NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Atlantic Road Construction and Paving Limited*, 2025 NSCA 31

Date: 20250507
Docket: CAC 533183
Registry: Halifax

Between:

Atlantic Road Construction and Paving Limited

Appellant/
Respondent on Cross Appeal

v.

His Majesty the King

Respondent/
Appellant on Cross Appeal

Judges:	Beaton, Fichaud and Scanlan, JJ.A.
Appeal Heard:	March 26, 2025, in Halifax, Nova Scotia
Facts:	In February 2019, a first-class blaster with 40 years of experience, employed by a subcontractor of Atlantic Road Construction and Paving Limited, conducted blasting operations at a construction site in Halifax, Nova Scotia. The operations were subject to the Blasting Safety Regulations under the Occupational Health and Safety Act. Charges were laid against the appellant concerning the storage and handling of explosives and the reporting and record-keeping requirements related to these blasting activities (paras 1-2).
Procedural History:	Provincial Court: The appellant was acquitted of all charges (para 3). R. v. Atlantic Road Construction and Paving Limited, 2024 NSSC 99: The Summary Conviction Appeal Court

	overturned acquittals on counts 1 and 6, ordering a new trial on those counts (para 3).
Parties' Submissions:	Appellant: Argued that the trial judge's findings were reasonable and supported by the evidence, and that the SCAC erred in ordering a new trial on counts 1 and 6 (paras 6, 20-25). Respondent (HMK): Contended that the SCAC erred in law by misinterpreting the regulations and excluding evidence, and sought leave to appeal on additional counts (paras 4, 29-30).
Legal Issues:	Whether the SCAC erred in ordering a new trial on counts 1 and 6 by reweighing evidence and substituting its view for that of the trial judge (para 23). Whether leave should be granted for the cross-appeal concerning the interpretation of "blasting incident" and the admissibility of blast logs (para 31).
Disposition:	Appeal allowed; acquittals on counts 1 and 6 restored (para 26). Cross-appeal: Leave denied (para 32).
Reasons:	Per Scanlan J.A. (Beaton and Fichaud JJ.A. concurring): The Court found that the SCAC erred in law by reweighing evidence and substituting its view for that of the trial judge, who had the benefit of hearing witnesses and assessing their credibility firsthand. The trial judge's findings were reasonably supported by the evidence, and the SCAC should not have ordered a new trial on counts 1 and 6 (paras 18-25). Regarding the cross-appeal, the Court determined that the standards for granting leave were not met, as there was no clear error or issue of significance beyond the specific case (para 32).

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Held:	1. Appeal allowed, acquittals on count 1 and 6 restored; 2. Cross-Appeal: Leave denied. Per reasons for judgment of Scanlan, J.A.; Beaton and Fichaud, JJ.A. concurring.
Counsel:	George Franklin and Danielle Vautour-Wilmot (articled clerk), for the appellant Erica Koresawa, for the respondent

Reasons for judgment:

Précis

[1] In February 2019 Thomas Wilson, a first-class blaster with 40 years experience, was employed by a company subcontracted by the appellant. During that month he had prepared and detonated blast charges at a construction site on Pepperell Street, Halifax, Nova Scotia. The *Blasting Safety Regulations*, N.S. Reg. 89/2008 (the "***BSRs***"), created pursuant to the *Occupational Health and Safety Act*, S.N.S. 1996, c.7, regulate blasting operations, including the storage and handling of blasting materials, record keeping and reporting to the Department of Labour (the "**DOL**").

[2] There were a number of charges laid against the appellant related to blasting operations at the Pepperell Street location. Only some of those charges are relevant in this appeal. The relevant charges can be separated into two general categories: first the charges related to the storage and handling of explosives, and second the reporting and record keeping requirements related to blasting activities.

