



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Martin and Kennedy*, 2021 NLCA 16

Date: March 23, 2021

Docket Number: 202001H0042

BETWEEN:

**SEAN MARTIN
and BRADLEY KENNEDY**

APPELLANTS

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, O'Brien and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201701G4053
(2020 NLSC 73)

Appeal Heard: March 11, 2021

Judgment Rendered: March 23, 2021

Reasons for Judgment by: Welsh J.A.

Concurred in by: O'Brien and Butler JJ.A.

Counsel for the Appellants: Keith S. Morgan

Counsel for the Respondent: Shawn Patten

Authorities Cited:

CASES CONSIDERED: *Newfoundland Recycling Ltd. v. Newfoundland and Labrador (Attorney General)*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153.

STATUTES AND REGULATIONS CONSIDERED: *Cargo Securement Regulations*, NLR 152/04, section 31(1)(a); *Highway Traffic Act*, RSNL 1990, c. H-3; *Provincial Offences Act*, SNL 1995, c. P-31.1, sections 3 and 6; *Criminal Code*, section 839; *Load Security Regulations*, NLR 1008/96, section 3(4)(c).

Welsh J.A.:

[1] Sean Martin and Bradley Kennedy were convicted of transporting unsecured scrap metal contrary to section 31(1)(a) of the *Cargo Securement Regulations*, NLR 152/04, under the *Highway Traffic Act*, RSNL 1990, c. H-3. Their appeal to the summary conviction appeal court was dismissed. They seek leave to appeal, and if granted, appeal the decision of the summary conviction appeal judge (the “appellate judge”).

[2] The background facts are succinctly stated by the appellate judge (2020 NLSC 73):

[7] The appellants are both heavy equipment operators employed with the same recycling enterprise. They testified that they were travelling back to the company’s scrapyard transporting a load of oversized No. 1 steel, with an uneventful stop at the weigh scale in Goobies. Once back at the scrapyard they were approached by Constable T. Hussey who issued tickets for failing to cover their cargo.

[3] In order to assess the charges against the appellants, it was necessary for the trial judge to interpret section 31(1)(a) of the *Cargo Securement Regulations*, which provides:

Where a vehicle that is operating on a highway in the province is carrying a load of sand, gravel, crushed stone, slag, salt or a mixture of them in the form of particles of up to 40 millimetres in diameter or is carrying waste or scrap metal, the

(a) portion of the load that is not enclosed by the vehicle or load container shall be covered with a covering made of tarpaulin, canvas, net or other material capable of confining the load within the vehicle or load container; ...

(Emphasis added.)

[4] The appellate judge concluded that the trial judge did not err in determining that the loads of No. 1 steel being transported were “scrap metal” within the meaning of section 31(1)(a) of the *Regulations*. Accordingly, the appeal was dismissed.

Leave to Appeal

[5] Charges under the *Highway Traffic Act* and *Regulations* are dealt with pursuant to the *Provincial Offences Act*, SNL 1995, c. P-31.1, section 3. Section 6 of the *Provincial Offences Act* incorporates provisions of the *Criminal Code* that are applicable to summary conviction offences:

Except where and to the extent that it is otherwise specifically enacted, the provisions of the *Criminal Code* respecting summary convictions and the proceedings relating to them apply, with the necessary changes, in respect of offences and orders and proceedings relating to the offences and orders made or to be made under this Act.

[6] Section 839 of the *Criminal Code*, which addresses appeals to this Court from the summary conviction appeal court, specifically requires leave in order to proceed with an appeal which is restricted to a question of law. The test to be applied in determining whether leave should be granted is set out in *Newfoundland Recycling Ltd. v. Newfoundland and Labrador (Attorney General)*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153:

[9] Thus, to obtain leave to appeal pursuant to s. 839(1):

(a) the appeal must “be taken on a ground that involves a question of law alone”, and

(b) the ground(s) of appeal must be such that

(i) either the ground of appeal has a “reasonable possibility of success”, or

(ii) “the proposed question of law [has significance] to the administration of justice”.

[7] In this case, the first criterion is satisfied. The interpretation of section 31(1)(a) of the *Regulations* is a question of law.

[8] Regarding the second prong of the test, the issue in this appeal could not be said to have significance to the administration of justice. The interpretation of section 31(1)(a) of the *Regulations* involves the application of settled principles of statutory interpretation. Further, interpretation of this particular

provision would not have broader application in other contexts or circumstances, that is, outside the transport of scrap metal, as contemplated by the test.

