SUPREME COURT OF YUKON

Citation: *Director of Occupational Health and Safety v. Yukon (Government)*, 2011 YKSC 50

Date: 20110609
S.C. No. 10-AP018
Registry: Whitehorse

Between:

Director of Occupational Health and Safety

Respondent

Government of Yukon

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

Sarah D. Hansen — Counsel for the Appellant
Lenore Morris — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Government of Yukon (the "Government"), prior to the hearing of the within appeal, for an order that this Court should determine the appeal by way of a new trial ("trial *de novo*"). In the alternative, the Government asks for an order allowing fresh evidence to be adduced at the appeal hearing.

[2] The Government is appealing a conviction by the Territorial Court that it, as the "constructor" during the Hamilton Boulevard Extension construction project, failed to ensure that its contractor, P.S. Sidhu Trucking Ltd. ("Sidhu"), as well as the contractor's

supervisor and blaster, carried out certain safety measures and procedures prescribed by the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159, (the "*Act*") and regulations.

[3] In particular, the Government was convicted under s. 4 (a) of the *Act* because of an incident on May 6, 2008, when flyrock from some blasting work fell into areas of the Lobird trailer court in Whitehorse. The principal ground of appeal is that the trial judge erred in finding that the Government was the only "constructor" on the entire project.

ISSUES

[4] A number of issues and sub-issues were raised in this application:

1. Should there be a trial *de novo*? The Government advanced three grounds for this relief:
    a) It was convicted of a matter with which it had not been charged, and was therefore denied an opportunity to present its defence;
    b) The trial judge failed to give any, or alternatively adequate, reasons to support his finding that the Government was the only "constructor" on the entire project; and
    c) There is fresh evidence that could affect the result at a new trial.
2. As I understood the Government's counsel, even if I do not order that the appeal hearing proceed by way of a trial *de novo*, she seeks to have the fresh evidence allowed at the appeal hearing in any event.

ANALYSIS

1. Test for a trial *de novo*

[5] The summary conviction appeal provision in the *Criminal Code* allowing for an appeal hearing by trial *de novo* is s. 822(4):

> "Despite subsections (1) to (3), if an appeal is taken under section 813 and because of the condition of the record of the trial in the summary conviction court or for any other reason, the appeal court, on application of the defendant, the informant, the Attorney General or the Attorney General's agent, is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a trial *de novo*, the appeal court may order that the appeal shall be heard by way of trial *de novo* in accordance with any rules that may be made under section 482 or 482.1, and for that purpose the provisions of sections 793 to 809 apply, with any modifications that the circumstances require."

[6] The procedural requirements for making an application under s. 822(4) are set out in Rule 5 of this Court's *Summary Conviction Appeal Rules, 2009*.

[7] In their text, *The Conduct of an Appeal*, 2nd ed., (Toronto: Butterworths, 2000), Sopinka and Gelowitz at p. 129, referred to s. 822(4) and commented as follows:

> "The discretion conferred on an appeal court in an application under this sub-section is extremely broad, and there can be no exhaustive list of the factors to be taken into account. A defect in the record of the trial, relating to completeness or intelligibility, or a breach of the principles of natural justice, would be the strongest grounds for an application for trial *de novo*. Conversely, a transparent effort by one of the parties to adduce new evidence that ought to have been adduced at the first trial will weigh against a trial *de novo*, although the presence of fresh evidence ought not to disentitle an applicant to a trial *de novo*."

[8] In *R. v. Prasad*, [1995] B.C.J. No. 1829, Wilson J. considered an application under s. 822(4) of the *Criminal Code* and commented on the principles that govern such an application:

> "[19] First, I am not persuaded by [the appellant's counsel] that any doubt I may have must be resolved in favour of [the appellant]. In my view, if there is to be a variation from the prescribed procedure, then the onus must be on the applicant for that variation, to demonstrate, on a preponderance of probabilities, that a trial *de novo* is in the interests in justice.
>
> [20] Second, the words "interests of justice" refer generally to the merits of the case.

> [21] Third, providing meaning to the words "interests of justice" involves consideration of several factors, not simply the interests of the accused; but, both the interests of the accused and the interests of the administration of justice generally."