Lower court proceedings

[3] At trial, Provincial Court Judge Paul Scovil (the "Trial Judge") acquitted the appellant of all charges. Presiding over the Summary Conviction Appeal Court ("**SCAC**"), the Honourable Justice Ann Smith (the "**SCAJ**") overturned acquittals on counts 1 and 6, and ordered a new trial on those counts only. The appellant now appeals that order.

[4] In order to avoid confusion, I refer to the respondent on the appeal/cross-appellant on the cross-appeal as "**HMK**". On cross-appeal, HMK argues the SCAJ erred in law when interpreting the regulations governing the reporting requirements. Second, HMK argues the SCAJ wrongly excluded paper exhibits proffered by it at trial. The cross-appeal involves counts 10, 11, 15, 19 and 20. The cross-appeal requires leave of the Court.

[5] I will deal with the leave application below.

[6] For the reasons which follow I would set aside the SCAC decision ordering a new trial on counts 1 and 6. I would also deny leave on the cross-appeal.

Appeal of convictions as entered by the SCAC on counts 1 and 6

[7] In *R. v. Stanton,* 2021 NSCA 57, at paras. 47-48, this Court discussed the standard of review in *Criminal Code* section 839 appeals. The standard relates to the decision at the SCAC level. The appeal to this Court is not an appeal *de novo*:

> [47] This Court in *R. v. Pottie,* 2013 NSCA 68 identified the two standards of review in play in summary conviction matters: the standard of review to be applied by the SCAC judge reviewing the trial decision, and the standard of review to be applied to the review by this Court of the SCAC judge's decision. *Pottie* describes these standards of review:
>
> > [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. **In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.**
> >
> > [17] Our jurisdiction is grounded in the error alleged to have been committed by the SCAC judge. It is not a *de novo* appeal from the trial judge. This court must determine whether the SCAC judge erred in law in the statement of application of the principles governing its review (*cites omitted*). This distinction is important when considering whether to grant leave; the error we must identify is in the SCAC judge's decision.

(Bolded emphasis added)

[8] As noted above, all charges against the appellant stemmed from blasting operations at Pepperell Street. Mr. Wilson was working at the Pepperell site conducting blasting operations and he discovered an unexploded blasting detonator. The appellant was required to report a "misfire" to DOL as required by the *BSRs*. He made that report and DOL launched an investigation.

[9] There were no charges related to the failed detonation, but the DOL investigation included extensive review of CCTV footage from cameras installed on a nearby rooftop. The camera recorded video of the worksite over an extended period and included video of the blasting operations. The videos were entered as exhibits at trial and, along with the evidence of the principal witness, Mr. Wilson, were supplemented by the records of delivery of blasting materials to the construction site.

[10] The Trial Judge acquitted the appellant of all charges. The SCAC did not allow the appeal related to the blast operations wherein the HMK was alleging the appellant had failed to report two blasting incidents. Nor did it agree with HMK that the Trial Judge improperly excluded some documentary evidence related to the blasting operations.

[11] The SCAJ prepared a lengthy decision (*R. v. Atlantic Road Construction and Paving Limited*, 2024 NSSC 99). She said of the standard of review:

> [8] The standards of review applicable on a summary conviction appeal are well-established. Pure questions of law are reviewed for correctness; the appeal court is free to replace the trial judge's opinion with its own.

[12] If there is an error in a question of law an SCAC may correct it. Other than questions of law, SCAC judges are not free to replace the trial judge's opinion on the facts with their own. It is worth repeating paragraph 16 from *Pottie*:

> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.

[13] The SCAJ dealt with counts 1, 6 and 13 separately from the others. We are concerned here with counts 1 and 6:

> 1. On February 5, 2019, Atlantic Road Construction & Paving Limited, being an employer under the Act, failed to ensure explosives were stored in a magazine or day box on February 5, 2019, contrary to section 31 of the Blasting Safety Regulations, thereby committing an offence contrary to section 74(1)(a) of the Occupational Health and Safety Act.
>
> …
>
> 6. On February 6, 2019, Atlantic Road Construction & Paving Limited, being an employer under the Act, failed to ensure explosives were properly stored, contrary to section 74(1)(a) of the Occupational Health and Safety Act.

