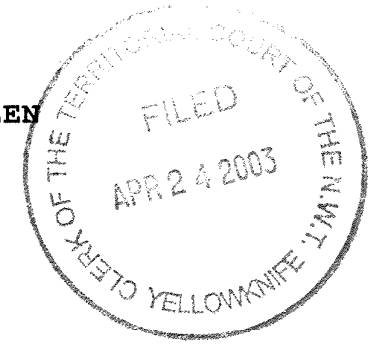
2003 NWTTC A5

T-1-CR-2002001700

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:



HER MAJESTY THE QUEEN

- and -

SUPREME STEEL LTD.

Transcript of the Ruling on a No-Evidence Motion delivered by The Honourable Judge B.A. Bruser, sitting in Yellowknife, in the Northwest Territories, on the 7th day of March, A.D. 2003.

APPEARANCES:

Mr. N. Sinclair: Counsel for the Crown

Mr. J. Josse: Counsel for the Defendant

(Charge under s. 39 *Mine Health and Safety Act*)

THE COURT: I am going to say something about the law. I am of course alive to it, but with members of the media here, I want to do all I can, reasonably, to help educate them because they're the people who ultimately get the word out to the public. They need all the help they can get. This is a complex case.

The charge is that the Defendant, Supreme Steel Ltd., on or about July 17th, 2001, at the Diavik mine site near Yellowknife, did fail to take every reasonable measure and precaution to protect the health and safety of the deceased workers, and that is because, it is said, Supreme Steel had them work in an unsafe manlift: a Grove AMZ131XT.

The offence is contrary to Section 15 of the *Mine Health and Safety Act*. This is what is commonly called a no-evidence motion, although the words "no evidence" can be misleading because there is more to the concept than simply those two words. Another way it is commonly worded is it is an application for a directed verdict. What directed verdict means is that if there were a jury trial, the defence could make a motion to have the judge direct the jury to a verdict of acquittal. Hence directed verdict. Both terms, before a judge sitting alone, have the identical meaning. A no-evidence motion equals motion for directed verdict. They are not different concepts.

The *Ewaschuk* brief presented by the prosecutor

today in support of its argument, succinctly sets out the correct statements of law.

Another word that crops up from time to time is a motion for non-suit. Again, it has the same meaning as a no-evidence motion or motion for a directed verdict.

A motion like this is made at the end of the case for the prosecution. The case for the prosecution ended yesterday. The accused has not yet been put to its election. That properly is left to the end of the no-evidence motion. Obviously, if I allow the no-evidence motion, the case is dismissed. If the case is dismissed, that is the end of the matter. If it is the end of the matter, the defence has no election to make. If I do not allow the no-evidence motion, the defence is called upon to make its election. One of the advantages of a no-evidence motion is that it presents the defence with a proper and a valuable opportunity to get a sense of how the Court may be thinking about a matter.

The word "sufficient" and the word "insufficient" are often referred to. These do not, in the context of a no-evidence motion, have the same meaning as arguments made at the end of all of the evidence in a trial after this stage has been passed.

The trial judge at the point we are now at in the no-evidence motion has to apply a test. The test is

whether there - and I'm putting it in its simplest context for the benefit of the media, although I have considered it, Counsel, in a broader context - is any evidence upon which a reasonable trier of fact, properly instructed, could return a verdict of guilty? Or as is more often put, but in a sense that can be confusing to a layperson, is there any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty? The meaning is the same, but there is no jury in this trial.

I am not entitled to terminate the matter here even if there is evidence that may be unreliable or dubious if the test I referred to is otherwise met.

Another way the test is often put, and this can help explain the test but in different words, is whether the Crown evidence merely gives rise to suspicion or whether it is such as to justfy the inference of guilt. Mere suspicion is not enough. It is enough - I repeat, it is enough - to justfy the inference of guilt.

I am not allowed at this stage to weigh the evidence, I am not allowed to test its quality, and I am not allowed to test its reliability. Also, I am not allowed at this stage, although I could do so later on if the matter gets past this point, to draw inferences of fact from the evidence. All of these things are for the trier of fact. If there were a

jury, it would be for the jury. A judge alone - for the judge after this point. I also have to determine whether there is any admissible evidence. The word "admissible" is important given the number of objections that have taken place regarding admissibility in this trial. And I have to determine whether the admissible evidence, direct or circumstantial, if believed by a properly charged jury acting reasonably, could justify a conviction.

I agree with the prosecutor and with the defence that I am entitled to and indeed must engage in a form of limited assessment, or weighing, in the sense that I have to determine if the test I referred to before has been met; that is, if there is sufficient evidence to permit a properly instructed jury to convict within the parameters I earlier identified.

While some case law may refer to this as a limited weighing, I prefer to look at it more in the context of an assessment, because as soon as the judge at this stage engages in a weighing of any sort, the danger of weighing past the threshold or past the barrier becomes very real. It is an assessment. It is an assessment of where the evidence may lie, and in that context, it is the probing that the prosecutor spoke of. Is there evidence? The probing is to look for that. Another way to put it: Is there the presence of evidence on every essential element and,

of course, to the required standard of a reasonable jury properly instructed and acting reasonably?

