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ONTARIO COURT OF JUSTICE

Provincial Offences Court

HER MAJESTY THE QUEEN

v.

UBA INC.

* * * * * *

J U D G M E N T

HER WORSHIP JUSTICE OF THE PEACE S. WOODWORTH
On the 2nd day of June, 2009 at Kitchener, Ontario

* * * * * *

CHARGE: Discharge Contaminant into the Natural Environment, S. 186 (1) Environmental Protection Act, R.S.O. 1990, c E.19

APPEARANCES:

P. Poly — Counsel, Ministry of the Environment

B. Weintraub — Counsel for Defendant

ONTARIO COURT OF JUSTICE

Provincial Offences Court

T A B L E O F C O N T E N T S

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Transcript Ordered June 2, 2009
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TUESDAY, JUNE 2, 2009

R E A S O N S F O R J U D G M E N T

Justice of the Peace S. Woodworth: (Orally)

The matter in respect of UBA Inc. is before the court for judgment today.

The defendant company UBA Inc. is charged that on or about the 2nd day of June 2006 at or near Shirley Avenue in the City of Kitchener, the Regional Municipality of Waterloo did commit the offence of discharging a contaminant or causing or permitting the discharge of a contaminant, namely Liquid Bril Tak, into the natural environment that caused or was likely to cause an adverse effect, contrary to Section 14(1) of the *Environmental Offences Act* R.S. O. 1990 as amended thereby committing an offence under Section 186(1) of the said Act.

The trial in this matter proceeded upon an extensive agreed statement of facts that was noted as Exhibit One in the trial. That agreed statement of facts is as follows:

1. UBA Inc. is a company incorporated in Quebec, Ontario Incorporation Number 1458722.

2. UBA Inc. is involved in the chemical distribution business. It purchases bulk acids, alkalis and bleaches along with a few others and breaks them into smaller loads for delivery to

the industrial customers via a fleet of company owned multi-compartmental tank trucks.

3. UBA Inc. owns and operates a chemical blending and distribution facility located at 2605 Royal Windsor Drive, City of Mississauga, Regional Municipality of Peel (hereinafter the UBA Facility).

4. Liquid Bril Tak is a corrosive Chemical composed of primarily caustic soda liquid 50 percent UN 1824 which requires protective equipment to prevent contact with skin, eyes, ingestion and inhalation, in cases of insufficient ventilation.

5. On June 2, 2006 UBA Tanker truck, the "tanker truck", was loaded with 46 inches or about 4000 imperial gallons of Liquid Bril Tak at the UBA Facility. The tank attached to the trailer was manufactured in 1977 by Westank and is referred to by UBA as tank number 61. Tank number 61 was not pressurized at the time.

6. The "design pressure" of tank 61 was 30 PSI , meaning it is designed to operate safely at a pressure of up to 30 PSI. Tank 61 was equipped with a rupture disk which is designed to rupture at a pressure of 45 PSI, 1.5 times the design pressure. This mechanism is designed to prevent tank failure due to over pressurization.

7. On June 2nd, 2006 a driver employed by UBA Inc., the UBA driver, was supposed to deliver the tanker truck from the UBA Facility to the Brick Brewery in Kitchener to deliver its load of

Liquid Bril Tak. Instead the UBA driver proceeded to the Brick Brewery in Waterloo that day.

8. Upon arrival at the Brick Brewery in Waterloo on June 2nd, 2006 the UBA driver pressurized the tank. In the presence of a Brick Brewery employee, the UBA driver began pumping the product into the top of a large, upright tank. Another Brick Brewery staff person arrived and advised the UBA driver that he was at the wrong location. The UBA driver stopped pumping the Liquid Bril Tak into the top of the tank and received directions to the Kitchener plant.

9. The tank was left pressurized as the UBA driver drove through stop and go traffic in Waterloo toward the Kitchener plant on city streets.

