SUPREME COURT OF YUKON

Citation: *Director of Occupational Health and Safety v. Government of Yukon*, *William R. Cratty and P.S. Sidhu Trucking Ltd.*, 2012 YKSC 47

Date: 20120611
S.C. No. 10-AP014
10-AP015
10-AP018
Registry: Whitehorse

Between:

DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY

Respondent

And

GOVERNMENT OF YUKON, WILLIAM R. CRATTY AND P.S. SIDHU TRUCKING LTD.

Appellants

Before: Mr. Justice R.S. Veale

Appearances:

Lenore Morris	Counsel for the Director of Occupational Health and Safety
André Roothman	Counsel for William Cratty
Brian Beresh	Counsel for P.S. Sidhu Trucking Ltd.
Paul Devine and Sarah Hansen	Counsel for Government of Yukon

REASONS FOR JUDGMENT

INTRODUCTION

[1] On May 6, 2008, Peter Hildebrand, the blaster for P.S. Sidhu Trucking Ltd., set off an explosive charge on the Hamilton Boulevard Extension in the City of Whitehorse that resulted in numerous rocks (fly rock) falling on the ground and on some occupied homes in the nearby Lobird Trailer Court neighbourhood ("the Trailer Court"). One rock penetrated a trailer roof and ended up in the living room. Other fly rock hit roads, fences, sheds, vehicles and trailers. The Trailer Court was 149 metres from the blast

site located on the Hamilton Boulevard Extension. There was property damage to some trailers but fortunately no personal injuries.

[2] The trial judge convicted the Yukon Government, P.S. Sidhu Trucking Ltd. ("Sidhu Trucking"), and William R. Cratty ("Cratty") of various offences under the *Occupational Health and Safety Act,* R.S.Y. 2002, c. 159, (the "*OHS Act"*) and the OHS Regulations. Each of these defendants is now appealing its convictions on the basis of alleged errors in fact and law. Notably, the Yukon Government appeals its conviction on the ground that although it was the owner, it was not the "constructor" of the Hamilton Boulevard Extension project. The blaster pleaded guilty and was convicted of an offence contrary to OHS Regulations, Y.O.I.C. 2006/178, Part 14 ("Blasting"); specifically of s. 14.04(3), which reads "No blaster shall authorize or permit any work that may jeopardize the safety of any person."

[3] Offences under the *OHS Act* are strict liability offences. Once the prosecutor has proven beyond a reasonable doubt that a defendant has committed the prohibited act, the burden of proof shifts to the defendant to demonstrate, on a balance of probabilities, that it exercised due diligence to prevent the accident or conditions that led to it. See *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299.

THE EVIDENCE

[4] The Hamilton Boulevard Extension is a road which was created to conveniently link a number of Whitehorse subdivisions to the downtown core. Although within city limits, the Yukon Government, as owner, planned and paid for the construction of the road. In September 2007, Yukon Government and Sidhu Trucking signed a 143-page contract (the "Contract"), valued at approximately $9 million, in which Sidhu Trucking was contracted to construct the sub-grade and base construction of the Hamilton

Boulevard Extension, including rock blasting, common excavation and placement of rock fills, and other things (“the Project”).

[5] Sidhu Trucking had initially engaged a firm from Prince George, British Columbia, to undertake the blasting work. However, as the Project fell behind schedule, Sidhu Trucking instead brought in Peter Hildebrand, a local blaster (the “blaster”). He first obtained a blaster’s permit in 1975 when he came to the Yukon. He commenced road construction blasting in 1998 and, before this contract, had only blasted once in an urban setting. He had previously worked as a blaster with Paramjit Sidhu, the owner of Sidhu Trucking, at Whitehorse Copper, a copper mine that operated in the City of Whitehorse in the 1970s. Mr. Sidhu was also a blaster at that time.

[6] Division 1 (“General Requirements”) of the “Plans and Specifications” portion of the Contract states in s. 16.0 that “[b]lasting will be permitted only after securing the approval of the Owner” and notes that “such approval shall not be construed as approval of the methods employed by the contractor in blasting”. The General Conditions of the Contract define “Owner” as “the Government of the Yukon or its authorized agent or representative as designated to the Contractor in writing”. Before each blast, the blaster was required to prepare a one-page document, called the Proposed Blast Design, and provide it to Harvey Kearns, the Yukon Government Project Inspector (“Kearns”), for approval.

[7] The proximity of the Trailer Court to the road work presented an issue virtually from the beginning of the blasting work. On November 1, 2007, a piece of fly rock, the size of the owner’s fist, went through the roof of Trailer # 23 and landed on the living room floor. Trailer # 23 was located approximately 350 metres from the blast site. Kearns prepared an Incident Report dated November 7, 2007 about this event. The

Report was prepared in consultation with Cratty, who agreed that Sidhu Trucking would pay for the damage.

[8] The Incident Report stated at page 2:

> **Corrective Measures**
> - Proper communication between driller and blaster as to hole depths;
> - Loading the holes with a smaller amount of explosives;
> - Over drilling the holes to provide adequate collars and proper packing of holes;
> - Covering the shallow holes with sand or very fine material to stop fly rock;
> - If needed, he will get another blaster.

[9] The Incident Report was discussed at Site Meeting # 3. In minutes prepared from that meeting, Jeff Boehmer, the Yukon Government's Program Manager ("Boehmer"), stated:

> 4) YG Items:
> …
> f) Lobird Trailer Incident Report – HK [Kearns] had prepared a report on the incident and was good to see that the Contractor had instituted corrective actions to insure that future incidents did not occur. BC [Cratty] confirmed that the holes were not stemmed properly.

[10] "Stemming" refers to the loading and packing of the drill holes. Apart from Boehmer, the Yukon Government was also represented at Site Meeting # 3 by Pat Molloy (Director, Community Infrastructure Program) and Kearns.

[11] The blaster was not present for either the investigation preceding the Incident Report or the site meeting. At trial, he testified that he could not recall receiving the Incident Report. He did say that Cratty had told him about the November 1, 2007 incident, and he knew that a small rock had gone through the roof of a trailer in the Trailer Court.

[12] Following the November 7, 2007 Incident Report, it appears that the condition requiring shallow holes to be covered with sand or very fine material was followed for some of the blasts. However some of the blasts holes remained uncovered, including those drilled for the May 6, 2008 blast. The blaster had conducted 18 blasts along the roadway before the 19th blast on May 6, 2008.

The May 6, 2008 Blasting Incident

[13] The Proposed Blast Design for Blast #19, the May 6, 2008 blast, contained many details about the drilling and blasting required. Under Site Details, it stated:

> … Distance to nearest structure (utility) 400 (m)

[14] The blaster explained that 400 metres was "his own" estimate. He assumed it was a safe distance. He had a "general idea" that the Trailer Court was nearby. It is a fact that the Trailer Court was not visible from the blast site because of a hill.

[15] The Proposed Blast Design was given to Kearns.