[9] In *R. v. R.N.-Z.M.*, [2005] O.J. No. 5497, Hill J. considered s. 822(4) and commented, at paras. 11 and 12, that "a traditional appeal" under the summary conviction appeal provisions in the *Criminal Code* "is an appeal on the four corners of the record." He further stated that the "primary procedure" is an on-the-record appeal and that an appeal by trial *de novo* has become the "exception". At para. 13, he confirmed that the onus is on the applicant for a trial *de novo* appeal. At para. 14, Hill J. further commented that the discretionary criterion of the "interests of justice" in s. 822(4) "contemplates a balance of individual as well as broader administration of justice issues".

[10] In her rebuttal argument, the Government's counsel conceded that an appeal by trial *de novo* is an "exceptional remedy".

[11] In *R. v. Winters* (1981), 27 B.C.L.R. 385 (C.A.), McFarlane J.A., in referring to the predecessor provision to s. 822 of the *Criminal Code*, noted the "very broad discretion" that can be exercised in the interests of justice by the appeal court whenever an application is made for a trial *de novo* (para. 14). Nevertheless, an appellant who is seen to be using the trial *de novo* provisions of the *Criminal Code* "to take what might be called a second bite at the cherry and adopt a different tactic [at the new trial] is an important element for the [appeal court judge] to consider in deciding" whether or not to allow a trial *de novo* (para. 13).

[12] With these considerations and principles in mind, I conclude, for the reasons that follow, that there are no compelling reasons for a trial *de novo*, and that this application

amounts to a transparent effort by the appellant to adduce new evidence that ought to have been adduced at trial.

[13] I pause here to note that some of the grounds advanced by the Government on this application are the same, or very similar to, certain grounds of appeal. Thus, in deciding this application, it has not been my intention to decide the merits of the appeal. That decision will only be made after the full hearing of the appeal. However, as the Government's counsel has put me in this somewhat awkward position by framing her arguments on this application as she has done, I am compelled to answer the issues as they were raised, while recognizing that further or other arguments may be made at the appeal hearing. Thus, what I have said here should not be taken as pre-judging how I may decide the issues on the appeal generally.

a) Government convicted of a matter with which it had not been charged?

[14] The charge of which the Government was convicted stated as follows:

> "On or about the 6th day of May, 2008 at or near Whitehorse, Yukon, as a constructor during the Hamilton Boulevard Extension construction project, did unlawfully commit an offence by failing to ensure that its contractor on the project, P.S. Sidhu Trucking Ltd., and P.S. Sidhu Trucking Ltd.'s supervisor William Cratty and blaster Peter Hildebrand working on the project, carried out measures and procedures prescribed by the *Occupational Health and Safety Act* and regulations, contrary to subsection 4(a) of the *Occupational Health and Safety Act*, R.S.Y. 2002 c. 159, which resulted in a blasting incident causing flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon."

[15] The Government submitted that it appeared for the trial fully prepared to address this charge, which stipulated that it was "a constructor " during the part of the Hamilton Boulevard extension construction project when the blasting incident took place, and that this was clearly the focus of all involved at the trial, including the prosecutor, defence

counsel and the trial judge. However, the Government argued that it was convicted of being "the constructor" of the *entire* Hamilton Boulevard Extension construction project, and that it was not given an opportunity to present a defence to that finding.

[16] The government also argued that the trial judge's decision can be read to say that, if an owner is convicted of being a contractor on a part of a project, by default it becomes the constructor on all phases of the project, regardless of its level of involvement in those other parts of the project as a whole. This, says the Government, sets a dangerous precedent from a public policy perspective, because it incorrectly assigns the responsibility for the health and safety of workers on such a project to the owner, as opposed to the contractor most directly responsible for safety.

[17] The Government submitted that it is clear that the charge focused on one incident. I agree. For the purposes of disposing of this application, I also conclude that the charge focused on one specific project, namely the one involving P.S. Sidhu Trucking Ltd. as the Government's "contractor" on the project, with William Cratty as Sidhu's supervisor, and Peter Hildebrand as Sidhu's blaster.