10. As the tanker truck proceeded along an incline on Shirley Avenue, in the City of Kitchener, Regional Municipality of Waterloo, the rupture disk on the top of the tank ruptured and Liquid Bril Tak was discharged

11. When the UBA driver heard the loud whistling sound of the rupture, he saw in his rear view mirrors that the liquid was spilling onto Shirley Avenue and brought the truck to a stop. By that time approximately 70 gallons of the liquid had covered a portion of Shirley Avenue for a distance estimated to be 300 to 400 feet in length.

12. The driver exited the vehicle and used his spill kit. A neighbouring business provided buckets and absorbent to help contain the spill..

Some vehicles drove through the spilled product on the road, but the UBA driver placed signs on the road to stop traffic and reported the spill.

13. The Kitchener Fire Department responded within about a minute, the first truck arriving at about 7:38 on June 2nd, 2006. Waterloo Regional Police also responded to close the road to traffic and secure the area. An official of the Ministry of the Environment attended throughout the incident as did a cleanup contractor certified by the Canadian Emergency Response Contractors Alliance, arranged for by UBA, UBA's technical manager Benoit Joubert, a UBA mechanical technician and a maintenance technician employed by UBA. An official from the Regional Health Unit attended briefly during the afternoon after being contacted by the Ministry of the Environment and provided information from the Material Safety Data Sheet for the handling of Liquid Bril Tak, set out in paragraph 4 above, which material Safety Data Sheet had already been provided by UBA several hours earlier.

14. Access to the area was restricted as vehicle and pedestrian traffic was re-routed and the roadway was closed from approximately 7:45 a.m. to 9:45 p.m.

15. A clean up was undertaken by the contractor UBA retained. The spilled material was vacuumed from the road and catch basin, the roadway was washed and all liquid effluent was collected for appropriate disposal.

16. The air pressure regulator on the tank was not removed by the Ministry of the Environment for testing.

17. Ministry of the Environment orders were issued requiring UBA to cease using all vehicles capable of using air pressure to transfer chemicals, for the storage or transport or both of chemicals, until such time as UBA installed on its tankers a pressure vent above the rupture disk and tamper proof pre-set air pressure regulators. An order was also issued requiring additional training of UBA drivers in the operation of the air pressure system and legislated requirements.

Even though the case proceeded on these extensive agreed facts the trial continued for 13 days over several months.

The defence position is that the evidence presented at trial does not establish beyond a reasonable doubt that the discharge of the contaminant into the environment which occurred on June 2nd, 2006 actually caused an adverse effect or that it was likely to cause an adverse effect, or that in the alternative any adverse effect was so trivial that it should not attract penal consequences.

Adverse effect is defined in Section 1(1) of the *Environmental Protection Act*.

Adverse effect means one or more of,

a) impairment of the quality of the natural environment for any use that can be made of it

b) injury or damage to property or to plant or animal life

c) harm or material discomfort to any person

d) an adverse effect on the health of any person

e) impairment of the safety of any person

f) rendering any property or plant or animal life unfit for human use

g) loss of enjoyment of normal use of property

h) interference with the normal conduct of business.

The case of *Ontario v. Canadian Pacific Ltd.* [1995] 2 S.C.R. 1031 dealt with a challenge to then section 13(1) (a) of the Environmental Protection Act. That Section stated;

> Notwithstanding any other provision of this Act or the regulations no person shall deposit, add, emit or discharge a contaminant or cause or permit the deposit, addition, emission or discharge of a contaminant into the natural environment that:
>
> a) causes or is likely to cause impairment of the quality of the

> natural environment for any use that can be made of it.

Section 13 (1) (a) was amended in 1988 and later renumbered as 14 (1). That provision states;

> Despite any other provision of this Act or the regulations no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect.

Adverse effect is defined in Section 1 (1) of the *Environmental Protection Act* and includes impairment of the quality of the natural environment for any use that can be made of it.

