R. v. Supreme Steel Ltd., 2003 NWTTC 01 T-1-CR-2002001700

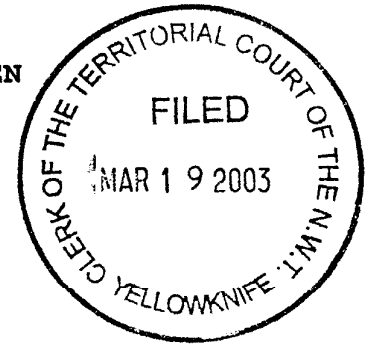
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

SUPREME STEEL LTD.



Transcript of a Ruling delivered by The Honourable Judge B.A. Bruser, sitting in Yellowknife, in the Northwest Territories, on the 26th day of February, A.D. 2003.

(Ruling on Admissibility of Statements)

APPEARANCES:

Mr. N. Sinclair: Counsel for the Crown

Mr. J. Joosse: Counsel for the Defendant

(Charge under s. 39 of Mines, Health and Safety Act)

THE COURT: This is a ruling regarding the admissibility of statements reduced to transcript form. Two of them are before the Court as Exhibits "A" and "B". The form of the statements per se is not in issue. Voluntariness, as that term has come to be known at common law, is not in issue regarding any of the statements.

There are three categories into which the statements fall:

1: There is a statement of a witness not being called by the Crown. That person is Peter Leder. Exhibit 1 contains an Agreed Statement of Facts. Paragraph 6 provides that the manager of construction services for Supreme Steel Ltd., who was in charge of the work at the mine on behalf of Supreme Steel Ltd., was Peter Leder.

2: The statement of a witness who has been called. This person is Derrick Singer.

3: The statement of a witness who, the Crown says, will be called. On the basis that he will be called, the defence says that his statement can be admitted without objection. The name of that person is Gordon Leder.

Paragraph 7 of the agreed facts provides that the Supreme Steel Ltd. supervisor on duty at the time of the event was Gordon Leder.

Because Gordon Leder is to be called, this ruling

need not concern his statement. This leaves me with categories one and two; that is, the statements of Peter Leder and Derrick Singer.

The Crown began its submissions by referring to the *Mine, Health and Safety Act*. This is an Act of the Government of the Northwest Territories. It is the Act that governs this proceeding because it is this Act under which the charge has been laid.

Crown counsel says that Section 24(1) ought to be the starting point. It provides that an inspector shall investigate an accident that has caused loss of life.

The evidence so far is clear. There was loss of life. Two people died. The two people who died were employees of Supreme Steel Ltd., the Defendant.

When the word "event" is used, it refers to the event that caused the loss of life.

The inspector, Hugh McKercher, happened, by coincidence only, to have been making one of his infrequent visits to the mine. He was there at the time of the event. This was fortuitous because he was immediately able to secure the scene. He secured it, awaiting the arrival of the RCMP, because, in his view, a police investigation would have to take precedence over a mine investigation under the Act.

Section 21(2) provides that an inspector may bring any other person to the mine to assist the

inspector in an investigation or inspection. The RCMP were brought to the mine for a different purpose. In fact, they weren't brought to the mine by the inspector. Rather, they were informed of the incident by the inspector, who was waiting for them, as I said, to conduct a police investigation. But they were there. They completed the police part of the investigation. In a sense, they were brought to the mine because the inspector had them informed of what had occurred.

Section 23 provides that, amongst other things:

> "Every person at the mine shall ...
> (c) provide the inspector with such information relevant to the administration of this Act and the regulations as the inspector may reasonably request."

The paragraph does not read that such people are to provided the inspector, or anyone assisting him, with such information.

There is evidence from Corporal Ing that his understanding was that he and Corporal Brandford remained at the mine to assist the inspector. In doing so, they took some statements. These are the statements that are in issue.

It is my view that if the legislature intended that the assistance of the people helping the inspector were to be contemplated within paragraph (c) of Section 23, the legislature would have clearly said

so. It did not say so in clear language.