[18] The contract between the Government and Sidhu (the "contract") was adduced as evidence at trial. Jeffrey Boehmer was called as a prosecution witness. He was the program manager assigned to the entirety of the Hamilton Boulevard Extension project (the "overall undertaking"). Mr. Boehmer was asked a number of questions about the contract by both the prosecutor and the Government's trial counsel. In the following answer during cross-examination, he clearly made a distinction between the overall undertaking and the specific portion of the work contracted out to Sidhu:

> "My position was, I worked for the Yukon Government as a program manager and I was assigned for the completion of the

> Hamilton Boulevard project. So it's actually a fairly large project, it's not just the construction. There's other things involved, like getting the street lights up, getting the proper approvals and acceptance by the City of Whitehorse. There is a whole bunch of things that go along with that."[1] (my emphasis)

And later, Mr. Boehmer said the following:

> "Q And the contract we are actually talking about is the one that you had with Sidhu, which is Exhibit Number 19. And he was to actually construct the road?
> A That's right.
> Q That was the contract-- that's the contract were talking about?
> A Yes, to construct a road base up to the underside of the asphalt. So pour on the surface gravel and put the culverts in and do all the other work associated with that."[2] (my emphasis)

[19] Earlier, in direct examination, Mr. Boehmer made reference to other contractors involved in the overall project, including "Skookum", which I understand to be a reference to the paving contractor, Skookum Asphalt Ltd., and "Bigfoot", which I understand to be a reference to Bigfoot Construction, the contractor which did the tree-falling and clearing of the right-of-way for the Hamilton Boulevard Extension, prior to Sidhu's involvement in constructing the road base and associated infrastructure.[3]

[20] The fact that the contract specifically was limited to the sub-grade and base construction for the Boulevard was confirmed by Mr. Boehmer in both his direct and cross-examination.[4]

[21] The Government's trial counsel was also very clear in her closing argument that the project should be restricted to the work associated with the Sidhu contract.

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[1] Transcript, March 31, 2010, p. 33.
[2] Transcript, March 31, 2010, p. 34-35.
[3] Transcript, March 31, 2010, p. 13-14.
[4] Transcript, March 31, 2010, pp. 13 and 36.

> "This was a project -- we have no disagreement this was a project under the *Act*, but the project that we're talking about is the one that was the contract with Mr. -- we've got the Sidhu company to sub-grade and -- for sub-grade and base of the road. It's not for any other project." [5]

[22] Despite this, the Government's appeal counsel also submits that there was no clarity as to whether the Government was being charged as "constructor" for all or part of the project. Once again, within the purpose of this application, I disagree. Based on the above, it seems clear that the Government was being charged as a constructor only in relation to the Sidhu contract, and not for any other aspect of the overall undertaking.

[23] It also seems clear that the trial judge was of the same view. In the opening paragraph of his reasons for judgment, cited at 2010 YKTC 42, he stated:

> "In September 2007, the Government of Yukon Department of Community Services awarded a contract to P.S. Sidhu Trucking Ltd. for the construction of the sub-grade and base for a portion of roadway in the City of Whitehorse known as the Hamilton Boulevard Extension. William Cratty was employed by Sidhu Trucking as the superintendent on the project."

It is apparent that the trial judge was not considering any additional work by other contractors such as Skookum Asphalt or Bigfoot Construction as forming part of the project at issue. This conclusion is supported by the later comment of the trial judge at para. 9:

> "Since the accident clearly occurred during the course of a project undertaken by the Yukon Government, constructed by Sidhu Trucking and supervised by Mr. Cratty, all would seem to be liable to be convicted unless they exercised due diligence to prevent the accident from occurring. However, each accused raised objections to the charges or the evidence that must be considered before the question of due diligence is reached." (my emphasis)

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[5] Transcript, April 1, 2010, pp. 16-17.

Once again, the trial judge seemed to be clearly focusing on the discrete project involving Sidhu and not on anything beyond that.

[24] The Government's counsel took issue with comments made by the trial judge at para's. 11 and13 of his reasons for judgment. Just prior to para. 11, the trial judge referred to the definitions of "constructor" and "project" in the *Occupational Health and Safety Act*. He then stated:

> "The Government of Yukon is clearly the owner of the project. It put out the tenders for the project, entered into the construction contract and paid the cost. However, in this case, the Department of Community Services was much more involved in the project than simply hiring a contractor and paying the bills. It retained overall control and management of the entire Hamilton Boulevard Extension Project, of which the contract with Sidhu Trucking was only a part..." (my emphasis)

[25] At para. 12, the trial judge quoted the comments made in *J. Stoller Construction Limited* v. *The Queen* (November 28, 1986, unreported, Ont. Prov. Ct.), on the interpretation of "constructor":