[14] When considering the evidence, an SCAC judge must focus on the issue of whether there was evidence upon which the trial judge could reasonably have rendered the verdict in the trial below. Above I stated the main evidence at trial

was that of the blaster, Mr. Wilson, the video evidence, and the records related to the delivery of blasting materials. As reported in *R. v. Atlantic Road Construction & Paving Limited*, 2023 NSPC 10, the Trial Judge said:

> [11] Here the requirements for admission of the CCTV footage by the Crown have been met. Having said that, the evidentiary value of the CCTV footage is a separate question when reviewing each count.
>
> …
>
> [20] ARCP argues that the Actus Reus of these charges are unproven by the Crown. They argue that while Mr. Wilson testified that he kept the detonator in his truck, the only evidence relating to the days particularized are the video images. These images do not prove beyond a reasonable doubt what was placed in the truck.

[15] The Trial Judge in paragraphs 16-19 referred to the HMK evidence showing boxes of detonators being stored in the truck, the video showing the storage, and the logs from Mr. Wilson's employer regarding the drop-off and pick-up of explosives. I refer to those paragraphs to highlight the fact the Trial Judge considered the totality of the evidence. In this appeal, HMK argues that had the Trial Judge considered the totality of the evidence he would not have acquitted the appellant. I am satisfied the paragraphs I have referred to show the Trial Judge did consider the entirety of the evidence. He did not piecemeal the evidence as suggested by the respondent.

[16] An appropriate review by the SCAC would have focussed on the question of whether the evidence could reasonably support the verdict of the Trial Judge. At paragraph 9 of her decision, the SCAJ referred to cases discussing the limited role of an SCAC in dealing with a lower court's findings of fact. I reproduce that paragraph here:

> [9] Findings of fact and factual inferences may not be interfered with absent palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, at paras. 10-14; *R. v. Clark*, 2005 SCC 2, at para. 9; *R. v. C.E.*, 2009 NSCA 79, at paras. 30-31). A "palpable and overriding" error is one that is plainly seen and shown to have affected the result (*Housen*, at para. 6; *Clark*, at para. 9). In other words, a palpable and overriding error is both obvious and dispositive. In *Waxman v. Waxman*, 2004 CanLII 39040 (Ont. C.A.), the Ontario Court of Appeal described the palpable and overriding standard this way:
>
> > [296] The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: *Housen* at 246. Examples of "palpable"

> factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> [297] An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at 281.

[17] I am mindful of those comments as I consider the evidence before the Trial Judge, and his findings based on that evidence. Mr. Wilson's evidence on cross-examination casts doubt on the reliability of all his evidence. He had no independent recall of the events on the dates in question. The video was of extremely poor quality to the point that he was not even able to say for sure that it was him in the video or exactly what occurred based on the video. The video did not trigger any independent memory of what occurred on the relevant days. Of the videos, the Trial Judge said:

> [23] Here there is no evidence that detonators were stored in the vehicle with other explosives. While Mr. Wilson testified that he sometimes kept detonators in his truck and that the truck was always locked, he did not give any testimony **in a reliable manner** as to what on the specific days detonators were stored in his truck.
>
> [24] In addition, I can not find, beyond a reasonable doubt, on the totality of the evidence presented by the Crown, that on the particular days charged detonators were placed in the ARCP vehicle.
>
> [25] The video contained with the delivery information from Atlantic Explosive make it likely that materials placed in the ARCP truck were detonators, but it is not proof beyond a reasonable doubt. …
>
> …
>
> [29] The video possibly shows Thomas Wilson at the ARCP truck at 8:05 a.m. The camera angle is such that activity of Mr. Wilson at the truck is obscured by the truck itself. At one point he picks up the white bucket. It is impossible to tell what, if anything, is in the bucket. He then makes his way over to the area where the day box is located. The white bucket swings freely by his side with the appearance of being empty. At the day box material is placed in the bucket which

> is then taken by Mr. Wilson to the blast area. The material appears to possibly be an explosive but even that is not clear.
>
> [30] The evidence regarding this charge does not even make it to the level of proof on the balance of probabilities, let alone beyond a reasonable doubt. It would be wrong to convict on this evidence and accordingly this count is dismissed.