The Crown says, however, that these statements were taken in cooperation with the mine inspector and "under his auspices". But that is not what the Act says. It does not talk about cooperation of this sort leading to the taking of statements. Exactly what is contemplated is unclear. But I need not rule upon it, nor define the parameters. These observations do not, however, make the taking of the statements unlawful.

There is, then, the second issue raised by the Crown. This is the issue of statements made by agents of an employer and the admissibility of such statements.

The Act does not preclude the operation of the common law. Indeed, the contrary appears to be stated in the Act. A consideration of the common law is therefore critical. It is that area which I shall now review in some depth.

The leading case is found at tab 1 of the Crown's brief of authorities. It is the Ontario Court of Appeal judgment in *Strand*, [1969] 2 C.C.C. 264 (Ont. C.A.). That case held that it is settled law that statements made - and here is the essence of it - by an agent within the scope of his authority to third persons during the continuance of the agency are receivable as admissions against his or her principal provided that such statements or admissions were made

as part of a conversation or other communication which the agent was authorized to have with the third party.

At tab 2 is the *St. Michael's Hospital* judgment, (1987), 2 C.E.L.R. 9 (NS) 327 (Ont. Dist. Ct.) At page 5 of *St. Michael's*, paragraph 30, the Court held that "Statements made to third persons by an agent within the scope of the agent's authority during the continuance of the agency are admissible against the principal ..." and then the Court referred to *Strand*.

The courts often refer to *Strand*, which, in itself, referred to settled law. *Strand*, I take it, remains good authority, and I follow it.

At tab 4 is the Provincial Court of British Columbia judgment of the *Crown v. Northwood Inc.* At page 4 of that ruling on a voir dire, the issue is defined. The issue was whether or not the statement of Mr. Bristow to a Mr. Senka and the transcript were admissible. The Court referred to the "settled law" at line 40 of the same page, that a statement of an accused person to a third party, even though it may be hearsay, can be admitted against the accused providing common law voluntariness has been met; voluntariness, as I said earlier, is conceded.

At page 5, beginning at line 3, the Court found that it did not see any difference between a statement of an accused person to a third party being admitted into evidence and the rule set out in *Strand Electric*.

Low, J. said, "A corporation has no voice save and except for its officers and employees," at lines 6 to 8. He went on to say that "If an employee speaks to a third party about matters within his knowledge, that statement will be admissible." I think, however, that this is a somewhat oversimplification of the rule, because he does not, in that paragraph, speak of the necessity for (a) being an agent, and (b) the agent speaking within the scope of the authority. It is the scope of the authority that is a critical component of the defence argument in the present case.

The case of *Caron v. Allport*, filed by counsel today is referred to. I will now proceed directly to the *Caron v. Allport* judgment. I begin at page 4. This is the same reference referred to by Low, J.:

> "The test of admissibility should not rest on whether the principal gave the agent authority to make declarations. No sensible employer would authorize his employee to make declarations. No sensible employer would authorize his employee to make damaging statements. The right to speak on a given topic must arise out of the nature of the employee's duties."

Because it is the nature of the employee's duties that define the employee/agent's scope, in order to understand the scope of the duties, one has to understand the nature of the duties. To understand the nature of the duties, the Court has to know something about the circumstances of the particular

matter before it.

I refer to the quote from page 4 of *Caron*, which comes from page 292 of the book of the *Law of Evidence in Canada* by Sopinka, J.

Continuing now with the same paragraph where I left off:

> "The errand boy should not be able to bind the corporation with a statement about the issuance of treasury stock. But a truck driver should be able to bind his employer with an admission regarding his careless driving. Similarly, an usher should be able to commit his employer with an observation about a slippery spot on the lobby floor. It is enough to show the existence of the employment and the general nature of the employee's work ..."

The ellipsis means that something has been left out. Defence counsel has referred to it today.

