

Her Majesty the Queen in Right of Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc.

[Indexed as: Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc.]

2011 ONCA 645

*Court of Appeal for Ontario, Rosenberg, Cronk and Watt JJ.A.
October 17, 2011*

Employment — Occupational health and safety — Interpretation and construction — Regulation under Occupational Health and Safety Act requiring use of signaller in operation of “vehicle, mobile equipment, crane or similar material handling equipment” where operator does not have full view of intended path of travel — Regulation not applying to road vehicles that are not actually or typically used to handle materials — Truck which was designed to transport goods and materials on public highways using attached trailer not engaged in material handling when it was moved from one part of vendor’s lot to another without trailer attached — Occupational Health and Safety Act, R.S.O. 1990, c. O.1 — Industrial Establishments, R.R.O. 1990, Reg. 851, s. 56.

The defendant owned and operated a highway tractor truck sales business. It directed employees to move a number of truck units from one part of its lot to another to facilitate paving being done to expand the parking lot. A truck unit with no attached trailer became stuck on a mound of aggregate. The cab of the truck unit had no rear window. Another employee attempted to clear the aggregate from behind the truck unit. No signaller was used. The driver of the truck unit reversed and drove over the employee, seriously injuring him. Section 56 of Reg. 851 under the *Occupational Health and Safety Act* requires the use of a signaller where the operator of a “vehicle, mobile equipment, crane or other similar material handling equipment does not have a full view of the intended path of travel”. The defendant was charged with an offence under s. 25(1)(c) of the Act for failing as an employer to ensure that the signaller requirement under s. 56 of the Regulation was carried out in its workplace. The trial judge found that material handling activity is a precondition to the application of s. 56 of the Regulation and that the truck unit in question was not a “vehicle” or “material handling equipment” within the meaning of s. 56. The defendant was acquitted. The summary conviction appeal court allowed the Crown’s appeal, holding that s. 56 does not require that a vehicle be engaged in the actual handling of materials at the time of a workplace accident. The defendant appealed.

Held, the appeal should be allowed.

“Vehicle” in s. 56 means vehicles that come within the class of “material handling equipment”. The summary conviction appeal court judge erred by failing to conduct a contextual and purposive examination of s. 56. The use of the words “or similar” in s. 56, in conjunction with the term “material handling equipment”, was a compelling indication that the provision was intended to apply only to those vehicles that constitute “material handling equipment” and not to all vehicles used in an industrial establishment. Moreover, s. 56 is also directed at the “load” of a “vehicle”. The use of the word “load” in conjunction with “vehicle” also implies that the vehicles contemplated by s. 56 are those that handle goods or other materials. Section 56 appears in Part I of the Regulation under the heading “Material Handling”, further suggesting that a “vehicle” under s. 56 means a vehicle that is also “material handling equipment”. Finally, if the word “vehicle” was interpreted to mean all vehicles, rather than only vehicles that constitute

material handling equipment, the scope of the signaller requirement under s. 56 would be extremely broad. If the legislature had intended s. 56 to have such a wide reach, that intention would have been expressed in clear and unambiguous language.

“Material handling” in the context of industrial establishments is usually undertaken in an interior or enclosed setting, extends over short distances and forms part of a broader industrial process involving the movement of materials or products for such purposes as supply, manufacturing, installation, warehousing, shipment and sale. The truck unit in question was not “material handling” equipment. Its primary purpose was to transport goods and materials on public highways using an attached trailer and it was used only incidentally on private roadways. There was no evidence that the truck was engaged in or intended to be used for any of the purposes related to the movement of materials or any other non-sales-related activities. Therefore, s. 56 of the Regulation did not apply to the truck on the day of the incident.

As the appeal raised matters of general public importance concerning the interpretation of s. 56 of the Regulation, the defendant was entitled to costs in the amount of \$18,000.