> "In my view, the learned Justice of the Peace correctly identified the 'constructor' in relation to a construction project, as the person who enjoys and can exercise the greatest degree of control over the entire project and all working upon it, in relation to ensuring compliance with prescribed safety methods and procedures. He plans and organizes the entire project. He has control over what contractors and subcontracts will be permitted to work and continue working upon it. He controls the ultimate 'purse strings' of payment for work upon the project. In planning the proposed project and deciding whether he will undertake it, and how it will be organized, he can consider the dimensions and logistics of the project and, drawing upon his experience and knowledge of the requirements and problems of such a project and his deemed knowledge of the legal requirements concerning occupational health and safety, he can make a reasoned assessment of what would be requisite to ensure compliance with the *Occupational Heath and Safety Act* and Regulations upon the project. He can consider the desirability, in the context of the planned project and the dimensions of what is involved in it, or organizing an ongoing programme of safety

> instruction for workers on the project (and I recognize that so grandiose a scheme may not be reasonably feasible in the circumstances of many projects). He can turn his mind, based on his experience, to an initial assessment *of how many competent supervisors he will need to hire to provide effective, ongoing supervision on the project in order to ensure that required safety measures and procedures are observed by all involved.* In organizing and engaging his contractors (and laying down guidelines for them in relation to the engagement of subcontractors), he can make it clear (and even contractually provide, if necessary) that non-compliance by anyone with required safety measures and procedures upon the project will not be countenanced, and that anyone unwilling to do all within their power to ensure compliance had better not take the contract, or if found in non-compliance (in a substantial way or repetitively) will be discharged and replaced."

[26] At para. 13, the trial judge concluded:

> "In my view, it is beyond doubt that the Government of Yukon Department of Community Services was the "constructor" on the Hamilton Boulevard Extension Project. "

[27] The Government's counsel argued that the trial judge's conclusion at para. 13 of his reasons for judgment must be taken to mean that he found the Government to be the "constructor" on the overall undertaking, from start to finish, and that the Government was therefore "convicted" of the something it was never charged with. For the purposes of this application, I disagree. The passages from the reasons for judgment which I have quoted above, read together with the entirety of the trial record, including the evidence of Mr. Boehmer, and particularly the exchanges between the trial judge and the Government's trial counsel, which I will come to shortly, make it clear to me that the trial judge was focusing on only that portion of the overall undertaking which involved the Sidhu contract.

[28] In any event, even if I am wrong in that conclusion, as the Government's counsel herself recognized, an appeal may only be brought from an order and not from reasons for judgment: see *R v. Sheppard*, 2002 SCC 26; *Knapp v. Town of Faro*, 2010 YKCA 7;

Larsen v. Coulter (1991), 82 D.L.R. (4th) 568 (B.C.C.A.). In this case, the "order" is the registration of a conviction against the Government for the offence on the information, which I quoted above at para. 12, and which I concluded is specific to that part of the overall undertaking relating to the Sidhu contract. Therefore, it is fallacious to contend that the Government was convicted of anything else besides that offence.

[29] It follows from my discussion above, from the cross-examination of Mr. Boehmer by the Government's trial counsel, and the exchanges between counsel and the trial judge during closing arguments, that the focus of all parties was the Sidhu contract and nothing more. Therefore, I conclude that the Government had a fair and reasonable opportunity to make full answer and defence to the charge, and the contention that a trial *de novo* is required because it was denied such an opportunity cannot be sustained.

b) Failure to give adequate or any reasons?

[30] This is a ground for both the application for a trial *de novo* and for the appeal. I repeat that my analysis here is solely for the purpose of deciding the application and should not be taken as a prejudgment of the merits of the appeal.

[31] The Government's counsel submitted that paras. 11, 12, 13 and 42 of the reasons for judgment represent the "sum total" of the trial judge's consideration of the constructor issue. In particular, the Government submitted that the trial judge's finding that "it is beyond doubt that the Government...was the "constructor" on the Hamilton Boulevard extension project" (para. 13) was conclusory and does not allow for meaningful appellate review of its correctness. I disagree.

[32] Firstly, para. 10 of the reasons for judgment also referred to the Government's argument at trial that it was "an owner" and not a "constructor" on the project and included the definitions of those two terms, as well as the definition of "project".

