SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Hoyeck*, 2021 NSSC 178

Date: 20200521
Docket: Halifax, CRH. No. 498744
Registry: Halifax

Between:

Her Majesty the Queen

v.

Elie Phillip Hoyeck

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	October 14, 2020, in Halifax, Nova Scotia
Written Decision:	May 21, 2021
Counsel:	Alex Keaveny, Crown Counsel Trevor McGuigan, Defence Counsel

By the Court:

Overview

[1] Mr. Hoyeck ("Hoyeck") pled guilty to three *Occupational Health and Safety Act,* S.N.S. 1996, c. 7, ("*OHSA*") offences, one of which was found to have resulted in the death of a worker, Mr. Kempton ("Kempton").

[2] The sentencing judge imposed the following sentence:

Count 2	$5,000 fine, plus $750 victim fine surcharge ("VFS")
Count 5	$5,000 fine, plus $750 victim fine surcharge $10,000 donation to the Minister's Education Fund 25 hours community service (cooperate in creation of safety video)
Count 11	$5,000 fine, plus $750 victim fine surcharge

[3] The Crown appeals the sentence imposed in ***R. v Hoyeck***, 2020 NSPC 24, in relation only to Count 5, on the grounds that the sentence is based on several errors in law that impacted the sentence and that the sentence is demonstrably unfit.

[4] In 2011, the Nova Scotia Legislature amended sections 74 and 75 of the *OHSA*, increasing the available penalties for all *OHSA* offences, including fatalities. The Supreme Court of Canada in ***R. v. Friesen***, 2020 SCC 9 ("*Friesen*"), found that sentences can and should depart from prior precedents when the legislature raises the maximum sentence for an offence to give "the legislative intent its full effect".

[5] The sentencing judge's imposed global fine of $15,000 represents 3% of the statutory maximum fine of $500,000 under the *OHSA*. For the reasons that follow, I find this is a demonstrably unfit sentence for an offender whose "reckless disregard or deliberate indifference to legislative safety measures"[1] resulted in the death of his employee. In addition, the sentence fails to consider the 2011 increases to the *OHSA* and the principle that Courts should generally depart from prior precedents and impose higher sentences when the legislature increases the

1 *R. v. Eagles*, 2010 NSPC 18, para. 47, as quoted by the sentencing judge in 2020 NSPC 24

maximum sentence for an offence. For the reasons that follow, the Crown's appeal is allowed.

Facts

[6] The agreed facts for sentencing can be found in the Appeal Book (see Tab "I"). Additional facts that were agreed upon during the sentencing hearing can be found in the Appeal Book (see Tab "G", pages 12-21).

[7] Hoyeck was the owner and supervisor of an auto body shop that provided auto service and repair. Kempton was an employee of Hoyeck's and had been a Red Seal Mechanic.

[8] On September 20, 2013, Hoyeck was in the shop when Kempton and another employee were working on a van that Hoyeck had put on a trailer. They began to strip the van. Kempton used an acetylene torch to remove the van's catalytic converter. Hoyeck came out and spoke to the two men. He then went to the garage. Kempton then used the torch to remove a strap attached to the gas tank. The tank ignited with Kempton trapped under the vehicle. The other employee yelled for help. Hoyeck responded and they removed Kempton from under the van. Kempton sustained severe burns and died the next day from his injuries.

[9] At the sentencing hearing, the Crown sought a global financial penalty for all three offences in the amount of $60,000 to $70,000, including $10,000 payable to the Minister's Education Fund, plus community service work in the form of a creative sentencing option. The Defendant sought a total financial penalty of $6,000 and did not oppose a creative sentencing option. The sentencing judge rendered a decision on June 5, 2020, and imposed a global financial penalty, including a VFS of $27,250, plus 25 hours of community service work in the form of participation in a safety video.

[10] The sentencing judge found a number of aggravating and mitigating factors relevant to sentencing, at paras. 61 to 65 of the decision, which are not in dispute:

> <u>Aggravating Factors</u>
>
> 1. "the number of offences and the number and variety of safety issues that constitute the offences"
> 2. "the violations played a role in Mr. Kempton's death"

3. "the overall seriousness of the safety issues and the very real risk that many of them could have caused injury or death"

4. Hoyeck has a previous record for criminal and regulatory offences

Mitigating Factors

1. "Hoyeck has pleaded guilty which I accept as an indication of acceptance of responsibility and remorse"

2. Hoyeck has a limited previous record for occupational safety offences, despite having been in business for 18 years

Issues

[11] The issues on appeal are agreed between the parties and are as follows:

- Issue 1: Did the sentencing judge err in principle by failing to properly consider the 2011 increase in penalties for *OHSA* fatalities to $500,000 and the principle that courts should generally impose higher sentences than the sentences imposed in cases that preceded an increase by the legislature in maximum sentences?

- Issue 2: Did the sentencing judge err in principle by relying on previous sentences in non-fatality cases in determining the applicable range for *OHSA* offences that result in fatalities?

- Issue 3: Did the sentencing judge err in principle by failing to give sufficient weight to Hoyeck's blameworthiness?

- Issue 4: Did the sentencing judge err in principle by making unreasonable findings regarding Hoyeck's financial circumstances, and overemphasize the impact of financial circumstances on quantum?