[16] The actual distance to the Trailer Court was 149 metres. The blaster said he did not design the blast based on this distance. He admitted that if he had proper knowledge of the location of the Trailer Court, he would not have done the blast. He also testified that urban blasting was different than rural blasting because in urban blasting you have to be able to control your blast much more closely. He acknowledged that blasting was a risky business.

[17] The blaster did not use any blasting mats or sand to cover the drill holes on May 6, 2008. His general answer about why he had decided not to use mats was:

> It depends on where the location was and the type of hole. If I was under the impression or feeling that I was far enough away from where any fly rocks could hit anything, I would – wouldn't bother with the sand and gravel.

[18] The blaster also acknowledged that it was time-consuming and costly to cover a blast site with sand and gravel. A blast with 100 drill holes would take three or four hours to cover. He found mats to be cumbersome and heavy, and in some cases he found that they left a dangerous mess.

[19] For May 6, 2008, the blaster had proposed 380 drill holes, but Sidhu Trucking's drillers had drilled 423 holes. It was the biggest blast he had done to date. The blaster did not control the drillers who were employed by Sidhu Trucking.

[20] The May 6, 2008 blast caused considerably more damage than the November 1, 2007 blast. After the May 6, 2008 blast, there were rocks on the road leading to the trailers. A rock came through the roof of Trailer 212 and the blast caused damage to Trailers 214, 217 and 218. The rocks from the blast hit fences, sheds, vehicles and trailers.

[21] Guards had been placed at various locations around the Trailer Court, but none of the occupants had been notified of the blast. An investigator for the Director of Occupational Health and Safety took photographs of the damage and measurements of various distances from the blast site. Guard # 1 was 521 metres from the blast site, guard # 2 was 622 metres, guard # 3 was 358 metres, guard # 4 was 677 metres and guard # 5 was 355 metres from the blast site. However, Trailers 212, 112 and 218 were 166, 219 and 149 metres, respectively, from the blast site.

[22] As noted, Peter Hildebrand took responsibility for the May 6, 2008 blast by pleading guilty to a charge of permitting "a work that may jeopardize the safety of any person."

Trial evidence about the May 6, 2008 blast

[23] Scott Parker, an expert blaster called at the trial by counsel for the Director of Occupational Health and Safety, indicated that blasting is not an exact science, and he appeared very unwilling to blame the blaster. Had it not been for the fly rock incident, he testified that he would have considered the blast a success.

[24] Mr. Parker did acknowledge that there was zero tolerance for fly rock in urban settings. He pointed out some of the things that could have been done to eliminate this risk:

1. the drill holes could have been deeper;
2. the drill holes could have been covered with blasting mats or sand, which would have significantly reduced the risk;
3. the number of drill holes could have been reduced; and
4. the drill holes could have been spaced closer together.

[25] Mr. Parker went as far as saying he might have made the same decisions as the blaster, but he acknowledged that it was the blaster's responsibility to know the location and distance of the buildings and to readjust his blast if necessary. He said that there should have been a measurement done by a surveyor. The engineer or site inspector who received the blast records should have informed the blaster of the distance. He also said that an orientation to the risks on the site should have been conducted by the superintendent, the owner, or the owner's engineers.

[26] Counsel for Sidhu Trucking cross-examined Mr. Parker on the issue of rock fractures and how they would have affected blasting:

> Q Yesterday, on cross-examination again, there was much discussion and there were photographs put into evidence showing that there's fracturing in the rocks,

> and I was left with the impression that a blaster drilling and putting explosives into that setting has no idea what it is that they're going into. So if – are there ways that a blaster can acquire knowledge of the nature of the rocks; so, for instance, in this case, the fracturing of the granite?
>
> A Fracturing of granite was common throughout the Canadian Shield in the east and throughout the plutonic complex in the west. A blaster with even four or five years experience in that rock would encounter that same problem numerous times, or not – just about every time actually. That fracturing within the top five metres of the surface and the ground here is commonplace, that he should be able to look for it, anticipate, and take actions to accommodate it.

[27] Jeff Boehmer testified at the trial. He is an engineer who has worked for the Yukon Government for 25 years. This was his first blasting project. He acknowledged receiving the Proposed Blast Design reports from Kearns, but he did not read the section setting out the distance to nearest structure.

[28] Boehmer acknowledged that the Yukon Government, as owner, had many contractual provisions with Sidhu Trucking to ensure blasting safety, but he said that blasting was ultimately the responsibility of Sidhu Trucking as the contractor. Boehmer acknowledged being very nervous after the fly rock incident on November 1, 2007. He had previously issued a contract addendum on August 29, 2007, containing the following provisions on Rock Removal:

> 3.2.11 Blast rock in such a manner that the maximum dimension of rock fragments is less than 1 meter.
>
> 3.2.12 Blast rock in such a manner as to contain "flyrock" within cleared limits.
>
> 3.2.13 When blasting near existing infrastructure use suitable means to protect infrastructure. Pay particular attention to the existing o/h hydro line crossing and the existing Lobird water line crossing

> the r/w. Use matts (sic) to control flyrock under hydro line as required.

[29] Boehmer stated that the Yukon Government's role was not to tell the contractor how to do its work but rather to monitor the construction progress and check on compliance. He advised that after the May 6, 2008 blast, blasting mats were brought in, blasts were smaller with 50 – 60 drill holes, and sand was placed over the blast site before the blasting mats were laid. There were no fly rock incidents after the May 6, 2008 blast.

[30] The Director of Occupational Health and Safety (the "Director") testified that at approximately 10:15 a.m. on May 7, 2008, he received a telephone call from Kearns indicating that there had been a "blasting incident" the previous evening. At the same time, the Director's assistant received a phone call from Cratty reporting the same thing. The Director advised that his office has an answering service that monitors phone calls 24 hours a day. There is also an on-call safety officer available to respond to calls and a list of names for the answering service to call, should the on-call safety officer not be available. The Director testified that immediate reporting is required to ensure that there is no tampering with the scene when an incident occurs.

[31] The Director also stated that he did not at any time read or review the Contract between the Yukon Government and Sidhu Trucking.

The Trial Judge's decision about liability

[32] Yukon Government, Sidhu Trucking, and Bill Cratty were charged on three separate informations with offences under the *OHS Act* with respect to the May 6, 2008 blast. As noted, Peter Hildebrand pleaded guilty to an offence under the OHS Regulations.

[33] The Yukon Government was charged as a constructor under ss. 4(a) and (b) of the *OHS Act*, for failing to ensure that the measures and procedures prescribed by the *OHS Act* and OHS Regulations were carried out and for failing to ensure that employers and other persons working on the project complied with the *OHS Act* and OHS Regulations. It was convicted of s. 4(a) only, as the judge applied the rule in *R. v. Kienapple*, [1975] 1 S.C.R. 729, to the second charge.

