown relies on the 2012 decision out of the Yukon Supreme Court in *Director of Occupational Health and Safety v. Government of Yukon, William R. Cratty, and P.S. Sidhu Trucking Ltd*., 2012 YKSC 47. The case involved rock blasting in relation to the construction of the Hamilton Boulevard Extension which resulted in falling rocks damaging property in the Lobird Trailer Court. On appeal, at para. 70, Mr. Justice Veale made the following comment:

> As noted, an employer's obligation under s. 3(1)(a) of the *OHS Act* is to ensure the workplace and processes are safe and without risk to health "so far as is reasonably practicable". This confirms the defence of due diligence which is set out in *R. v. Sault Ste. Marie (City)*…

[40] Per the doctrine of *stare decisis*, I am generally bound to follow pronouncements of law out of the Supreme Court of Yukon. The above quote, on its face, suggests that Justice Veale expressly determined that the phrase "so far as is reasonably practicable" in s. 3 of the *Act* relates only to the defence of due diligence; and, therefore, by inference, is not an essential element that need be proven by the Crown. However, it

must be noted that the precise issue before me was not actually argued before Mr. Justice Veale. In other words, he was not asked to decide whether the phrase "so far as is reasonably practicable" is or is not an essential element of the *actus reus* of an offence pursuant to s. 3 of the *Act*. In the circumstances, I am not of the opinion that the case stands for the legal proposition asserted by the Crown; nor am I persuaded that this quote amounts to binding legal authority on this issue.

[41] Conversely, the defence relies on the 2018 decision in *R. v. Precision Diversified Oilfield Services Corp.*, 2018 ABCA 273, out of the Alberta Court of Appeal. While not binding authority, the case deals squarely and comprehensively with this very issue. The Court's analysis and conclusion are persuasive and warrant repeating at some length:

> 49 The words of an enactment define the *actus reus* of an offence: *R v Beatty*, 2008 SCC 5 at para 43, [2008] 1 SCR 49. Further, it is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: *Quebec (Attorney General) v Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831 at 838, 20 DLR (4th) 602. As a result, every word and provision in a statute is supposed to have a meaning and function, and the courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham Ont: LexisNexis Canada Ltd., 2014) at sec.8.23.
>
> 50 Here, the language of s. 2(1) of *OHSA* does not frame the "reasonably practicable" component as a defence, or as a way for the employer to avoid liability. Nor is there anything in the words of s. 2(1) that suggests the burden of proof shifts to the employer. The "reasonably practicable" proviso qualifies the otherwise broad and general duty under s. 2(1), but it does not say liability will fall on the employer *except* or *unless* the accused *shows* or *establishes* it was not reasonably practicable to avoid the unsafe condition. Section 2(1) creates a duty, but says an employers' duty is merely to do what was reasonably practicable.

> 51 As a result, in any prosecution for violating a provision of *OHSA* brought pursuant to s. 41(1), the Crown must prove the employer contravened a provision of *OHSA*, and establishing a breach of the general duty is contingent on showing that it was reasonably practicable to ensure a worker's health or safety. It follows that, in order to prove the employer committed an offence by violating its general duty, the Crown must establish it was reasonably practicable for the employer to address the unsafe condition through efforts that the employer failed to undertake.
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> 52 For these reasons, the ordinary meaning of the provision suggests that the expression is not a codification of the due diligence defence. The legislative history also does not support the codification interpretation either. The language of this provision has remained in force essentially unchanged since Alberta enacted its first general occupational health and safety legislation in 1976: *The Occupational Health and Safety Act*, SA 1976, c 40, ss. 2(1) and 32(1), which was two years *before* the Supreme Court recognized the distinction between offences of strict and absolute liability in *Sault Ste. Marie*. It is difficult to conclude that the legislature had intended to codify common law principles yet to be developed.
>
> 53 In my view, requiring the Crown to prove it was reasonably practicable for the employer to address the unsafe condition through efforts that the employer failed to undertake does not undermine the *OHSA*'s basic goals. I agree that the *OHSA* is remedial public welfare legislation intended to guarantee a minimum level of protection for the health and safety of workers and its provisions ought to be generously interpreted in a manner that is in keeping with the purposes and objectives: *Ontario (Ministry of Labour) v Hamilton (City)* (2002), 58 OR (3d) 37 at para 16, 2002 CarswellOnt 220 (WL Can) (CA). However, it does not follow that a court ought to disregard the principles of statutory interpretation in assessing what is considered to be proof of those provisions: *R v St. John's (City)*, 2016 NLTD(G) 81 at para 19, 2016 CarswellNfld 194 (WL Can). It would no doubt be easier to enforce all kinds of public welfare legislation if the Crown did not have to prove all the elements of the offence beyond a reasonable doubt. But ease of enforcement alone cannot justify disregarding the ordinary meaning of the text and adopting a strained interpretation instead.

[42] The Alberta Court of Appeal goes on to note that this interpretation is entirely in keeping with that taken in both the Ontario and Saskatchewan Courts of Appeal (See para. 61-64).

[43] I would adopt the reasoning of the Alberta Court of Appeal in *Precision* in finding that the phrase "so far as is reasonably practicable" in s. 3(1) of the *Act* constitutes an essential element of the offence that must be proven beyond a reasonable doubt by the Crown.

Issues 3 and 4: the *Actus Reus*

[44] A determination of whether the Crown has met its burden in proving the *actus reus* requires consideration of the evidence on training, experience, and supervision in relation to Mr. Taranhike.

Training, Experience, and Supervision

[45] Mr. Taranhike started with Venture at the end of January 2015. He had no prior experience in relation to elevators but had worked as a plant operator and in construction. Of particular note, he testified to having learned through his prior experience working with industrial machinery and working at height, the importance of complying with safety requirements. Furthermore, he had obtained safety certification through the Alberta Construction Safety Association.

