Citation: R. v. Scott Steel Ltd. and Ron Scott
2006 BCPC 0096

Date: 20060308
File No: 57520-01
Registry: Port Coquitlam

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

**SCOTT STEEL LTD. and
RON SCOTT**

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE D. STEINBERG**

Counsel for the Crown:	R. Kockx
Counsel for the Defendant:	D. Corrigan and F. Potts
Place of Hearing:	Port Coquitlam, B.C.
Date of Hearing:	March 8, 2006
Date of Judgment:	March 8, 2006

Introduction:

[1] On October 27th, 1997, the Mile 8.3 (Kitimat Subdivision) railway bridge owned by the Canadian National Railway (CN) collapsed while being rebuilt by Scott Steel Ltd. As a result of the collapse, one person from each of the companies was killed and a number of others were severely injured. Ron Scott and his company Scott Steel Ltd., a provincially incorporated construction company, are charged under the provisions of *British Columbia Regulation 585/77* and amendments thereto, and sections 75(2) and 77(1) of the *Workers' Compensation Act*, R.S.B.C. 1996, C-492 and amendments thereto, (formerly R.S.B.C. 1979 C-437 and

amendments thereto) as follows:

Count 1

SCOTT STEEL LTD., being an Employer, and RON SCOTT, being a Director, Officer, Manager or Supervisor of SCOTT STEEL LTD., on or about the 27th day of October, 1997, at or near Mile 8.3 on the Kitimat Subdivision, near Terrace, in the Province of British Columbia, while contracted to reconstruct a railway trestle type bridge, did fail to ensure that all pertinent construction details including minimum specifications for critical bracing components, and minimum temporary bracing requirements were available at the job site during erection of bridge components, to wit: steel bents, contrary to Industrial Health and Safety Regulation 34.10(1)(a) of British Columbia Regulation 585/77 and amendments thereto, and sections 75(2) and 77(1) of the *Workers' Compensation Act*, R.S.B.C. 1996, C-492 and amendments thereto, (formerly R.S.B.C. 1979 C-437 and amendments thereto).

Count 2

SCOTT STEEL LTD., being an Employer, and RON SCOTT, being a Director, Officer, Manager or Supervisor of SCOTT STEEL LTD., on or about the 27th day of October, 1997, at or near Mile 8.3 on the Kitimat Subdivision, near Terrace, in the Province of British Columbia, did fail to ensure that a structure under construction, to wit a railway trestle type bridge, was capable of withstanding the stresses likely to be imposed upon it during construction, including a 840 D.E.H. Locomotive Crane Number CN50430 under load, contrary to Industrial Health and Safety Regulation 8.02(1)(b) of British Columbia Regulation 585/77 and amendments thereto, and sections 75(2) and 77(1) of the *Workers' Compensation Act*, R.S.B.C. 1996, C-492 and amendments thereto, (formerly R.S.B.C. 1979 C-437 and amendments thereto).

Count 3

SCOTT STEEL LTD., being an Employer, and RON SCOTT, being a Director, Officer, Manager or Supervisor of SCOTT STEEL LTD., on or about the 27th day of October, 1997, at or near Mile 8.3 on the Kitimat Subdivision, near Terrace, in the Province of British Columbia, during the erection of a partially assembled structure, to wit a railway trestle type bridge, did fail to brace or otherwise secure that structure to withstand a load likely to be imposed upon it, namely a 840 D.E.H. Locomotive Crane Number CN50430 under load, contrary to Industrial Health and Safety Regulation 34.32 of British Columbia Regulation 585/77 and amendments thereto, and sections 75(2) and 77(1) of the *Workers' Compensation Act*, R.S.B.C. 1996, C-492 and amendments thereto, (formerly R.S.B.C. 1979 C-437 and amendments thereto).

Count 4

SCOTT STEEL LTD., being an Employer, and RON SCOTT, being a Director, Officer, Manager or Supervisor of SCOTT STEEL LTD., on or about the 27th day of October, 1997, at or near Mile 8.3 on the Kitimat Subdivision, near Terrace, in the Province of British Columbia, did fail to ensure the adequate direction and instruction of ironworkers in the safe performance of their duties in erecting a steel bent with a Locomotive Crane Number CN50430 during construction of a railway trestle type bridge, contrary to Industrial Health and Safety Regulation 8.18 British Columbia Regulation 585/77 and amendments thereto, and sections 75(2) and 77(1) of the *Workers' Compensation Act*, R.S.B.C. 1996, C-492 and amendments thereto, (formerly R.S.B.C. 1979 C-437 and amendments thereto).

[2] Objection was raised on behalf of the accused with respect of the jurisdiction of the provincial work safety legislation over their work on the bridge. Between November 27th, 2000 and November 17th, 2001, 31 days were spent in the determination of that issue. Judgment was delivered December 17th, 2001. The trial finding that the province lacked jurisdiction over this particular job site of Scott Steel was overturned on appeal to the Supreme Court of British Columbia. Tysoe, J. held that, on the facts as set out in the judgment, the provincial legislation did apply to Scott Steel. On further appeal, the Court of Appeal refused leave to appeal on the basis that the appeal did not raise a question of law alone. The matter was therefore remitted back to this Court for the trial of the matter.

Findings of Fact:

[3] The evidence in this case disclosed that historically CN had used its own work crews to build and maintain its railway bridges. Beginning in the 1990s, CN increasingly put reconstruction projects out to public tender. Scott Steel is a provincially incorporated construction company whose work sites would normally be under the jurisdiction of provincial legislation. Amongst various other construction projects they had worked on, Scott Steel had been contracted by CNR to work on a number of CN projects prior to winning the contract for the upgrades of the bridges at Miles 8.3 and 12.8.

[4] Bents are the vertical structures which hold up the rail structure and are placed at right angles to the direction of the

bridge. The work at Mile 12.8 consisted of replacing the wooden bents one by one along the length of the trestle. The locomotive crane that was used would come out as far as needed along the rebuilt trestle proceeding further as each bent was replaced. The major task at the Mile 8.3 trestle was to replace the twelve timber bents numbered thirteen to twenty four in the middle section of the bridge with five steel bents. A bay is the space between two bents. Because of the height of the rail line above the ground each timber bent in the section of the bridge in question was two stories high and was six posts across. A two storey bent is constructed by pinning one post to the top of another post. To maintain geometrical integrity, a bent must have a number of braces fastened from post to post across the bent. In addition, a bent must have cross bracing and longitudinal bracing running to other bents in order to remain stable. As well, in a two storey bent there is a minimum tolerance for the upper post to be out of vertical alignment in relation to the lower post to which it is pinned so that forces generated by the weight of traffic over the trestle will travel vertically through the posts down into the ground. If the upper post is not held vertically aligned with its lower post the downward forces would cause the upper post to rotate downwards with the pin acting as a hinge because a pinned connection is weak and inherently unstable. It is the bracing that keeps everything appropriately aligned and thus gives the entire structure its strength. Specifically, it is the longitudinal bracing and the struts running from bent to bent at the intermediate cap where the two posts are pinned together that prevent the rotation of the upper post around its pin and keeps the structure upright and stable.

[5] The work was scheduled in time limited work blocks because this bridge was part of an active rail line. This allowed the construction crew to be free from interruption from rail traffic and to have free access to the bridge so that they could remove various timbers, open up the track bed in order to drive piles directly under the bridge, install the steel bents and replace some of the bracing. Work blocks were set by CN since CN required that they be able to continue to pass regular rail traffic over the bridge. When a work block was completed the bridge would have to be in a condition that was safe for rail traffic. All tools, equipment and personnel had to be clear of the track.

[6] The construction was to proceed by inserting the new steel bents between the existing wooden bents. The steel bents, which were slightly shorter that the wooden bents, would be placed onto corbel caps that sat on freshly driven piles. The idea was to maneuver and fasten each steel bent into place on its corbel cap, and once they were all in place, to raise the rail bed slightly, remove the wooden bents, shim the steel bents to the right height, and then lower the rail bed down onto the new steel bents. By maintaining the existing structure and not have the new steel bents be load-bearing until the very end, the rail line could continue to use the original wood bents to support the weight of rail traffic throughout the project. The only caveat was that at all times, and especially when there was rail traffic, there would have to be a minimum amount of critical bracing left in place to maintain structural integrity. This was critical in this project since the steel bents were being largely fabricated on the shore and were then carried on the trestle to their particular bay by the locomotive crane. The workers would then use the crane to position the new steel bent into place from the side of the bay through a gap created by removing all the longitudinal bracing that obstructed the side of the bay through which the steel bent was being swung. The bridge would remain a stable structure even if the longitudinal bracing was removed from one bay as long as the bents on either side of the open bay were strutted back to stable structures. As long as a bent was properly braced back to another stable structure it would be kept stiff and in position and thus stable. What was vital was for the supervisors to never permit the inadvertent creation of a free-standing structure that was not braced back to something stable. A free-standing structure is unstable, prone to collapse, and cannot safely carry a load.

[7] Glen Hickey was a journeyman ironworker employed by Scott Steel. He had never worked on a wooden structure prior to working on the projects at Miles 12.8 and 8.3. He had worked at a different site for Scott Steel putting up two buildings and then decided to work on the bridges at Miles 12.8 and 8.3. On the morning of October 27th, 1997 the Scott Steel employees received their work assignments and were told there was a short work block as there were two trains scheduled to cross the bridge. Hickey was told to finish bolting up steel bent #1 which had been swung into place some time earlier between wooden bents #12 and #13, and then to fix a problem that had arisen the day before with the bolts at the corbel cap for steel bent #2. The workers were also told that the bracing on the side of the bay between wood bents #15 and #16 had to be removed in order to swing in steel bent #2. The steel bent then had to be temporarily stabilized with tirfors and the bay closed with temporary bracing replaced on the wood bents to stabilize the bridge for the rail traffic that was expected in a few hours. While Hickey was working, John Marti and Ed Van Druten, the Scott Steel supervisors were busy working on the top of the bridge. The bridge collapsed as a locomotive crane which was carrying part of steel bent #2 entered the section of trestle between wood bents #13 and #15.

Relationship between CN and Scott Steel:

[8] CN provided the contract requirements, engineering drawings and specifications to Scott Steel. Scott Steel was required to submit its own written work procedures to CN for approval. CN kept a field supervisor, Darrel Davis, on site in order to ensure that the work being done by Scott Steel met the contract requirements.

[9] Davis did provide some safety equipment at the beginning of the project when it appeared that Scott Steel employees had arrived at the job site without the necessary gear.

[10] While Scott Steel supplied the construction labourers and a foreman to supervise and plan their activities, pursuant to

section HC02360 of the contract, CN provided diesel electric locomotive cranes and tender cars, as well as all the timbers to be used for the reconstruction. The locomotive cranes were used to carry material to and from the trestle, to drive new piles, and to maneuver the heavy timbers and steel bents into place. CN employees, who were aided by CN oilers and flagmen relaying signals, operated the locomotives. At various times during pile-driving activities or the removal of materials from the site or the delivery and placement of new materials, Scott Steel's employees were also involved in relaying signals to the crane operators.