[34] Sidhu Trucking was charged as an employer under ss. 3(1)(a) and (b) of the *OHS Act* for failing to ensure that the processes under its control were safe and without risks to health and for failing to ensure that work techniques and procedures to prevent the risk of occupational injury were adopted. It was also charged under the OHS Regulations for allowing its worker to engage in blasting activities that jeopardized the safety of persons in the Trailer Court (Part 1, s. 1.04(a) and (b)) and for failing to immediately report the incident (Part 14, s. 14(12)(a)). It was only convicted under section 3(1)(a) of the *OHS Act* and s. 14(12)(a) of the OHS Regulations, again because of the application of *Kienapple*.

[35] Cratty was charged with failing, as a supervisor, to provide proper instructions to the blaster and ensure that he performed his work without undue risk (s. 7 of the *OHS Act)*. He was also charged under the Blasting part of the OHS Regulations for failing to immediately report the incident (Part 14, s. 14(12)(a)). He was convicted of both on these charges.

[36] As will become clear below, highly relevant to this appeal are the characterizations of the roles of Yukon Government and Sidhu Trucking in the project, in that Yukon Government was charged as a constructor and Sidhu Trucking as an employer.

[37] The trial judge relied upon a quote from *J. Stoller Construction Limited v. the Queen*, (November 28, 1986, unreported Ont. Prov. Ct.) (“Stoller”) to conclude that “it is beyond doubt” that Yukon Government was the constructor of the Project.

[38] The trial judge’s reasoning is set out at para. 11 of his decision:

> The Government of Yukon is clearly the owner of the project. It put out the tenders for the project, entered into the construction contract and paid the cost. However, in this case, the Department of Community Services was much more involved in the project than simply hiring a contractor and paying the bills. It retained overall control and management of the entire Hamilton Boulevard Extension Project, of which the contract with Sidhu Trucking was only a part. The Department had an in-house engineer, Mr. Boehmer, who was designated as "Program Manager". The Department also maintained a full-time inspector, Mr. Kearns, on the job site itself. The contract with Sidhu Trucking was very detailed and specific as to how construction was to be carried out. In particular, it required that blasting plans be provided to the Department in advance of all blasts. These plans, including plans for the May 6th blast, were forwarded from Mr. Hildebrand to Mr. Boehmer for his review.

ISSUES

[39] The following issues will be addressed:

1. Did the trial judge err in finding that members of the public are protected by the *OHS Act*?
2. Did the trial judge misinterpret the evidence of the blaster and the expert and err in finding that the blasting incident was foreseeable?
3. Did the trial judge err in finding that Sidhu Trucking was in control of the blasting process?
4. Did the trial judge err in determining that Sidhu Trucking failed to exercise due diligence?

5. Did the trial judge err in determining that Cratty as supervisor failed to exercise due diligence?

6. Did the trial judge err in finding that Sidhu Trucking and Cratty did not report the blasting incident to the Director of the Community Infrastructure Program “immediately”.

7. Did the trial judge err in law in convicting the Yukon Government as a “constructor” under s. 4(a) of the *OHS Act*?

The Standard of Review

[40] An appeal is not a re-trial of a case. The standard of review is set out in *Housen v. Nikolaisen*, 2002 SCC 33. The standard of review for a question of law is correctness. The standard of review for a finding of fact or inference of fact is that the trial judge cannot be reversed unless he has made a “palpable and overriding error” i.e. an error that is plainly seen. Matters of mixed fact and law lie along a spectrum between the two standards, but where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error (see para. 36 and preceding discussion).

ISSUE # 1: Did the trial judge err in finding that members of the public are protected by the *OHS Act*?

[41] This submission of Sidhu Trucking and Cratty is essentially that the *OHS Act* is for the protection of workers and not the public. Since it was the public that was affected by the May 6, 2008 blast, the OHS scheme is not an appropriate vehicle for a prosecution. There are four main submissions that make up this argument:

1. the purpose of the *OHS Act* is solely to protect and promote the health and safety of the workplace which did not include the Trailer Court;

2. the safety of non-workers outside the workplace was not in the contemplation of the legislation when the law was proclaimed;

3. there is no evidence that any contractor or employee was at risk during the blast on May 6, 2008; and

4. the residents of the Trailer Court are not prejudiced by this interpretation because they have a civil remedy for damages.

[42] In my view, it is quite correct that the primary purpose of the *OHS Act* is to protect workers and the workplace. Nevertheless, to say that this is all it protects is an unduly narrow interpretation not in keeping with s. 10 of the *Interpretation Act*, R.S.Y. 2002, c. 125:

> Every Enactment Remedial
>
> 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.

[43] This section of the *Interpretation Act* has been interpreted as encouraging courts to give a broad rather than a narrow interpretation to a remedial public welfare statute.

[44] I also note that the *OHS Act* is very similar to Ontario's *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (The Ontario *OHS Act)*. In *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 370 (CA), Sharpe J. set out a helpful interpretative principle at para. 16 that accords with my application of the *Interpretation Act*:

> 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.

[45] Further, as the trial judge here pointed out, the *OHS Act* refers to “any other person” and “another person” in its “Hazardous Work” sections (ss. 15 and 16). It would be a narrow interpretation indeed to find that an unsafe practice in the workplace requires evidence of specific endangerment to a worker, as opposed to the general public.

[46] The duties of a party to a project caught by the *OHS Act* are not limited to situations where workers are endangered or injured but rather require that work is performed without undue risk to anyone and that the workplace is safe. The whole purpose of the *OHS Act* is to promote safe practices in the workplace at all times. This includes safety for members of the public that are in proximity to the workplace.

[47] In my view, the trial judge has interpreted the *OHS Act* correctly and it would be a perverse interpretation to allow a defence that, in the words of the trial judge, essentially says “my activities didn’t endanger my workers; they only endangered the general public”.

Issue # 2: Did the trial judge misinterpret the evidence of the blaster and the expert and err in finding that the blasting incident was foreseeable?

[48] This argument was jointly made by Sidhu Trucking and Cratty. The trial judge found that the defence of due diligence was not available because the risk of the blast was foreseeable.

[49] Sidhu and Cratty submit that the judge erred in relying on the admission of the blaster that he would have done things differently had he known that the Trailer Court

was 149 metres away rather than the 400 metres indicated in his blasting report. This submission draws on the statement of Hillier J. in *R. v. Lonkar Well Testing Ltd.*, 2009 ABQB 345, at para. 36 that:

> … the wisdom gained by hindsight is not necessarily reflective of reasonableness prior to the incident …

[50] Counsel for Sidhu Trucking and Cratty say that we do not know for certain that knowledge of the actual distance from the blasting site to the Trailer Court would have made any difference in the planning and execution of the blast, especially given that the expert stated that the blast was 98% successful.

[51] In particular, counsel suggest that, despite the finding of the trial judge, the following exchange does not establish distance as a relevant factor to the consequences of the blast:

> Ms. Morris: Okay. You indicated that you were performing the blast to industry standards. And so I'm going to put it to you: If you were in the situation again, blasting 423 holes, some of them shallow, at a site that's less than 200 meters from residents; the blast in uncovered, would you do it that way again?
>
> Mr. Hildebrand: If I would have had the proper knowledge I wouldn't have done it in the first place, and if I had the proper information, I wouldn't have done it on May the 6th of 2008. And again, I would answer your question: If I knew, I wouldn't do it again, no.