[46] For approximately the first six or seven months with Venture, Mr. Taranhike worked closely with a certified mechanic, learning to do installations of primarily hydraulic elevators and elevator maintenance.

[47] From the end of August 2015 to the fall of 2016, Mr. Taranhike was responsible for elevator maintenance on a route that included Fort St. John, Hudson Hope, and Fort Nelson.

[48] In October 2016 to February 2017, Mr. Taranhike was in full-time attendance at Durham College where he completed Elevator Mechanic Prep Level 1 and Level 2, two of the three levels offered. His grades have been filed as exhibits 4 and 5. In Level 1, his overall average was 82, and, notably, he scored 96 on EDM Safety and 99 on EDM Ladders, Scaffolding & Work Platforms. In Level 2, his overall average was 87 with 88 in EDM Installation – Traction Elevators and 95 in EDM Lifts for Persons with Physical Disabilities.

[49] Upon his return, Mr. Taranhike was appointed as the OH&S Manager for Venture. His main focus was on obtaining COR certification. COR, or Certificate of Recognition, is a program that certifies that a company meets mandated safety requirements.

[50] Mr. Taranhike was also responsible for updating Venture's Occupational Health and Safety Manual (the "Manual") and for company safety training. Exhibit 32, an email from Mr. Tobin dated March 14, 2017, announcing Mr. Taranhike's new position provides the following overview of the position:

> His main priority is to get Venture COR Certified. This includes:
>
> - Making sure all employees have required safety gear.
> - Vehicle maintenance and daily inspection logs.
> - Employee safety training and awareness.
> - Site visits, interviews and inspections.
> - Record keeping (JHAs, toolbox meetings and monthly safety meetings).
> - Starting and Co-chairing employee safety committee.

> Pursuing a COR Certification is part of Venture's commitment to providing an ONGOING safe work environment for its employees.

[51] Mr. Taranhike continued in this position up to the date of the accident. According to Mr. Bentley, Mr. Taranhike was successful in obtaining COR certification in both Alberta and the Yukon prior to the accident.

[52] In June 2017, Mr. Taranhike was involved in the installation of four large traction elevators in Whistle Bend Place ("Whistle Bend") in Whitehorse, along with two other MITs and a trained, although not certified, mechanic. According to Mr. Taranhike, Mr. Bentley was in charge of the project, and checked on them daily to give direction. Mr. Bentley also showed them how to do the roping of the elevators. Mr. Taranhike indicated this was his first traction elevator installation. He further noted he continued his safety duties and dealt with some logistical supply issues during the project. Mr. Taranhike estimated that he spent a total of 13 or 14 weeks at Whistle Bend.

[53] Sometime early in 2018, Mr. Taranhike entered into discussions about relocating to Whitehorse to assume the LR position. He testified that he wanted to move away from safety and focus on getting his elevator mechanic certification.

[54] At the end of May 2018, Mr. Taranhike worked on the installation of a LULA elevator at Elias Dental ("Elias") with a certified mechanic. He also assisted the mechanic with elevator maintenance at Whistle Bend. Mr. Taranhike says he was only involved in the Elias project until the platform was installed, but not yet moving, at which point, he returned home for the birth of his child. Evidently, there were issues with the elevator at Elias, and upon Mr. Taranhike's return, he was involved in making the

necessary adjustments. Timesheets indicate that Mr. Taranhike spent a total of 66 hours on the initial installation at Elias, and an additional 78 hours making adjustments.

[55] In terms of other training, Mr. Bentley testified to Friday toolbox meetings on technical issues offered first by conference call, and now by video, with mandatory attendance. On cross-examination, his evidence was unclear about whether these meetings started before or after the accident. Mr. Taranhike, however, noted that Venture had weekly safety meetings, so I accept that there were at least weekly meetings focussed on safety that Mr. Taranhike attended or led, although he does not believe he attended while he was in Whitehorse.

[56] The DATS record filed as exhibit 31 confirms that Mr. Taranhike completed a number of online training sessions. Between January 2015 and September 2018, he is confirmed to have completed 33 sessions. Of particular note, these include fall protection refreshers from both British Columbia and Alberta, ladder safety, and personal protective equipment ("PPE") use. The record also confirms that Mr. Taranhike reviewed the Manual on May 9, 2018. There was some confusion about the applicable edition of the Manual at the time of the accident, as only parts of it appear to have been forwarded to OH&S investigators. These are included in the joint book of documents filed as exhibit 1.

[57] At trial, Mr. Bentley provided the full Manual, dated October 2018, and filed as exhibit 35, and testified that it was located on Mr. Taranhike's laptop, with an indication that he had forwarded it to a client a few days before the accident. As this evidence was not put to Mr. Taranhike, there are questions with respect to weight pursuant to the

rule in *Brown v. Dunn*, (1893), 6R. 67 (H.L.). That being said, the evidence is more than sufficient to satisfy me that Mr. Taranhike was intimately acquainted with the Manual and safety policies at the time of the accident as he was the one primarily responsible for maintaining and updating them.

[58] The Manual, in turn, confirms that all Venture employees are provided with the Elevator Industry Field Employees Safety Handbook. A photograph filed as exhibit 19 confirms that Mr. Taranhike had a copy of the Handbook in the toolbox at the MEL site. Notably, s. 11.1(b) of the Handbook in relation to moving platforms states, "Before hoisting or roping of a platform, the governor shall be installed and roped to the safety releasing arm and tested to ensure that the safety is operational."

[59] As this overview of Mr. Taranhike's training and experience indicates, supervision of Mr. Taranhike by Venture has included both close direct supervision when working on an installation with a trained or certified mechanic, and times where the approach to supervision would be described as more hands off or remote.