[11] The evidence also discloses that from time to time the CN flag personnel would help unload materials at the job site. In addition, Darrel Davis received permission from his superiors to participate actively in the workforce for a few days, in an effort to keep the job on schedule and to train the Scott Steel crew in how to install parts of the rail deck. CN employees were to operate the pile-driver, and do the lifting and transporting of various structures, and Scott Steel employees were to do the fabrication, guiding, adjusting into place, alignment and bolting together of the structure. It would have been impossible for Scott Steel employees to do their work without the active assistance of the CN engineers and oilers in operating the crane locomotives to drive the piles, to remove the old structure, and to bring and maneuver into place the large heavy structures that were being worked on. That is what the contract contemplated, and that is what was being done on this job site. I find as a fact that virtually no task of any consequence in the reconstruction of this trestle could have been accomplished without the employees of CN and Scott Steel working in close cooperation and harmony with each other.

[12] Greg Porisky was the CN project engineer in Edmonton who was in charge of this contract for CN. Paragraphs 18(2) and 41 of the contract contained a term that the work was to be under the control and supervision of the CN Engineer and that Scott Steel was to comply with any direction given by the CN Engineer or his agent.

[13] The powers of the CN Engineer under the contract are found in part in clauses 18, 20, and 22.

> 18(1). The Engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard thereto shall be final.
>
> 18(2). The work shall, in every particular be under and subject to the control and supervision of the Engineer; and all orders, directions or instructions, at any time given by the Engineer with respect thereto, or concerning the conduct thereof, shall be by the Contractor promptly and efficiently obeyed, performed and complied with to the satisfaction of the Engineer.
>
> 20. Should the Contractor use or employ, or intend to use or employ, in or about the works, any tools, plant, materials, equipment, or things which, in the opinion of the Engineer, are not in accordance with the provisions of the Contract or are for any reason unsuitable for the works, or should the Engineer consider that any work is for any reason improperly, defectively, or insufficiently executed or performed, the Engineer may order the Contractor to remove the same and to use and employ proper tools, plant, materials, equipment, or things, or to properly re-execute and perform such work, as the case may be;…….
>
> 22. If the Engineer shall at any time consider the number of workmen, quantity of machinery, tools, plant, equipment, or of proper materials or things, respectively employed or provided by the Contractor on or for the said works, to be insufficient for the advancement of such works, or any part thereof, toward the completion within the time limited in respect thereof, or that the works are, or some part thereof is, not being carried on with due diligence, the Engineer may, in writing, order the Contractor to employ or provide such additional workmen, machinery, tools, plant, equipment, material and things as he may think necessary, and in case the Contractor shall not, within three days, or such other longer period as may be fixed by any such order, in all respects comply therewith, the Engineer may provide and employ such additional workmen, machinery, tools, plant, equipment, material and things respectively or employ a sub-contractor or sub-contractors as he may think proper, and may pay in respect of such additional workmen such wages, ……..and all such amounts so paid shall be repaid on demand by the Contractor……The Contractor shall employ the additional sub-contractor, or subcontractors, workmen, machinery, tools, plant, equipment, material and things so provided and employed by the Engineer, in the diligent advancement of the works; the workmen so provided being thereafter exempt from discharge or removal by the Contractor without the consent and approval of the Engineer. In the event the Engineer provides and employs additional workmen or employs a sub-contractor or sub-contractors, such shall thereupon be deemed to be the workmen of the Contractor or sub-contractors of the Contractor for the purposes of this Contract.

[14] Darrel Davis was the engineer's authorized agent on site. Clause 41 of the contract between CN and Scott Steel empowered Davis in the following terms:

> 41. All orders, directions, instructions or notices to be given or powers exercisable by the Engineer under any provision in the contract may be given or exercised by a duly and expressly authorized agent of the engineer;

provided that no certificate involving the acceptance on behalf of the Railway of any work whatsoever, shall be valid or binding on the Railway, unless signed by the Engineer personally.

[15] These provisions, however, must be understood in conjunction with paragraphs 16 and 34 of Section HC01005 of the General Instructions which form part of the contract:

16 Construction Methods and Prosecution of Work

16.1 As far as it is consistent with the nature of the work and the results to be attained, the order and methods of prosecuting the work will be left to the discretion of the Contractor, with whom the responsibility for such order and methods shall rest provided; however, that the Engineer shall have the right at all times to prescribe and control such order and methods with a view to the safety and to the rapid and economical construction of the work.

34 Field Representatives

34.1 A field representative may be stationed at the site to report to the engineer on the progress of the work as a whole and the manner in which they are being performed and to report any failure by the contractor to fulfil the requirements of the contract and to direct the contractor's attention to such failure.

34.4 No representative of the Engineer shall perform any duty or management on the Contractor's behalf.

[16] I find that Davis' role and responsibility was to be the eyes and ears of CN at the work site. He was to ensure that the material being supplied by Scott Steel, and its work, was being performed to the standard required by CN in the contract, that the work was being performed in a timely manner, and to keep an eye open for unsafe conditions. He normally expressed his concerns about the quality of site supervision, lack of production and safety issues and his serious concern that the project may not finish on time, to his superior, Greg Porisky, in Edmonton. Two examples of this are when Davis expressed his concern about the initial lack of written work procedures and his concern about the capability of Mike Scott to act as a supervisor. These concerns were sent to Porisky along with a request by Davis that a change of supervisory personnel be made by Scott Steel. Porisky then communicated with Ron Scott who responded by replacing Mike Scott, first with John Marti, and then by Ed Van Druten. It is important to note however that it was **concerns** that were being relayed by Davis. The decision to respond to those concerns by replacing the supervisor and the ultimate choice of supervisor was done by Scott Steel. This in fact is precisely what was required by clause 34 of the contract between CN and Scott Steel which contained the following provision:

34 A competent representative shall be kept on the ground by the Contractor during all working hours, to receive the orders of the Engineer, and should such representative be deemed by the Engineer incompetent or conduct himself improperly, he shall, on the request of the Engineer, be forthwith discharged, and another shall at once be appointed in his stead by the Contractor; such representative shall be considered as the lawful representative of the Contractor; and shall have full power to carry out all requisitions and instructions of the Engineer, but this clause shall not relieve the Contractor from the duty of personally superintending the work.

Another example of this is found in Exhibit 24, a fax from Davis to Porisky dated August 18th, 1997 setting out his concerns about safety issues on site and a lack of necessary tools for the Scott Steel workers. In that fax Davis asks for a copy of the letter Porisky would be sending to Ron Scott the owner of Scott Steel. Davis also mentioned safety issues to the Scott Steel supervisor on site. It was then up to Ron Scott and other Scott Steel personnel to decide how best to deal with those concerns. Davis' role was to express those concerns, it was Ron Scott's role to deal with them. Finally, if Davis saw something that he felt was more urgent, he would bring it directly to the attention of the Scott Steel employee. In practice, this meant that Darrel Davis, CN's field representative at the site, retained some authority to order work be stopped by Scott Steel employees if he thought a worker was doing something improperly or dangerously.

[17] The terms of the contract guaranteed that CN retained the right to ensure that the work being done for them was of a standard that they approved and that the work being performed on their property was being carried out in a safe manner by competent workers. While CN retained the right to step in and if necessary complete a job if Scott Steel did not in CN's opinion take appropriate remedial action on a complaint by CN, the hiring and if necessary the disciplining of Scott Steel employees remained with Scott Steel management. It was the Scott Steel supervisors who were responsible for assigning the day's tasks to their employees and for supervising that the task was both being carried out and being carried out in a safe manner.

[18] The trestle collapsed as the locomotive crane entered onto the part of the bridge that was being worked while carrying half of steel bent #2 out to the bay between #15 and #16. This bay had had its longitudinal bracing on one side removed to enable the bent to be swung into place. The bridge collapsed coincidental with the locomotive putting on its brakes as the bent it was carrying approached its destination. I find that at the time of the collapse the locomotive was an operating piece of railway equipment

under the control of CN employees.

[19] The accused also argue that Davis' role was more than just ensuring that the work was being performed safely and to the specifications required by CN and inspecting the bridge to ensure that it was safe for passing trains. They argue that, despite his denial, he was also responsible for ensuring the safety of the trestle for the passage of the locomotive cranes. They submit that Davis was in error when he testified that he was responsible only to ensure the safe passage of the regular train traffic and not for the passage of the other rolling stock of CN such as these locomotive cranes. I agree with the accused that it is an artificial and wrong distinction drawn by Davis when he testified that he was responsible for the one and not the other. Despite his denial of responsibility for the safety of the rail cranes, I am satisfied that at the job site, the ultimate responsibility for ensuring that the trestle was safe for rail traffic, including the locomotive cranes, to enter upon it, rested with the CN site supervisor, Darrel Davis. This does not alter the fact that during the periods when the cranes would be in service delivering or positioning materials, those activities would be at the request and direction of Scott Steel employees who would be indicating when they were ready for the delivery of materials to a particular area under reconstruction and then guiding those materials into position.

[20] Davis was also in charge of coordinating the work blocks with the passage of scheduled trains over the trestle and of ensuring that the trestle was in a secure enough condition to allow for safe passage. Davis was available for consultation and advice to Scott Steel employees, but that was not part of his responsibility. That role arose from the fact that this was a work gang working on a complex task in a remote location, Davis had certain expertise gained from his training and years on the job, and he was prepared to voluntarily lend a hand from time to time. While I find as a fact that the Scott Steel supervisors and workers looked up to Davis as an expert in the construction of this type of railway bridge, I find that he did not have any direct authority over the Scott Steel employees in the usual course of their duties. It is noteworthy that it was not Davis who developed the work procedures for the erection of either the wooden or the steel bents, though he would have been capable of doing so in the eyes of the Scott Steel employees. The requirement was that Scott Steel develop the procedures because they were in charge of the construction.

[21] I do not accept the defence submission that Darrel Davis was a supervisor of Scott Steel employees. The contract makes it clear that that was not his role.

[22] There is no suggestion that Scott Steel was involved in any way in the operation or running of the railway. This is specifically highlighted by the timing of the work blocks, which were set exclusively by CNR and over which Scott Steel had no authority, although they did from time to time make a request of CN to allow certain extra work blocks to be worked.

Relevant sections of the *Workers' Compensation Act* and policy:

[23] Section 71(1) of the *Workers' Compensation Act*, R.S.B.C. 1996, C-492 and amendments thereto provide the authority for the Workers' Compensation Board to make regulations for the prevention of injuries to workers under their jurisdiction. Section 71(3) sets out the authority to inspect a work site and reads in part as follows;

> An officer of the board or a person authorized by the board may at all reasonable hours inspect the place of employment of a worker within the scope of this Part.

Section 71(8) sets out the authority of a commissioner or officer of the board to investigate an accident resulting in injury or death to a worker:

> A commissioner or officer of the board may investigate an accident resulting in injury to, or the death of, a worker, and may inspect and inquire with respect to health and safety matters at any place of employment, and may make the inquiries and inspect the documents he considers necessary for these purposes, and any employer, worker or other person who withholds information from a commissioner or officer making inquiries, or who otherwise obstructs or interferes with a commissioner or officer in the exercise of his functions under this section commits an offence and is liable on conviction to a fine not exceeding $5,000, or to imprisonment not exceeding 3 months, or to both.

