COURT FILE NO: 4160 999 00000800 97
DATE: 2003/07/24

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GRANT FOREST PRODUCTS INC. and HER MAJESTY THE QUEEN (Ministry of Labour for Ontario)

BEFORE: THE HONOURABLE MR. JUSTICE JOHN S. POUPORE

COUNSEL: Ms. Cheryl A. Edwards, for the Appellant
Bruce Arnott and Wes Wilson, for the Respondent

ENDORSEMENT

[1] This an appeal under s.116 of the *Provincial Offences Act* of the decision of His Honour Justice P. Belanger of the Ontario Court of Justice, rendered July 26, 2002. The Appellant was convicted of three charges laid under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 and had dismissed the constitutional question in which the Appellant sought a declaration under s.52 of the *Constitution Act* 1982, that the definition of "employer" in s.1(1) of the *Act* is so overbroad that it is inconsistent with s.7 of the *Canadian Charter of Rights and Freedoms* and, to the extent of any inconsistency of no force and effect.

[2] The charges arose out of an incident that occurred on the 20th day of February, 2000 at a large wafer board plant owned and operated by the Appellant. A worker lost three fingers after catching his hand in a roller chain drive mechanism.

[3] The Information charged the Appellant as "employer" with: failing to insure proper guarding of a machine; failing to ensure the machine was not adjusted or repaired before motion that may endanger a worker was stopped; and failing to instruct a worker in the hazards of

adjusting a roller on the same machine while it was operational. After conviction, on a joint submission, a penalty of $100,000 was imposed allocated as follows: $30,000, $30,000 and $40,000 on each of the three counts, respectively.

[4] Section 120(1) of the *Provincial Offences Act*, R.S.O. 1990, chapter P.33 states:

> 120. (1) On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,
>
> (a) may allow the appeal where it is of the opinion that,
>
> (i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground, there was a miscarriage of justice; or
>
> (b) may dismiss the appeal where,
>
> (i) the court is of the opinion that the appellant, although the appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or
>
> (iii) although the court is of the opinion that on any ground mentioned in subclause (a) (ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

[5] The trial judge made a number of findings with respect to each of the three counts. Every one of these findings is reasonable and supported by the evidence. Further, in arriving at his conclusion on each count, he made no error in law.

[6] Further, I agree with the conclusion of the trial Judge on the constitutional issue.

[7] A matter that was not raised at trial is the applicability of the *Kienapple* principle to Counts 2 and 3 of the Information. I am satisfied that Counts 2 and 3 possess the same or substantially the same elements. The rule against registering multiple convictions should therefore be applied. The conviction on Count 3 shall therefore be stayed.

[8] The penalty was a joint submission of $100,000 split between the counts. Counsel, in the event that the *Kienapple* argument was successful, requested that opportunity to argue penalty. They are invited to contact the Regional Trial Co-Ordinator to make suitable arrangements for this argument as soon as possible.

John S. Poupore, S.C.J.

Released: July 24, 2003

3P