Federal Express (Re), [2004] C.L.C.A.O.D. No. 1 (Beauchamp), **consd**

Other cases referred to

African Lion Safari & Game Farm Ltd. and Kerrio (Re) (1987), 59 O.R. (2d) 65, [1987] O.J. No. 194, 37 D.L.R. (4th) 80, 19 O.A.C. 205, 1 C.E.L.R. (N.S.) 197, 3 A.C.W.S. (3d) 260 (C.A.); *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904; *Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co.* (2008), 91 O.R. (3d) 321, [2008] O.J. No. 2776, 2008 ONCA 561, 62 M.V.R. (5th) 180, 295 D.L.R. (4th) 83, 239 O.A.C. 162, 168 A.C.W.S. (3d) 355 [Leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 434]; *Bristol-Myers Squibb v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, [2005] S.C.J. No. 26, 2005 SCC 26, 253 D.L.R. (4th) 1, 334 N.R. 55, J.E. 2005-996, 39 C.P.R. (4th) 449, 139 A.C.W.S. (3d) 552; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, [1984] S.C.J. No. 18, 9 D.L.R. (4th) 161, 53 N.R. 169, J.E. 84-428, 3 O.A.C. 321, 20 Admin. L.R. 1, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 12 W.C.B. 118; *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37, [2002] O.J. No. 283, 155 O.A.C. 225, 52 W.C.B. (2d) 484 (C.A.) [Leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 146]; *Ontario (Ministry of Labour) v. United Independent Operators Ltd.* (2011), 104 O.R. (3d) 1, [2011] O.J. No. 236, 2011 ONCA 33, 330 D.L.R. (4th) 333, 90 C.C.E.L. (3d) 155; *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21, [2001] O.J. No. 1443, 144 O.A.C. 231, 153 C.C.C. (3d) 521, 11 C.C.E.L. (3d) 46, 42 C.R. (5th) 279, 49 W.C.B. (2d) 475 (C.A.); *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC ¶210-006, 76 A.C.W.S. (3d) 894; *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 2009 BCCA 563, 100 B.C.L.R. (4th) 28, 313 D.L.R. (4th) 29, 280 B.C.A.C. 237, 79 C.P.C. (6th) 244, [2010] 3 W.W.R. 1, 66 M.P.L.R. (4th) 165, 203 C.R.R. (2d) 87

Statutes referred to

Canada Labour Code, R.S.C. 1985, c. L-2 [as am.]

Canadian Charter of Rights and Freedoms, s. 7

Highway Traffic Act, R.S.O. 1990, c. H.8 [as am.]

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, ss. 1(1) [as am.], 25(1)(c)

Rules and regulations referred to

Aviation Occupational Health and Safety Regulations, SOR/2011-87, s. 8.1
Canada Occupational Health and Safety Regulations, SOR/86-304 [as am.],
 ss. 14.1, 14.16 [as am.]
Industrial Establishments, R.R.O. 1990, Reg. 851, ss. 3, 56
Maritime Occupational Health and Safety Regulations, SOR/2010-120, s. 209
Oil and Gas Occupational Safety and Health Regulations, SOR/87-612, s. 15.1

Authorities referred to

Côté, Pierre-André, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000)
 Driedger, Elmer A., *The Construction of Statutes* (Toronto: Butterworths, 1974)
 Ménard, Louis, et al., *Dictionnaire de la comptabilité et de la gestion financière: anglais-français avec index français-anglais* (Montreal: Institut canadien des comptable agréés, 1994)
 Office québécois de la langue française, *Grand dictionnaire terminologique*, Office québécois de la langue française (2006), online: <http://granddictionnaire.com/BTML/FRA/r_Motclef/index1024_1.asp>
 Robert, Paul, *Le nouveau petit robert: dictionnaire alphabétique et analogique de la langue française*
 Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008)

APPEAL by the defendant from the conviction entered by Cooper J., sitting as summary conviction appeal court judge, (2010), 104 O.R. (3d) 182, [2010] O.J. No. 5911 allowing a Crown appeal from an acquittal.

Daniel J. Michaluk, for appellant.

Raj Dhir and Sarah Loosemore, for respondent.

The judgment of the court was delivered by

[1] CRONK J.A.: — The main issue on this appeal concerns the interpretation of s. 56 of an industrial workplace regulation known as *Industrial Establishments*, R.R.O. 1990, Reg. 851 (the “Regulation”), enacted under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the “Act”). Section 56 of the Regulation requires employers to use a “signaller” in certain circumstances when operating specified equipment in an industrial establishment. The constitutionality of s. 56 of the Regulation is also raised as an alternative and secondary issue.

I. Relevant Legislative Provisions

[2] Section 25(1)(c) of the Act requires an employer to ensure that prescribed health and safety measures are carried out in the workplace. Section 56 of the Regulation is one of these measures. It reads as follows:

56. Where the operator of a vehicle, mobile equipment, crane or similar material handling equipment does not have a full view of the intended path of travel of the vehicle, mobile equipment, crane or similar material handling equipment or its load, the vehicle, mobile equipment, crane or similar material handling equipment shall only be operated as directed by a signaller who is a competent person and who is stationed,

- (a) in full view of the operator;
- (b) with a full view of the intended path of travel of the vehicle, mobile equipment, crane or similar material handling equipment and its load; and
- (c) clear of the intended path of travel of the vehicle, mobile equipment, crane or similar material handling equipment and its load.

II. *Facts*

[3] The appellant, Sheehan's Truck Centre Inc. ("Sheehan"), owns and operates a highway tractor truck sales business in Burlington, Ontario. The units offered for sale are displayed in Sheehan's parking lot. In August 2006, Sheehan decided to expand its parking lot. An external construction company was hired to complete the expansion work.

[4] On the day in question, four Sheehan employees were directed by their supervisor to move a number of the truck units held for sale from one part of the parking lot to another to facilitate the paving work associated with the expansion. One of these employees, Dennis Meek ("Meek"), attempted to move a 25-foot long Volvo VNL 660 truck unit. Although the truck unit was designed to attach to a cargo trailer, no trailer was attached to it at the time. The cab of the truck unit had no rear window.