The Supreme Court in the *Canadian Pacific* case concluded that the issues raised by C.P. in relation to the old Section 13 (1) (a) are directly relevant to Section 14 (1) and Section 1 (1) (a) of the Revised Act. Thus this decision applies to the legislation which forms the basis for the charge against UBA Inc.

Justice Gonthier at Paragraph 64 of the Canadian Pacific case states;

> It is apparent from these other enumerated impacts that the release of a contaminant which poses only a trivial or minimal threat to the

> environment is not prohibited by Section 13 (1). Instead the potential impact of a contaminant must have some significance in order for Section 13 (1) to be breached.

The court continues in the same paragraph:

> The choice of terms in Section 13(1) leads me to conclude that polluting conduct is only prohibited if it has the potential to impair the use of the natural environment in a manner that is more than trivial.

Justice Gonthier at paragraph 65 of that same case then goes on to apply what has been termed the "absurdity principle" in interpreting statute the words of the statute stating that a statute should be interpreted to avoid absurd results.

The court states in paragraph 65:

> One method of avoiding absurdity is through the strict interpretation of general words.

The Court then goes on to quote *Dreidger on Statutes* (3rd ed.) 1994 stating:

> Absurdity is often relied on to justify giving a restrictive application to a provision. Where a provision is open to two or more interpretations the absurdity principle may be employed to

> reject interpretations which lead to negative consequences as such consequences are presumed to have been unintended by the legislature. In particular because the legislature is presumed not to have intended to attach penal consequences to trivial or minimal violations of a provision the absurdity principle allows for narrowing the scope of the provision. In this respect the absurdity principle is closely related to the *maim de minimis non curat lex,* the law does not concern itself with trifles.

The court continues in paragraph 65:

> A degree of significance consistent with the objective of environmental protection must be found in relation to both the impairment and the use which is impaired.

At paragraph 68 of the *Canadian Pacific* case (supra) the court states:

> A similar contextual and fact sensitive analysis is required in interpreting the expression "for any use that can be made of it" (the natural environment), the kinds of environmental uses that can be made of a particular area and the question of whether the release of a contaminant has impaired these uses

> in a manner that is more than trivial or minimal will involve certain factual inquiries. The character of the neighbourhood in which the contaminant has been released, the nature of the released contaminant and the amount released will all be important factors.

It appears from this decision that not only is the principle of *de minims non curat lex* applicable to an offence under Section 14 (1) of the Environmental Protection Act but that it is necessary for the court to apply that principle in order to avoid an absurd result.

In the recently released case *of R. v. Williams Operating Corp.* the Ontario Superior Court of Justice in Thunder Bay sitting as a Provincial Offences appeal court stated at paragraph 86 of that decision:

> The trial judge used the *maxim de minimis non curat lex* to determine that the quantities of the substances deposited were so insignificant as not to constitute an offence.

The court continued:

> I accept the appellants argument based on the principles in R. v. Sault Ste. Marie, R. v. Goodman, and R. v. Croft *de minimis* does not apply to public welfare or strict liability offences.

The court in that case mentioned the case of *Ontario v. Canadian Pacific Ltd.* [1995] S.C.J. No. 62 but appears neither to have distinguished, analyzed or discussed that case in relation to the principle of *de minimis*. This court can only conclude that the decision of the Superior Court in the *Williams Operating* case is limited to the factual situation of that particular case which involved a charge under the *Fisheries Act* with a significantly different wording than the charge before this court and that the *Canadian Pacific* case being a decision of the Supreme Court of Canada remains the binding authority particularly in respect of Section 14 of the *Environmental Protection Act*.

The agreed facts in this case clearly indicate that on June 2nd, 2006 approximately 70 gallons of Liquid Bril Tak or caustic soda spilled from UBA tanker 61 covering a portion of Shirley Avenue for 300 to 400 feet. The road was closed to pedestrian and vehicular traffic from approximately 7:45 a.m. to 9:45 p.m., during which time access to the local businesses was restricted.