[60] When working shoulder to shoulder with a mechanic, Mr. Taranhike was given opportunities to observe various tasks and then to perform them himself. As a registered MIT in British Columbia, Mr. Taranhike was issued a Personal Skills Passport (the "Passport"). When able to demonstrate to a certified mechanic that he was able to perform a task from start to finish without requiring assistance, Mr. Taranhike could ask the mechanic to sign off on the task in his Passport, thus confirming that Mr. Taranhike was qualified to perform the task without supervision.

[61] According to Mr. Bentley there is controversy in British Columbia surrounding use of the Passport, not least of which is the fact that employers are not able to access an employee's Passport because of privacy legislation. Mr. Taranhike noted the difficulty in getting his Passport signed off. It should also be noted that the signed confirmation of competency on tasks in the Passport, before being able to perform said tasks unsupervised, was not a requirement in the Yukon at the time of the accident.

[62] With those limitations in mind, the Passport offers at least some insight into Mr. Taranhike's level of competence in relation to the various elevator installation and maintenance tasks.

[63] Mr. Taranhike's Passport was filed as part of exhibit 1. The Passport shows that Mr. Taranhike was found to be competent in a large number of the installation tasks in relation to the installation of passenger hydraulic elevators. There are no tasks listed under passenger traction elevators that have been initialled.

[64] As noted, Mr. Taranhike worked on the installation of passenger traction elevators at Whistle Bend, but he indicated that the trained mechanic was not an authorized Passport signatory. Mr. Taranhike's Passport is signed off on maintenance and repair/service of passenger traction elevators.

[65] The Passport also contains a section on Workplace Achievement that includes "repetitive criteria" which requires Passport holders to demonstrate proficiency over different setups. Mr. Taranhike is signed off on Rigging and Hoisting Equipment; Applying Troubleshooting Techniques; Layout Hoistways; Install Guiderails, Guiderail Supports, and Fastenings; Install Pit Structures, Jacks, and Suspension Systems; Install

Hydraulic Piping System; Maintain Electrical and Electronic Systems; Adjust Door Operators; as well as some criteria in relation to maintenance, servicing, and alteration of elevators.

[66] Filed as exhibit 28 is an email from Jorge Velasco, the mechanic who trained Mr. Taranhike over his initial months with Venture. The email is dated April 15, 2015, and addressed to Mr. Bentley. In the email, Mr. Velasco writes of Mr. Taranhike, "I think he can put a Richmond elevator from top to bottom." Mr. Bentley testified that a Richmond elevator is a relatively complex passenger hydraulic elevator. As Mr. Velasco was not called as a witness, the email cannot stand for the truth of Mr. Velasco's opinion, but it is evidence, in part, of the basis for Mr. Bentley's views in relation to Mr. Taranhike's competence.

[67] When Mr. Taranhike was responsible for the maintenance circuit while based in Fort St. John, he was working largely on his own. However, the evidence was clear that he had easy access to other MITs and to mechanics as and when he required technical assistance. During this time period, it is clear that Mr. Taranhike made full and appropriate use of the resources available to him. He described running into difficulty working on a complex traction elevator at a dam. He contacted Mr. Bentley for assistance and described Mr. Bentley as "uncommonly genius" and able to refer him to specific pages and paragraphs in two thick binders Mr. Taranhike had, which Mr. Bentley was able to quote almost verbatim.

[68] Mr. Taranhike also testified to seeking and receiving help from a number of other individuals at Venture. This is confirmed to some extent in an email dated

November 15, 2015, filed as exhibit 17, in which Mr. Taranhike writes to thank Mr. Bentley for comments on Mr. Taranhike's performance. Mr. Taranhike writes, "Wanted to say thanks to one and all cos it's you guys that always happily pick up the phone and walk me through when I'm stumped. You're all an awesome team!"

[69] Mr. Taranhike confirmed that he knew he could contact anyone at Venture for assistance while he was working at the MEL, including mechanic Ryan Young, who Mr. Taranhike knew to be very knowledgeable on the LULA he was installing at the MEL, as Mr. Young had previously been a manager at Garaventa, the manufacturer of the device.

[70] As noted, Mr. Taranhike made no calls to anyone at Venture while installing the LULA at the MEL.

[71] On the other hand, the evidence was clear that before assigning the MEL installation to Mr. Taranhike, no one from Venture asked him about his experience with the Elias LULA. Similarly, no one from Venture reached out to ask how he was doing at the MEL. The only communication appears to have been an email exchange with Mr. Young dated September 26, 2018, and filed as exhibit 15. Much of the email relates to questions regarding the status of the work on the Elias LULA, but Mr. Young also refers to the MEL in stating, "Also the new install, please measure actual dimensions vs the drawings. If something doesn't add up, now is the time to act."

Standard of Care

[72] In considering whether the evidence makes out the prohibited act, it is important to note the elements that must be proven in this regard. Specifically, the Crown must prove:

1. That Mr. Bentley failed to ensure proper instruction to Mr. Taranhike or failed to ensure Mr. Taranhike's work was done without undue risk; and

2. That Venture failed to ensure Mr. Taranhike was given necessary instruction and training and was adequately supervised, taking into account the nature of the work and Mr. Taranhike's abilities; and, as stated in *Precision*, that "it was reasonably practicable for the employer to address the unsafe condition through efforts that the employer failed to undertake" (para. 44).

[73] Defence argues that the regulatory framework in force in the Yukon at the time of the accident offered no mandates or guidelines for training, supervision, education, or qualification of elevator mechanics. As such, defence submits that the Court must look to expert evidence on industry standards in determining the appropriate standard of care in deciding whether the essential elements of the prohibited act have been proven.

