

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: **R. v. Scott Steel Ltd.,**
2004 BCCA 2

Date: 20040105

Docket: CA30639

Between:

Regina

Respondent

And

Scott Steel Ltd. and Ron Scott

Appellants

Before: The Honourable Chief Justice Finch
(In Chambers)

F.G. Potts Counsel for the Appellants

S.I. Macdonald Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
December 12, 2003

Place and Date of Judgment: Vancouver, British Columbia
January 5, 2004

Reasons for Judgment of the Honourable Chief Justice Finch:

[1] The appellants apply for leave to appeal the judgment of the Supreme Court of British Columbia pronounced 20 February 2003 allowing the Crown's appeal from the appellants' acquittal in Provincial Court on 17 December 2001. The appellants were charged under the **Offence Act**, R.S.B.C. 1996, c.338 for breaches of the **Workers Compensation Act**, R.S.B.C. 1996, c.492 and the Industrial Health and Safety Regulation, B.C. Reg. 585/77, as the result of two fatalities and other workers' injuries which occurred during a reconstruction project on a railway bridge owned by the C.N.R.

[2] At trial, the learned Provincial Court judge held that "the exercise of the jurisdiction of the provincial body had been ousted in favour of federal jurisdiction". On the Crown's appeal to the B.C. Supreme Court the learned summary conviction appeal judge held that the trial judge erred in his conclusion concerning jurisdiction. Tysoe J. held:

[16] It was also an error for the trial judge to conclude that the jurisdiction of the provincial body was ousted in favour of federal jurisdiction because Scott Steel was working on a railway that formed the core of CNR's federal undertaking. This was also the case in *Construction Montcalm*, where a provincial construction company was working at the site of a federal undertaking but the Supreme Court of Canada nevertheless held that the construction company was subject to provincial wage legislation. The test of jurisdiction in respect of occupational health and safety is the same as the test in respect of labour relations, and it is not determinative whether the activities in question take place at a site owned or controlled by the federal or provincial enterprise.

[3] He concluded:

[20] In summary, the trial judge should have applied the test set out in *Northern Telecom No. 1* to the findings of fact he made and concluded that the provincial legislation dealing with occupational health and safety applied to Scott Steel. He erred in distinguishing the *Canada Labour Code* case by creating an unsupported distinction between legislation dealing with labour relations and legislation dealing with occupational health and safety. I allow the appeal and order a new trial.

[4] On this application for leave to appeal under s.124(1) of the **Offence Act** the appellants must raise a ground of appeal that involves a question of law alone, show that the issue of law is important, and show further that the appeal has a reasonable prospect of success: **R. v. Hildebrand** (2000), 144 B.C.A.C. 156, 2000 BCCA 579 ¶7.

[5] The issue which the appellants seek to raise on appeal is whether the summary conviction appeal court judge "erred in law when he determined that the [Workers Compensation] Act applied to the appellants in the particular circumstances of this case". They would seek to argue on appeal that it was an error to impose upon "a single work site with an integrated work force including both C.N. and Scott Steel Ltd. employees, two separate and conflicting schemes of occupational health and safety".

[6] The Crown opposes the application for leave to appeal on two grounds. First it says such an appeal would be premature because the Provincial Court has not yet heard and determined the substance of the charges against the appellants. Second, the Crown says there is no reasonable prospect of success on appeal because the ground alleged is dependant upon facts not supported by, and contrary to, the findings of the trial judge.

[7] In my opinion, the test for leave to appeal to this court has not been met. The appellants raised the jurisdictional issue at the commencement of the proceedings in Provincial Court. The learned Provincial Court judge was of the view that he could not decide that issue without a proper factual foundation. He said:

[3] Prior to the commencement of the trial, objection was raised on behalf of Scott Steel that the provincial legislation did not apply to their work at Mile 8.3 and therefore they could not be prosecuted for an alleged violation of that **Act** and its regulations.

[4] Because counsel could not agree on sufficient facts, the Court was unable to make such a determination prior to the calling of evidence. The parties agreed to commence the trial without prejudicing the right of the applicant to renew his objection once the court had heard those witnesses whose evidence would enable the court to make the findings of fact necessary to determine the jurisdictional issue.

[emphasis added]

[8] His review of the evidence and his factual conclusions on the evidence are set out from paragraph 9 to 16 of his reasons.

[9] I understand from what the learned Provincial Court judge said that the issue of whether the **Workers Compensation Act** and the Industrial Health and Safety Regulation apply is a question of mixed fact and law. His legal conclusion depended on his findings of fact. That is also clear from the way in which the issue sought to be raised has been framed by the appellants - "in the particular circumstances of this case".

[10] As the question raised is not one of law alone, the proposed appeal does not satisfy the criteria for leave to appeal set out in s.124(1) of the **Offence Act**.

[11] Counsel for the appellants argue that it was unfair for the Crown to have an appeal as of right from the decision of the Provincial Court judge, whereas the appellants must now obtain leave to appeal the decision of the summary conviction appeal court judge. The Crown's appeal arose as of right under s.109 of the **Offence Act**, incorporating relevant provisions of the **Criminal Code**, and appeal from "acquittal". However, if the Crown wished to appeal the decision of a summary conviction appeal court, it too would have to raise a ground that involved a question of law alone as required by s.124 of the **Offence Act**, again incorporating the relevant provisions of the **Criminal Code**.

[12] The application for leave to appeal is dismissed.

"The Honourable Chief Justice Finch"