[5] While Meek was attempting to back up the truck unit, it became stuck on a mound of aggregate. Another Sheehan employee, Joshua LaPenna ("LaPenna"), approached Meek and told him that he would clear the obstructing aggregate from behind the truck unit. It is unclear whether Meek understood LaPenna's offer of assistance. In any event, LaPenna walked behind the truck unit and began to attempt to clear the obstruction. Unfortunately, Meek then again reversed the truck unit and drove over LaPenna, causing him a serious pelvic injury. As a result, LaPenna was hospitalized for several weeks and unable to work for a few months.

[6] No "signaller" was involved at any point in directing Meek's operation of the truck unit.

[7] Following the accident, Sheehan was charged with an offence under s. 25(1)(c) of the Act, for failing as an employer to ensure that the signaller requirement under s. 56 of the Regulation was carried out in its workplace. It defended the charge

on two bases: (1) s. 56 of the Regulation did not apply to vehicles like the Sheehan truck unit; and (2) in the alternative, s. 56 of the Regulation violated s. 7 of the *Canadian Charter of Rights and Freedoms* on the grounds of overbreadth and gross disproportionality.

[8] Sheehan was acquitted at trial. The trial judge concluded that the Act is remedial public welfare legislation that is designed "to guarantee a minimum level of protection for the health and safety of workers". In this context, he held that s. 56 of the Regulation "specifically addresses worker safety *as it relates to material handling*" (emphasis added). In this sense, he concluded, s. 56 supports the broader protective purpose of the Act.

[9] The trial judge next considered how the "material handling" provisions of the Regulation fit within this overall legislative scheme. In his view, two factors indicated that material handling activity is a precondition to the application of s. 56 of the Regulation. First, under the "associated words" rule of statutory interpretation, which requires that a listed statutory term be read in conjunction with associated listed terms, the words "or similar material handling equipment" (emphasis in original) in s. 56 direct the reader of that provision "to the common function of material handling". Second, the placement of s. 56 in the Regulation as a whole, among safety regulations grouped under the heading "Material Handling", also supports the conclusion that s. 56 contemplates material handling activity.

[10] The trial judge then addressed the meaning of "material handling", a term that is not defined in the Regulation. He concluded that the Sheehan truck unit was not a "vehicle" or "material handling equipment" within the meaning of s. 56 of the Regulation.

[11] In the trial judge's view, the use of a signaller is "clearly desirable" and would constitute "a true 'best practice'" where "a vehicle is backing-up in circumstances where the operator does not have a full view of the intended course of travel". However, the use of a signaller is not a requirement of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "HTA"), "the statute that governs most operations of a highway tractor type", nor has the legislature made it "a general requirement for the safe reversing of a vehicle for the purposes of the Act or the Regulation". In particular, given the intended place and purpose of the use of Sheehan's truck unit, s. 56 did not impose a signaller requirement on Meek's operation of the unit.

[12] Accordingly, the trial judge concluded that an offence under s. 25(1)(c) of the Act was not made out. He therefore

regarded it as unnecessary to address Sheehan's attack on the constitutionality of s. 56 of the Regulation.

[13] The Crown appealed, arguing that the trial judge erred in his interpretation of s. 56 of the Regulation. It was the Crown's position that s. 56 applies to all vehicles used in an industrial establishment, regardless of whether they constitute "material handling equipment", when the operator of the vehicle has a blind spot preventing a full view of the vehicle's intended path of travel.

[14] The summary conviction appeal court judge (the "SCAC judge") agreed. In brief reasons on this issue (four paragraphs), he ruled that s. 56 of the Regulation does not require that a vehicle be engaged in the "actual handling of materials" at the time of a workplace accident. Rather, in his opinion, s. 56 is triggered where the vehicle at issue is "intended to be used for this purpose" and, further, this was the intended use of the Sheehan truck unit once a trailer was attached to it. The SCAC judge also held that s. 56 of the Regulation does not violate s. 7 of the *Charter* and, hence, that it is constitutional.

[15] The SCAC judge therefore set aside the acquittal entered by the trial judge and convicted Sheehan of failing to ensure that the signalling requirement established by s. 56 of the Regulation was carried out in its workplace, contrary to s. 25(1)(c) of the Act. I will return to the SCAC judge's reasoning in support of this decision later in these reasons.

[16] Sheehan now appeals, with leave, to this court.

[17] For the reasons that follow, I conclude that s. 56 of the Regulation does not apply to road vehicles in industrial establishments that are not actually or typically used to handle materials. It follows, in my view, that the SCAC judge erred in his interpretation of s. 56 of the Regulation. On the unchallenged findings of the trial judge, Sheehan's truck unit was neither actually or typically used to handle materials. Accordingly, an offence under s. 25(1)(c) of the Act was not made out. In light of this conclusion, it is unnecessary to address Sheehan's constitutional challenge to s. 56 of the Regulation. I would therefore set aside the conviction entered by the SCAC judge, restore the decision of the trial judge and enter an acquittal on the offence charged.