[74] Crown argues that the Yukon legislative framework is not silent as to the training, supervision, instruction, education, and qualifications of installers of elevating devices. They point to the overlapping duties of employers, supervisors, and employees

articulated in the *Act*, and note that s. 5.03 of the *Occupational Health and Safety Regulations*, O.I.C. 2006/178, indicates that permanently installed elevators are governed by the *Elevator and Fixed Conveyances Act*, RSY 2002, c. 69 and *Fixed Conveyances Regulations* O.I.C. 1998/040. The Crown points specifically to s. 7 of these *Regulations* which requires a contractor to "satisfy the chief inspector with respect to the competence of its personnel", and s. 18(a) which requires the contractor to ensure that "no person, firm or corporation shall be assigned or undertake work that they have not been registered for under section 6 and have experience in".

[75] Crown argues that fulfilling these obligations necessarily means ensuring appropriate training of personnel and making an informed assessment of employees' abilities, experience and competence.

[76] In Yukon *(Director of Occupational Health and Safety) v. Yukon Tire Centre et al*, 2013 YKTC 92, this Court ruled on an application to quash on the basis that the regulatory sections under which the defendants were charged did not create an offence or impose a duty. In rejecting the application, Faulkner J. stated:

> 21 In my view, the submissions of the defendants result primarily from an unduly narrow reading of the *Occupational Health and Safety Act* and the *Regulations*.
>
> 22 In referring to the interpretation of the Ontario *Occupational Health and Safety Act* in *Ontario (Ministry of Labour)* v. *Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.), Sharpe J.A. said:
>
> > [16] The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in

> keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.
>
> 23 I also note the provision of s. 10 of the *Interpretation Act,* R.S.Y. 2002, c.125*:*
>
> > Every enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects.
>
> 24 To read this legislation as the defendants do would completely frustrate the objective of it as it would, in most cases, absolve employers and supervisors of any responsibility for workplace safety.

[77] Faulkner J. goes on to conclude that "the *Occupational Health and Safety Act* does, in fact, impose broad duties on employers and supervisors" (para. 49).

[78] That being said, as conceded by the Crown, the legislative framework, while not silent with respect to duties imposed, does not stipulate exactly how an employee must be trained or supervised. This then begs the question as to how the Court assesses what amounts to "proper" or "necessary" instruction and "adequate" supervision in this instance. As fair and liberal as the interpretation of public welfare legislation must be, these broad duties must still be interpreted and measured within the context of elevator installation.

[79] As noted, defence counsel argues that interpretation should have regard to the industry standards with respect to training and supervision. In this regard, they ask the Court to rely on the evidence of their expert, Douglas Guderian.

[80] The majority of the cases filed in these proceedings address the application of industry standards in the context of the defence of due diligence rather than proof of the

actus reus. This is unsurprising as, often in these types of proceedings, proof of the circumstances surrounding the accident clearly establish the *actus reus*. Furthermore, in *Precision*, the Court acknowledged similarities in what the Crown must prove and the defence of due diligence at para. 60:

> …We agree that the employer's obligation to establish on the balance of probabilities that it took all reasonable steps overlaps with the requirement we have imposed on the Crown to prove it was reasonably practicable for the employer to address the unsafe condition through the particularized efforts. However, these remain distinct inquiries subject to different standards of proof. Certain factors, such as mistake and employee error, may affect the due diligence defence in ways that will not affect the *actus reus* assessment. Thus, it is possible for both sides to meet their obligations on the applicable standard of proof.

[81] I also find the comments of the summary conviction appeal judge in *Precision* to be relevant, noting that the Court of Appeal did not overturn her findings, but simply found that her reasons were not as clear as they perhaps could have been. The decision is cited as *R. v. Precision Drilling Ltd*., 2016 ABQB 518, and the relevant passage is at paras. 77 and 79:

> 77 A trial judge has to identify the appropriate standard of care in the particular situation which is being assessed. It will be rare that a trial judge can do this in a technical field without reliance on expert evidence, and rarer still that a trial judge can impose their own standard of care on an industry. …
>
> …
>
> 79 Therefore, where, as here, the evidence is that the accused followed industry standards, the setting by a trial judge of standards higher than industry compliance requires assessment, especially where there is no expert evidence on the issue. Here, the trial judge made no assessment of industry standards and legislation. In my respectful view, this was an error. …

[82] It is entirely logical and appropriate, in my view, to consider any applicable industry standards with respect to training and supervision in assessing whether the Crown has met its burden in proving the *actus reus*.

[83] That being said, much of the law around industry standards in the context of due diligence would be equally applicable at the *actus reus* stage. This would include the law as stated in *R. v. London Excavators & Trucking Ltd*. (1997), 34 W.C.B. (2d) 19 (Ont. Prov. Ct.), at para. 17:

> When any industry practice is found to exist, and when the application of that practice to a particular fact situation flies in the face of a specific statutory or regulatory requirement, such as in s. 228 of Regulation 213/91, then the industry practice must be considered overruled. The same can be said if the industry practice does not amount to due diligence. S. 228(2) of the Regulation declares that "The employer who is responsible for the excavation shall request the owner of the service to locate and mark the service." Industry practice must model itself after the Regulation.

[84] Similarly, in *R. v. Placer Developments Ltd*. (1983), 13 C.E.L.R. 42 (Y.T. Terr. Ct.), at para. 26, Stuart J. noted:

> No one can hide behind commonly accepted standards of care if, in the circumstances, due diligence warrants a higher level of care. Reasonable care implies a scale of caring. A variable standard of care ensures the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each case. The care warranted in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required, and the extent the accused could control the causal elements of the offence. (R. v. Gonder (1981), 62 C.C.C. (2d) 326 (Y.T. Terr. Ct.), at 332 -3)

[85] With those caveats in mind, I turn to the evidence of industry standards offered by the defendants' expert, Mr. Guderian.