[52] I disagree with counsel's interpretation. I find that it was perfectly appropriate for the trial judge to infer from this exchange that distance was an important factor in the decisions made about the May 6, 2008 blast.

[53] Elsewhere in his evidence, the blaster made other references to the relevance of distance in executing blasts:

Q No. Can you tell me what was behind your decision to use mats in some cases and not in others?
A It depends on where the location was and the type of hole. If I was under the impression or feeling that I was far enough away from where any flyrock could hit anything I would – wouldn't bother with the sand and gravel.
Q Is it time-consuming or expensive to apply either mats or sand and gravel cover?
A It's a bit more time-consuming, yeah, it is.
Q How much time, say? If you have – say you have a blast with 100 holes in it, how much time would it add?
A Probably three or four hours.

[54] Again, in examination in chief of the blaster:

Q Yeah. Some of the blasts were uncovered. Why was that?
A Well, I was confident I was far enough away from any structures.
Q What's the disadvantage to – why wouldn't you do it every time?
A Well, if you don't need it, why do it?
Q It takes time; is that right?
A It does take time, yeah. Yeah, all of it does take time.
Q Does it cost money?
A If it's not necessary, then why would you do it?
Q Does it add to the costs?
A Well, it does add to costs, obviously.

[55] The evidence of the expert confirmed the importance of the distance between the blast and structures:

Q The – and any of the other things that we're referring to, though, I mean, the covering, the mats, is there anything that you think would have been done? I mean, in this case we know, and you pointed out, that the blaster indicated he didn't know the distance to the surrounding buildings.
A To give you an idea, I went on the site now knowing the location of the Lobird Subdivision. I stood basically where the shot was, looked around and went "What subdivision?" Would he have been reasonably aware that he was that close to a subdivision? After being so long on the site, having shot that many shots

> up to that point, would it have been a reasonable expectation for him to know it was there? Yes. That was his responsibility to ensure that he knew where those things were. That's a blaster's responsibility in an urban setting.
>
> Q Given the location there where you can't see the subdivision from the blast site, would it have been – would you have expected him to have asked to see a map of the area?
>
> A Yes, and there should have been enough people walking over and tapping him on the shoulder and saying "oh, by the way, it's right there." That's – when I go on site, when I give orientation to blasters, they know where the manholes are, the sewer lines are, they're going to go around and find the property points; that that lady in that house, okay, doesn't like her china cabinet rattling; do something about it. You're going to have to readjust your shot. In an urban setting you have to take those all into consideration. You have to know your surroundings.
>
> Q Should someone have provided that information to the blaster?
>
> A Yes.
>
> Q Who do you think should have?
>
> A That should have come back from – I would have expected it from some engineers in the form of a measurement conducted by a surveyor, knowing the distance from the shot to the Lobird Subdivision to the nearest ten feet. And the site inspectors and that sort of things who he submitted the blast records to should have looked at it and "oh, by the way, it's right there." And he would have looked at it, "I got to do things differently."

[56] The trial judge did not misinterpret the evidence of the expert and the blaster. Distance is a relevant consideration when planning a safe blast, and, on the evidence, it seems that an informed understanding about the proximity of buildings to the blast site would have led to different choices in planning the May 6, 2008 blast.

[57] Counsel for Sidhu Trucking and Cratty go further, also arguing that the fact that the blast was imperfectly planned does not change the fact that the outcome of the blast was not reasonably foreseeable.

[58] I disagree with this submission as well. Damage from the blasting incident was foreseeable. Neither the expert nor the blaster testified differently. They both acknowledged that blasting was inherently dangerous. Moreover, counsel's foreseeability argument becomes very tenuous when one considers the November 7, 2007 incident, which demonstrated that there was a real potential for fly rock to land in the Trailer Court if proper safety precautions were not followed. Past experience can be a reliable predictor of future incidents or damage.

[59] The reliance of counsel on the statement of Hillier J. in the *Lonkar* case, above, is misplaced and taken out of context. *Lonkar* involved a sweet gas well operation where Lonkar provided a pressure vessel, housed in a trailer, to measure the service flow rate of the gas well. A piece of equipment called a Meter Run malfunctioned and had to be replaced. Certain repairs were started but the Meter Run was to be left intact until the Lonkar supervisor returned. By the time the supervisor returned, an employee was dead having removed more parts from the equipment. The major factor in the death was a low level of oxygen. In those circumstances, Hillier J. determined that Lonkar took reasonable care. While this summary does not do justice to the complex facts in the *Lonkar* case, I conclude that the facts are quite distinguishable from the blasting incident in the case at bar. Although the wisdom gained by hindsight is not necessarily reflective of reasonableness, in the case at bar the practical wisdom gained from the November 7, 2007 experience should have informed reasonableness and safe practice.

[60] I conclude that the trial judge did not misinterpret the evidence of the blaster and the blasting expert, and did not err in finding that the blasting incident was foreseeable.

ISSUE # 3: Did the trial judge err in finding that Sidhu Trucking was in control of the blasting process?

[61] As noted, the trial judge convicted Sidhu Trucking as an employer under s. 3(1)(a) of the *OHS Act* for "[allowing] its worker to engage in blasting activities in a manner that caused flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, …"

[62] Section 3(1)(a) of the *OHS* Act states:

> 3(1) Every employer shall ensure, so far as is reasonably practicable, that
>
> > (a) the workplace, machinery, equipment, and processes under the employer's control are safe and without risks to health;

[63] For liability under s. 3(1)(a), a process must be "under the employer's control".

[64] Counsel for Sidhu Trucking submits that the blaster was hired as an independent contractor, not as an employee. Counsel relies on the case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, at para. 34:

> If the employer does not control the activities of the worker, the policy justifications underlying vicarious liability will not be satisfied.

[65] Unfortunately, the *Sagaz Industries* case is discussing the law of vicarious liability in a civil context, where different considerations apply.

[66] The case of *R. v. Wyssen* (1992), 10 O.R. (3d) 193 (C.A.), is a more applicable decision as it was made in the context of an Ontario *OHS Act* prosecution. The precise issue was whether the Ontario *OHS Act* applied to the employer of an independent contractor. Section 14(1)(c) of the Ontario *OHS Act* stated that the employer shall

ensure that the measures and procedures prescribed are carried out in the workplace.