III. Issues

[18] As argued by the parties, there are two issues on this appeal:

- (1) Does s. 56 of the Regulation apply to a "vehicle" that does not constitute "material handling equipment" in an industrial establishment?

- (2) Does s. 56 of the Regulation offend s. 7 of the *Charter* on the basis of overbreadth or gross disproportionality?

IV. *Analysis*

(1) *Statutory interpretation issue*

(a) *The Regulation*

[19] Section 3 of the Regulation states that the Regulation applies to “all industrial establishments”. The term “industrial establishments” is not defined under the Regulation. However, it is defined in s. 1(1) of the Act as meaning “an office building, factory, arena, shop or office, and any land, buildings and structures appertaining thereto”. Under this wide definition, there is no doubt that Sheehan’s business premises constituted an “industrial establishment” and that the Regulation, which is concerned with safety in industrial establishments, applied to Sheehan’s workplace.

[20] Part I of the Regulation sets out various safety measures generally applicable to industrial establishments, including requirements relating to material handling. Section 56 appears in Part I of the Regulation under the heading “Material Handling”.

[21] The signaller requirement established by s. 56 is triggered by (1) the operation of “a vehicle, mobile equipment, crane or similar material handling equipment” in circumstances where (2) the operator “does not have a full view of the intended path of travel”.

[22] The parties accept that, by reason of the absence of a rear window in the cab of the Sheehan truck unit, Meek did not have a full view of the truck unit’s intended path of travel when operating it in reverse. Thus, the second precondition to the engagement of s. 56 was satisfied in this case. The issue, therefore, is whether the truck unit constituted a “vehicle . . . or similar material handling equipment” for the purpose of s. 56, so as to satisfy the first precondition to the application of s. 56. There is no suggestion that the Sheehan truck unit was an item of “mobile equipment” or a crane.

(b) *SCAC judge’s decision*

[23] The SCAC judge’s ruling that s. 56 of the Regulation applies to vehicles in industrial establishments that are intended for use in handling materials was based on the principle that public welfare legislation is to be interpreted broadly. Relying on this court’s decision in *Ontario (Ministry of Labour) v.*

Hamilton (City) (2002), 58 O.R. (3d) 37, [2002] O.J. No. 283 (C.A.), at paras. 16-17, leave to appeal refused [2002] S.C.C.A. No. 146, the SCAC judge held [at para. 40] that the Regulation is public welfare legislation and, consequently, that it is to be “interpreted liberally [so] as to best assure the attainment of its objects”. In his view, the object of the Regulation is to protect vulnerable working men and women, [at para. 41] “especially when heavy equipment is involved”, an objective with which the courts must not lightly interfere. On this sole ground, he concluded that [at para. 43]

[Sheehan’s] truck . . . did not have to be engaged in the actual handling of materials at the time of the accident. It is sufficient if it was intended to be used for this purpose with a trailer attached. The intended purpose must take precedence over the literal, technical interpretation of the trial judge.

[24] Sheehan argues that the SCAC judge erred by failing to consider the meaning of s. 56 of the Regulation in context, including in light of the safety-related purpose of the Act. For the reasons that follow, I agree.

(c) *Governing interpretive approach*

[25] The Supreme Court of Canada has repeatedly endorsed the approach articulated by E.A. Driedger in *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67, cited in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008), at p. 1, as the preferred modern method of statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See, for example, *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, at para. 26.

[26] This approach also governs the interpretation of a regulation: Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), at p. 24. It requires an examination of “the language of the provision, the context in which the language is used and the purpose of the legislation or statutory scheme in which the language is found”: *Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co.* (2008), 91 O.R. (3d) 321, [2008] O.J. No. 2776, 2008 ONCA 561, at para. 23, leave to appeal refused [2008] S.C.C.A. No. 434.

(d) *Nature of legislative scheme*

[27] As noted by the SCAC judge, protective legislation that is designed to promote public health and safety, like the Act and associated regulations, is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme: *Hamilton (City)*, at para. 16. In addition, in the case of regulations, the words of the authorizing statute provide necessary and important interpretive context: see, for example, *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, [2005] S.C.J. No. 26, 2005 SCC 26, at para. 38.

[28] This court has recognized that the Act is a public welfare statute, the broad purpose of which is “to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace”. This requires that the Act be interpreted in a manner consistent with its broad purpose, the promotion of worker safety: see *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21, [2001] O.J. No. 1443 (C.A.), at para. 22; *Ontario (Ministry of Labour) v. United Independent Operators Ltd.* (2011), 104 O.R. (3d) 1, [2011] O.J. No. 236, 2011 ONCA 33 (“*UIOL*”), at paras. 31 and 64.

[29] The SCAC judge was correct to approach the interpretation of s. 56 of the Regulation in a manner that advances the protective aims of the Act and the Regulation as a whole. Both the Act and the Regulation are designed to safeguard workers in the workplace. The Regulation focuses on worker safety in “industrial establishments”, as that term is defined under the Act. In that context, s. 56 of the Regulation imposes a specific safety measure — a signaller requirement — that applies in defined circumstances in industrial establishments.