Section 71(9) deals with arrangements with federal inspectors:

> Not withstanding anything contained in any Act, the board may enter
>
> a. an arrangement with any minister of the Crown in the right of Canada or the Province, whereby inspectors in the employ of Canada or the Province or an agency of them may, when considered necessary in the interests of safety and accident prevention, be authorized and required to carry out the duties and responsibilities of an inspector under this Act, and every inspector in the course of those duties and responsibilities shall be under the direction of the board.

Section 74(1) provides the authority to shut down a workplace in conditions of immediate danger:

> Where the board or an officer of it considers that conditions of immediate danger exist in any employment or place of employment which would likely result in serious injury, death or industrial disease to any worker employed there, the board or officer may order the employer to immediately close down all or part of the employment or place of employment and the industry carried on there……

Section 75(1) provides the authority to issue orders and directives:

> In addition to the rules and regulations which may be made under this Part, the board may issue the orders and directives it considers requisite for the due administration and carrying out of this Part…..

Section 77 provides for the liability of an officer of a corporation:

> 77(1)Where an offence under section 70(2), 74(3) or 75(2) committed by a corporation is committed with the consent or connivance of, or has been facilitated by neglect on the part of, a director or other officer or a manager or supervisor of the corporation, he, as well as the corporation, commits the offence; and, where a corporation has failed to make provision for compliance with a regulation or order to which section 70(2), 74(3) or 75(2) applies, every director or officer, manager or supervisor of the corporation who ought to have made that provision commits the offence.

Provincial Board policy with respect to workplaces under the jurisdiction of Labour Canada is found in Exhibit 82 p.1:

> Officers of the board shall not conduct inspection or other activity in workplaces under Labour Canada jurisdiction unless directed to do so by Occupational Safety and Health Division management.

Preliminary Issues:

[24] The accused have raised two preliminary objections that must be dealt with before consideration can be given to whether or not the Crown has proven its case against the accused. These are the issues of jurisdiction and whether the nature and manner of the investigation violated the accuseds' rights under sections 7 and 11 of the *Charter of Rights and Freedoms*.

Jurisdiction:

[25] There is no dispute in this case that CN is an inter-provincial undertaking. Therefore, CN is a federal undertaking and its workers and issues of workplace safety are governed exclusively by federal legislation. The accused renew their argument that given the parameters of this contract, the division of responsibilities on this project, and the close working relationship between the Scott Steel employees and the CN workers, all workers on this specific work site at the Mile 8.3 railway trestle, whether employed by CN or Scott Steel, were subject to only to federal legislation and that provincial jurisdiction had been ousted. They argue that the earlier appeal in this case turned on the limited facts found by the Court at that time. They argue that since a new trial was ordered, the appellate court left open the possibility that, if certain additional or other facts were found at this trial, this Court could still properly conclude in law that provincial jurisdiction had been ousted in favour of the federal regime which governed CN.

[26] The accused make two principle arguments in support of their submission. The first argument is based on the very close and necessary working relationship between the workers of the two companies. The second argument is based on the difficulties inherent in having workers on a site subject to differing work safety legislation depending on who their employer is, regardless of the task they may be working on together.

[27] The case law sets out that any analysis as to whether provincial jurisdiction has been superceded by federal law entails a situation specific two-prong test.

> a) is the operation as a whole a federal work or undertaking?,
>
> if not, then
>
> b) is that part of the work which is not a federal undertaking an integral part of an acknowledged federal work or undertaking.

[28] The Supreme Court of Canada in *United Transportation Union v. Central Western Railway Corp* [1990] 3 S.C.R. 1112

mandated that the Court is to use a flexible test in its analysis of the constitutional issue. At paragraph 45 the Court wrote:

> The principles enunciated in Northern Telecom are not intended to be applied in a strict or rigid manner. Instead, the test should be flexible and attentive to the facts of each particular case. As was stated in A.G.T. v. C.R.T.C., it is impossible in my view, to formulate in the abstract a single comprehensive test. The common theme in the cases is simply that the court must be guided by the particular facts in each situation, an approach mandated by this court's decision in Northern Telecom. Useful analogies may be found in the decided cases, but in each case, the determination of this constitutional issue will depend on the facts which must be carefully reviewed, as was done by the trial judge in the present appeal.

[29] Since the decision of the Supreme Court of Canada in *Bell Canada and Quebec (C.S.S.T.)* [1988] 1 S.C.R. 749, it is settled law that, in principle, labour relations and working conditions fall under s. 92(13) of the *Constitution Act*, 1867, "Property and Civil Rights in the Province" and are thus within the exclusive jurisdiction of the provincial legislatures.

[30] In *Bell Canada*, the Supreme Court set out a summary of applicable principles at pp. 761-2. Propositions two and three of those principles are as follows:

> Proposition Two:
>
> In principle, labour relations and working conditions fall within the exclusive jurisdiction of the provincial legislatures: these matters fall into the class of subjects mentioned in s. 92(13) of the Constitution Act, 1867, "Property and Civil Rights in the Province": Toronto Electric Commissioners v. Snider, [1925] A.C. 396
>
> Proposition Three:
>
> Notwithstanding the rule stated in proposition two, Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects, as is the case with labour relations and working conditions in the federal undertakings covered by ss. 91(29) and 92(10) a., b. and c. of the Constitution Act, 1867, that is undertakings such as Alltrans Express Ltd., Canadian National and Bell Canada. It follows that this primary and exclusive jurisdiction precludes the application to those undertakings of provincial statutes relating to labour relations and working conditions, since such matters are an essential part of the very management and operation of such undertakings, as with any commercial or industrial undertaking.

[31] The Court went on to note in the following paragraph that

> It should however be noted that the rules stated in this third proposition appear to constitute only one facet of a more general rule: works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction.

At p. 859, the Court wrote:

> In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it....
>
> ... However, I think it is worth making certain clarifications regarding the concept of impairment. If the application of a provincial statute to a federal undertaking has the effect of impairing or paralyzing it, that *a fortiori* is an almost certain sign that such application bears upon the specifically federal nature of the undertaking and constitutes an encroachment on the exclusive legislative authority of Parliament.

[32] The Court in *Bell Canada* gave various factual examples of what might constitute an impairment of a federal undertaking including this example found at p. 864:

> An inspector may also under, ss. 186, 187, 188 and 189, order the suspension of work or the complete or partial shutdown of a workplace and, if necessary, affix seals if he or she considers a worker's health, safety or physical well-being to be endangered. No one may then enter the workplace without the inspector's authorization. Work cannot resume and the workplace cannot be reopened until the inspector so authorizes. Under these powers, an inspector could, if the Act is applicable to Canadian National or to Bell Canada, close down a train station, a railway signal depot, a railway which he or she regarded as obsolete, or an essential part of Bell Canada

> telecommunications network. Such measures are not punitive provisions designed to enforce the legislation or provincial regulations, like those in question in *Great West Saddlery Co. v. The King*, supra, and those to which Lambert J.A. alludes in *Alltrans*. They are provisions designed to protect occupational and safety and are an integral part of the preventive system set up by the Act. However, it is clear that they would impair undertakings such as Canadian National and Bell Canada.

[33] The case of *Montcalm Construction Inc. v. Quebec Minimum Wage Commission* [1979] 1 S.C.R. 754 dealt with the applicability of provincial legislation to a construction company building an airport. The Supreme Court of Canada held at p. 768:

> The issue must be resolved in the light of established principles the first of which is that Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule: *Toronto Electric Commissioners v. Snider* [1925] AC 396. By way of exception however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject: *In re the validity of the Industrial Relations and Disputes Investigation Act* [1955] SCR 529 (the Stevedoring Case). It follows that primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment, but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence; thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one; *In re the application of the Minimum Wage Act of Saskatchewan to an employee of a Revenue Post Office* [1948] SCR 248, (the Revenue Post Office case); *Quebec Minimum Wage Commission v. Bell Telephone of Canada* [1966] SCR 767 (the Bell Telephone Minimum Wage Case); *Letter Carriers Union of Canada v. Canadian Union Postal Workers* 1975 1SCR 178 (the Letter Carriers' case). The question whether an undertaking, service or business is a federal one depends on the nature of its operation: Pigeon J. in *Canada Labour Relations Board v. City of Yellowknife* [1977] 2 SCR 729, at p. 736. But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", (Martland J. in the Bell Telephone Minimum Wage case at p. 722), without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity; *Agence Maritime Inc. v. Canada Labour Relations Board* 1969 SCR 851. (the Agence Maritime case); the Letter Carriers' case.

[34] The majority of the Court determined that despite the fact that aeronautics was under federal jurisdiction, the key factor in *Montcalm* was the fact that the ordinary business of *Montcalm* was the business of building. What they built was accidental and there was, therefore, nothing specifically federal about their ordinary business.

[35] The Manitoba case of *R. v. CanAmera Foods,* [1999] M.J. No. 469, a decision of the Queen's Bench and the appeal decision found at [2000] M.J. 312 are illustrative of the proposition that even if a federally regulated grain elevator is operating in close coordination with a refinery ordinarily under provincial jurisdiction, this nexus is not sufficient in itself to oust provincial jurisdiction over the refinery.

[36] *CanAmera* operated an elevator as a transfer facility, an extraction plant, a refinery and a warehouse. The grain elevator was under federal jurisdiction. All the other businesses would normally be under provincial jurisdiction. Two workers were killed at the refinery. The Court of Queens Bench listed nine facts showing the connections between the facilities. These were:

1. The respondent's elevator is operated only for the purpose of its seed processing and refinery facilities;
2. although employees are not interchangeable between the three facilities due to different training demands and requirements, the respondent's maintenance department has employees who work and service equipment in all three facilities;
3. all three facilities are physically connected;
4. the heads of the three facilities all report to one branch manager who is in charge of the whole overall operation in Altona;
5. the respondent maintains one payroll for all employees, and pay and benefits are dealt with at the Altona site for all employees at the site;
6. there is one laboratory at the Altona site which, attends to quality control issues and testing for seed product received, as well as the meal and oil products sold by the respondent;
7. the whole plant has one designated safety officer with respect to all employees on the site;
8. there is a common ownership, management, control, and direction of all three facilities;
9. there is coordination and consultation among the various facilities and departments in carrying out the overall

production functions of the plant.

[37] The Manitoba Court of Appeal did not disturb these nine findings of fact asserted before the Court of Queens Bench, but allowed the appeal on the basis that the refinery was not a vital, essential or integral part of the elevator business. Thus, even with the degree of integration that was demonstrated, the Court held that two different jurisdictions applied.

The Supreme Court of Canada in *United Transportation Union v. Central Western Railway Corp* supra**,** had this to say about two railways that connected with each other:

> paragraph 24
>
> Railways by their nature form a network. As a consequence, purely local railways may very well touch either directly or indirectly upon a federally regulated work or undertaking. That fact alone cannot reasonably be sufficient to turn a local railway into an interprovincial work…..
>
> paragraph 49
>
> ……if work occurs simultaneously between the two enterprises, functional integration may exist. This temporal integration does not exist, however, between Central Western and CN, as each operates independently within its own sphere.
>
> paragraph 60
>
> ……something more than physical connection and a mutually beneficial commercial relationship with a federal work or undertaking is required for a company to fall under federal jurisdiction. In my opinion, the requisite degree of integration was absent on these facts.