I leave that body of the law behind me. I can only hope that this does help the members of the media who are here today, because it will not be every case that they will have the benefit of this type of education.

In my view, the probing, the assessment, lead me to a determination that this case goes beyond mere suspicion. There is a vast, complex web of interconnecting admissible evidence for the trier of fact to weigh. That web of evidence has to be tested for quality. And quality is a significant issue for the trier of fact in this case given the complexity of the evidence and the varying opinions that are being offered, and the trier of fact has the task ahead of it to assess and weigh reliability. Furthermore, this is a case in which it may be open for the trier of fact to draw inferences of fact from proven evidence. Inferences can only be drawn from evidence that is admissible and which the trier of fact finds to be proven. I can't get into that area. It's not my job. If I get into it, I fall into error.

These inferences - the testing of quality, the testing of reliability, and to some extent findings of reliability - are all tools or pencils for the trier of fact to use to connect the many pieces of evidence.

The argument raised by the defence today says that the charge as worded invites the Court to reason backwards, but that is not an invitation that this Court will accept. Obviously, the fact of the tip-over has to be looked at if the Court is determining what the cause of it may have been. But one does not arrive at the simplistic conclusion that because there was a tip-over, the defendant must be guilty or must have committed a prohibited act. I will not, as this proceeds further, and I do not today, fall into that error.

The defence says that the Crown must have to prove more than the tip-over. I think Crown counsel concedes that.

The defence has for many months been made aware of the nature of the case for the Crown. Aspects of that changed over time. It is evident that a key area for the trier of fact will be the operation, servicing, and maintenance of the switches in issue; but I cannot make those determinations today.

The trier of fact could come to a number of different conclusions, or to put it in the language of metaphor, it may decide to ignore some sign posts and to follow other sign posts, it may decide to follow detour signs or ignore detour signs.

One of the paths that the trier of fact could decide to follow - and I don't think I have to go this

far but I will because I don't think it can hurt and it may help - could be this scenario, and I make it without falling into any of the prohibited areas but merely to show that I am alive to where the trier the fact may be heading. I put it within this rather simplistic framework because I think it would be a mistake for me to become too detailed at this stage.

The illustration may go like this: Key safety limit switches were either stuck or intermittently sticky. This compromised safety. Manlift operators depend on the safety limit switches for their safety and for the safety of others at the work site. The lives of the operators, and others, depend upon these limit switches working properly, especially in this model of manlift because the operators in the platform, or, as it is also called, man basket, have no way, once they are up in the air, of knowing whether or not they are working within the angle safety envelope. There are no angle alert devices in the platform. There are no bells, no whistles, no lights, no monitors. There's nothing that can tell them if what they are doing on the platform is giving them this angle or that angle. They have controls to raise the riser and the boom to certain heights and to certain angles, but they don't know with any precise certainty where they are necessarily at.

Again, to make it clear, I'm not making findings

of fact. I am identifying areas that the trier of fact could be looking at and findings that it might be headed towards, and this is one illustration, which I continue with.

The trier of fact could find that Supreme Steel, as the lessee of the manlift, has a reasonable measure of care to take in being responsible for knowing about the importance of safety limit switches. The trier of fact could find that despite this knowledge, which the trier of fact might make a finding of, Supreme Steel relied upon the Klondike inspection report as conveying a message to it that the manlift was in safe operating shape. The trier of fact might find that the Klondike report was structural in scope and that it had nothing to do with safety limit switches. The report says nothing about the condition or maintenance of those switches. The trier of fact might therefore conclude that Supreme Steel had no reasonable basis upon which to find that the manlift safety limit switches were safe other than by assumption. The trier of fact could logically, if it got that far, find that the Defendant was engaged in a risky form of Russian roulette by permitting its employees to operate the manlift. The trier of fact, if it got that far, could find that to be a prohibited act.

The trier of fact might find that had the limit switches been properly inspected before the manlift

was operated, that the stuck or intermittent sticky condition would have been discovered upon such proper inspection. The trier of fact might be led to the conclusion that had all of this been done properly, the event would not have happened.

All of this has to be weighed, but this is one plausible scenario on the evidence. When I say "on the evidence", I mean within the scope of the test, the probing test. I probe, I see these things, I say that the trier of fact might make those findings.

There are other scenarios as well that the trier of fact might find, scenarios favourable to the Crown and scenarios favourable to the defence. But so far as the no-evidence motion is concerned, there is some evidence upon which a reasonable jury, properly instructed and acting reasonably, could find that the prohibited act occurred. Once that finding has been made, the due diligence issue becomes one that has to be factored in, and of course the trier of fact would assess and weigh the totality of the evidence in determining what the verdict ought to be.

The trier of fact has to determine between the competing expert opinions. I touched on this before. But there will be considerable assessment and weighing of that evidence.

For the reasons given, I dismiss this no-evidence motion.

I haven't dealt with other aspects of the charge because they are to a large extent admitted or clearly sufficient.

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Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich,
Court Reporter