[30] That said, consideration of the protective purposes of the legislative scheme is not the only consideration when attempting to ascertain the scope of s. 56 of the Regulation. The Act seeks to achieve “*a reasonable level of protection*” (emphasis added) for workers in the workplace. For obvious reasons, neither the Act nor the Regulation mandate or seek to achieve the impossible — entirely risk-free work environments.

[31] The modern method of statutory interpretation requires that the words of s. 56 of the Regulation be interpreted in the entire context in which they are used and in accordance with their grammatical and ordinary sense, having regard to the purposes of the Regulation and the Act as a whole. As I will explain, it is my opinion that by failing to conduct this contextual and

purposive examination of s. 56 of the Regulation, the SCAC judge fell into error.

(e) *Meaning of “vehicle” in section 56 of the Regulation*

[32] Section 56 of the Regulation provides that a signaller must direct the operation of a vehicle, “[w]here the operator of a vehicle, mobile equipment, crane or similar material handling equipment does not have a full view of the intended path of travel . . .” (emphasis added). None of the terms “vehicle”, “material handling” or “material handling equipment” is defined in the Regulation or in the Act itself.

[33] Notwithstanding the absence of a definition of the word “vehicle” in the Regulation, I think it self-evident that it is susceptible of a broad construction according to its ordinary meaning. However, since it appears in s. 56 in association with other listed means of moving goods and products, including “similar material handling equipment”, the associated words rule of statutory interpretation requires that “vehicle” be interpreted in conjunction with the associated listed words. As observed by the trial judge, under this rule, the reader is invited to look for a common feature among the terms listed.¹ The application of this rule, as well as a plain reading of the phrase “a vehicle, mobile equipment, crane or similar material handling equipment”, suggests that “vehicle” as employed in s. 56 means a vehicle that falls within the general class of “material handling equipment”.

[34] The Crown argues that the term “material handling equipment” as used in s. 56 modifies only the immediately preceding word “crane”, and not the word “vehicle”. I disagree.

[35] In my view, the use of the words “or similar” in s. 56, in conjunction with the term “material handling equipment”, is a compelling indication that the provision is intended to apply only to those vehicles that constitute “material handling equipment”, and not to all vehicles used in an industrial establishment.

[36] Moreover, s. 56 is also directed at the “load” of a “vehicle”. The use of the word “load” in connection with “vehicle” also implies that the vehicles contemplated by s. 56 are those that handle goods or other materials.

[37] Apart from the text of s. 56 itself, this interpretation is reinforced by the context in which s. 56 appears in the Regulation. As noted by the trial judge, s. 56 forms part of various safety regulations set out in Part I of the Regulation, under the heading “Material Handling”. This heading is a relevant and

¹ See *Sullivan on the Construction of Statutes*, *supra*, at pp. 227-30.

proper guide to the interpretation of s. 56: see *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, [1984] S.C.J. No. 18, at pp. 376-77 S.C.R.; *African Lion Safari & Game Farm Ltd. and Kerrio (Re)* (1987), 59 O.R. (2d) 65, [1987] O.J. No. 194 (C.A.), at p. 73 O.R.

[38] Most, although arguably not all, of the provisions under the "Material Handling" part of the Regulation concern some aspect of material handling performed in an industrial setting. The placement of s. 56 in that part of the Regulation that concerns "Material Handling" further suggests that a "vehicle" under s. 56 means a vehicle that is also "material handling equipment".

[39] Finally, in my view, this interpretive conclusion also accords with logic and common sense. If, as the Crown urges, the word "vehicle" in s. 56 is interpreted to mean all vehicles, rather than only vehicles that constitute material handling equipment, the scope of the signaller requirement under s. 56 would be broad indeed.

[40] In particular, given the wide definition of "industrial establishment" set out in s. 1(1) of the Act, an expansive interpretation of "vehicle" in s. 56 of the Regulation would result in the application of the signaller requirement to vehicles of any type, in a host of industrial settings, as long as the operator's view of the vehicle's intended path of travel is partially or wholly obscured. For example, the term "industrial establishments" includes shops and offices and adjacent lands. If the Crown's interpretation of "vehicle" were to be accepted, the signaller requirement under s. 56 would apply to passenger cars operated in reverse in such everyday locations as shopping centres and plazas or many office building parking lots, so long as the driver's view is even partially obscured.

[41] I have considerable difficulty in accepting that s. 56 of the Regulation is intended to have such sweeping application. I agree with Sheehan's contention that this expansive view of the scope of s. 56 would impose a signaller requirement in circumstances far beyond those that are reasonably necessary to protect workers from safety hazards in industrial settings. In my opinion, if the legislature had intended s. 56 to have such a wide reach, this intention would have been expressed in clear and unambiguous language.