[38] In the result, *Central Western* was found to be under provincial, not federal jurisdiction. This depite the fact of the physical interconnection of their rail lines and their mutually beneficial commercial relationship.

[39] As required by the court in *Montcalm*, supra, the question to be answered in this case is:

> Was the work of Scott Steel integral to an existing federal work or undertaking?

[40] In support of their submission that the employees of CN and Scott Steel were working as one unit at this site, the accused point to the degree to which both groups had to work together as an integrated workforce. The movement of the locomotive cranes which I have found to be a part of the operation of the railway was a necessary element in this reconstruction project as it was continuously moving back and forth across the bridge. By the terms of the contract it was operated only by CN personnel. Neither workforce could accomplish their tasks without the active cooperation of the other group.

[41] The defence argues that Tysoe, J. found the judgment of December 17, 2001 in this matter to be in error because it focused on the difficulty of having two differing jurisdictions governing workplace safety on one work site. The defence submits that the proper focus should be on the degree of integration of the two workforces in order to determine the jurisdictional question. However, the issue of integration was squarely before the Court in 2001 as set out in paragraph 8 of that judgment:

> [8] The applicant contends that on this particular project the work of both CN and Scott Steel was so intimately bound up that Scott Steel should be viewed as a subsidiary of CN, and thus, subject only to the federal health and safety scheme as set out in the ***Canada Labour Code***.

[42] The Court clearly set out in the judgment of December 2001 that the workforces of the two companies were working together, and that cooperation between the two was vital and necessary for the work of rebuilding the trestle. The evidence has not changed in that regard. The evidence is unequivocal and I find that Scott Steel's work could not have been accomplished under the terms of this particular contract without the active participation of some CN employees and equipment. There is no doubt that large heavy duty cranes and the qualified personnel to operate them were needed to accomplish many of the tasks. The contract specified that those pieces of equipment and their operators were to be provided by CN. Overall authority over these cranes and the CN personnel operating them remained with CN, although it was Scott Steel employees who would request their use at any particular moment, and in the carrying out of the task, would be involved in signaling to the CN workers how to maneuver the crane and place any load it may be carrying.

[43] In *Reference re Industrial Relations and Disputes Act*, [1955] S.C.R. 529 (the Stevedores' Reference) the Supreme Court

of Canada dealt with the question of whether the federal government had jurisdiction over the labour relations of a work or undertaking not in itself federal. In the *Stevedores*' case the federal undertaking was the international and interprovincial flow of cargo carried by ships in and out of Toronto harbour. The loading and unloading of the ships was supplied by a stevedoring company which was in no way connected through corporate ownership to any of the shipping companies. The Court held that the work of the stevedores was integral to the business of transporting freight on these ships and was therefore subject to the legislative jurisdiction of Parliament.

[44] The Court came to a similar conclusion in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178 (the letter Carriers' case). The post office had contracted out the delivery and collection of mail to a private company. The Court found that this work which was carried out under the supervision and control of the post office authorities was essential to the work of the post office and formed part of its core undertaking. The employees of the company therefore came under federal jurisdiction.

[45] The companies in the *Stevedores' Reference* and the *Letter Carriers'* case were doing the essential work that one would expect a shipping company or a postal service to be doing. They were, respectively, actively engaged in the handling and transport of international and inter-provincial cargo and collecting and delivering mail. They were not for example building and installing mail boxes which would then be used for post office functions. In contrast, Scott Steel was not running a railway, it was doing repair work for a railway.

[46] The case of *Winnipeg (City) v. Canadian Pacific Railway Co.* [2003] M.J. 303 cited by the accused is of limited assistance. Canadian Pacific built a mezzanine at its rail car repair shop without first obtaining a municipal building permit. The Provincial Court held that the construction was reasonably necessary and essential to CP's operation as a federal undertaking and they were therefore not required to obtain the permit. It is not clear from the case whether CP was using its own employees or had contracted the work out to a construction company.

[47] It is true in this case that the reconstruction of the trestle at Mile 8.3 was reasonably necessary for the operation of the railway, but there is no suggestion that CN or Scott Steel would have needed to obtain any provincial permits or building approvals for this reconstruction work on land controlled by CN. Cases such as *Montcalm*, supra, and the trilogy of *Bell*, supra, *Alltrans Express v. British Columbia* (Workers'/Workmen's Compensation Board), [1988] 1 S.C.R. 897 and *Canadian National Railway Company v. Courtois*, [1988] 1 S.C.R. 868 all illustrate that companies under federal jurisdiction are in certain areas subject to provincial laws of general application and sometimes the reverse is also true. The fact that no building permit was required does not rule out the applicability of provincial jurisdiction over worker safety when those workers are employed by a construction company not otherwise coming under federal jurisdiction.

[48] The second argument made by the accused with respect to jurisdiction is based on the difficulty inherent in investigating and enforcing safety issues if there are two different agencies claiming jurisdiction over a work site. The accused submit that the authority to investigate under section 71(8) of the provincial legislation arises from an injury or death to a worker under its jurisdiction. The accused point out that the federal investigators derive their authority in the same manner. They argue that what flows from this, since no arrangement had been made under 71(9) of the provincial *Act* to be able to inspect a federal workplace, is that only in the unique situation where there is a death or injury to workers from both companies can the investigators from both jurisdictions intervene and embark on an investigation. It is the accuseds' position that in this case, but for the unfortunate fact of deaths and injuries to both sets of workers, the collapse and consequent deaths and injuries could not have been properly and fully investigated. The Crown contends that the matter could have still been investigated though perhaps with more difficulty and not as thoroughly.

[49] An illustration of the potential difficulty faced by the provincial investigators was given by John Naylor, the engineer employed by the Board to assist Nick Hadikin, the provincial safety officer, in the investigation of the collapse. He was asked during the trial why he and Hadikin did not approach the CN employees directly to get statements from them instead of making an arrangement with Jim Beynon the federal investigator to put the questions from the provincial investigators to the CN employees.

> Q. All right. So, if those were the powers [s. 71(8) of the Workers Compensation Act] you had, why didn't you take statements from the CN people directly at the site?
> A. The…if I can describe the…the scene on site. We arrived on site and CN was in control of the site. For the purpose of…in first trying to rescue the crane operator and eventually trying to retrieve the crane operator. CN is…is not under WCB jurisdiction and the CN Police were in charge of the site, so that before we could even enter the site we had to approach a large gentleman with a revolver on his hip and sign in and get his OK to access the site.

[50] Defence counsel detailed a number of scenarios which highlight the difficulties that could arise on a work site where some workers working as part of a team were under provincial jurisdiction while the other workers on the team were under federal

jurisdiction. One example dealt with pile-driving. Under this contract much pile-driving had to be done. The crane operator, a CN employee, would be operating the pile-driver and would be subject to federal jurisdiction. The worker at the base of the pile directing the crane operator would be a Scott Steel employee and would be subject to provincial jurisdiction. If an accident had happened while pile-driving, one end of that pile would be investigated by the federal authorities and the other end would be investigated by provincial safety officers. The other example posed by defence counsel dealt with the possibility of a Scott Steel employee being injured or killed while a lift was happening using the crane owned and operated by a company whose employees were under federal jurisdiction. The provincial investigator would not have the same ability and authority to enter the property and investigate the people and equipment involved as he would have if he had sole jurisdiction over the site and the workers. This could potentially prevent investigation and prosecution.

[51] A split in jurisdiction may make the investigation and prosecution of an alleged infraction of the *Act* or *Regulations* more difficult or even impossible, but that issue was squarely before the Supreme Court of British Columbia in the original appeal of this matter.

[52] I find, as I did in the first judgment, that the relationship between Scott Steel and CN was one of contract. They did not share common ownership, management or supervision. The provision of the drawings and specifications by CN constituted the aim of the contract. The supply of certain materials and equipment operated by CN personnel was specified by the terms of the contract, and did not change the fact that these were two independent entities. The mere fact that one party to a contract wishes to have its own supervisor on site to ensure that the terms of the contract are being adhered to and that the work being performed on its property was being done safely, is not enough to demonstrate such a close integration of companies, as to consider Scott Steel to be a subsidiary of CN and thereby displace provincial jurisdiction.

[53] The fact is that CN was engaged in the operation of an interprovincial railway, while Scott Steel was a provincially incorporated construction company involved in a discreet relationship with CN for the reconstruction of the Mile 8.3 railway bridge owned by CN.

[54] Each fact that I have found in this trial concerning the relationship between CN and Scott Steel and their respective workers, is one that I either found explicitly in the first judgment or was manifestly obvious in those findings of fact. Because I do not find any additional germane facts to those earlier found, I am bound by the appellate decision of Tysoe J. and I rule that Scott Steel and its workers were under the jurisdiction of the provincial *Workers' Compensation Act* RSBC 1979 Chapter 437 and its associated *Occupational Health and Safety Regulations* 585/77.

Was there a violation of the accuseds' rights under sections 7 and 11(d) of the *Charter of Rights and Freedoms* due to the way in which the investigation was conducted:

[55] The accused submit that their rights under section 7 and 11 (d) of the *Charter of Rights and Freedoms* have been violated by the way in which the investigation into the collapse was conducted. If a breach is found, then depending on the seriousness of that breach, an appropriate remedy could be a judicial stay of the charges.

[56] These two related sections read as follows:

> s.7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> s.11. Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

[57] Defence counsel argues as he successfully did in *R. v. T.K.* [1999], B.C.J. No.3170, a decision of the British Columbia Supreme Court, that an accused is entitled to a competent investigation. He does not claim, nor could such a claim be sustained that an accused is entitled to a perfect investigation. The reality of many investigations is that there are manpower and financial constraints, memories fade, witnesses contradict each other in their perceptions of what they have seen or heard, witnesses disappear or die, weather can interfere with the locating of exhibits and the list goes on. None of this detracts from the requirement for a competent investigation. As was stated in *R. v. D.O.S.* [1992], N.J. No. 280 and adopted in *T.K.* supra, at paragraph 21:

> In my view, the greatest guarantee of an accused person's civil liberties, is not the court, defence counsel or even the Canadian Charter of Rights and Freedoms, but a competent police force dedicated to conducting a thorough investigation with an open mind and with a view to uncovering relevant evidence that bears on the truth or falsity of the allegations facing the accused.

[58] Defence counsel submits that a competent investigation is the fundamental underpinning to ensuring the rights conferred upon an accused under sections 7 and 11(d) of the *Charter* are not violated. The defence submits that they are entitled firstly to an objective assessment of the evidence before any charges are laid, and secondly, to proper disclosure of the evidence uncovered so as to be able to make full answer and defence.