The Ontario Court of Appeal decided at para. 15:

> … The employer's duty under the Act and Regulations cannot be evaded by contracting out performance of the work to independent contractors. …

[67] The question under the Yukon *OHS Act* is not whether the blaster was an independent contractor but whether the blaster was under the control of Sidhu Trucking. I conclude that Sidhu Trucking had control over the blaster for the reasons articulated by counsel for Yukon Government, specifically:

> (a) Sidhu Trucking chose which blaster was employed;
>
> (b) Sidhu Trucking planned and designed the blasting in conjunction with its blaster subcontractor;
>
> (c) Sidhu Trucking organized and supervised the blaster and its other workers at the workplace and had day-to-day control over activities at the workplace;
>
> (d) Sidhu Trucking hired and instructed its workers on notification to residences of the blasting and enforced safety areas during the blasting to control safe access;
>
> (e) Sidhu Trucking was required to maintain safety manuals and equipment as well as a health and safety supervisor on site during the blasting; and
>
> (f) Sidhu Trucking was required to give notice to YTG prior to any blasting.

[68] In addition, Sidhu Trucking provided the materials, including explosive materials, employed the drillers who drilled the holes into which explosives would be set, and controlled the number of holes drilled.

[69] I have no difficulty concluding that the blasting process was under the control of Sidhu Trucking and the trial judge made no error in that regard. This does not mean that

it was under the *exclusive* control of Sidhu Trucking, but that is not required under the *OHS Act,* which creates overlapping obligations between owners, employers and constructors, to ensure every participant in a construction project has a safety focus.

ISSUE # 4: Did the trial judge err in determining that Sidhu Trucking failed to exercise due diligence?

[70] 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)*, cited above, at p. 1331:

> … Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. …

[71] Counsel for Sidhu Trucking submits three arguments in support of its position:

1. that Sidhu Trucking discharged its duty of due diligence by hiring a qualified expert to perform the blast;
2. that Sidhu Trucking had no duty to provide maps to the blaster to verify the distance from the Trailer Court; and
3. that Sidhu Trucking had no way of knowing whether 149 metres was a safe distance or not.

[72] I disagree with these submissions. As I stated above, the overlapping obligations set out in the *OHS Act* are created to ensure that everybody has an obligation to ensure a safe blast.

[73] The trial judge correctly focussed on the distance of the blast from residences, especially in light of the damage caused by fly rock in the November 7, 2007 incident, and the fact that both the expert and the blaster confirmed the importance of distance. The November 7, 2007 Incident Report, with which Sidhu Trucking's supervisor Cratty was directly involved, specifically referred to the practice of "covering the shallow holes with sand or very fine material to stop flyrock". Either having the blaster at the meeting in which the Incident Report was discussed, or otherwise reviewing the concerns and recommendations with him, would have been, in my view, the minimum effort necessary for compliance with due diligence. This did not happen, and neither did Cratty ensure that the blaster used sand to cover the blasts or take other steps to protect the Trailer Court. I note that Sidhu Trucking was also responsible for the 423 holes drilled rather than the 380 anticipated by the blaster.

[74] I find that the obligation to establish due diligence on the balance of probabilities has not been met by Sidhu Trucking. There is no evidence that there was a system or practice in place before blasting to ensure safety. Specifically, Sidhu Trucking had expressly contracted in para. 36 of the Contract to fully comply with terms and conditions imposed pursuant to the *Yukon Environmental and Socio-economic Assessment Act,* S.C. 2003, c. 7, which included:

> 26. The proponent shall ensure adequate separation distances between active blasting locations and all people/vehicles/equipment not associated with the blasting activities

[75] I conclude that the trial judge correctly determined that Sidhu Trucking did not exercise due diligence and failed as an employer to ensure that blasting processes under its control were safe and without risks to health.

ISSUE # 5: Did the trial judge err in determining that Cratty as supervisor failed to exercise due diligence?

[76] The submissions by counsel for Cratty are similar to those of Sidhu Trucking, as he is similarly interested in establishing that he exercised due diligence.

[77] The trial judge convicted Cratty on the charge that contrary to s. 7(a) of the *OHS Act*, he, as a supervisor, failed to ensure that a worker holding a blaster's permit received proper instruction and performed his work without undue risk.

[78] Counsel for Cratty relies upon the fact that when the blaster testified, he did not criticize Mr. Cratty's supervision or instruction. Counsel submitted that Cratty's only obligation was satisfied when he met the terms of the *OHS* Regulations for blasting which states:

> 14.04 (1) A blaster shall be assigned responsibility for conducting or directing any blasting operations.
>
> (2) No person shall conduct or direct any work in the blasting area without the prior approval of the blaster responsible for that area.
>
> (3) No blaster shall authorize or permit any work that may jeopardize the safety of any person.

[79] Counsel submitted that Cratty could not second guess the blaster.

[80] I do not agree that the supervisor can say that his obligation under the *OHS Act* was met by the simple act of hiring the blaster. The obligation in s. 7(a) to ensure proper instruction must include reviewing the Contract and regulations that specifically relate to blasting, particularly in an urban area when the blaster hired had no previous similar experience. That obligation would also include a review of the November 7, 2007 incident and the Incident Report with the blaster and ensuring that all blasts had

complied with the critical corrective measure of “covering the shallow holes with sand or very fine material to stop fly rocks”.

[81] The trial judge did not err in finding Cratty did not exercise due diligence.

ISSUE # 6: Did the trial judge err in finding that Sidhu Trucking and Cratty did not report the blasting incident to the Director of the Community Infrastructure Program “immediately”.

[82] Section 14.12 of the *OHS Regulations* requires that the employer and supervisor “immediately” report “an unusual occurrence with explosive materials”. The trial judge found that the blast occurred at approximately 7 p.m. on May 6, 2008, and was reported at 10:15 a.m. on May 7, despite the Director maintaining an answering service 24 hours a day, 7 days a week. The trial judge found that the word “immediately” has a clear and unambiguous term meaning “without delay” or “without an interval of time”.

[83] Counsel for Sidhu Trucking and Cratty raise two points on this issue. The first is that “immediately” should be interpreted as meaning “with reasonable promptness, having regard to all the circumstances in the particular case”. See *Regina ex rel. Ingalls v. Lambert*, [1960] N.B.J. No. 5, at para. 38. Specifically, counsel submit that it would be of paramount importance to first secure the area and ensure the safety of everyone in close proximity to the blast.

[84] I certainly agree that the circumstances of each incident vary and must be given consideration in the context of a defence of due diligence. However, a 15-hour delay does not reflect due diligence here, given that the accident happened in the City of Whitehorse and the Director could have been easily contacted any time during the 15-hour period.

[85] Counsel submitted that I should consider the evidence of the blaster, who testified to watching Cratty phone Occupational Health and Safety, receive no answer, and say “Well, I guess I’ll have to phone them tomorrow morning”.

[86] The trial judge, without ruling on the admissibility of the evidence, decided that one attempt to call does not suffice to establish due diligence.

[87] I find that the trial judge has not erred in his interpretation of the word “immediate” or its application in these circumstances.

ISSUE #7: Did the trial judge err in law in convicting the Yukon Government as a “constructor” under s. 4(a) of the *OHS Act*?

[88] This final issue is, in my view, the most complex one.