[42] Based on his reasons, I am unable to conclude that the SCAC judge considered the meaning of the word "vehicle" in s. 56 of the Regulation in the context of the language of s. 56 itself and the Regulation as a whole. In light of the considerations set out above, I agree with the trial judge that, properly

read, “vehicle” in s. 56 means vehicles that come within the class of “material handling equipment”.

(f) *Meaning of “material handling” in section 56 of the Regulation*

[43] The phrase “material handling” appears to have received little judicial consideration, either generally or in the specific context of s. 56 of the Regulation. Moreover, the legislative history of the Regulation and of s. 56 provides no insight into its intended meaning.

[44] In contrast to the SCAC judge, who did not expressly advert to this issue in his reasons, the trial judge grappled directly with the meaning of “material handling” as it appears in s. 56 of the Regulation. He concluded that, given the place and purpose of its use, the Sheehan truck unit was not “material handling” equipment as contemplated by s. 56.

[45] I agree for several reasons. First, the trial judge made the following pertinent factual findings concerning the Sheehan truck unit: (1) the truck unit was a “highway tractor unit”; (2) the “primary and by far most common use” of the truck unit was to convey attached trailers on public highways; (3) the trailers would “often be laden with materials”; and (4) the purpose of the unit, therefore, was the transport of goods and materials.

[46] These findings are not challenged on this appeal.

[47] The trial judge next considered whether the transport of goods and materials on public highways fell within the ambit of “material handling” as contemplated by s. 56 of the Regulation. In doing so, he turned to *Federal Express (Re)*, [2004] C.L.C.A.O.D. No. 1 (Beauchamp), a decision of an appeals officer under the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the “Code”).

[48] The issue in *Federal Express (Re)* was whether courier delivery vans constituted “motorized materials handling equipment” under the *Canada Occupational Health and Safety Regulations*, SOR/86-304 (the “COHSR”), enacted under the Code. Section 14.16 of the COHSR required that “motorized materials handling equipment” used in areas occupied by employees be equipped with “a horn or other similar audible warning device that automatically operates while [the equipment] travels in reverse”. In *Federal Express (Re)*, two courier companies were charged with contraventions of the Code and the COHSR because delivery vans owned by them were operated in reverse in areas occupied by employees when the vans were not equipped with the requisite “back-up” warning devices.

[49] The COSHR contained a specific definition of “materials handling equipment” [in s. 14.1]:

“materials handling equipment” means equipment, including its supporting structures, auxiliary equipment and rigging devices, *used to transport, lift, move or position persons, materials, goods or things* and includes mobile equipment used to lift, hoist or position persons, but does not include an elevating device that is permanently installed in a building.²

(Emphasis added)

[50] In addition, the COSHR expressly excluded motor vehicles operated on public roads from the back-up warning device requirement, thus differentiating between road vehicles and “materials handling equipment”. Other provisions of the COSHR also appeared to distinguish between road vehicles and “materials handling equipment”.

[51] Thus, the legislative scheme considered in *Federal Express (Re)* differed in several material respects from the legislative framework under scrutiny in this case. Unlike the Regulation, the COHSR contained a specific definition of the term “materials handling equipment”, an express exclusion of motor vehicles operated on public roads from the back-up warning device requirement, and other provisions that distinguished road vehicles from material handling equipment.

[52] The trial judge in this case, while alive to the different legislative schemes at issue, viewed the analysis and interpretive conclusion expressed in *Federal Express (Re)* regarding the meaning of “materials handling equipment” under the COHSR as “persuasive and sensible”.

[53] I agree that *Federal Express (Re)*, while concerned with a different legislative regime, is instructive in identifying certain of the general characteristics of “material handling”. In particular, the appeals officer in *Federal Express (Re)* noted, at paras. 33-34, that the English and French language versions of the definition of “materials handling equipment” in the COSHR suggested that “materials handling” has the following characteristics:

- [the] purpose of “handling” — and its French equivalent “manutention” — is . . . to manoeuvre persons, materials, goods or things, to transfer them, to change their positioning relatively [*sic*] to a previous one;

² The emphasized words in this quote also appear, in virtually identical language, in the definitions of “material handling equipment” set out in the *Aviation Occupational Health and Safety Regulations*, SOR/2011-87, s. 8.1; the *Oil and Gas Occupational Safety and Health Regulations*, SOR/87-612, s. 15.1; and the *Maritime Occupational Health and Safety Regulations*, SOR/2010-120, s. 209.

- “materials handling equipment” is used when what needs to be moved is too heavy or too bulky to be moved manually;
- the handling of materials is carried out as part of a larger process, as one of the steps that has to be accomplished in order to successfully complete the whole process; and
- the handling of materials takes place in an “enclosed” area of the work place, for example, a warehouse, a terminal, a wharf, a tarmac, as opposed to an “open” area like a public road.