There does not appear to be any dispute that the spill was cleaned up in its entirety or that the material caused no damage to plant or animal life, did not enter the water table and caused no lasting damage to the road surface.

The only evidence of any one suffering discomfort or any type of physical reaction to the spill was that of Constable Alison Curran with the Waterloo Regional Police Services. She stated that she arrived on scene at approximately 7:46 a.m. to assist with traffic direction. She indicated that initially she was some 300 to 500 metres from the spill and then moved to a position approximately 100 metres from the spill where she remained for over an hour. At some point she began to experience what she described as a dry scratchy throat which did not improve when she chewed gum or drank water. When she inquired of the fire department members on scene if she needed to back away or use breathing apparatus they did not feel that was necessary. Eventually Constable Curran spoke to paramedics on scene who recommended that she attend Grand River Hospital for assessment. Although she saw a nurse practitioner the symptoms had disappeared by the time she arrived at the hospital. There was no evidence presented to the court that directly related the symptoms this officer experienced to the caustic soda spill.

Mr Mark Jasper President Of Echelon Response gave evidence that his company had been involved in some 40 to 60 events involving caustic soda and that the greatest distance he had ever seen airborne caustic soda travel was 25 to 35 feet from the initial incident. It is also apparent

from the photographs entered as exhibits at the trial that there were a number of persons who were in much closer proximity to the actual spill not wearing breathing apparatus or protective clothing, none of whom reported any physical symptoms, including the driver of the vehicle.

The evidence of Pascal Thibault, who was qualified as an expert in the handling and characteristics of hazardous materials, was that it was not possible for caustic soda solution to travel airborne for 100 metres.

Although there are businesses in the vicinity of the spill the prosecution called no evidence to establish the nature of those businesses and whether those businesses were in any way disrupted or inconvenienced by the spill in question. It is apparent that these businesses were not evacuated. Constable Curran at one point in her evidence indicated that vehicles were allowed to go through for people who were working in businesses in the area. There is no evidence that the normal conduct of those businesses was interfered with as a result of the discharge. There is however no question that Shirley Avenue was closed to through traffic for virtually the entire day, although none of the photographs entered as evidence show any vehicles approaching the barricades or being turned back. There is some dispute as to the nature of the road itself. Mr. Hall, the Ministry of the

Environment official who responded to and dealt with the spill, indicated initially that this was a fairly active through street and what he termed a secondary arterial road. Subsequently he indicated that the road in question actually used to be dead-end street but had been converted to a through road. It appears from the evidence that although Shirley Avenue is a through road that it services an area that is primarily industrial in nature and would be unlikely to experience the volume of traffic found on most city streets in residential or commercial areas.

Echelon Response was a company retained by UBA to provide services to respond to unplanned releases to the environment and to provide training to UBA personnel. Personnel from Echelon Response attended at the scene of the spill in order to facilitate the clean up of the Liquid Bril Tak on Shirley Avenue. Mark Jasper, president of that company, gave evidence that his company had responded to 40 to 60 events involving spills of caustic soda. He stated that this was the first time that a Ministry of the Environment Official stopped them from using a technique involving a street sweeper to remove the spilled material and absorbent material used to contain it from the surface. It appears that this was the result of Mr. Hall observing a dust cloud emanating from the street sweeper which had been brought to the scene from a construction site. This raised concerns in his mind that the material would

become airborne in the course of the clean up. It appears from Mr. Hall's own evidence that there was some confusion in his mind as to the positioning of the sweeper when he observed the dust cloud. Initially he stated that it was within the area of containment but subsequently corrected himself stating that it was outside that area. Mr Jasper's evidence was that the dust cloud was solely the result of the necessity to clean the brushes on the sweeper which had been brought from a construction site prior to using it in the clean up and that the brushes were being operated in the opposite direction from that which would have been used in the actual clean up. Mr Hall indicated that this was the first time he had been involved in a spill of sodium hydroxide or caustic soda. What is apparent is that the method that was ultimately used to clean up the material took a much longer time than the other solutions proposed by Echelon response.