[33] Further, any consideration of the issue of the adequacy of reasons must begin with reference to *R v. Sheppard*, cited above, where Binnie J., speaking for the Court, summarized the principles of the law on the duty of a trial judge to give reasons, at para. 55:

> "1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
>
> 2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
>
> 3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.
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> 4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.
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> 5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(*a*) of the *Criminal Code*, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

> 6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.
>
> 7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.
>
> 8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.
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> 9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.
>
> 10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso."

What I distill from the above quote is the importance of the trial record in assisting an accused to understand why a conviction has been entered. Clearly, trial judges are not held to some abstract standard of perfection. So long as their reasons are reasonably intelligible and provide a basis for meaningful appellate review, then they will be held to be sufficient.

[34] I have already referred to the relevant passages from the trial judge's reasons for judgment and some of the evidence of Mr. Boehmer. At this point, I do not want to go too

much further into Mr. Boehmer's evidence, because I do not want to cross the threshold into the merits of the appeal. However a few extracts from pertinent exchanges between the trial judge and the Government's trial counsel may be helpful:

> "MS. HARTLING: ...We didn't have anything to do with the every day running of the business. We provided no materials, no equipment; all we wanted was the contract adhered to. Harvey Kearns didn't do any work. He watched for breaches and then he would go and he would talk with the contractor about it.
> THE COURT: Yeah, but surely, he wasn't there watching out of interest. He was there watching in some sort of supervisory or compliance role, surely. I mean, he wasn't there just --
> MS. HARTLING: That's exactly what I'm saying.
> THE COURT: -- because he enjoyed being out and about.
> MS. HARTLING: That's what I'm saying exactly. He was there in order to ensure that the contract was complied with. He was not supervising Sidhu. He was not supervising its workers. If he had any concern about anything that he thought was a breach of the contract then he was to go to Mr. Boehmer and then they would -- Mr. Boehmer would contact Mr. Cratty. He had no -- he could not direct the workers what to do. He could not --
> THE COURT: Well, given that -- given that -- let's accept your theory that he was Mr. Boehmer's eyes only and that ultimately the control lay with Mr. Boehmer. I don't think that -- I don't see that that makes any difference.
> MS. HARTLING: I think that's the biggest difference.
> THE COURT: I mean Boehmer -- well, YTG was exercising clearly on this contract a pretty considerable degree of control over this. I mean, if you look at the -- if you look at the description of a constructor in *Stelco*:
>
> > He plans and organizes the entire project. He has control over what contractors and subcontractors will be permitted to work and continue working on it. He controls the ultimate 'purse strings' for payment for work on the project. In planning the proposed project and deciding whether he will undertake it, and how it will be organized, he can consider the dimensions and logistics of the project...
>
> And so on and so on. To me, it's like a -- I read that and I say, "Hey, that's YTG."
> MS. HARTLING: Well, I would argue against that.
>
> ...
>
> THE COURT: All right, well let me ask you this, then. What was the purpose of the contract requiring Sidhu to provide to YTG its plans for blasting?
> MS. HARTLING: To it --

THE COURT: I mean, again, was that so Mr. Boehmer had something to look at, I mean.

MS. HARTLING: No, I asked Mr. Boehmer that question and suggested to him that what it -- what the forms were doing was ensuring YTG that the constructor was paying attention to requirements that would make for the safety of the project.

THE COURT: All right. But it does suggest that YTG was purporting to exercise some degree of supervision and control over the blasting or else they wouldn't have asked for this information to be provided to them.

MS. HARTLING: I wouldn't word it as a degree of supervision and control over the blasting. A supervision and control over the safety; was the blasting going to be conducted in a safe manner, which was a specification of the contract."[6]

[35] Later, Ms. Hartling referred to the passage from the *Stoller* decision, cited above, which the trial judge quoted at para. 12 of his reasons for judgment and the conversation continued as follows:

"MS. HARTLING: Okay. Well, let's just go over that quote from *Stoller* a little bit:

> ...the person who enjoys and can exercise the greatest *(the greatest)* degree of control over the entire project and all working upon it, [ct. reporter's emphasis] --

YTG, I would suggest, is not exercising the greatest degree of control.

> ...in relation to ensuring compliance with prescribed safety methods and procedures. He plans and organizes the entire project.

YTG is not organizing all of the project, is not organizing all of the running of the project.

> He has control over what contractors and subcontractors will be permitted to work and continue working on it. He controls the ultimate 'purse strings' of payment for work on the project.