[54] The appeals officer in *Federal Express (Re)* also held that the purpose of the back-up warning device requirement under s. 14.16 of the COSHR was “to deal with equipment that handles materials within a work place, as opposed to equipment that transports materials from an employer’s to a client’s work place” (para. 55). In contrast, the sole purpose and function of the delivery vans in question was to move, carry or transport materials, persons, things or goods from one location to another, utilizing public roads. Their operation for this purpose was subject “to the prescriptions of the *Motor Vehicles Act* of the province where they are being operated” (paras. 42 and 43-48).

[55] The appeals officer concluded, at para. 58:

I will add that any summary review of the literature or of other legislation on the subject of materials handling equipment is further evidence that Part XIV of the [COSHR] was not intended to cover motor vehicles like courier vans and trucks. It is clear that the designation of “material handling equipment” refers to what is commonly known as “powered industrial trucks”, that is mobile, power-driven vehicles that are used to carry, push, pull, lift, stack and tier material. And among them we find lift trucks, electric pallet trucks, elevated order pickers, low-lift platform trucks, cantilever trucks, counter-balance front/side loader trucks and single-side loader rider trucks, to name but a few.

[56] The focus of the appeal officer’s reasoning in *Federal Express (Re)* was on the place and purpose of use of the applicable vehicles, in the context of the specific language of the definition of “materials handling equipment” set out in the COSHR.

[57] In this case, on the undisputed findings of the trial judge, the primary purpose of the Sheehan truck unit was the transport of goods and materials, via a trailer, on public highways. As the trial judge indicated, when used for this purpose, the operation of the Sheehan truck unit was subject to the provisions of the *HTA*. In light of these findings, it cannot be said that the Sheehan truck unit possessed the attributes of material handling identified in *Federal Express (Re)*, set out above.

[58] In addition, the Sheehan truck unit did not possess many of the features of “material handling” suggested by ordinary and specialized dictionary definitions of that term.

[59] The French-language version of s. 56 of the Regulation reads:

56. Si l'opérateur d'un véhicule, de matériel mobile, d'une grue ou d'un appareil de manutention similaire n'a pas une vue dégagée de la trajectoire prévue de l'appareil ou de sa charge, il doit se faire guider par un signaleur qui est une personne compétente et qui est posté :

- a) bien en vue de l'opérateur;
- b) bien en vue de la trajectoire prévue de l'appareil et de sa charge;
- c) à l'écart de la trajectoire prévue de l'appareil et de sa charge.

(Emphasis added)

[60] The term used in place of “material handling” in the French-language version of s. 56 is “manutention”. *Le nouveau petit robert* defines “manutention” as “[m]anipulation, déplacement manuel ou mécanique de marchandises, en vue de l'emmagasiner, de l'expédition et de la vente”. This defines it as the movement of merchandise for the purpose of warehousing, shipment and sale.

[61] A similar definition is found in Louis Ménard et al., *Dictionnaire de la comptabilité et de la gestion financière: anglais-français avec index français-anglais* (Montréal: Institut canadien des comptables agréés, 1994), which defines “manutention” as:

Déplacement manuel ou mécanique de produits, de matières ou de marchandises, en général sur une faible distance, associé aux opérations d'approvisionnement, de fabrication, de montage, d'emmagasiner, d'expédition ou de vente.

[62] This definition describes “manutention” as the movement of products, generally across a short distance (“en général sur une faible distance”), associated with supply, manufacturing, installation, warehousing, shipping or sale operations (“associé aux opérations d'approvisionnement, de fabrication, de montage, d'emmagasiner, d'expédition ou de vente”).

[63] An even more specific definition is found in the Quebec Government's *Grand dictionnaire terminologique*, Office québécois de la langue française (2006), online: <http://granddictionnaire.com/BTML/FRA/r_Motclef/index1024_1.asp>. It defines “manutention” as follows:

Action de déplacer automatiquement, mécaniquement ou manuellement, à l'aide d'appareils de manutention, des matières, des produits en cours de fabrication ou des produits finis sur une faible distance et généralement à l'intérieur.

Il ne faut pas confondre le terme *manutention* avec les termes *manipulation* et *transport*. En effet, le terme *manipulation* se limite aux déplacements effectués dans l'aire d'un poste de travail, tandis que le terme *transport* correspond à des déplacements qui se font sur une distance plus importante que dans le cas de la manutention et généralement à l'extérieur.

(Emphasis added)

[64] This definition specifies that “manutention” involves moving materials or products over a short distance (“sur une faible distance”) and generally in an interior setting (“généralement à l’intérieur”). It also notes that “manutention” is distinct from the French term “transport”. In contrast to “manutention”, “transport” refers to movements over a longer distance (“sur une distance plus importante”) and generally outside (“généralement à l’extérieur”).

[65] The *Oxford English Dictionary* also offers a brief and narrow definition of “materials handling”. It defines the term as “the movement and storage of materials *in a factory*” (emphasis added): *Oxford English Dictionary*, 2nd ed., vol. IX (Oxford: Clarendon Press, 1989), at p. 465.