[59] The defence submits that the provincial authorities did not properly investigate the collapse of the trestle because of their perception of the jurisdictional limits on how they could proceed in the conduct of their investigation. As noted above in this judgment, Naylor and Hadikin, the provincial investigators, felt at that time that they did not have the jurisdiction to compel CN employees to talk to them directly. They also felt that they did not have the power to compel CN to produce relevant documents. This is why they entered into an arrangement with Jim Beynon the federal investigator to do a coordinated investigation. The defence argues that the provincial investigator was obliged to collect all relevant evidence and to determine, if there was to be a finding of fault, whose fault it was. In order to do this properly the investigator would also need to review all the investigative findings concerning CN. The accused argues that did not happen here because Hadikin felt he had no power to require CN to do anything. Instead he entered into an arrangement with the federal investigators and received material through them. The evidence of Naylor is that the provincial and federal inspectors agreed to work as a team so as not to conduct separate interviews with the various employees while at the same time ensuring that all relevant witnesses would be interviewed. All the investigators contributed to the list of questions, though the evidence of Naylor is that the primary person preparing the questions was Hadikin, the provincial WCB safety officer. The provincial and federal investigators also agreed to compare notes so as to cover all the aspects that they needed to complete their investigations. The interview technique was designed so that all the investigators would be present, and then one person would ask questions and the others would take notes in order to record the information as accurately as possible. It is clear from the evidence of Naylor that CN personnel were removed from the accident site very shortly after the collapse and there was difficulty interviewing them until after they had consulted counsel and the interviews had been coordinated through the Labour Canada investigators. Naylor agreed that had the provincial investigators felt they had authority over the CN employees, they would not have allowed those workers to leave the site before giving their statements while the information was still fresh in their minds.

[60] The accused submit that to the extent that the provincial authorities either could not or did not properly investigate the incident, the defendants have been prejudiced and there ought to be a judicially imposed stay of proceedings. The issue thus becomes - is there any credible evidence of an investigatory problem, that ultimately concluded in an incompetent investigation thereby creating prejudice to the accused thus violating their sections 7 and 11(d) *Charter* rights. Secondly, if there is, is it sufficiently cogent as to warrant a stay.

[61] The accused in *R. v. D.O.S.* supra, was charged with sexual assault alleged to have occurred twenty years earlier. The case primarily turned on the Court's assessment of the credibility of the complainant and the accused. The Court's comments about the value of a competent police investigation was prompted by the failure by the police to properly interview a witness who told them that she did not recollect some of the noteworthy events described by the complainant as happening in front of that witness. The Court at page 7 had this to say about the police decision not to take a statement from that witness:

> It is perhaps natural, if on questioning, a person says he or she cannot recall an incident, to assume that that person has nothing of value to add to the investigation and to discount that person's further involvement. There is, however, a great danger in this. The effect of being too quick in concluding that because a person cannot recollect anything specifically about a particular incident, the person's evidence is of little value, may be to reject relevant evidence that does not support the Crown's case. The fact that a person does not recollect may of course mean that he or she has forgotten but it could also mean, in circumstances where the witness had an opportunity to observe and would normally be expected to have seen something, that the incident did not happen. The Crown (and I use that term compendiously to include the police) have a duty in investigating an alleged crime, to attempt to uncover all reasonably available evidence that may have the effect of confirming the charge or exonerating the accused. Through the doctrine of disclosure that information then becomes available for the use of the defence and there may even be circumstances, where the Crown ought, in the discharge of its duty, to call evidence damaging to its own case as part of the case for the Crown.

[62] The accused in *T.K.* supra, was charged with sexual assault and unlawful confinement. The Court determined on the facts of that case that "the officer acted on an uncorroborated complaint and, without any further investigation, conducted a search, arrested the accused without warrant, strip searched and detained him overnight, all in contravention of his rights under the Charter." In addition, a transcript of a taped interview of the complainant was never checked by the investigator for accuracy and the tape was lost before trial despite requests by the defence for disclosure of the tape within weeks of the interview. Another tape of an interview of a witness was also destroyed despite the transcript having indications that 18 times something was said that the transcriber described as inaudible, three spots where the tape skipped and two places where there were question marks. The Court found that the accused was prejudiced by the loss of the tape. In all of the above circumstances Loo J. stated: "I find in all

of the circumstances that this is a clear case in which a judicial stay of proceedings should be and is granted."

[63] In this case there is evidence that there was difficulty getting CN to be forthcoming, but in the end there is no evidence that anything was lacking. I find that while the investigation was not perfect, Hadikan from WCB and Benyon from OHSA did coordinate their investigative efforts and shared information and documents. There is no evidence that the accused can point to that indicates that they have been prejudiced by the jurisdictional concerns of the investigators and the way in which they chose to work around their perceived difficulty. It is not enough for the accused to complain that they are not aware of things that may remain unknown due to a deficient investigation, and therefore are not in a position to point to actual prejudice. The Court cannot speculate on the existence of prejudice and find prejudice to the accuseds' right to make full answer and defence, where there is no evidentiary basis for grounding such a finding. The existence of a possibility, or a speculation that there could be prejudice is not sufficient.

[64] The total volume of evidence produced by the Crown in this case and the lack of ongoing demands for disclosure by the defence are indicative of the fact that by the time of the trial all probative materials that could be available whether from CN or Scott Steel were produced and available to the accused. The only items apparently not produced are John Marti's computer and a notebook kept by Darrel Davis, both of which disappeared early on irrespective of any jurisdictional problem. Those items are not in existence and so cannot be produced.

[65] I find that while the investigation in this matter was not perfect, it was competent and thorough. The accused's rights under sections 7 and 11(d) of the *Charter* have not been infringed by the manner of this investigation.

[66] Having dealt with the two preliminary issues I now turn to a consideration of the evidence.

Have the assumptions underlying Naylor's opinion contained in his report been proven:

[67] The opinion evidence as to why the trestle collapsed was provided by the Crown witness John Naylor from the Prevention and Investigation Division of the Engineering section of the Workers' Compensation Board. He is a structural engineer employed by the Board since 1991. He was sent out to the accident site to determine the mode and cause of failure and to provide technical assistance to the WCB safety officer Nick Hadikin. The defence did not object to Naylor being qualified as an expert able to give opinion evidence on the mode and cause of the failure of the trestle bridge at Mile 8.3 which forms the subject matter of these proceedings. His report, which gives his opinion as to why the trestle collapsed, was filed as Exhibit 75 at the trial. Some, but not all, of the factors that must be considered in order to determine the weight to be given to his opinion are: was it written objectively; were the underlying assumptions he used to come to his opinion been proven in evidence; did he improperly exclude from his consideration any evidence; was he, improperly and without justification, selective in what evidence he used when there may have been contradictory statements given to him by witnesses; and is there independent objective evidence to support his conclusions.

[68] Naylor arrived on the scene the day after the accident. He began his investigation by meeting with the federal investigators, touring the site, making observations of the condition of various structural members of the trestle and taking photographs. In coordination with Hadikin and Beynon, the federal safety officer, a list of areas to be covered and questions to be asked of both Scott Steel and CN personnel were developed. Employees from both companies were then interviewed. The provincial investigators asked questions of the Scott Steel personnel and the federal investigator interviewed CN workers. Both sets of investigators sat in on the interviews and took notes. Naylor also reviewed documents and design drawings, and when he felt he needed additional information or documents he arranged through the federal official to obtain them from CN. While it would appear from his evidence and some of the correspondence that CN was not prompt in their cooperation, there is no evidence that Naylor had not yet received everything he requested by the time he wrote his report. The Crown did not call as witnesses all of the persons he interviewed.

[69] Naylor concluded in his report that:

> It is our opinion that the collapse started when the assembly of Bents 13, 14, and 15 buckled at the intermediate caps, deflecting toward Bent 16. The failure then progressed southward in a domino effect until the damage reached Bent 20, which was braced longitudinally with diagonals to Bent 21. The rail crane fell into the pond, dropping its boom and the steel frame for Bent 2 onto the pile of wooden debris in the pond.
>
> The existence of rot in the wooden trestle is not considered to be a significant contributing factor at this time. The rail crane had traveled back and forth on the trestle numerous times during the project. A train passed over the trestle only 90 minutes before it collapsed. During this brief interval, the extent of any rot in the structure did not significantly change.

> The collapse was caused by the removal of bracing between Bents 12 and 13 and between Bents 15 and 16. Without this support, the free-standing assembly of Bents 13, 14, and 15 lacked any longitudinal diagonal bracing, rendering it structurally unstable and incapable of supporting the rail crane. This deficiency was not recognized, detected or corrected by Scott Steel or CN staff.

[70] Naylor did not improperly pick and choose between the evidence of witnesses who gave conflicting evidence as to whether all the bracing between bents #15 and #16 was removed or some was left on the west side of the bay. It is true that he testified that he made an assumption as to which version was more likely correct in order to prepare his report. However, it is clear from the evidence, that when it came to an analysis as to the mode and cause of the collapse Naylor had accepted the more conservative of the reports by the various witnesses he spoke to, that is, that there was still some bracing left on the west side of the trestle. Specifically, Naylor assumed that the most important strut on that side, the one at the intermediate cap was still in place. The alternative, that there was no bracing at all across that bay would only have strengthened his opinion.

[71] Naylor made a point of examining the area around bent #12 to determine if there was any indication that either permanent or even temporary bracing had been in place between it and bent #13. He found no such indication and he has pointed out in the photographs that he took of that area that there is no indication of even a single broken strut hanging from bent #12. Every one of them appears to have been removed prior to the collapse. There is nothing in Davis' daily activity log for October 27th that directly contradicts this assessment by Naylor. I find that there was no bracing in place between bents #12 and #13 at the time of the collapse.

[72] There was evidence at the trial that there were some pre-existing broken struts and some rot in various wooden braces in this trestle. One of the facts relied upon by Naylor in dismissing the importance of rot or the presence of broken struts in parts of the structure from his assessment as to why the trestle collapsed is that he had been told that approximately 90 minutes earlier a train had been able to pass over the bridge. This was an important assumption since it ruled out other possible causes of structural failure. It was therefore important for the Crown to prove that fact. This was done through the evidence of Hickey and Davis who testified on that point. I accept that a train had passed safely over the trestle shortly before the collapse. The only change of significance between that event and the collapse was the work that Hickey was doing removing the bracing between bents #15 and #16. According to Hickey, during the process of removing the bracing in that bay the second rail crane was being used to carry the bracing away. This crane came onto the trestle from the south end, stopping by bent #16 to get its load and then going back to the south. This meant that it was always over a braced and therefore stable part of the structure as it went back and forth. The collapse only occurred as the other crane entered onto the trestle from the north end once the bay between #15 and #16 had been opened up on the east side of the rail. As evidenced by the fact that the tender car it had been towing was seen by Naylor at the edge of the still upright bent #12, the moment the rail crane crossed the open bay between #12 and #13, and put its weight on the now unstable structure comprised of bents #13, #14, and #15, the trestle collapsed.

[73] Drawing R-6666-6 of the design drawings that were marked as Exhibit 13 at the trial was reviewed by Naylor prior to forming his opinion. One of the notes on that drawing reads in part as follows:

> Bent Plumbness & Stringer Conversion:
>
> Contractor is to ensure that all new bents are installed to plumb.
>
> Contractor is to correct plumbness on existing bents to less than 6" over full height of bent (bents 8, 11, 12, 13 17 & 32 currently out of plumb 6"-12").