He does -- he pays ultimately for the project. but remember, he doesn't -- if he performs any one of these things doesn't ultimately make him a constructor because it may not equate to the exercising of the greatest control over the project.

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[6] Transcript, April 1, 2010, pp. 18-20.

> ...he can make a reasoned assessment of what would be requisite to ensure compliance with the *Occupational Health and Safety Act* and Regulations upon the project.
>
> YTG isn't able to be in the very internal details of the workings of the project. They're not able to see and do everything. They don't direct it. That's for the supervisor, so YTG doesn't exercise any control over the majority of the contract and its being exercised.
>
> THE COURT: You know, it brings to mind an additional question, that is, what is the project? I mean, the ultimate control of the grand project, which was the Hamilton Boulevard Extension, clearly was YTG.
>
> MS. HARTLING: Well, that's why I pointed it --
>
> THE COURT: You know, if the project is more narrowly defined as the specific project undertaken by this contract between YTG and P.S. Sidhu, then maybe it's a little greyer. But say if the overall construction project is the whole thing from start to finish, I think Mr. Boehmer himself would say, "Hey, I'm the guy," you know, "I was" -- well, the project manager, what was his title? Yeah, project -- program manager, so.
>
> MS. HARTLING: We have to be careful that we're not sort of confusing what an owner and what a constructor does because what I seem to be hearing from the Bench is that an owner could never be a constructor, because the owner ultimately pays.
>
> THE COURT: No, no.
>
> MS. HARTLING: In every project, the owner ultimately pays.
>
> THE COURT: No, no, an owner -- the fact that the owner pays doesn't make him a constructor, but an owner could end up also being the constructor, clearly..."[7] (my emphasis)

[36] The sentence I underlined above, combined with the trial judge's comment at para. 11 of his reasons that the Government "retained overall control and management of the entire Hamilton Boulevard Extension Project, of which the contract with Sidhu Trucking was only a part ....", presumably gives rise to the Government's contention that the trial judge *decided* that it was the constructor on the overall undertaking. However, I do not need to resolve that issue here. For present purposes, I view these statements as part of the judge's analysis leading to his ultimate conclusion, which was that the Government breached its responsibilities for safety as "a constructor" on the project pertaining to the

[7] Transcript, April 1, 2010, pp. 21-22.

Sidhu contract. To the extent that the trial judge may have gone further in his reasons with respect to the overall undertaking, I once again return to the principle that this appeal is not from the trial judge's reasons, but only from the final order (i.e. the registered conviction).

[37] Thus, the entirety of the trial record makes it clear that the trial judge was properly focused on both the statutory and common-law definitions of "constructor" and that his analysis principally turned on a consideration of which party exercised the "greatest degree of control" in relation to the Sidhu contract. Viewed in that context, the trial judge's somewhat conclusory statement at para. 13 of his reasons for judgment can be understood as his finding that it was the Government which exercised the greatest degree of control over the contract. Whether that conclusion was correct or not is a matter to be decided when the appeal is eventually heard. However, for present purposes, I am satisfied that the reasons were sufficient, and the Government's proposition to the contrary does not support the application that the appeal hearing be held by way of a trial *de novo*.

c) Fresh evidence could affect the result?

[38] Fresh evidence may be admitted on a summary conviction appeal pursuant to ss. 683(1)(d) and 822(4) of the *Criminal Code*. The former provides:

> "For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
>
> ...
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;" (my emphasis)

Section 683(1)(d) applies to summary conviction appeals by virtue of s. 822(1) of the *Code*.

[39] Section 822(4) is quoted above at para. 5.

[40] The common law test for the admission of fresh evidence was set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, and affirmed in *R. v. Lévesque*, 2000 SCC 47, at para. 14, as follows:

> "In *Palmer*, *supra*, this Court considered the discretion of a court of appeal to admit fresh evidence pursuant to s. 610 of the *Criminal Code*, the predecessor of s. 683. After emphasizing that, in accordance with the wording of s. 610, the overriding consideration must be "the interests of justice", McIntyre J. set out the applicable principles, at p. 775:
>
> > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
> >
> > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> >
> > (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> In *R. v. M. (P.S.)* 1992 CanLII 2785 (ON C.A.), (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 410, Doherty J.A. wrote the following concerning these principles:
>
> > The last three criteria are conditions precedent to the admission of evidence on appeal. Indeed, the second and third form part of the broader qualitative analysis required by the fourth consideration. The first criterion, due diligence, is not a condition precedent to the admissibility of "fresh" evidence in criminal appeals, but is a factor to be considered in deciding whether the interests of justice warrant the