[66] Taken as a whole, the above-quoted definitions suggest that “manutention” or “material handling” in the context of industrial establishments usually (1) is undertaken in an interior or enclosed setting, such as a factory or plant; (2) extends over short distances; and (3) forms part of a broader industrial process involving the movement of materials or products for such purposes as supply, manufacturing, installation, warehousing, shipment and sale.

[67] On the trial judge’s findings, these characteristics did not apply to the Sheehan truck unit. In its condition on Sheehan’s lot on the day of the accident, the truck unit did not have the capacity to “handle” materials — no trailer was attached to it. Even with a trailer attached, the intended purpose of the truck unit was to transport goods and materials on public highways, that is, in exterior settings over potentially considerable distances. The trial judge held that the Sheehan truck unit was “just one item of Sheehan’s truck inventory” offered for sale to the public, after which it “would almost certainly be employed on public roadways”, with only minor use of private roadways. Before this court, the Crown accepted that Sheehan is not in the business of selling trailers.

[68] Further, as noted by the trial judge, there was no evidence at trial that Sheehan used the truck unit or intended to use it for anything other than sale to the public. In particular, there was no evidence that the Sheehan truck unit was engaged

in or intended for any "processing, manufacturing, material movement or other [non-sales-related] activity". The trial judge summarized this aspect of the record in this fashion:

In fact, no evidence was presented to the court of any material handling activity by Sheehan's, either actual activity or activity possible or contemplated, that would have utilized the Volvo truck (or any other truck in the sales yard inventory).

[69] These findings and observations are amply supported by the evidential record.

(g) *Conclusion*

[70] In these circumstances, I conclude that s. 56 of the Regulation does not apply to road vehicles that are not actually or typically engaged in the handling of materials. In light of the trial judge's factual findings, above-described, I also agree that the Sheehan truck unit did not constitute a "vehicle . . . or similar material handling equipment" within the meaning of s. 56 of the Regulation. The requisite element of "material handling" activity, necessary to trigger the application of s. 56, was not demonstrated in this case. Accordingly, s. 56 of the Regulation did not apply to Sheehan's truck unit on the day in question and the Crown failed to establish the *actus reus* of the offence charged under s. 25(1)(c) of the Act.

(2) *Constitutionality of section 56 of the Regulation*

[71] In light of my conclusion that s. 56 of the Regulation did not apply to the Sheehan truck unit, it is unnecessary for the disposition of this appeal to consider Sheehan's challenge to the constitutionality of s. 56 of the Regulation.

V. *Disposition*

[72] For the reasons given, I would allow the appeal, set aside the conviction entered by the SCAC judge and restore the verdict of acquittal entered by the trial judge.

[73] Sheehan seeks costs of the appeal in the sum of \$18,000 (its actual partial indemnity costs are said to approximate \$78,000) on the ground that the issues on appeal raised matters of general public interest and importance. The Crown resists an adverse costs award since costs awards against the Crown on the basis of public interest considerations are rare and exceptional and may only be justified in narrow circumstances that the Crown says do not apply here.

[74] This appeal raised matters of general public importance concerning the interpretation of s. 56 of the Regulation. Litigation involving the public interest “raises unique policy considerations that may, in exceptional cases, justify a departure from ordinary costs rules”: see *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 2009 BCCA 563, at para. 181. Moreover, on the motion granting leave to appeal to this court in *UIOL*, Doherty J.A., in chambers, held that the financial burden arising from the reasonable legal costs of an appeal in what is essentially public interest litigation need not be borne by the successful party in a proceeding that the Crown properly views as “the vehicle for clearing up a matter of statutory interpretation of wide application”. This is such a case.

[75] The costs sought by Sheehan are reasonable. It was successful at trial and, again, before this court. In all the circumstances, I conclude that a costs award against the Crown in the modest amount of \$18,000 is appropriate and I would so order.

Appeal allowed.

McQueen v. Echelon General Insurance Company

[Indexed as: McQueen v. Echelon General Insurance Co.]

2011 ONCA 649

Court of Appeal for Ontario, Gillese, R.P. Armstrong and Karakatsanis J.J.A.
October 18, 2011

Insurance — Automobile insurance — Statutory accident benefits — Trial judge not erring in ordering insurer to pay insured housekeeping benefits, transportation benefits and cost of s. 24 assessments — Trial judge entitled to reject report of orthopaedic surgeon retained by insurer to examine insured on basis that his assessment was made after brief, superficial examination and without reference to occupational therapy report or neurological and psychiatric testing that surgeon himself recommended.

Insurance — Damages — Mental distress — Damages for mental distress available to person insured under standard automobile policy regardless of whether that person is named party to insurance contract — Insurer unreasonably denying statutory accident benefits to insured — Insurer breaching its contract with insured by taking adversarial approach from beginning — Insurer’s adversarial attitude likely to cause mental distress and in fact causing mental distress — Trial judge not erring in awarding insured damages for mental distress.

The plaintiff was injured in a motor vehicle accident in 2004 and applied for statutory accident benefits from her insurer, the defendant. The defendant paid some housekeeping and transportation benefits, but stopped doing so after