(Emphasis added)

[18] The SCAC is entitled to conduct a limited weighing of the evidence. That does not mean a SCAC judge is permitted to sift through the evidence in search of an alternative reality, re-weighing evidence as though they were the trial judge. The Trial Judge here had the benefit of having heard the witnesses and assessed their credibility and reliability first-hand. The written record available to a SCAC is not the same as having heard the evidence.

[19] The record is clear, there were problems with the quality of the video evidence and the reliability of the entirety of Mr. Wilson's evidence. The extent and impact of those factors is best weighed by the Trial Judge.

[20] Was there evidence reasonably capable of supporting the Trial Judge's verdict? If the answer was yes, that should have been the end of the case before the SCAC. To go further and virtually do a retrial based on the transcript was an error in law. Recall the video evidence and Mr. Wilson were the main evidence before the Trial Judge, and to a lesser extent the records related to the delivery of the blasting materials. Mr. Wilson in cross-examination said:

> Q. And I want, I want to be clear about this because I was listening very carefully during your testimony and at virtually every juncture I heard a lot of, I assume, I guess, I think and I want to be clear on this. You have no actual memory, sitting here today, of the events seemingly shown on those videos. Is that correct?
>
> A. Correct.
>
> Q. Okay. You have no actual memory of any specific day at the Pepperell site, whether it's February 5th, 6th or 7th, 2019. Correct?
>
> A. Correct.
>
> Q. The videos that we watched last week, watching them, in fact, did not trigger any actual memory for you. Correct?
>
> A. Correct.

Q. And so, naturally you have no ability to say whether or not those videos do, in fact, accurately depict any specific event or day's events for a particular day on that jobsite. Correct?

A. Correct.

Q. Now, in terms of memory of the Pepperell job, I gather that if a unique event occurred that might, there may be a reason for it to stand out to you, like a circuit cutoff, you may have general recollection of that occurrence. Is that fair?

A. A little bit, yeah.

Q. A little bit. Okay. But, other things, like watching buckets supposedly being carried from point A to point B on this jobsite, you have no memory of that. Correct?

A. No. No.

Q. And no knowledge of what's actually in those buckets at any point in time?

A. Correct.

…

Q. You don't recall being able to identify your face in any of the videos that we watched?

A. No, could not, no.

Q. No. And in terms of this photograph, while you could identify your face, you think, you don't actually know who the other two people in the photograph are, do you?

A. I couldn't, I couldn't swear, no.

Q. No. You could make a guess, but you don't remember the event seemingly being depicted in the photograph.

A. No.

Q. And you can't make out those, those, the faces if those people, can you?

A. No. No.

Q. You're guessing. If, if we asked you to guess you'd make a guess based on where they're standing or what they seem to be wearing.

A. Yes.

Q. Yeah. Same question for sub tab (c) of tab 14. This was another photograph that we looked at last week. If I asked you all the same questions, you'd give me all the same answers in relation to this photograph. Correct?

A. Yes.

[21] Other portions of the transcript make it clear that Mr. Wilson had no actual memory of most days at the Pepperrell Street location. Viewing the video in court he testified he could not see what was inside the various boxes in the trucks. He had no actual memory of events depicted in the videos, and looking at the videos he could not even tell which blasting site in Halifax was shown as they all look the same to him. The cross-examination made clear that much of his direct evidence was mere speculation and not independent memory, or memory triggered by the video.