> admission of the evidence: *McMartin v. The Queen*, *supra*, at pp. 148-50; *R. v. Palmer*, *supra*, at p. 205.
>
> In my view this is a good description of the way in which in the principles set out in *Palmer* interact." (my emphasis)

[41] The two pieces of fresh evidence that the Government seeks to introduce are:

a) The evidence of Pat Molloy, who was an Acting Assistant Deputy Minister for the Government's Department of Community Services on the date of the offence; and

b) An expert opinion from Ryan Conlin, an Ontario lawyer practicing principally in the area of occupational health and safety law, who represents employers in litigation arising under the relevant Ontario legislation.

[42] The proposed evidence of Mr. Molloy is set out in his affidavit sworn March 7, 2011. If a trial *de novo* is ordered, then presumably he would also testify at that trial. His affidavit indicates that, at the relevant time, his role was to supervise a number of program managers, such as Mr. Boehmer, and provide project management services on behalf of the Government for numerous municipal infrastructure and development projects in the Yukon. The Government's appeal counsel submitted that she wants to adduce this evidence primarily for the purpose of establishing that there were various phases to the entirety of the Hamilton Boulevard Extension undertaking besides the Sidhu contract. Secondarily, at least as I read Mr. Molloy's affidavit, the purpose of this evidence is to show that it was Sidhu, not the Government, that was responsible for numerous specific activities under the Sidhu contract. Finally, Mr. Molloy deposed that the contractual obligation that Sidhu provide the Government with blasting plans in advance of blasting was not for the purpose of approving or disapproving any such plans,

but was simply in concert with the Government's overall responsibility to audit and monitor Sidhu's performance under the contract.

[43] With respect to this evidence, I am satisfied on a balance of probabilities that the Government has met the second, third and fourth criteria in *Palmer* for the admission of fresh evidence. The evidence is clearly relevant and there is no suggestion that it would not be reasonably capable of belief. Further, it could reasonably be expected to have affected the result at trial. However, the principal difficulty I have with admitting that evidence on the appeal is that it clearly could have been adduced at trial with the exercise of due diligence. I recognize that the criterion of due diligence is not a condition precedent to the admissibility of fresh evidence in criminal appeals, or quasi-criminal appeals such as this, but it remains a factor to be considered in deciding whether the "interests of justice" warrant the admission of the evidence. Indeed, McIntyre J. adopted the reasons of Ritchie J. in *McMartin v. The Queen*, [1964] S.C.R. 484 (at para. 775):

> "... it [is] not in the best interests of justice that evidence should be so admitted as a matter of course. Special grounds must be shown to justify the exercise of this power by the appellate court..." (my emphasis)

[44] Further, the "interests of justice" refer not only to the interests of the accused, but also to the merits of the case and to the interests of the administration of justice generally: see *R. v. Mackie*, 2001 BCSC 1843, at para. 2; and *R. v. Prasad*, at para. 21, cited above.

[45] In the case at bar, I conclude that it is not in the interests of justice to allow Mr. Molloy's evidence at the appeal. The Government's counsel has failed to provide any clear explanation or evidence as to why Mr. Molloy's evidence was not adduced at trial. Nor has she established any "special grounds" for the admission of that evidence now. In

her written submissions, she conceded that had the Government known the charge against it, this fresh evidence could have been adduced at trial. That submission seems to flow from the Government's first argument in support of a trial *de novo*, which is that it was not given an opportunity to make full answer and defence, because it did not appreciate that it might be found liable for being a "constructor" on the entirety of the overall undertaking. As I have dispensed with that argument above, I am unable to accept it as a reasonable explanation for why Mr. Molloy's evidence was not called earlier. As well, much of his proffered evidence relates to Sidhu's obligations under the contract and his explanation for why the Government required blasting plans from Sidhu in advance of blasting. However, these were all live issues at trial and any evidence relating to those issues should have been reasonably anticipated. I can understand why the Government now feels that Mr. Molloy's evidence would be helpful in resolving the questions under appeal. However, that only raises the question of why Mr. Molloy's evidence was not reasonably anticipated as a necessary part of the Government's defence at trial.