[86] While Crown did not address Mr. Guderian's evidence in the context of the *actus reus*, they did raise two concerns about Mr. Guderian's report and evidence which need to be addressed.

[87] Firstly, they argue that there is a lack of uniformity in the industry with respect to the required level of supervision. This argument is based on excerpts of the legislation in British Columbia in relation to direct supervision requirements. Based on these excerpts, the Crown argues that the defence evidence about industry standards was inaccurate, or that industry standards do not comply with British Columbia law. The Crown acknowledges that the defendants are not subject to the British Columbia regulations in this case; however, the Crown also acknowledged that that direct supervision of MITs in British Columbia was not required under the regulations prior to April 30, 2020. In my view, amendments which may affect the current degree of uniformity across the industry, do no undermine Mr. Guderian's evidence on industry standards as the relevant standards in this case are those in place at the time of the accident.

[88] Secondly, the Crown raises a concern that Mr. Guderian apparently did not review Mr. Velasco's statement and discounted Mr. Tobin's statement in favour of information provided by Mr. Bentley. The Crown's questions in cross-examination suggest Mr. Tobin and Mr. Velasco may have raised concerns about Mr. Taranhike doing an installation on his own, at least after the fact. It must be noted that it was open to Crown to call either or both of these individuals as witnesses. Whatever they may have said in their statements is not in evidence before me.

[89] Even if I were to accept that Mr. Guderian's opinion was impacted as a result of this line of questioning, any suggestion of partiality would only have potential impact, in my view, on Mr. Guderian's opinion about whether or not the defendant's met industry standards. It does not impact on the reliability or credibility of Mr. Guderian's evidence with respect to industry standards on the training and supervision of elevating device mechanics more generally, the area in which he was qualified to give expert evidence.

[90] I can and do accept Mr. Guderian's evidence in this regard.

[91] Mr. Guderian's expert report was filed as exhibit 38 and was supplemented by his *viva voce* testimony. Of particular importance, is his explanation of the mechanic training pathway and procedure. The first nine steps are relevant and can be summarized as follows:

1. Safety training;

2. Registration as an MIT or apprentice;

3. Shoulder to shoulder supervision with a certified or temporary mechanic in which the mechanic gives an overall view of requirements, then starts teaching the easiest tasks and then moving on to more complex tasks;

4. Increased autonomy by having the MIT do small tasks themselves, and then having them do them independently once proficiency is demonstrated;

5. Smaller tasks are linked together into larger processes and the apprentice is left to work independently on these processes; it is not uncommon at this stage for the MIT to be left on their own for a day or two at a time, to build independence;

6. An optional step in which the MIT and mechanic do one final job together before the MIT leads a job of their own. This was described as a double check to ensure step 5 has been successful;

7. Another optional step in which the mechanic and MIT work side by side on parallel elevators at the same time;

8. The MIT is assigned a simple device, or a more complex but repetitive job if they have done a lot of work on a particular type of device. MITs are left to work independently without direct supervision, with the expectation that they will reach out to the employer if they encounter any problems. Generally, MITs reach this stage at one to two years;

9. An adjustor is sent to review and prepare for the final inspection. This is described as a key stage to determine if the MIT is fully ready to do installations on their own or if further training is required. This assessment is based on the number of errors noted. Three to four would be considered normal, but a dozen or more would be indicative of a particularly slow learning curve or an inability to meet the technical requirements.

[92] Mr. Guderian opined that Mr. Taranhike was in the eighth step at the MEL. As the project was 75% to 80% complete, Mr. Taranhike was within days of step nine where an adjustor would be sent in to complete the job. Mr. Guderian also believed that Mr. Taranhike had had the benefit of both the optional sixth and seventh steps. The first being the installation of the Elias LULA and the second being the work installing multiple traction elevators at Whistle Bend. Although it must be acknowledged that Mr. Taranhike was not present for the entirety of the installation of the Elias LULA.

[93] Mr. Guderian provided further evidence relevant to the assessment I must make. He noted that he is very familiar with Durham College as it is the only facility currently delivering the mandatory Ontario curriculum. He has toured the facility a number of times and was able to confirm that they have multiple elevating devices on site, including separate labs for hydraulic and electronics. This allows students to do complete assemblies and diss-assemblies as part of their training. Mr. Guderian further confirmed the evidence of both Mr. Taranhike and Mr. Bentley that Venture is the only company outside of Ontario to send employees to Durham College.

[94] Mr. Guderian also confirmed Mr. Bentley's evidence that a LULA is one of the most simple elevating devices to install, and that the Garaventa LULA came with one of the most thorough and comprehensive installation manuals either has ever seen.

[95] Finally, Mr. Guderian confirmed the evidence of both Mr. Bentley and Mr. Lee in relation to the critical importance of safeties on elevating devices, and that one would never, ever get on a moving platform without operational safeties.

The Actus Reus

[96] Against this backdrop, the ultimate question is whether the Crown has proven that both Mr. Bentley and Venture committed the prohibited acts.

[97] Crown argues that the following evidence is sufficient to find that the Crown has discharged its onus:

- While with Venture for over 3.5 years, Mr. Taranhike spent a significant amount of his time on administrative work as the safety officer;
- His experience “on the tools” was primarily on maintenance of existing elevators and installation of hydraulic elevators;
- He had limited experience working on traction elevators, and indicated that he felt he gained “knowledge but not understanding” at Whistle Bend;
- He did not participate in the full installation of the Elias LULA;
- Mr. Bentley did not review Mr. Taranhike’s Passport prior to the MEL, nor had he signed off on any of the tasks for Mr. Taranhike.
- Mr. Bentley did not have any discussion with Mr. Taranhike prior to the MEL install to attempt to discern Mr. Taranhike’s skill level to perform the work safely and competently;

- Mr. Bentley did not communicate with Mr. Taranhike about how the MEL install was going or perform any spot checks;

- Mr. Bentley was aware the MEL install was taking longer than normal;

- Mr. Bentley never reviewed any JHAs for the MEL install or confirm if they were being completed;

- Mr. Bentley never instructed Mr. Taranhike on any aspects of the MEL installation including safeties;

- The accident demonstrated that Mr. Taranhike fundamentally misunderstood the mechanical workings of the LULA and the importance of the safeties in an elevator with traction components.