[9] Finally, the question of whether a ground of appeal has a reasonable possibility of success will necessarily require a review of the appellate judge's reasons for denying the appeal from the decision of the trial judge. In this case, the appellants submit that the substantive issue before this Court is "whether on a contextual reading of the legislation the regulation requires that all scrap metal being transported be covered or only scrap metal up to 40 mm in diameter." The submissions on that issue which were made on appeal to this Court are the same as those that were made to the appellate judge. The question, then, is whether upon review of the appellate judge's reasons for decision, that issue has a reasonable possibility of success.

[10] The appellate judge referenced the trial judge's decision:

[17] The trial judge in his oral reasons considered the *Regulations* as a whole, noting that different provisions addressed the transportation of larger objects, including vehicles. He considered the wording of the previous subsection 31(1)(a) and was not satisfied that the removal of the qualifier "shredded" could only be explained as an error, noting: "[T]he newer legislation has the broader category of scrap metal, whereas the previous legislation has the more specific subcategory of shredded scrap metal." (Oral decision at page 65 of the Transcript of Proceedings.) There had been evidence that the Province no longer had a scrap metal shredder and the trial judge opined that this may have resulted in the change. He reasoned: "One could certainly imagine the difficulty of having to conduct inspections to make sure that the entirety of the load in one of these vehicles complies with the particular legislation." (Oral decision at page 66 of the Transcript of Proceedings.)

[18] The trial judge correctly concluded that the only reasonable interpretation was to apply the language used by the legislature. It was not for the court to order that only scrap metal of 40 millimetres or less needed to be covered to protect users of the roadways in the Province, nor was it within the trial judge's expertise to exempt No. 1 steel scrap metal cargoes with the potential safety repercussions for the public. Analysis of the legislation in accordance with the rules of statutory interpretation did not support such an interpretation. ...

[11] The appellate judge then referenced, at paragraph 18, the well-established "pragmatic approach [to statutory interpretation] and the role of [the] 'plain meaning' analysis." She continued:

[19] The merits of an exception for the transport of No. 1 heavy steel scrap metal and indeed all scrap metal loads is a consideration for the Government with its constitutional authority over and expertise in the realm of highway safety. The *Act*

provides ministerial authority to regulate the “securing of loads carried by motor vehicles and trailers” (subsection 187(1)(bb) of the *Act*). ...

[20] I conclude that the trial judge correctly interpreted subsection 31(1)(a) of the *Regulations*.

[12] The appellate judge addressed the issues that grounded the appeal before her. The same issues ground the appeal in this Court. The appellate judge considered the relevant legal principles in reviewing the decision of the trial judge for error. Having reviewed the appellate judge’s decision and the ground on which this appeal is brought, I am satisfied that there is no reasonable possibility of success on this appeal.

[13] The language of section 31(1)(a) is clear and unambiguous. The change in language from “shredded scrap metal” found in the previous provision (section 3(4)(c) of the *Load Security Regulations*, NLR 1008/96), does not support a conclusion that, under the current provision, only scrap metal “up to 40 millimetres in diameter” must be covered. The reference to “40 millimetres” is to “sand, gravel, crushed stone, slag, salt or a mixture of them in the form of particles”. Those materials are clearly separated from “waste or scrap metal” by the word “or”. As stated by the appellate judge, the only reasonable interpretation of the unambiguous language of the section is that all scrap metal in a load being transported in the Province must be covered.

[14] Further, as stated by the appellate judge, the concerns raised by the appellants are questions of policy falling within the scope of authority of the legislature. If an exception to the application of section 31(1)(a) of the *Regulations* should be made for No. 1 steel, or any other scrap metal, that decision is for the legislature to make.

Summary and Disposition

[15] In summary, applying the *Newfoundland Recycling* test for granting leave to appeal from the summary conviction appeal court, the first criterion is satisfied; that is, the interpretation of section 31(1)(a) of the *Regulations* is a question of law. However, neither of the two criteria in the second prong of the test is satisfied. For the above reasons, I conclude that the ground on which this appeal is taken has no reasonable possibility of success. In addition, the question of law does not have significance to the administration of justice as contemplated by the test.

[16] Accordingly, I would deny leave to appeal.

B. G. Welsh J.A.

I concur: _____

F. P. O'Brien J.A.

I concur: _____

G. D. Butler J.A.