[74] Naylor explained the significance of bent #13 being out of plumb to this extent. Since the posts that formed the bent measured 12" x 12", an out of plumbness of greater than 6" meant that any vertical force being placed on the bent by rail traffic passing over it, would tend to rotate the upper storey around its pinned connection to the bottom storey leading to collapse unless properly braced. I accept that the weight of the rail crane and its load created a vertical force that as demonstrated by Naylor caused a horizontal deflection in bent #13 at the intermediate cap which was a pinned connection between two stacked vertical posts. There was no strut in place to resist this horizontal deflection and thus the trestle collapsed. Naylor continued to emphasize the importance of having the bracing in place when he was asked about the effect of rot in cross-examination. He explained, "I already had a structure that if it was in perfect shape was unstable, so how much worse can you make it." I accept Naylor's succinct summary, "Geometry is the key to maintaining the stability of the trestle."

[75] I find that the Crown has proven at trial the essential facts relied on by Naylor in coming to his opinion. I find that his observations, analysis, opinion and testimony in court were all done in a professional and objective manner. There is no evidence to support a reasonably founded suggestion that he has acted in any partisan manner.

[76] I accept the opinion of Naylor as to the mode and cause of the structural failure of the trestle at Mile 8.3. I find as a fact that the trestle collapsed because the bracing and struts were removed from the intermediate cap between bents #15 and #16 when it was unsafe to do so because the bay to the north between bents #12 and #13 had not yet had the minimum required rebracing replaced at the intermediate caps. This created an unstable structure that collapsed when the rail crane entering from the north proceeded onto it.

Has the Crown proven the *acteus reas* of the various counts:

[77] The *Workers' Compensation Act* supra, is a public welfare statute. Charges under the *Act* and its *Regulations* are strict liability offences. The Crown in this case therefore has the burden to prove the *actus reas* beyond a reasonable doubt. Only if the Crown has succeeded in proving the *actus reas* does the burden shift to the two accused to establish on a balance of probabilities that they exercised due diligence to prevent the offending activity. *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299.

[78] With respect to the charges against the accused Ron Scott personally, Section 77 of the *Workers' Compensation Act* supra, provides that the Crown must first prove that the corporate accused is guilty of the offence. If the Crown is successful on this point, they must then also prove beyond a reasonable doubt that the corporate offence was done with the consent or connivance of, or had been facilitated by neglect on his part as a director and officer of the corporation.

[79] The Crown has relied to a large extent on Naylor's report and testimony as well as the evidence of Glen Hickey in their effort to prove the *actus reas* of each count.

[80] Naylor testified in chief that he found a handwritten work procedure entitled "Removing and Installing Steel Span" on the wall of the Scott Steel job shack right beside the design drawings of the trestle. These procedures were filed as Exhibit 7 at the trial. The evidence discloses that the only written instructions available to the Scott Steel employees called by the Crown were in the Scott Steel job shack. To argue as the defence has done that there may have been additional written procedures in the CN trailer misses the point of the legislation. The requirement is that the procedures be available at the job site at all times. The CN trailer was under the control of CN, not Scott Steel. Whatever may have been inside, I find as a fact, would not have been available to the Scott Steel employees at the job site at all times.

[81] In Naylor's opinion the Scott Steel procedures were far too brief, lacked sufficient detail and were ambiguous and therefore were not acceptable. It was his opinion that the written procedures should be sufficiently clear that verbal clarification of the procedures would not be required. He highlighted step 2 in the work procedure entitled "Removing and Installing Steel Span" which reads:

> Remove all cross-bracing and struts from existing bridge where the steel bents have to go.

[82] Naylor testified that this step is ambiguous in that a worker could understand from it since it referred to steel bents in plural, that all the bracing throughout the center section of the bridge was to be removed before proceeding onto the next step. He made the point that the procedure should have clearly directed that only the bracing from the one particular bay being worked on was to be removed at any given time. These procedures are in contrast to the typed document entitled "Written Procedure for Removing and Installing Steel Spans" found in Annex "B" page B12 of the tender document which was filed as Exhibit 10. These procedures set out that the work was to proceed one bent at a time with some temporary bracing being reinstalled and the struts replaced before moving on to the next area where a steel bent was to go. However this written procedure has none of the detail of Exhibit 7 with respect to how to carry out the steps outlined. An example of the lack of important detail can be seen in the wording of step 2 of the procedure found in Exhibit 10 "Drive steel piles while keeping the structural integrity of the bridge intact." Nowhere is there any guideline as to what that means or what the minimum bracing must be in order to keep the structural integrity of the bridge intact.

[83] This concern is well grounded when one compares these procedures with the procedures for "Removing and Installing New Frame Bents". Those procedures are far more detailed and less ambiguous. However even those procedures are lacking in important areas. The only mention of replacing bracing comes in the section dealing with a two-storey bent where step 15 mentions installing two struts at the intermediate cap so that a train could pass over the bridge. There is no mention of the need to install bracing for single storey bents so that the structure would be properly tied together without creating any unstable portions during the construction. Even the typed procedure dated September 27, 1997 for installing steel bent #1 and entered as Exhibit 35 fails to include as a final step the replacing of temporary longitudinal bracing between the old wooden bents to close off the bay. The only mention of temporary bracing is an instruction to install struts temporarily tying the steel bent to the existing structure. This may have been adequate to ensure that the steel bent stayed in position before the installation of the related cross-bracing between the new steel bents once adjacent ones were in position. However, what was of critical importance was to reinstall temporary bracing to ensure that the old wooden bents remained stable until they were removed.

[84] Compliance with *Industrial Health and Safety Regulation* 34.10(1)(a) requires a detailed and comprehensive set of properly ordered steps so that a worker can understand how to complete his assigned task safely. While the opinion by Naylor that written instructions should be so clear as to not need any further verbal clarification may be setting the standard too high, given all the variables that can take place at a work site, I do find that the procedures that were at the Scott Steel job site with respect to the erection of the steel bents did not meet the requirements of the *Regulation*. It was of fundamental importance to maintain the bridge in a stable condition at all times. These instructions were grossly deficient in outlining to the workers how this was to be maintained. If the instructions were followed as written, the workers would have removed all the bracing before starting the next step. Following the written instructions would have created an unstable structure. The Crown has proven the *actus reas* of Count 1 beyond a reasonable doubt.

[85] Count 1, which alleges a failure of the contractor to have all pertinent construction details including erection procedures on site, is only one aspect of the alleged failure contained in Count 4 to ensure the adequate direction and instruction of workers in the safe performance of their duties. Adequate direction and instruction requires that the supervisors ensure that the employees they are directing and instructing know how to perform their tasks and how to do so in a safe manner. Adequate direction requires that a worker not be directed to undertake a task unless it is safe to do so. Therefore, direction, as distinct from instruction, also includes the responsibility for maintaining adequate levels of supervision over the work being directed.

[86] Exhibit 26 at the trial is a note dated September 27 from Darrel Davis to the Scott Steel supervisors John Marti and Ed Van Druten. Paragraph four is as follows:

> Can you please give me the procedures for the steel bent installations as well as the steel spans. I think it would be a good idea to sit down with all involved as to the plan of attack. This will be very involved and dangerous. If there is anything I can do to help with this activity of construction please bring it to my immediate attention so I can arrange accordingly.

[87] While there is nothing in the evidence at trial to indicate that the Scott Steel supervisors, with their years of experience doing similar work, were not already aware of the dangers and difficulty of the work they were undertaking, these written comments by the CN field representative served to explicitly emphasize these points.

[88] Glen Hickey testified that he thought he knew what he was doing in his job as an ironworker. However, he also testified that he was not shown any written procedures to do with the removal and installation of new frame bents nor any written procedures for the installation of the steel bents.

> Q: My question is, prior to the installation of the steel bents were you given any written direction as to how the [sic] work with respect to how the steel span was going to be installed?
>
> A: No.
>
> Q: Okay. Breaking that a little further, were you given any written direction with respect to how the steel bents that would support the steel span were to be installed?
>
> A: No.
>
> Q: Were you given any verbal directions on – or instructions on how that work was to progress or proceed?
>
> A: The only verbal instruction was,"Do this or do that." You know, and I figured these guys knew what they were doing, right?
>
> Q: Okay. You indicate that you – you've not seen Exhibit 7 [hand written procedures prepared by Scott Steel] before, that document?
>
> A: This one here?
>
> Q: Yes.
>
> A: No, I never seen this before.
>
> Q: Did you see any other written procedures on the site, which related to the work that you were going to be doing on the site.
>
> A: No. There was no paperwork handed to me or written procedures to show me what to do on the bridge. I got – I got on this bridge and you know more or less go with the guys who have the knowledge and with the guys who have been doing it and you just follow and help out and learn as you go.
> Q: Who were your immediate supervisors?
>
> A: Primary supervisors will be John Marti and Ed – Ed Van Druten.

> Q: What were their – as you understood it, what were their – what was their role –
>
> A: Well, as I –
>
> Q: -- roughly to you?
>
> A: As I work for Scott Steel, they were supervisors for Scott Steel so they – I reported to them and I got work orders from them. And they told me pretty much what to do. But the other site supervisor, which would be Darrel Davis from CN, from time-to-time and on occasion, he would, you know, show you what to do and how to do it, I guess.
>
> (transcript, Dec. 12, 2000, p. 630)

[89] I find that Hickey was not adequately instructed in the procedures he was to follow. There was more required of his instruction than to "more or less go with the guys who have the knowledge and with the guys who have been doing it " and learning as you go. Before being told to remove bracing he had to be instructed which bracing could come out and how to maintain the bridge in a stable condition as he worked. Without proper instruction he would not even be in a position to ask a supervisor if it was safe to start on a new task. Adequate direction required that Hickey's supervisors be aware of the state of the trestle before they assigned new tasks to him. The evidence is clear that Hickey's supervisors, Van Druten and Marti were too caught up in the rush to complete their own tasks as workmen, to be aware that the bay between bents #12 and #13 was still open when he was instructed to remove the braces from the bay between bents #15 and #16. They neither surveyed the work site themselves nor did they ask Hickey or anyone else about what progress had been made in restrutting the first open bay before directing him to open the bay between bents #15 and #16. Thus they failed to determine if it was safe to direct Hickey to start on his new task.

[90] I find that the *actus reas* of Count 4 has been proven beyond a reasonable doubt.

[91] Counts 2 and 3 are related allegations that the accused failed to ensure that the trestle was capable of withstanding reasonably expected stresses on it or failed to ensure that it was properly braced to withstand those stresses.

[92] Detailed in the drawings marked Exhibit 13 page 6666-8 are the anticipated weights of the new steel components. Exhibit 38 dated October 13, 1997 is a letter from Scott Steel to Darrel Davis dealing with the installation of steel bent #1. The letter reads in part as follows:

> The following considerations for bent installation have been attended to, overall weight of the steel bent, location of assembly in relation to area of erection, and crane capacities.
>
> Our lift capacities will be determined using CN tender crane chart for machine #50435, these weights are considered accurate and shall be the basis of our calculations.
>
> The overall weight of the first lift to be made is 22,569 lbs, included is block, rigging, and all components being 100% bolted.
>
> Crane rating allows us to position the crane no further from centerline of rotation than 32' which gives us a total of 22,800 lbs capacity of lift.