[46] In short, the Government has not met the statutory or common-law test for the admission of Mr. Molloy's fresh evidence. While the evidence may indeed have affected the outcome at trial, that is insufficient on its own to justify its admission. Accordingly, this evidence is incapable of supporting the Government's application for a trial *de novo*.

[47] I now turn to Mr. Conlin's evidence. He states in his thirty-page report that he is often called upon to advise owners of construction projects on how to structure their legal relationship with construction contractors to avoid being treated as the "constructor" for a given project. Mr. Conlin was asked to provide his opinion in response to several

questions from the Government's appeal counsel. For example, Mr. Conlin was asked to describe the analysis performed under the Ontario *Occupational Health and Safety Act*, R.S.O. 1990, c. 1, which counsel informed me is very similar to the Yukon legislation, in determining the circumstances under which an owner might be held to be a "constructor". Further, he was asked to opine whether the Government, if it was the owner of a project in Ontario such as the one in the case at bar, would have been found to be the "constructor". Finally, he was specifically asked to review the Sidhu contract and consider whether the provisions in the contract would have been sufficient in Ontario to relieve the owner of potential liability as the "constructor" for the project identified in the contract.

[48] This evidence raises two concerns. First, does it meet the criterion for the admission of expert opinion evidence in *R. v. Mohan*, [1994] 2 S.C.R. 9, and if it does, does it also meet the *Palmer* criteria for the admission of fresh evidence?

[49] In *Mohan*, the Supreme Court stated, at para. 17:

> "Admission of expert evidence depends on the application of the following criteria:
>
> (a) Relevance;
> (b) Necessity in assisting the trier fact;
> (c) The absence of any exclusionary rule;
> (d) A properly qualified expert."

[50] My principal concern about Mr. Conlin's evidence is whether it is necessary in assisting the trier of fact or, in this case, the appeal court. Essentially Mr. Conlin's evidence amounts to little more than a legal opinion about the application of Ontario legislation and related case law to circumstances similar to those in the case at bar. The Government's counsel attempted to elevate the status of this opinion by suggesting that it is evidence of "legislative facts", which are traditionally directed at the purpose behind the legislative scheme under which relief is sought. Further, says counsel, this evidence will

provide guidance to the appeal court in relation to the public policy considerations in determining which party is best suited to ensure compliance with the occupational health and safety regulations on a project. However, regardless of how the Government chooses to characterize the nature of the opinion, it remains essentially a legal opinion on matters which this court (or any trial court) is equally capable of opining about. Therefore, it does not meet the necessity criterion in *Mohan.*

[51] Further, as the Supreme Court noted in *Mohan*, there is also a concern inherent in the consideration of 'necessity' that experts not be permitted to usurp the function of the trier of fact. At para. 23, the Court noted:

> "These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue...."

I find that parts Mr. Conlin's report come dangerously close to expressing an opinion on the ultimate issue of whether the Government could be found liable as a "constructor" under the Sidhu contract.

[52] In any event, even if I am wrong with respect to Mr. Conlin's report failing to meet the *Mohan* criteria, I nevertheless conclude that it also fails to meet the *Palmer* criteria for the admission of fresh evidence. With the exercise of due diligence, the Government could have procured this report in time for the trial and attempted to adduce it as evidence there. Once again, there is no reasonable explanation for the Government's failure to do so, and I find that it would not be in the "interests of justice" to allow it to be introduced at this stage. In these circumstances, there is no need for me to express any view on whether the report meets the remaining three criteria in *Palmer.*

[53] Since the evidence is incapable of admission, it is also incapable of supporting the Government's application for a trial *de novo*.

2. Should the fresh evidence be admitted on the appeal hearing?

[54] The determinations I made above with respect to the admission of fresh evidence, as one of the grounds for justifying a trial *de novo*, are also dispositive of whether the fresh evidence should be allowed at the appeal hearing in any event. Thus, the appellant will be precluded from making any reference at the appeal hearing to the evidence of Pat Molloy or Ryan Conlin. However, to the extent that Mr. Conlin's evidence involves nothing more than points of legal argument, the appellant is of course free to raise those or similar arguments at the appeal hearing.

COSTS

[55] No submissions were made regarding costs on this application. Therefore, the issue may be addressed at the appeal hearing.

Gower J.