[98] Given the differences in the essential elements of the two offences, clearly Mr. Bentley is referenced in the Crown's arguments both in his capacity as supervisor and as the operating mind of the corporate defendant.

[99] It bears repeating that at this stage the onus is on the Crown to prove the offences beyond a reasonable doubt. There is no onus on the defendants to disprove the offences. They need only raise a reasonable doubt to secure an acquittal.

Mr. Bentley

[100] Turning first to Mr. Bentley, the elements of the offence in his role as supervisor relate only to whether he ensured that Mr. Taranhike had proper instruction and his work was performed without undue risk.

[101] In terms of proper instruction, as the accident suggests issues in relation to both technical and safety aspects of the installation, proper instruction would require that Mr. Taranhike had been given sufficient training and experience in relation to both.

[102] With respect to safety instruction, there is more than enough evidence to raise a reasonable doubt. The evidence indicates that Mr. Taranhike had significant knowledge, training, and experience in relation to safety. He came to Venture with safety certification. He participated in online safety training when he began his employment with Venture. He completed a course in Elevator Device Mechanic Safety at Durham College and obtained a grade of 96. He was responsible for staff safety training. He not only read the Manual, but also revised and updated it. He was able to secure COR certification for Venture in both Alberta and the Yukon. He was provided with a copy of the Field Safety Handbook, which he had with him at the MEL site. He was provided with a comprehensive installation manual with clear and detailed descriptions, photographs, diagrams, with safety warning symbols and explanations throughout, which by his own account and that of his helper, he followed step by step. The installation manual explains the installation of the safeties and the correct, and safe, way to fix the travel problem.

[103] Based on all of this evidence, I do not find that Mr. Bentley was required to expressly instruct Mr. Taranhike on something as basic as the use of safeties on an elevating device.

[104] With respect to technical instruction, the question is not whether Mr. Taranhike was given exhaustive instruction, but whether he was given “proper” instruction. The

evidence of Mr. Guderian and Mr. Bentley was clear that it is virtually impossible for any mechanic to know absolutely everything, as there are differences from device to device. However, the same principles are applicable across devices and the mechanic must learn to apply those principles and adapt to the differences they encounter.

[105] While Mr. Taranhike did spend significant time on his safety responsibilities over his time with Venture, but his first solo elevator install was significantly later than the industry norm. This means his experience in elevator installation would have been spread out over a longer period of time. It does not was necessarily mean that his experience was deficient.

[106] The evidence establishes that Mr. Taranhike did have training and experience on the technical requirements of installation. He worked shoulder to shoulder with a mechanic for six to seven months and was involved in numerous hydraulic elevator installations, with his competency on a number of hydraulic installation tasks confirmed in his Passport. He spent a lot of time doing maintenance and repairs on elevators including three traction elevators. While not installation, the experience would nonetheless reinforce his understanding and familiarity with the mechanical workings of multiple different elevating devices.

[107] He successfully completed two terms at Durham College with high marks in relation to courses on both hydraulic and traction elevators, which included the opportunity to work on actual devices.

[108] I calculate that he had the equivalent of 3.5 months working on the installation of four traction elevators at Whistle Bend. While he also continued his safety

responsibilities, it is important to note that on cross-examination, he was asked how much time he spent on safety over this period of time. He responded by subtracting the time he spent on vacation and working at Whistle Bend from the overall time period to arrive at the amount of time devoted to safety. By that I conclude that 13 to 14 weeks was the amount of time actually spent on the Whistle Bend install and not on safety.

[109] As noted by the Crown, Mr. Taranhike indicated that his Whistle Bend experience gave him knowledge but not understanding of traction elevators. I have some difficulty with his evidence in this regard. It is hard to believe that with all his training and experience to that point, Mr. Taranhike somehow did not grasp how a traction elevator works. Rather it felt like a defensive rationalization to explain the accident at the MEL. But even if it was not, it does not change the fact that he was given the instruction. The issue is whether supervisory responsibilities in ensuring proper instruction were met, not whether learning was successful.

[110] Mr. Taranhike then had at least some experience on the installation and adjustment of an identical LULA device at Elias. Again, while not a full installation, I conclude that this experience would have familiarized him with the mechanical workings of the LULA.

[111] In terms of the LULA, Crown made much of the fact that most of Mr. Taranhike's experience related to hydraulic elevators and that his understanding of the traction elements of the LULA were deficient, presumably because of insufficient instruction.

[112] The difficulty I have with this argument is that it is inconsistent with the evidence. It presupposes that elevators are either exclusively hydraulic or traction, but that the

LULA is somehow a unique combination of the two. This is not my understanding of Mr. Bentley's evidence on this point. While Mr. Taranhike thought the LULA was classified as a handicap lift, or "HC", device for the purposes of his Passport, I prefer Mr. Bentley's evidence that the LULA is actually a passenger hydraulic elevator. He testified that type of device is based on what moves the elevator, either a hydraulic piston or electrical in the case of a traction elevator. Classification is not based on how the elevator is suspended and whether or not the device has ropes. Indeed, Mr. Bentley noted that there are roped hydraulic elevators.

[113] Ultimately, I am left with a reasonable doubt as to whether there was indeed a failure to ensure proper technical instruction.