[93] It is apparent from this, that due to the heavy weights of the construction materials involved in this reconstruction, detailed consideration was being given to calculating the capacity of the crane to handle the anticipated loads. There is no such consideration shown with respect to the carrying capacity of the trestle and what braces would have to remain in place in order to ensure that it was able to withstand the loads about to be placed on it.

[94] In view of this and the opinion of Naylor that I have accepted, that the trestle collapsed because too many braces had been removed from it leaving it unstable and therefore unable to safely bear the weight of the rail crane and its load, I find that the *actus reas* of Counts 2 and 3 have also been proven beyond a reasonable doubt.

Did the accused exercise due diligence:

[95] Having found that the Crown has proven beyond a reasonable doubt the *actus reas* of each count, I now turn to a consideration of whether the accused have established on a balance of probabilities that they exercised due diligence to avoid commission of the offences. The defence of due diligence may take one of two forms: (1) holding a reasonable belief in a mistaken set of facts which, if true, would render the act or omission innocent, or (2) if the accused took all reasonable steps to avoid the particular offending event. *Sault Ste. Marie*, supra

[96] With respect to Count 1, the accused point out that they did have written work procedures at the work site. In general terms the procedures did outline the steps required to accomplish the work at hand. I keep in mind as well that the various sets of procedures, whether typed or handwritten were passed on to CN and accepted by them as part of the contract requirements. They were, however, the Scott Steel procedures and intended for the guidance of their employees. Only Scott Steel would know the level of experience and the amount of detail and guidance that their employees would need in order to understand how to perform their tasks safely. It was Scott Steel's responsibility to ensure that all pertinent construction details including erection procedures were available at the job site for their employees. I accept the Crown's submission that when working on a structure such as a trestle that was being partially dissassembled as part of the rebuilding process, the procedures required under the *Regulations* must include minimum specifications for critical bracing components, and minimum temporary bracing requirements. The procedures on site did not contain this necessary information. As discussed above the various procedures were in some respects inconsistent with each other, ambiguous on key points, and lacking in necessary detail. I find that the accused did not take reasonable care to comply with *Industrial Health and Safety Regulation* 34.10(1)(a) of *British Columbia Regulation* 585/77.

[97] The allegations in Counts 2, 3, and 4 all have a common theme. Whether it is a complaint that the accused did not ensure the appropriate level of stability for the anticipated work procedure, or a complaint of inadequate direction and instruction, the common thread is that the Scott Steel supervisors lost track of the big picture.

[98] Whether there were too few workers on hand to get the job done in a timely manner, or for some other reason, the result was that on October 27th the accuseds' supervisors were feeling that they were under great time pressure to complete the day's work.

[99] Hickey testified that as he watched the scheduled 11 o'clock train pass over the trestle, it caused the track to move more than he had previously experienced. He went onto the bridge to bring his concerns about track safety to the attention of Marti, Van Druten and Davis. He found them on the trestle talking about how much work there still had to be done before bringing out steel bent #2 and getting it secured before the next anticipated train crossing later that day.

[100] He testified that his concerns about seeing the track move about in a way that worried him were not taken seriously.

> Q: What were they [Marti, Van Druten and Davis] doing in the center of the bridge?
>
> A: I don't know. They were just starting to scooch ties and stuff, I guess, 'cause all this work had to be done before we could even think about making this lift.
>
> Q: Okay
>
> A: It was coming on one o'clock. We had like two and a half to three hours to get all these ties scooched back together, get the tirfors pulled out, set up from underneath for bent number 2, Steel bent 2. All this bracing had to be taken out between 15 and 16 and the rush was on. You know, John was frustrated, Darrel was frustrated; it was a state of, I guess panic, you know. Like I didn't have time—he says, "You know, get back out here and – you know, you got all this stuff to do here."
>
> Q: We'll get to that. Did – did Mr. Van Druten or Mr. Marti have any response to you when you raised the issue of the ripple?
>
> A: No, they were pretty much too busy and tied up in the work and getting all this work done before this train comes back through at four o'clock.
>
> (transcript December 12, 2000 p.600)

[101] Hickey then described having a quick sandwich since there was no time for lunch, and returning to the job site.

> Q: What were you going back to do?
>
> A: I was going to go back and we had all this – had the bracing to come out between bents 15 and 16. That was the next job.
>
> Q: And how did you know – how had it been explained to you or how had it been made clear to you that this bracing now had to come out of that bay?
>
> A: Well, it was – it was obvious that it had to come out.
>
> Q: In terms of the sequence of things that had to be done, you mentioned, for example, earlier your tirfors had to be moved. In terms of the sequence in which things would have to be done, including the bracing being removed, had anybody explained to you, "This is the sequence that we are going to do things?"

A: I was told what I had to do that day and what materials I had to use and who was going to be working with me.

Q: Okay. When were you explained that information?

A: Well, I was told that in the morning.

Q: Okay. In the morning meeting?

A: Mm-hmm

Q: And who was it that was telling you that?

A: John said it to me.

Q: And at that time, were you explained the sequence of events, and again I mean in terms of doing this before doing that, or this after that?

A: No.

Q: Had anybody explained to you the order or the sequence of events that were to take place that day?

A: Just the morning meeting, it included what time the train was coming. We had to make this critical lift. We only had so much time to get it put in and have the bridge secure back for the train to buzz back through at 4 o'clock.

(transcript Dec. 12, 2000 p. 604)

Later Hickey testified:

Q: Okay. Had you removed cross bracing in previous occasions?
A: Yes.
Q: Okay. And normally, who would tell you to take it out?
A: Ed, John.
Q: And on this occasion, who told you to take it out?

A: John did earlier that morning, but like I said, after I went over and met Darrel in the middle of the bridge, told him about the waving and stuff, they just passed that off. Then they said to me, "Look, you've got to hurry up. All this bracing has to come out. The tirfor's got to be set up. The ties got to be scooched back. This bent – this bent had to be rigged up, put into place, stabilized and all the bracing and cross-bracing and struts gotta go back in before this train comes back."

(transcript Dec. 12, 2000 p. 606)

[102] Hickey had started the morning bolting up steel bent #1 and fixing the bolts at the corbel cap for steel bent #2. It is unclear from Hickey's testimony whether the order to start skeletonizing the bay between bents #15 and #16 came from Marti, Van Druten or Davis or all three as a group. While Davis clearly denied giving Hickey instructions to remove the bracing between bents #15 and #16 I find that it is irrelevant who may have given Hickey the direction to start on his new job, whether Davis from CN, or Van Druten or Marti from Scott Steel. The testimony is unequivocal that Marti and Van Druten were present and working in the bay between bents #15 and #16 and therefore had to be aware that that second bay was now being skeletonized.

[103] The defence argues that it was reasonable for the Scott Steel supervisors to rely on Darrel Davis' expertise when he might have directed the Scott Steel workers to start skeletonizing the bay between bents #15 and #16 before the bay between #12 and #13 was sufficiently rebraced.

[104] The defence has argued that clause 18(2) of the contract between CN and Scott Steel which provided that:

The work shall in every particular be under the control and supervision of the Engineer.

and clause 3.5.5 of section HC05121 of the specification forming part of the contract which reads:

All fieldwork shall be done under the full-time supervision and inspection of the Railway

meant that Davis was acting in a supervisory role over Scott Steel staff. The accused submit that it would therefore be reasonable for them to rely on his directions on the sequencing of work. I disagree for the reasons set out earlier in this judgment. In the context of the contract as a whole these clauses were meant by the parties to be limited to the overall supervision of the work by CN staff to ensure that Scott Steel was meeting the contract requirements. Looked at as a whole it is clear that CN was not

assuming responsibility for the guidance, direction, or the issuing of orders to Scott Steel or its employees except in the general sense of ensuring that the contract was being fulfilled properly, safely and within the agreed upon time line.

[105] In *R. v. Structform International Ltd.*, [1992] O.J. No. 1711, Gotlib J. of the Ontario Court of Justice – General Division wrote at page 11:

> The case law is clear that one employer cannot point a finger at another employer who might be closer to the situation. Every employer has a duty to see that the workplace is safe. And in the complexity of construction it is important that every employer use knowledge, due diligence, etc., to ensure that the workplace is safe. An employer is not entitled to say it is someone else's responsibility.

[106] I find that it was not appropriate for Scott Steel to rely on Davis for the assigning and sequencing of tasks. Scott Steel had the responsibility to ensure that its supervisors understood the nature of the construction work they were in charge of, and what had to be done to make sure that the work was being done safely. Scott Steel management had to develop their own work procedures – they were not provided by CN. Scott Steel had the responsibility to ensure appropriate management and supervision of its own employees by means of its own supervisors. It was their responsibility to ensure that adequate written procedures were developed, posted and adhered to. It was their direct responsibility to ensure that their workers were properly trained and supervised in the carrying out of those procedures. It was the responsibility of the Scott Steel supervisors to determine what the necessary steps were to complete a task, to determine the sequence and timing of work, to assign the work to be done at any given moment to their employees, and to ensure any move to a new phase in the work could be done in a safe manner. The Scott Steel supervisors had to be aware at all times which tasks were being worked on by their employees, which stage a task was at, and that the written work procedures were being followed. It was up to the Scott Steel supervisors to keep in mind the "big picture" of all that was happening throughout the entire work site to ensure that the work was being coordinated and accomplished in a safe manner.

[107] It is clear from Hickey's evidence that there was little communication between the workers on the various crews such as the pile-driving crew and the crew removing struts and positioning the new steel bents as to which struts and bracing they were each removing in the sections of the trestle they were working on. They relied on "the guys running the job" to show what had to come out and especially Ed Van Druten. (transcript Dec. 12, 2000 p. 640). Thus it would be imperative for the supervisors to be constantly aware of the specific tasks that each crew was performing lest cumulatively too many struts would be removed at a given time and the bridge become unstable.

[108] The exercise of reasonable care by a supervisor on a structure as complex and dangerous as this project required as well that the workers had a clear understanding of who had authority over them. For example, here you had work assignments handed out in the morning briefing to each worker. Presumably when the Scott Steel supervisor was assigning each worker their task for the day, it was done in a coordinated fashion with a view to the current state of the trestle. Given the unclear lines of authority at the site, Scott Steel site supervisors should have anticipated that the Scott Steel labourers may have accepted a direction from Davis to undertake a new task. For a worker to then change his task because Darrel Davis allegedly gave a direction to that worker to start on a different task was to invite trouble. It was incumbent on Scott Steel management to have their staff understand and accept that their work assignments could only come from their supervisor and not from a variety of people wandering through the job site. They should not be expected to respond to the commands of various people each of whom may not be aware of how another has scheduled the work.

[109] Hickey was questioned in chief about who he received direction from.

> Q. Okay. And after you got to 8.3, who was telling you which bent you were going to work on?
>
> A: John and Ed.
>
> Q: "Ed" is Ed Van Druten?
>
> A: Mm-hmm.
>
> Q: You have to say "yes" or "no".
>
> A: Yes, sir.
>
> Q: So what would happen at these morning meetings? You started to explain…
>
> A: It was mostly to tell you what you were going to do that day, what materials you were going to use.
>
> Q: Who would tell you what you were going to do that day?
>
> A: John Marti and Ed Van Druten.