[89] The sections of the *OHS Act* under which the Yukon Government was convicted are as follows:

> s. 1 Interpretation
>
> In this Act,
>
> …
>
> "constructor" means a person who undertakes a project for an owner and includes an owner who undertakes all or part of a project by themselves or by more than one employee;[1]
>
> …
>
> *Constructor's duties*
>
> 4 Every constructor shall ensure, so far as is reasonably practicable, that during the course of each project the constructor undertakes
>
> (a) the measures and procedures prescribed by this Act and the regulations are carried out on the project;

[1] I note that the word “employee” was used in the definition of constructor in 2008. It was amended to read “employer” in s. 6 of the *Miscellaneous Statute Law Amendment Act, 2010*, SY 2010, c. 12.

> (b) every employer and every person working on the project complies with this Act and the regulations; and
>
> (c) the health and safety of workers on the project is protected.

[90] Throughout the Contract, the Yukon Government is described as “the Owner” and Sidhu Trucking is described as “the Contractor”.

[91] General Condition 47.2 of the Contract states:

> The Contractor shall familiarize its officers, employees, agents and subcontractors with the terms of the Occupational Health and Safety Act, R.S.Y. 2002, c.159 and Regulations passed thereunder to ensure complete understanding respecting the obligations, duties and responsibilities imposed and compliance required. The Contractor acknowledges that it is, and assumes all of the responsibilities and duties of, the ‘Constructor’ as that term is defined in the Occupational Health and Safety Act, and agrees that it shall, as a condition of the Contract, comply with the Occupational Health and Safety Act and Regulations. (my emphasis)

Submissions of the Director of Occupational Health and Safety

[92] Counsel for the Director of Occupational Health and Safety takes the position that the Contract between Yukon Government and Sidhu Trucking stipulated not only what the Contractor would do but, in many instances, how the Contractor would perform it. This, she says, reflects the reality that the Yukon Government assumed a ‘Constructor’ role in the Project.

[93] In support of this, she notes that the Yukon Government had four employees who regularly worked on the Project:

1. Harvey Kearns, the Project Inspector, worked on the Project close to full-time and prepared the Incident Report dated November 7, 2007. He also

received the Proposed Blast Design report for the May 6, 2008 blast which caused the damage;

2. Jeff Boehmer, an engineer, was the Program Manager for the Project. He was also designated the “Engineer” under the Contract and assumed the powers and responsibilities assigned to that role;

3. Two site surveyors were employed by the Yukon Government. A survey company was also contracted to provide layout services and calculate rock volumes.

[94] Counsel for the Director of Occupational Health and Safety pointed to the following terms of the Contract as evidence that the Yukon Government was able to closely direct how certain work on the Project was to be done:

1. the Engineer was entitled to have access to the work at all times, to require information on the Project from the Contractor and the Contractor had to provide “every possible assistance.”;

2. the Engineer could require the Contractor to remove the superintendent or any employee from the Project;

3. the Engineer could require the Contractor to do any work at the Contractor’s expense to ensure compliance with the Contract;

4. the Contractor required the approval of the Yukon Government before blasting and “such approval shall not be construed as approval of the methods employed by the Contractor in blasting, the sole responsibility therefore being that of the Contractor”;

5. the Contract required the Contractor to submit proposed blast designs containing the following detail:

> Indicate proposed method of carrying out work, types and quantities of explosives to be used, loading charts and drill hole patterns, type of caps, blasting techniques, blast protection measures for items such as flying rock, vibration, dust and noise control. Include details on protective measures, time of blasting and other pertinent details.

6. the Contract also required the Contractor to “visit property holders of adjacent buildings and structures to determine existing conditions and describe blasting operations”;

7. in addition, under the heading Protection, the Contractor was required to:

> Prevent damage to surroundings and injury to persons in accordance with proposed lasting plan. Erect fencing, post guards, sound warnings and display signs when blasting to take place, or use any other measures deemed necessary to protect public and adjacent structures.
>
> Place display sign at rock gardens climbing face to advise of blasting schedule. Place public announcements on local radio to advise of blasting schedule.
> Notify Yukon Aviation Department of proposed blasting locations. Provide UTM coordinates of proposed blast area.

8. the Engineer could schedule pre-construction meetings and site meetings for issuing instructions from the Owner or Engineer;

9. the Contractor was required to prepare and maintain a construction schedule for approval or revision by the Engineer;

10. the Engineer could permit other contractors to be on the worksite;

11. the Engineer could retain any expert to examine completed work and if not performed in accordance with the Contract, the Contractor had to pay the costs of the expert.

[95] In this factual context, counsel for the Director submitted that the trial judge's determination that the Yukon Government was the Constructor on the Project was appropriate, given the following legal and policy considerations:

1. The terms of the Contract are important but the Yukon Government cannot contract out of public interest legislation. See *Royal Trust v. Potash*, [1986] 2 S.C.R. 351, at para. 40.
2. On any construction project, there must be one party who is the Constructor, and whether a party is an "owner", "constructor" or "employer" must be determined on the facts of each case rather than by private agreement of the parties.
3. The Contract detailed not merely what the Contractor was to do, but how he was to do it. Because the terms set out above are "how to" terms, the trial judge correctly decided that the Yukon Government is the Constructor.
4. The Yukon Government fit the definition of Constructor in the Contract and under the *OHS Act*, as an "an owner who undertakes all or part of a project … by more than one employer"[2].
5. The Yukon Government was also "the person who enjoys and can exercise the greatest degree of control over the entire project". This meets the common law definition of "constructor" as articulated in *Stoller*,

[2] I note that counsel sometimes used the word "employer" in the definition of constructor but at the time of the offence it was "employee", see footnote 1, above.

The Yukon Government Submission

[96] Counsel for the Yukon Government submit that the trial judge erred in finding the Yukon Government was the Constructor in that:

> (a) he wrongfully concluded that the blasting incident occurred during the course of a project undertaken by Yukon Government, and in doing so, improperly imposed a burden on the Government as owner of the Project to act as the constructor;
>
> (b) he drew unreasonable conclusions of fact which were unsupported by evidence about the role of the Yukon Government and its employee, who attended on the project only to ensure contractual compliance.
>
> (c) He failed to consider and give effect to the provision of the appellant's contract with its contractor which stated that its contractor was to assume the responsibilities and duties of constructor on the Project.

[97] The Yukon Government submits that Sidhu Trucking should have been charged as an employer and a constructor under the *OHS Act*. The Yukon Government, it is submitted, was a prudent owner ensuring quality control under the Contract and did not usurp Sidhu Trucking's control of the Project as constructor.

[98] Counsel for the Yukon Government agrees with counsel for the Director that the *Stoller* control test applies, but additionally points to the case of *R. v. Natsco Mechanical Contractors Inc.*, 2010 ONCJ 445 (*Natsco*), to support the principle that an owner may remain directly involved in the Project to ensure quality control and adherence to contract specifications without becoming the constructor.