[114] The remaining element with respect to the charge against Mr. Bentley is whether he failed to ensure Mr. Taranhike's work was performed without undue risk. It is important to note that the requirement is not to ensure the work is performed with absolutely no risk. Such a standard is impossible in this type of industry. The purpose of the legislation is to make the workplace as safe as possible by reducing the risk presented by the dangers inherent in the type of work.

[115] Given that the MEL LULA was a relatively simple elevating device; that Mr. Taranhike had some experience with an identical device immediately prior to the MEL project; Mr. Taranhike's extensive training and experience on workplace safety, and the availability of the necessary safeties to prevent this very type of accident, safeties that Mr. Taranhike apparently installed but then disengaged, I find that I am

also left with a reasonable doubt as to whether Mr. Bentley failed to ensure that the work was performed without undue risk.

[116] Based on these findings, I find that the Crown has failed to prove the charge in relation to Mr. Bentley to the requisite standard of proof beyond a reasonable doubt, and an acquittal must be entered.

Venture

[117] Turning to the charge against Venture, the Crown must prove beyond a reasonable doubt that Venture failed to ensure that Mr. Taranhike was given necessary instruction and training; that he was adequately supervised; and that it was reasonably practicable for the employer to address the unsafe condition through efforts that the employer failed to undertake

[118] With respect to the first of these essential elements, necessary instruction and training, I find that I am left with a reasonable doubt for the same reasons articulated with respect to Mr. Bentley.

[119] With respect to adequate supervision, however, I come to a different conclusion. That being said, some of the Crown's arguments in this regard are less persuasive than others. Firstly, with respect to Mr. Bentley not reviewing Mr. Taranhike's Passport before the MEL installation, while it makes some logical sense that an employer should be able to review a Skills Passport as a means of informing themselves as to the competencies of their workers, the uncontradicted evidence of Mr. Bentley was that

employers in British Columbia are not allowed to ask to see Passports because of what he referred to as “freedom of information”, which I took to mean privacy legislation.

[120] Next, with respect to the argument that Mr. Bentley was aware that the MEL installation was taking longer than the usual two to four weeks, for three reasons, I do not see this as a major red flag.

[121] Firstly, as Mr. Taranhike’s first solo installation, one would expect it to take longer than the norm for a more experienced mechanic.

[122] Secondly, there was evidence of other factors which would impact delay, including other tasks performed by Mr. Taranhike such as elevator maintenance elsewhere, and issues with site preparation. Specifically, Mr. Taranhike indicated that there were issues with power, the lack of a beam to tie off on, and the shaft being fully drywalled, all of which caused delay.

[123] Lastly, the evidence was not entirely clear as to how long the install was taking. Mr. Taranhike thought he started sometime in August but did not seem sure. The email from Ryan Young on September 26 seems to suggest that the installation was still in the early stages. There were no time sheets filed in relation to the start date. Nor was there any evidence as to the amount of time spent off site on other tasks or the amount of delay occasioned by the site issues. As a result, it was not exactly clear how much time the install was taking in comparison to the usual two to four weeks.

[124] The argument that Mr. Bentley failed to communicate with Mr. Taranhike about how the installation was going, or do spot checks, is contrary to the evidence with

respect to the industry standard articulated by Mr. Guderian at stage eight of the training pathway to the effect that the onus is placed on the MIT to reach out when they need help to encourage independence.

[125] Review of the JHAs is a bit of an odd situation. Venture clearly had an established process to ensure that JHAs were completed on a daily basis. The process had a clear enforcement strategy as mechanics were required to forward all JHAs to a designated person who would review them. Any issues would be raised at the safety meeting. The difficulty here is that Mr. Taranhike was the designated person to receive and review the JHAs for compliance. Perhaps a different person should have been assigned to receive Mr. Taranhike's JHAs, but it is not altogether surprising that this did not happen. The evidence indicates that Mr. Taranhike did complete the JHAs as required and kept them in a binder on site. There is no reason to disbelieve him on this point, as Mr. Mugadza did observe Mr. Taranhike preparing the paperwork. Unfortunately, the JHAs along with the LULA installation manual and some other items appear to have gone missing sometime after the accident.

[126] This leaves the argument that Mr. Bentley, and by extension, Venture, failed to take steps to assess Mr. Taranhike's skill level before assigning him to the MEL project. In my view, this argument is persuasive.

[127] The evidence with respect to assessing MIT competency was at best passive. Mr. Bentley testified that there were no official performance reviews conducted. As a small company, he said, pretty much, they all knew how everyone was doing. When asked specifically about Mr. Taranhike's competency, Mr. Bentley referenced the email

from Mr. Velasco in 2015 which referenced installation of a Richmond elevator. Mr. Bentley went on to say that no one had ever brought any issues with respect to Mr. Taranhike's performance to his attention.

[128] In my view, adequate supervision does require an employer to ensure employees are competent to take on the tasks assigned to them. The law is clear that an employer must develop appropriate systems to meet their obligations and to ensure these systems work. This is articulated in the decision in *R. v. Stelco*, [1989] O.J. No. 3122 (Ont. Prov. Ct.) at para. 40:

> Obviously I have made a finding that Stelco as a constructor has not been able to exonerate itself from the acts of its employees who should have anticipated the problems and acted accordingly. I must agree with the Crown that the obligation of the constructor is much more than to simply create a system to inform employers concerning their responsibilities under the Act, it must take the next reasonable step and ensure the effective operation of the system through its supervisors. Due diligence must in addition to a good system, establish that a person in charge is doing what he is supposed to do. Tesco Supermarkets Ltd. v. Nattrass, [1972] A.C. 153 (H.L.), 186.