Q: Who would tell you what materials you were going to use?

A: John and Ed.

Q: In terms of the order that things were going to go that day, who would tell you – or would you be told the sequence of the events for the day?

A: Yes, usually.

Q: Okay. And who would tell you the sequence of events that were going to happen in a day?

A: John or Ed.

(transcript December 12, 2000 p.595)

[110] Hickey testified that John Marti and Ed Van Druten were his immediate supervisors.

A: As I worked for Scott Steel, they were supervisors for Scott Steel, so I reported to them, and I got work orders from them, and they told me pretty much what to do. But the other site supervisor, which would be Darrel Davis from CN, from time to time and on occasion would show you what to do and how to do it.
.
.
.
Q: Did you ever have occasion to go to Davis and ask him how to do something?
A: Yes
(transcript 12/12/2000 p. 630)

Q: Is it Darrel was – Darrel was the one who was giving the orders and Marti was passing the orders on to the guys on the line?
A: Well, see, like I said, I'd take my orders from – from John and Ed. They would come down from Darrel. And from time to time when Darrel – when I'd meet him on the site or if he'd come up to me and if I was doing something wrong, he'd show me what to do with it and how it was supposed to be done.
(transcript 12/12/2000 p. 678)

Q: So now Davis at that point tells you , you've got to do some work, though. You've got to get down and get that corbel fixed up?
A: Okay, at that time, after I told him, like, when I walked up to the guys, they almost, like, it was almost a feeling of, you know, "Where are you going? You're not taking a break, eh?" You know, that was the feeling. So I said, "Hang on, I'm going to go grab a quick sandwich," and then that's when – well, I told them about it before that. So when I went to check, I think I had to grab a crescent wrench, and so I went in and had two or three bites of a sandwich, like five, ten minutes maximum. Ran back out and then on the way back through, I think he [Darrel] was walking back over through the middle of the bridge, and that's when he mentioned to me, "Come on, you've got to get all this done."
Q: And that's when Darrel was telling you, "You've got to get all this done, get the bracing out of 15, 16."
A: Yes. "You've got all this to do. You've got to get all these ties moved back. You've got to get the tirfor shifted over. You've got to get all the bracing, the struts, the cross-braces took out of 15 and 16. This bent got to be put in place. Its got to be stabilized, then you've got to get the braces back on."
THE COURT: So it was he that gave you that whole list?
A: Yeah
MR. CORRIGAN: That was Darrel Davis that gave you that whole list of things you were to do?
A: Yeah. Yeah.

(transcript 13/12/2000 p. 688)

[111] These excerpts indicate that Hickey knew he was to get his orders as to what tasks he was to perform from the Scott Steel supervisors. When Hickey was instructed to begin to skeletonize the bay between bents #15 and #16 no Scott Steel supervisor asked him or any other worker, nor checked for themselves, if the bay between bents #12 and #13 had been restrutted. It was in Scott Steel's own procedures that restrutting a bay was part of the procedures in installing the steel bents before moving on to the next one. The instruction to Hickey to get on with skeletonizing the second bay without checking whether the previous bay had been adequately rebraced was in direct contravention of step 5 of Scott Steel's own procedures.

[112] I accept Hickey's evidence that just before the collapse John Marti had been involved in moving ties to create a space for the crane to drop its line through the tracks so that it could pick up the steel bent and move it into position under the bridge. He testified that by the time of the collapse, Marti had moved to a position above him in the structure and had just handed him a tirfor

and and that Ed Van Druten was down below welding. No Scott Steel supervisor was engaged in watching the crane or the trestle as the bent was being brought to position. They were all acting as labourers. While I do not accept Davis' position that the rail crane was not considered rail traffic and that therefore he was not responsible for ensuring the integrity of the bridge before the crane entered onto it, I also do not accept that the Scott Steel supervisors were acting with due diligence in relying on the lack of protest by Davis to the crane coming onto the trestle just before the collapse. The evidence disclosed that he was not even present at the trestle as the rail crane entered onto it.

[113] Supervision of workers on a project as complex and dangerous as this one required full-time supervision, not part-time supervision by a site supervisor who was also acting as a labourer. There is no evidence that any of the persons responsible for supervising and being constantly aware of the state of the trestle were doing anything to maintain their awareness of the state of that structure. Clearly, no supervisor had in mind that the bay between bents #12 and #13 was still unstrutted when Hickey was directed to start to remove the bracing from the bay between bents #15 and 16. The fact is there was no person focused on acting as supervisor at that moment. No one looked, no one inquired, no one was aware, no one supervised.

[114] While I agree with the submission of the defence that on October 27, 1997 Scott Steel had competent supervisors on site, this fact provides no defence to the accused if at the time of the collapse they were not actively supervising, but rather, were working as labourers.

[115] With respect to Count 4, which alleges a failure to adequately direct and instruct the ironworkers, Hickey testified that he had been brought over to the Mile 8.3 project a few days before the collapse. Before that he had been working on the trestle at Mile 12.8. There is no evidence that he was shown or even aware of the work procedure prepared by Mike Scott about how to replace the bents and that temporary bracing was a necessary requirement before moving on to skeletonize another bay.

[116] I find that with respect to the corporate accused the *actus reas* of all four counts has been proven beyond a reasonable doubt by the Crown and the corporation has failed to meet the burden upon it of proving on a balance of probabilities that it acted with due diligence or has any other defence open to it. I find the corporate accused guilty on each of the four counts against it. I agree with the joint position of the Crown and the defence that Counts 2 and 3 charge essentially the same delict, and that the principle set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729 against multiple convictions should apply. I therefore enter a judicial stay on Count 2 as Count 3 is more specific to the facts before me.

[117] As a director and officer of the corporate accused, Ron Scott has been charged with the same offences as Scott Steel. In order to secure a conviction against him the Crown must prove that the corporate offence was committed with the consent or connivance of Ron Scott, or has been facilitated by neglect on his part, or where the corporation failed to make provision for compliance with a regulation, that he ought to have made provision for compliance, but failed to do so.

[118] There is no suggestion that the alleged breaches happened with the consent or connivance of Ron Scott.

[119] In the tender documents submitted to CN and which formed part of the contract between CN and Scott Steel, Ron Scott listed himself as the most senior of the supervisors employed by Scott Steel. He also prepared one of the sets of erection procedures submitted to CN. For the reasons set out above I have found those procedures did not fulfill the requirements of *Industrial Health and Safety Regulation* 34.10(1)(a). Ron Scott as the director and supervisor of the corporate accused ought to have ensured that the erection procedures were in compliance with the *Regulation*. He failed to do so. I find him guilty of Count 1.

[120] In *Tesco Supermarkets v. Nattrass* [1972] A.C. 153 at 186 the House of Lords held:

> That an employer, whether a company or an individual, may reasonably appoint someone to secure that the obligations imposed by the Act are observed cannot be doubted. Only by doing so can an employer who owns and runs a number of shops or a big store hope to secure that the Act is complied with, but the appointment by him of someone to discharge the duties imposed by the Act in no way relieves him from having to show that he has taken all reasonable precautions and had exercised all due diligence if he seeks to establish the statutory defence.
>
> He cannot excuse himself if the person appointed fails to do what he is supposed to do unless he can show that he himself has taken such precautions and exercised such diligence. Whether or not he has done so is a question of fact and while it may be that the appointment of a competent person amounts in the circumstances of a particular case to the taking of all reasonable precautions, if he does nothing after making the appointment to see that proper steps are in fact being taken to comply with the Act, it cannot be said that he has exercised all due diligence.

[121] Counts 2, 3, and 4 deal with the quality of the instruction and supervision on site. Ron Scott did attend at the site for the installation of the first steel bent. I have not heard of any safety concern that arose during that procedure. He had the opportunity

to watch and evaluate his supervisors and the workers perform their duties. There is no legal requirement for him to be personally present throughout the rebuilding of this trestle, as long as he exercised due diligence in ensuring that qualified supervisors were present. These supervisors had to be capable of ensuring compliance with the work procedures and ensuring that the work was done in a safe manner. I find that John Marti and Ed Van Druten were knowledgeable and capable supervisors. The Crown has failed to adduce any substantive evidence to indicate the contrary. I find that Ron Scott did make adequate provision for the company to comply sections 8.02(1)(b), 34.32, and 8.18 of the *Industrial Health and Safety Regulations of British Columbia Regulation* 585/77 and amendments thereto. The breaches alleged in Counts 2, 3, and 4 were not facilitated by neglect on the part of Ron Scott. Rather they were caused by the lapse in judgment and attention by the Scott Steel supervisors who were knowledgeable and capable in that role, but had unfortunately chosen to neglect fulfilling their assigned role. I find Ron Scott not guilty of Counts 2, 3, and 4.

Is it appropriate to convict a company and its principal under provincial law:

[122] Counsel on behalf of the accused cites the British Columbia Supreme Court case of *R. v. Eurosport Auto Co.*, [2004] B.C.J. No. 2695 in support of their argument that where a

> company is so small and closely held that the individual and the company are one and the same, convicting both the individual owner and the company would violate the rule against multiple convictions. Accordingly, punishing the individual would, in effect punish the company and punishing the company would punish anew the individual.

[123] *Eurosport* dealt with an allegation of fraud against the company and its principal. The Court distinguished the Supreme Court of Canada decision in *R. v. Canadian Dredge and Dock Co.*, [1985] 1 S.C.R. 662 which noted that a corporation only acts through its agents and outlined three approaches for considering whether criminal intent can be said to reside in a corporate entity.

[124] However, the case before me does not require proof of criminal intent and I find that the case of *R. v. Alpha Manufacturing Inc.*, [2005] B.C.J. 1185 also from the Supreme Court of British Columbia to be much closer on the facts and correctly sets out the applicable law that governs this issue. Eleanora Anderson was the principal of Alpha Manufacturing which was a landfill operator operating under a permit issued pursuant to the *Waste Management Act*, S.B.C. 1982, c.41 as amended. The company and its principal were convicted under s. 3(1.1) of the *Act*. Reference was made to the *Eurosport* supra case in the argument advanced by defence counsel that convicting the principal in addition to her one-person company offended the rule against multiple convictions for the same offence. The Crown argued that the rule against multiple convictions applied to offences and not to offenders.

[125] The *Waste Management Act* contained the following provision:

> 34(10) Where a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who is authorized, permitted or acquiesced in the offence commits the offence notwithstanding that the corporation is convicted.

[126] I find that the intent of section 77 of the *Workers' Compensation Act* is similar in import to this provision in the *Waste Management Act*. Section 77 explicitly requires that the corporation be guilty of an offence before there can be a finding of personal responsibility in a director, officer or supervisor. Clearly the legislation contemplates the possibility of convicting a company and an individual. I therefore find that the conviction of Ron Scott and Scott Steel Ltd. on Count 1 does not offend the rule against multiple convictions.

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D. M. Steinberg. P.C.J.

DATED this 8th day of March, 2006.