[99] Counsel submits that Sidhu Trucking exercised significant control over the Project as a whole, as demonstrated by the following factors:

> (a) The contract was a unit price contract where Sidhu Trucking bid on a price to do the work to meet the required specifications in the Contract as provided by

Yukon Government. However, the way Sidhu Trucking planned and organized the project to achieve the contract specifications was entirely up to Sidhu Trucking. No oral testimony was offered on this issue;

(b) Sidhu Trucking had control over the creation, planning and organization of its work to meet the construction schedule and procedures in accordance with the timelines specified in the Contract;

(c) Under the terms of the Contract, Sidhu Trucking had the exclusive right to hire and fire supervisors;

(d) Under the terms of the Contract, Sidhu Trucking maintained control over its contractors and subcontractors. Yukon Government retained the right to protest a particular supervisor on the basis of competency alone, but no further right to directly terminate that supervisor;

(e) Sidhu Trucking controlled the costs and payment for all material; equipment, labour and subcontractors as well as made payments to itself from the bid price it was paid for the work.

[100] Counsel for Yukon Government also submitted that Sidhu Trucking had significant control over the blasting operations on the Project:

(a) Sidhu Trucking ultimately had control over which blaster was employed;

(b) Sidhu Trucking planned and designed the blasting in conjunction with its blaster subcontractor;

(c) Sidhu Trucking organized and supervised the blaster and its other workers at the workplace and had day-to-day control over activities at the workplace;

(d) Sidhu Trucking hired and instructed its workers on notification to residences of the blasting and enforced safety areas during the blasting to control safe access;

(e) Sidhu Trucking was required to maintain safety manuals and equipment as well as a health and safety supervisor on site during the blasting; and

(f) Sidhu Trucking was required to give notice to Yukon Government prior to any blasting.

[101] Counsel says that the Yukon Government's control over blasting was in the nature of quality control, with Sidhu Trucking retaining control over the actual work.

ANALYSIS

[102] Having considered these submissions, I respectfully disagree with the trial judge that the Yukon Government was the constructor on this project. In my view, the Contract stipulated that Sidhu Trucking was the constructor and it was an error of law to ignore this term of the Contract entirely. This is not a case of the Government contracting out of public interest legislation, as there is no requirement in the *OHS Act* that the Yukon Government, or any owner, shall also be the constructor. To be sure, the definition expressly considers that an owner can, in some circumstances, also be a constructor. A finding that the Yukon Government assumed the single role of owner is a long way from a finding that it contracted out of public interest legislation to avoid liability. The Contract does not reflect an evasion of government responsibility but rather an agreement between the owner and contractor that the contractor assumed the obligations of constructor in the *OHS Act*.

[103] There is merit in giving effect to this term of the Contract as it indicates the intention of the owner and the contractor as to which would be the constructor. I agree that, in principle, there should be one constructor on a project and, in my view, it is preferable that its identity be made clear at the outset to ensure workplace safety. I disagree with the submission of counsel for the Director that the role of each party

under the *OHS Act* should be determined retrospectively by looking at the facts and determining which definition fits which party. That appears to me to be a recipe for confusion on a construction site, where the protection and safety of the workers and the public require everyone on the site to know their obligations under the *OHS Act* and Regulations at the outset of the Project. That said, there is certainly a continuing role for the control test where there may be doubt about who the constructor is or where a constructor is not designated.

[104] The starting point for determining whether the Yukon Government was a "constructor" for this Project must be the terms of the *OHS Act*. The *OHS Act* is very similar to Ontario's *OHS Act*, and I found caselaw from that jurisdiction of assistance. I note, however, that, while otherwise identical, the definition of constructor in the Ontario *OHS Act* has always employed the term "employer" rather than "employee", which previously appeared in the Yukon *OHS Act.*

[105] The objective of the *OHS Act* is to create obligations for employers, constructors, owners, supervisors, suppliers and employees to ensure every participant in a construction project has a safety focus. Bellamy J. stated it concisely in *Ontario (Ministry of Labour) v. Enbridge Gas Distribution Inc.*, 2010 ONSC 2013, at para 24, where she described the overlapping and redundancy of *OHS Act*:

> *…*If all workplace parties are required to exercise due diligence, the failure of one party to exercise the requisite due diligence might be compensated for by the diligence of one of the other workplace parties. The purpose is to leave little to chance and to make protection of workers an overlapping responsibility.

[106] In this particular case, the Yukon Government was both an owner of the Project and an employer of four employees. Unfortunately, it was not charged, in the alternative, as an owner or employer.

[107] The definition of constructor had three parts, and means:

1. a person who undertakes a project for an owner;
2. includes an owner who undertakes all or part of a project by themselves; or
3. includes an owner who undertakes all or part of a project by more than one employee.

[108] In the context of this Project, Sidhu Trucking was clearly “a person who undertakes a project for an owner”. However, it was not charged with offences as a constructor, but rather as an employer.

[109] It is possible under the definition that the Yukon Government becomes a constructor as “an owner who undertakes all or part of a project by themselves or by more than one employee.” However, the word ‘undertakes’ is significant, as it strikes me that when an owner hires a contractor to undertake a project as its constructor, the owner cannot also be undertaking the project unless it explicitly takes back some of the responsibilities contracted out. Thus, I do not agree with the trial judge’s characterization of the roles of the parties in para. 9 of his judgment:

> Since the accident clearly occurred during the course of a project undertaken by the Yukon Government, constructed by Sidhu Trucking and supervised by Mr. Cratty, all would seem to be liable to be convicted unless they exercised due diligence to prevent the accident from occurring. … (my emphasis)

[110] At this point, in my view, one must look to the Contract between Sidhu Trucking and the Yukon Government, not because it is determinative as to who is the constructor, but because the intention of the parties to the Contract is a relevant factor.

[111] In paragraph 2.1, the Contract states:

> The Contractor shall, … in a careful and professional manner, diligently perform and complete the following work:
>
> > Hamilton Boulevard Extension
> > Subgrade and Base Construction, Whitehorse, Yukon,
> > 2007 – 2008.

[112] That clearly refers to Sidhu Trucking's obligation and fits the first part of the definition of constructor.

[113] To ensure that there was no doubt as to who the constructor was, General Condition 47.2 specifically imposed the responsibilities and duties of constructor under the *OHS Act* on Sidhu Trucking.

[114] This contract term and condition is significant. Ontario has taken a similar approach, in that the *OHS Act* requires a person to self-identify as the constructor in the Notice of Project that gets filed with the Ministry of Labour. The Court in *Natsco*, in addition to concluding an owner may remain directly involved in a project to ensure quality control and adherence to contract specifications without becoming the constructor, stated, at para. 64:

> Lastly, Natsco identified itself as the constructor in the Notice of Project it filed with the Ministry of Labour for the raw water pipeline project. This Court finds it was proven through an abundance of evidence, beyond a reasonable doubt, *R. v. Lifchus,* [1997] 3 S.C.R. 320*,* that Natsco was the constructor as defined under the *Act* of the raw water pipeline project.