There is no question that sodium hydroxide or caustic soda is corrosive and can pose health risks in situations of acute exposure or respiratory risks where mists are generated. The evidence of Mr. Ezeard was that although he smelled some fumes initially that they did not cause him any problems nor did they persist. He was the person in closest proximity to the spill immediately after it occurred.

In this case the effects of the spill were clearly minimal, there is not even any evidence before the court that the local businesses were in any way disrupted and it would appear that the police continued to allow access to some vehicles.

The defence relies also on the case of *R. v. Trimac Transportation Services*. That case involved a spill of some 200 litres of sodium chlorate at a weigh scale. The court in that case found that no adverse effect was shown to have occurred nor was there any likelihood of an adverse effect in the circumstances of the spill. The prosecution seeks to distinguish that case based upon the nature of the chemical involved being sodium chlorate as opposed to caustic soda, a corrosive material. Even sodium chlorate has the potential to harm the environment including flora and fauna depending on the area where it is released. The only real evidence of any adverse effect in relation to this spill is the closure of the road during the clean up. The prosecution contends that this is in itself sufficient to establish an adverse effect and in that respect relies upon the cases of *R. v. Crompton,* a 2007 decision of Ontario Court of Justice. That case however involved some serious physical reactions and an evacuation of the nearby business in addition to a road closure. In the case *of R. v. Pierre Belliveau and Norman Proulx,* a 2007 decision of the Ontario Court of Justice in

Cornwall involved an evacuation of a nursing home, a day long closure of two schools and a closure of area businesses. None of these cases deal with a situation were the only effect of the discharge was the closure of what appears to be a minor thoroughfare. This spill occurred totally on an asphalt or paved surface with no proven airborne contamination, no affect on plants or animals. It was in an industrial area with little pedestrian traffic. In this case the only evidence of any adverse effect is so trivial or minimal that it should not attract penal consequences and there was no likelihood of an adverse effect shown in the circumstances of this spill. Therefore the crown has not established beyond a reasonable doubt that the defendant caused or permitted the discharge of a contaminant into the natural environment that caused or was likely to cause an adverse effect in the circumstances of this case.

The defence has asked that even if I found in their favour in respect of the issue of adverse effect that I still address the issue of due diligence.

The evidence presented by the defence was that this was the first time a rupture disk had ever burst or failed on one of their vehicles while it was on the road. The defence called Pascal Thibault to give evidence. He was qualified as an expert in the field of design, operation and

regulation of pressure tanks and the handling and characteristics of hazardous materials including caustic soda. He gave evidence that the tank involved in this incident was classified as an MC 312 tanker with provision for 307 built in 1977 by Westank. He stated that an MC 312 trailer is a chemical trailer designed to contain a more corrosive product and that over time the corrosive products carried within that tank attack the stainless steel reducing the tank thickness and the MC 307 provision allows the tank to be utilized for other purposes once its thickness has been degraded.

Exhibit 56 at the trial was an external and/or internal visual inspection report from G&D Tank Repair relating to UBA unit #61 dated May 1st, 2006 indicating that the tanker in question had been inspected including but not limited to the bursting disk and the tank itself. The tank at that time appears to have still met the specifications for MC312. Mr. Thibault gave evidence that a Cargo tank marked or certified prior to August 31st, 1995 fitted with a non-reclosing pressure relief device or rupture disk may continue to be used in hazardous materials. Based upon the materials reviewed by Mr. Thibault it was his opinion that the equipment present on UBA tanker 61 on the date of this incident complied with all of the regulations particularly in respect of the venting devices required on such a tanker. The prosecution did not present

any evidence of regulations or industry standards to suggest that additional mechanical pressure release devices were required on such a tanker or that the same were regularly used or recommended by the industry in similar situations.