The defence has filed an excerpt from the *Law of Evidence in Canada*, 2nd edition, by Sopinka, J. At item number 6.328 is the following:

> "In criminal cases and prosecutions for regulatory offences (the latter being applicable to the case at bar) attribution is more restrictive because the nature of the proceeding is quite distinct and different policy considerations favour a more restrictive approach."

I am alive, then, not only to the quote in *Caron v. Allport*, but also to what further considerations Sopinka, J. may have had in mind.

Part of the problem with the ruling by Low, J. at

5 in the *Northwood Inc.* judgment is that in the quote that he refers to, there is a full period at the end of the sentence quoted, beginning with the words "it is enough to show the existence of the employment". But, in fact, there is more. It is the ellipsis, and the ellipsis is there for good reason. It is a cautionary sign. Fortunately, today the Court has been able to proceed past that cautionary sign and with due caution.

I continue with what Low, J. had to say, at page 5, beginning at line 42. He found that Mr. Bristow was an agent for the defendant company. He found that by way of admissions. The individual was employed by the Defendant. The details of how the statement was made are set out. There is a distinction between them and what I am dealing with, but that distinction is not critical. I do observe, however, that Mr. Bristow was not under any statutory compulsion.

I return now to my earlier remarks about the *Mine, Health and Safety Act*.

I do not go so far as to say that any of the statements that are in issue before me; that is, the two of the three, were made by means of statutory compulsion, and I say this for the earlier reasons I gave.

At tab 6 of the material filed by the Crown is an excerpt from Chapter 16 from *Criminal Pleadings and*

Practices in Canada, 2nd edition. I accept what is referred to; namely, that "An admission by an agent or representative," and here I would include an employee, "is inadmissible against his principal ..." and here I would include employer, "unless it relates to the scope of the employment," quoting in *Strand Electric*, and continuing with *McNamara*, an Ontario Court of Appeal authority, that the employee's admission is inadmissible if it involves matters that are not related to the employer's business. Therein lies an important directional sign as to how to define the scope of employment.

To understand this better, it is helpful to refer again to the remarks made by Sopinka, J., and here I will use the *Caron v. Allport* reference as I did before. But I'm going to take one part of it now from that paragraph, although I have considered all of it:

> "... a truck driver should be able to bind his employer with an admission regarding his careless driving. Similarly, an usher should be able to commit this employer with an observation about a slippery spot on the lobby floor. It is enough to show the existence of the employment and the general nature of the employee's work."

The material provided by the defence also includes an excerpt from the *Canadian Encyclopedic Digest*. At paragraph 892, the annotation is one that, in my view, in light of the other authorities I have be referring to, ought to be interpreted by me with a

measure of care.

Under the heading "Employee", it is said:

> "An employee can make an admission against the employer if the employee had authority to make it. Authority to act on behalf of the employer does not by itself confer upon the employee the ability to make an admission against the employer about such acts."

That comment has to be read in light of the truck driver/usher analogy which I referred to.

I do not think the law goes so far as to say that an agent or an employee of an employer is prohibited from making statements to anybody, whether it be a mine inspector, an RCMP member, a private investigator or anybody else, unless the employer gives the green light to make the statement. Nowhere do I find the law to take us to that principle.

Derrick Singer has been called to testify. He is an iron worker. He is familiar with manlifts. He has driven and operated many of them over many years. He worked for Supreme Steel at the event site operated by Diavik. He worked only for three days and then this event occurred. He was given compassionate leave and his wise wife told him he shouldn't come back. He knew who the two deceased people were. He knew they had been in the manlift that was the subject of the event. He heard the manlift topple over. He immediately turned around and saw it toppled over. He was the first to attend the scene. He was horrified

by what he saw. Several hours later, he told the police what he saw, in a statement given to an RCMP Corporal.

I do not know the exact details of the statement, nor of the statement of Peter Leder. I have not read them because I did not think it would be fair to the defence for me to read them. I also believe that it is not necessary to read the statements.