[115] I am also aware of the fact that the Ontario *OHS Act* contains s. 1(3) which states that “An owner does not become a constructor by virtue only of the fact that the owner has engaged an architect, professional engineer or other person solely to oversee quality control at a project.” The Yukon *OHS Act* does not have this provision.

[116] In *Natsco,* there was no contractual provision identifying Natsco as the constructor. Natsco was the contractor on a “raw water pipeline project” that travelled between St. Clair Power and Nova Chemicals. Nova Chemicals paid for the actual pipe and would ultimately own it. St. Clair Power also had a contract with another company, Interlink, to lay fibre-optic cable in the trench that Natsco was to dig and backfill. As the contract did not appear to designate the constructor, Natsco, the party charged as “constructor”, unsuccessfully submitted that it was not the constructor based on the *Stoller* control test.

[117] The case at bar, unlike the *Natsco* case, is a case where the constructor role was explicitly assumed by Sidhu Trucking. Sidhu Trucking did not at any time renounce its role as constructor. Indeed it did not have to, having been charged only in its capacity as an employer. As a result, counsel for Sidhu Trucking made no submissions on the *Stoller* control test argued by counsel for the Director of Occupational Health and Safety and counsel for the Yukon Government.

[118] In my view, the *Stoller* control test has currency, but its role in interpreting who is a constructor should play a secondary role to the terms of a contract. Where an owner and contractor agree that the contractor shall assume the statutory obligations of “constructor”, it makes little sense to challenge that arrangement, unless it can be established that the reality was quite different or the owner was attempting to evade its statutory duty. That is not the case in this Project. In my view, the evidence and the

contractual provisions lead to the conclusion that the Yukon Government did not act as constructor on the Hamilton Boulevard Extension Project, but rather exercised its rights under the Contract to ensure compliance with quality and safety. These rights are consistent with an owner's rights. The contractual obligations undertaken by Sidhu Trucking were by and large legal obligations under the *OHS Act* and Regulations to ensure a safe workplace and quality construction work. None of the contractual obligations were "how to do" a particular construction, but rather to "do it safely". While the Proposed Blast Designs did require that Sidhu provide detail on "the method of carrying out work" and additionally required Yukon Government's approval, the control over blasting remained with Sidhu Trucking, Cratty and the blaster hired by Sidhu Trucking.

[119] It is significant that counsel for the Director of Occupational Health and Safety made the following submission before me on the issue of Sidhu Trucking's control over the blasting and the blaster's work:

> Regardless, on the evidence, Sidhu Trucking controlled both the worksite and the drilling process. It provided the material, including explosive materials, and it employed the drillers who drilled the holes into which explosives would be set. The blaster neither chose the blast site, not even directed the drillers as to how many holes to drill. It was common for several days to pass between the time that the blaster prepared his blast designs and when the blast was conducted – during which time the blaster was not even on the work site.

[120] In fairness to counsel, this submission was made in the context of applying the control test as between Sidhu Trucking and the blaster, not as between Sidhu Trucking and the Yukon Government. However, it does indicate a level of control generally appropriate for a constructor as well as for an employer.

[121] Applied here, I find that the *Stoller* case is distinguishable from the case at bar because there was no contractual designation of the constructor in *Stoller*. Furthermore, *Stoller* involved the construction of a residential housing development by a corporate partnership. There was no owner/contractor dispute as to who was the constructor. The issue of the application of the control test was litigated in the context of remoteness. Stoller submitted that the violations were committed by workers of other employers on the project and Stoller should not be held liable, as constructor, for the employees of other employers on the project.

[122] Here, the Contract contains the usual clauses setting out how the Yukon Government could “undertake” part or all of the Project. The Yukon Government could exercise its authority under General Condition 32 entitled “Taking the Work Out of The Contractor’s Hands”. That did not happen but it is an example of the owner undertaking all or part of a project as per the statutory definition.

[123] The case of *R. v. Marina Harbour Systems*, [2008] O.J. No. 4950 (S.C.), is also helpful in determining when it is appropriate to impose an obligation as constructor. There, Pickering Harbour was the owner of a large dock facility, which began a redevelopment project for harbourside housing with docking facilities. Pickering Harbour subcontracted the project to various subcontractors. Marina Harbour Systems (“MHS”) contracted to supply and install a floating docking system. The contract did not specify who unloaded the dock on its arrival but Pickering Harbour normally provided that service. On the day in question, Pickering Harbour declined to unload the docks and an employee of Marshall Homes, the housing contractor, assisted with a forklift. A man who remained on the dock as it was being unloaded was injured and died when the load shifted on the forklift.

[124] The trial judge acquitted MHS both as constructor and as employer, and this decision was confirmed on the appeal to the superior court. At para. 26, the appeal judge wrote:

> … The trial judge concludes that the constructor must be someone with responsibility for the whole project. His further conclusion is that this constructor could not have been MHS. This conclusion is based on his finding that MHS had no duty to supervise the unloading of the docks, that Mr. Melanson's attendance on that day was "fortuitous" and that Pickering Harbour took responsibility for the unloading of the docks. …

[125] In contrast, Sidhu Trucking was the designated “constructor” contracted to do the blasting under the Contract, it hired the blaster and it drilled the holes for the blast.

[126] The trial judge in this case also included in his control test reasoning that the definition of constructor included the Yukon Government because “it retained overall control and management of the entire Hamilton Boulevard Extension Project, of which the contract with Sidhu Trucking was only a part”. The evidentiary record supporting this view is very thin, and there is no evidence of the timing of other projects or contracts. Boehmer, who was the Yukon Government’s Program Manager, described the Hamilton Boulevard Project as a fairly large project, as, apart from Sidhu’s work, it included street lights, a paving contract and tree clearing of the right-of-way. There is not a sufficient evidentiary record on the issue of whether the Yukon Government was in any way involved in undertaking “all or part of a project by themselves or by more than one employee” as set out in the definition of constructor. I take the trial judge’s reference to this aspect as going more to the *Stoller* control test than the second part of the definition of constructor. It should also be noted that s. 5 of the *OHS Act* provides for the situation of overlapping of the work areas of two or more employers and still places

the obligation on “the principal contractor” and only on the owner when there is no principal contractor.

CONCLUSION

[127] In conclusion, I allow the appeal of the Yukon Government and find that it was not the constructor on the project. I order that the conviction and sentence under s. 4(a) of the *OHS Act* be set aside. I do not find it necessary to consider the defence of due diligence given my decision.

[128] In reaching this conclusion, I have found that the Reasons of the trial judge are intelligible and provide a meaningful basis for appellate review. In that regard, I agree with the Reasons for Judgment of Gower J. in *Director of Occupational Health and Safety v. Yukon (Government)*, 2011 YKSC 50, where he concluded the trial judge’s reasons were adequate in dismissing an application for a trial *de novo*.

[129] The appeals against the convictions of Sidhu Trucking and Cratty are dismissed.

[130] Counsel may speak to costs in case management, if necessary.

VEALE J.