Based on the agreed facts the design pressure of the trailer in question was 30 P.S.I. and it was equipped with a bursting or rupture disk designed to rupture at a pressure of 45 P.S.I.
Mr. Thibault conducted some tests using a similar tanker and similar air compression system, as the tanker and trailer actually involved in the incident had been altered prior to the time he performed those tests. From those tests he concluded that the air compressor on the tractor would not have been able to create a pressure within the tank that exceeded 20 P.S.I. He ultimately concluded that the precise reason for the malfunction of the disk on June 2nd, 2006 can not be proven but based upon his tests that it was due either to mechanical failure or a defect in the rupture disk itself. Neither the failed rupture disk nor any part of the air compression or regulating system in use on that date were seized by the Ministry for testing.

The prosecution contends that the court should give absolutely no weight to this expert's testimony as he used a different truck, a different compressor and failed to consider the effects of dynamic pressure or the movement of

the liquid within the tank resulting from sloshing. Also the Crown contends that Mr. Thibault assumes based on the fact that there were leaks in the air pressurization system used to perform those tests that those same leaks existed in the air pressurization system in use on Unit 61 on the date of the incident. The crown contends that as an air a pressurization system is necessary to operate the brakes on the vehicle that the only logical assumption is that it was functioning properly.

Mr Thibault's tests resulted in him concluding that the tank could not be pressurized above 20 P.S.I. utilizing the air pressurization on the truck.

Mr. Hall with the assistance of Mr. Tomlinson conducted some tests on the air compressor unit on Unit 61 on the date of the incident and observed readings of 52 P.S.I. then 58 P.S.I. and a low reading of 40 P.S.I. However I am satisfied based on the evidence that as the hoses were not hooked up to the tanker that what was actually was being measured was the air pressure in the hoses as air was not entering the tank. There is no question that the tests that were conducted by Mr. Thibault cannot be said to replicate the conditions that existed on UBA Unit 61 on the date of the incident as he was using a different compressor, a different tanker and there was no allowance for movement of the liquid

in the tanker. It is clear that these factors must affect the weight that the court gives to this particular area of Mr. Thibault's evidence as an expert. However, I am not prepared to totally disregard his evidence as there is other evidence that supports his conclusion.

The person most familiar with the truck and tanker in question was the driver of that unit, Mr. Russell Ezeard. Mr. Ezeard's evidence was that the air compressor on Unit 61 was incapable of pressurizing the tanker above 20 P.S.I. His knowledge in this regard was based on long experience with the particular truck and tanker in question. He stated that although he did not check the air pressure in the tank prior to leaving the Brick Brewery in Waterloo and continuing to the Kitchener location he did check the pressure prior to off-loading some of the contents of his tank and at that time the pressure was 15 or 20 P.S.I. There is no question that he then proceeded to the second location with the tank pressurized. Although he did not check the pressure again it is only logical that after off-loading some of the contents at his first stop, the pressure would be lower than what he observed prior to unloading some of the contents of the tank.

The prosecution contends that the defendant company has not established due diligence based on a number of factors. They were aware of the

issue of sloshing within the tank and hitting the rupture disk and prior failure of the rupture disk but they took no additional steps to protect or reinforce that weak link in the delivery system. In addition the prosecution contends that the driver of UBA Unit 61 was sloppy and unsafe in driving a pressurized tank without first checking the pressure prior to leaving his first stop. There is no question that Mr. Ezeard might have taken further precautions including determining the tank pressure prior to leaving his first stop.

The test to establish due diligence is not whether a greater degree of skill and care would have prevented the incident but whether reasonable care was exercised in the circumstances. Mr. Ezeard was the person most familiar with this particular tanker and truck. His evidence was that the truck compressor was incapable of pressurizing the tank above 20 P.S.I. and that he checked the tank pressure prior to unloading product for ten minutes in Waterloo. He did not check the pressure again prior to leaving that location but testified that the off-loading of product would have served only to lower the pressure within the tank.