I conclude, regarding his statement, that it is admissible. I apply the principles I have referred to. That statement and the other one was made known to defence counsel late last year. To allow the statement of Derrick Singer does not, on my assessment of the submissions and other material, mislead or prejudice the defendant in making full answer and defence, nor does it impact upon the fairness of the trial to the extent that it requires exclusion.

I arrive at this conclusion regarding the Derrick Singer statement with the *Stinchcombe* judgment in mind, along with the other authorities, and here I part company with the proposition advanced by the Crown.

The Crown says that *Stinchcombe* requires disclosure of all material, which the Crown, it is conceded, has done. Crown counsel, however, says that *Stinchcombe* does not require the Crown to disclose the mode of its procedure. I think Crown counsel is

incorrect.

I am reading from *Stinchcombe*. It is a unanimous judgment. The Court referred to the British Columbia Court of Appeal judgment given by McEachern, C.J., in *R v. C.(M.H.)* (1988), 46 C.C.C. (3d) 142 (B.C.C.A.). The Court, in agreeing with McEachern, C.J.B.C., quoted favourably the following proposition:

> "There is a general duty on the part of the Crown to disclose all material it proposes to use at trial ..."

The Court went on to highlight that this would especially involve all evidence that may assist the accused even if the Crown did not intend to adduce it, but part of the rationale, in my view, of *Stinchcombe* is that not only does Crown counsel have to come to court with a briefcase in which material has been disclosed, but, also, it is essential that to avoid misleading the defence, to avoid prejudice, and to maintain the integrity of a fair trial, it inform defence counsel of what the evidence to be led will be, within reason. Clearly, each case has to be ultimately decided on its own merits. But I do not find in the matter before me unfairness to the degree that exclusion of evidence is mandated following *Stinchcombe*. I do, however, find a measure of unfairness. But defence counsel has taken advantage of opportunity afforded him by the Court to make full argument on these important issues. Unfairness, while

it may have existed this past Monday morning, has, by the passage of time, been largely addressed.

The statement, in conclusion, of Derrick Singer is to be admitted in the trial proper as an exhibit for the truth of what is in it, and to be weighed along with all the other evidence including any inconsistent evidence that he may have given in the trial, if, in fact, there are inconsistencies.

As for the statement of Peter Leder, the application of the principles I have referred to, the remarks I have made just now about *Stinchcombe*, lead me to an identical conclusion.

I rule that Peter Leder's statement may be admitted without the Crown calling him as a witness, because I find that he is in such a high capacity by virtue of the admissions that he is entitled to give a statement in the scope of his employment with the Defendant.

I am to some degree reinforced in my finding pertaining to the Derrick Singer statement by Section 61 of the *Evidence Act of the Northwest Territories*. It has some bearing because it refers to "a statement made by a person in a document". The statement he made is a statement in a document, the document being a transcript of a recorded statement. That subsection, 61(1), goes on to say that this is applicable where the maker of the statement is called

as a witness. Mr. Singer was called.

The *Evidence Act*, though, is largely about exceptions to the hearsay rule. Evidence acts tend to be about exceptions. That is how they originated. Exceptions to a rule do not by themselves make the common law principles inapplicable. Exceptions to a common law rule do not become exclusive of the common law simply because of the fact of the exception being enacted.

Now that I have ruled the statements to be admissible and have ruled that they may become the next exhibits for the truth of what is contained in them, I may read them, and I will do so.

I add this, though, and this is primarily in case this ruling is taken further. During the submissions made by counsel, I inquired as to whether the statements were relevant and probative. Crown said they were. I take that at face value. The defence does not argue that the statements are irrelevant or that the probative value of what is in them is exceeded by prejudicial content. If I were being asked to find that the statements were not relevant or not probative, it would be incumbent upon me to read them in order that I could arrive at a ruling on that aspect of the matter. However, that issue is not before me; therefore, I conclude the ruling that I make today by making these exhibits and by telling

counsel that it is now open for me to read them.

(CONCLUSION OF RULING)

.....

Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich,
Court Reporter