[22] The Trial Judge was entitled to make the findings he did considering all the evidence. As he noted, "likely" is not the standard used in convictions. "Proof beyond a reasonable doubt" is the applicable standard and the Crown failed to meet that burden of proof.

[23] It is not the job of the SCAC to reweigh the evidence in its entirety and decide whether there is another path to a different verdict. It was an error in law for the SCAJ to engage in independent fact-finding. The SCAJ must ask whether the Trial Judge's findings are reasonably capable of being supported by the evidence. If so, the findings must not be overturned (see *R. v. C.E.*, 2009 NSCA 79).

[24] Restricting my review to the issue that should have been addressed by the SCAC, I refer to the decision of the Trial Judge and ask: does the evidence support his conclusions? I am satisfied had the SCAC addressed the question as to whether the Trial Judge's verdict was reasonable – supported by the evidence he accepted as reliable – she would have concluded the Trial Judge was not unreasonable in finding the appellant not guilty.

[25] I am satisfied the Trial Judge considered all the evidence without piecemealing it. The lack of reliable evidence led to the inevitable result: HMK had not proven guilt beyond a reasonable doubt.

[26] The acquittals should be restored on counts 1 and 6.

[27] There was a second ground of appeal in relation to counts 1 and 6. It is not necessary to address that issue because I am satisfied the convictions should be set aside due to the errors related to the first ground of appeal.

The Cross-appeal

[28] The Trial Judge dismissed all charges against the appellant. These acquittals were confirmed by the SCAJ other than on counts 1 and 6 which I have dealt with above. The cross-appeal relates directly to counts 10, 11, 15, 19 and 20.

[29] The issues as stated by HMK in the cross-appeal are:

1. The learned Summary Conviction Appeal Justice erred in law by erroneously interpreting the meaning of "Blasting Incident" and "Misfire or suspected misfire" in section 12 of the *Blasting Safety Regulations.*
2. The learned Summary Conviction Appeal Justice erred in law by concluding/affirming that the photocopies of Blast Logs were inadmissible.

[30] The respondent on the cross-appeal articulates the issues as follows:

1. Should ARCP's acquittal on Counts 10, 11, 19, and 20 be overturned?
    a. Did the SCAC Judge, and the Trial Judge before her, err in their interpretation of the meaning of "blasting incident"/ "misfire" as contained in s. 12 of the *BSRs*?
    b. If so, does this error materially affect ARCP's acquittal on Counts 10, 11, 19, and 20?
2. Should ARCP's acquittal on Count 15 be overturned?
    a. Did the SCAC Judge, and the Trial Judge before her, err in concluding that the Crown had failed to establish the admissibility of the documents proffered as Mr. Wilson's blast logs?
    b. If so, did this error materially affect ARCP's acquittal?

Leave to appeal and the cross-appeal

[31] Section 839 of the Criminal Code applies to the cross-appeal, therefore this Court must determine whether leave should be granted before assuming jurisdiction. As noted in *R. v. Robb,* 2024 NSCA 69, leave is granted sparingly:

> [8.] The jurisdiction of this Court is limited. Leave is granted sparingly. There must be a clear error, or an issue that has significance beyond the specific case (*R. v. R.E.M.,* 2011 NSCA 8, citing *R. v. R.R.*, 2008 ONCA 497, and *R. v. MacNeil,* 2009 NSCA 46). The rationale for limiting these appeals is the recognition that

> there has already been an appeal in the proceeding. A further appeal is only allowed if the issues raised have clear merit or transcendence (*R. Ankur; R. Chandran*, 2023 NSCA 55 at para. 7).

[32] These standards are not met here. I would not grant leave on the cross-appeal.

Disposition

[33] The decision of the SCAC related to counts 1 and 6 shall be set aside and the acquittals as ordered by the trial court shall be restored.

[34] On the cross-appeal, leave to appeal is denied.

Scanlan, J.A.

Concurred in:

Fichaud, J.A.

Beaton, J.A.