Mr. Ezeard stated that the contents within the tank sloshed and that that was an every day occurrence but that he had never had a rupture disk burst in transit before nor had he ever

experienced a rupture disk bursting when he pressurized the tank using the truck's compressor.

Mr. Ezeard gave an opinion that it was the sloshing of the liquid that caused the rupture disk to burst despite the fact that he conceded that sloshing was an everyday occurrence and that he had never had a rupture disk burst in transit prior to this. Mr. Ezeard also conceded that he had no expertise in this area but was basing it upon an assumption of what had happened. This evidence still does not establish that the failure of the rupture disk was the result of overpressurization of the tank from the combined effect of sloshing and driving with the tank pressurized. In fact Mr. Ezeard's evidence seems to indicate the contrary. He stated that sloshing was an everyday occurrence that was common to make multiple deliveries and drive with the tank pressurized. His evidence was that there was no way to release pressure from the tank once pressurized without venting some of the contents of the tank into the air. Mr. Ezeard was adamant that a rupture disk had never burst in transit before and that he had never had a rupture disk burst when using the truck's compressor to pressurize the tank. There is no evidence to dispute this.

Mr. Thibault gave his opinion based apparently upon the false assumption that the incident had

occurred on a level road. However even when confronted with the fact that the incident had occurred on an incline he maintained his position that the failure of the rupture disk was not due to dynamic pressure as it would have required that all of the liquid within the tank go back to the back of the tanker up into the manhole or a 15 foot column of liquid, and this was not possible in his opinion. I see no reason to totally disregard this area of Mr. Thibault's evidence.

The prosecution also makes much of the fact that Mr. Ezeard indicated that he had replaced the rupture disk the last time that it had burst in April 2006 when he was making a delivery to Kencro. Mr. Ezeard was unable to provide the court with his log book for the month of May however company waybills showing all deliveries from UBA with Unit numbers and drivers names were entered as exhibits at trial and showed that Mr. Ezeard made no deliveries to Kencro in the month of May 2006. In addition Exhibit 54, an invoice relating to service of UBA unit 61, shows that the bursting disk on that unit was replaced at G & D tank and Trailer by a certified contractor on May 1st, 2006, a date subsequent to Mr. Ezeard's last visit to Kencro.

The onus is on the defendants to establish due diligence on a balance of probabilities, that is that they took all reasonable precautions in the

circumstances. The actual reason that the rupture disk failed on the date in question has not been and in my opinion cannot be established. The bursting disks used as pressure relief devices on the date of the incident appear to comply with the requirements for the type and age of tanker being used by UBA Inc. The evidence is clear that an incident of this type had never occurred before. Rupture disks had failed before but only at a customer's site and only using the more powerful air compressors located at the customer's sites. Sloshing of the contents of the tank was not only common but a daily occurrence and had never resulted in a similar incident prior to this. All of these factors affect the foreseeability of an incident such as this occurring. There was evidence that UBA's employees were trained in the handling of hazardous materials and dealing with spills. Clearly Mr. Ezeard took the appropriate steps to contain the spill and contact authorities. There is no question that there were other steps that might have been taken to prevent the occurrence of a spill including the additional use of mechanical reclosing pressure vents. The law however does not require perfection but only reasonable care in all of the circumstances.

In this case having regard to all these factors it is the finding of this court that the defence has established due diligence on a balance of

probabilities and the charge would be dismissed on that basis as well.

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FORM 2

CERTIFICATE OF TRANSCRIPT

Evidence Act, S. 5 (2)

I, DEBORAH M. NIHLS, CCR, certify that this document is a true and accurate transcript to the best of my skill and ability of the recordings of R. v. UBA Inc., in the Ontario Court of Justice, Provincial Offences Court, held at 77 Queen Street North, Kitchener on June 2, 2009, which recordings have been certified in Form 1.

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Deborah M. Nihls
Certified Court Reporter

June 8/09