[129] Furthermore, employers are cautioned about relying on advice received without taking steps to confirm its validity. In *R. v. London Excavators & Trucking Ltd.,* [1998] 40 O.R. (3d) 32, (C.A.), the Ontario Court of Appeal noted:

> 9 I respectfully agree with Mr. Arnott's characterization of the issue on this appeal and with the position he advances on that issue. Even though the appellant held the honest subjective belief that Cooper's supervisors had access to accurate locate information and had accurately imparted that information, the defence of mistake of fact was not established because it was not objectively reasonable for the appellant's foreman and backhoe operator to have accepted and acted upon that information without further inquiry.

[130] As Venture had no system in place to assess the skills and competencies of its employees and relied on information that was not objectively confirmed, I am satisfied that the Crown has proven beyond a reasonable doubt that Venture failed to ensure that Mr. Taranhike was adequately supervised.

[131] The remaining essential element is the requirement that the Crown prove the "so far as is reasonably practicable" requirement. Crown asserts that this element is established on the basis of the following reasonably practicable alternatives:

- Objectively assess Mr. Taranhike's competency, rather than assuming it, before assigning him to the MEL job;
- Assess his knowledge, skill and understanding of the unique aspects of the LULA elevator;
- Assign and arrange for a mechanic to mentor Mr. Taranhike through his first installation, whether in person or remotely;
- Contact Mr. Taranhike to ascertain why the job was taking so much longer than normal;
- Provide Mr. Taranhike with direct or indirect supervision during the course of the MEL job;
- Set up a system whereby Mr. Taranhike's JHAs were submitted and reviewed.

[132] Per the *Precision* case, this element requires the Crown to prove beyond a reasonable doubt, not just that there were reasonable steps that Venture could have taken, generally, but that it failed to undertake reasonable steps to address the unsafe condition. Thus, the question is whether these steps would have addressed the unsafe condition that resulted in the accident. This would include Mr. Taranhike's decisions to remove the platen plate and disengage the safeties. There is no concrete evidence indicating that Mr. Taranhike was struggling with other aspects of the MEL installation.

[133] An example of this requirement is seen in the trial decision in *Yukon (Director of Occupational Health & Safety) v. Yukon Tire Centre Inc. et al*. The case involved a fatal accident in which an employee was under a vehicle finalizing some work, while the keys were in the ignition and the engine was running. The vehicle was put in motion, and the employee was run over and killed. Faulkner J. determined that the implementation and enforcement of a lockout policy, as required by legislation, would have eliminated the clear risk of the vehicle being put in motion by leaving the ignition key in the vehicle.

[134] In assessing whether the recommended alternatives proposed by the Crown would similarly address the unsafe condition in this case, I find that contacting Mr. Taranhike to ascertain why the job was taking so much longer than normal is not persuasive. For reasons already stated, I am not satisfied that the evidence clearly established the nature and duration of delay.

[135] With respect to the JHAs, while I agree that it would have been advisable to arrange for Mr. Taranhike's JHAs to be reviewed by another person, there is no indication that anything in the JHAs would have alerted Venture to the unsafe condition,

particularly as Mr. Taranhike testified that he did not consider completing a JHA with respect to the removal of the platen plate.

[136] I am doubtful that a discussion about Mr. Taranhike's understanding of the LULA's components and his experience at Elias would necessarily have addressed the unsafe condition. It may have reinforced the importance of safeties, information Mr. Taranhike was well aware of, but would not likely have addressed the platen plate unless the discussion fortuitously happened to take place when Mr. Taranhike encountered the problem that led to the unsafe conditions.

[137] Similarly, while a formal assessment of Mr. Taranhike's skills and abilities would have been advisable in terms of ensuring appropriate supervision, as already noted, I am similarly doubtful that such an assessment would have addressed the unsafe condition. Mr. Taranhike managed to obtain extremely good marks at Durham College, including in traction elevators, and he managed to work with experienced mechanics at both Whistle Bend and Elias without there being any indication of deficiencies in his understanding about either the importance of safeties or the mechanical workings of a traction or LULA elevator.

[138] Some additional direct or indirect supervision or mentoring, again, may certainly have been advisable, and may possibly or even probably have addressed the unsafe condition provided it coincided with Mr. Taranhike's decisions to remove the platen plate and the safeties, or provided Mr. Taranhike was prepared to discuss the issue with a supervisor or mentor. I say this because the evidence suggests that Mr. Taranhike may

not have been prepared to volunteer any information that might have raised a question about his competence.

[139] Mr. Taranhike was fully aware that he could contact anyone at Venture for advice and assistance, and he had taken full advantage of the resources available to him in the past as was clear in both his *viva voce* testimony and the exhibit 17 email acknowledging all the help he had received.

[140] With respect to the MEL, however, Mr. Taranhike opted not to contact anyone at Venture, including Ryan Young who he knew to be a former manager at Garaventa and who he had been in contact with regarding both the Elias and MEL LULA installations. Instead, Mr. Taranhike opted to contact Garaventa to ask his questions.

[141] Mr. Taranhike was asked why he called Garaventa instead of Venture and his response was telling: "Good question. I think it was more that it was my first install, and I didn't want to give…yeah, I would say probably because it was my first install".

[142] In the result, while many of the suggestions of the Crown are entirely reasonable, good practice suggestions, and some of them may even, possibly, have addressed the unsafe condition, the standard of proof is proof beyond a reasonable doubt. Possibly or even probably are not enough to discharge the burden. Accordingly, I am left with a reasonable doubt on this final essential element.

[143] As Crown has failed to prove all the essential elements to the requisite standard, as required, the charge in relation to Venture has also not been made out and an acquittal must be entered.

[144] Based on my findings with respect to the *actus reus*, there is no need for me to address issues 5 and 6 in relation to the defence of due diligence.

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RUDDY T.C.J.