- Issue 5: Is the sentence imposed "clearly inadequate" such that it is demonstrably unfit?

- Issue 6: Does the sentence imposed represent a "substantial and marked departure" from a proportional sentence properly arrived at based on the correct application of the principles and objectives of sentencing such that the sentence is demonstrably unfit?

Standard of Review

[12] The same standard of review applies to each issue under appeal.

[13] In ***R. v Henneberry***, 2019 NSSC 119, the Court allowed a Crown appeal of a regulatory sentence under the *Fisheries Act*, R.S.C., c. F-14, increasing the penalty from $30,000 to $79,376.33. The Court discussed the standard of review for sentencing appeals at para. 7:

> 7 In paragraphs 38-42, the Respondent correctly sets out the applicable standard of review:
>
> …
>
> 39. It is well established that sentencing judges enjoy wide discretion and that their decisions are subject to deference on appeal. The Supreme Court of Canada most recently outlined this standard in *R. v. Suter* as follows:
>
> > It is well established that appellate courts cannot interfere with sentencing decisions lightly … This is because trial judges have "broad discretion to impose the sentence they consider appropriate within the limits established by law" (*Lacasse*, at para. 39).
> >
> > In *Lacasse*, a majority of this Court held that an appellate court could only interfere with a sentence in one of two situations: (1) where the sentence imposed by the sentencing judge is "demonstrably unfit" (para. 41); or (2) where the sentencing judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, and such an error has an impact on the sentence imposed (para. 44). In both situations, the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances.
> >
> > A sentence that falls outside of a certain sentencing range is not necessarily unfit …
>
> 40. In *R. v. Lacasse*, the Supreme Court outlined three reasons for the deference owed to sentencing judges' decisions:
>
> The reminder given by this Court about showing deference to a trial judge's exercise of discretion is readily understandable. First, the trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions. Second, the sentencing judge is usually familiar with the circumstances in the district where he or she sits and therefore with the particular needs of the community in which the crime was committed: *R. v. M. (C.A.)*, 1996

> CanLII 230 (SCC), [1996] 1 S.C.R. 500 (S.C.C.), at para. 91. Finally, as Doherty J.A. noted in *R. v. Ramage (2010)*, 2010 ONCA 488 (CanLII), 257 C.C.C. (3d) 261 (Ont. C.A.), the appropriate use of judicial resources is a consideration that must never be overlooked:
>
> > Appellate repetition of the exercise of judicial discretion by the trial judge, without any reason to think that the second effort will improve upon the results of the first, is a misuse of judicial resources. The exercise also delays the final resolution of the criminal process, without any countervailing benefit to the process.

[14] In ***Ontario (Labour) v. New Mex Canada Inc.***, 2019 ONCA 30, the Ontario Court of Appeal provided useful commentary on the threshold for determining a sentence is demonstrably unfit for a regulatory offence under Ontario's *OHSA*, at paras. 45 to 46:

> [45] What *Lacasse* adds with respect to the second situation is that in determining whether a sentence is demonstrably unfit, "[t]he fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention": at para. 11. Paragraphs 51 and 58-69 are helpful on this point.
>
> [46] Moreover, as the Crown pointed out before us, *Lacasse* affirms a very high threshold for determining whether a sentence is demonstrably unfit. It must be "clearly excessive or inadequate" or represent a "substantial and marked departure" from a proportional sentence properly arrived at based on the correct application of the principles and objectives of sentencing: *Lacasse*, at para. 52. Paragraphs 52-55 are of assistance on this point.

[15] In applying the standard of review in *Lacasse*, *supra*, an Appellate Court should only interfere with a sentence when the sentence imposed by the sentencing judge is "demonstrably unfit".

Analysis

Issue 1: Did the sentencing judge err in principle by failing to properly consider the 2011 increase in penalties for *OHSA* fatalities to $500,000 and the principle that courts should generally impose higher sentences than the sentences imposed in cases that preceded an increase by the legislature in maximum sentences?

[16] I will start by considering the first part of the question in Issue 1 (i.e. whether the sentencing judge erred in principle by failing to properly consider the 2011 increase in penalties for *OHSA* fatalities to $500,000).

[17] The Legislative Assembly in Nova Scotia has repeatedly increased the penalties for occupational health and safety offences:

- 1967: *Construction Safety Act*, s. 19(1) provides for a maximum fine of $1,000 (or 12 months' jail, or both) per offence.
- 1985: *Occupational Health and Safety Act*, 1985, s. 49(1) increases maximum fines to $10,000 (or 12 months' jail, or both) per offence.
- 1989*: Occupational Health and Safety Act*, 1989, s. 74(1) increases maximum fines to $250,000 (or 2 years jail, or both) per offence. Also adds s. 75 creative sentencing but limits the total cost to the s. 74(1) maximums.
- 1996: Current *Occupational Health and Safety Act* enacted through Bill 13, An Act Respecting Occupational Health and Safety. No change to previous maximums.
- 2011: Bill No 25, An Act to Amend Chapter 7 of the Acts of 1996, the *Occupational Health and Safety Act* amended Section 75 to make creative sentencing costs an option in addition to fine maximums, increasing the available penalties for all OHSA offences, and added ss. 74(1A) and (1B) which created a distinct maximum $500,000 fine for offences that result in a fatality -- this is double the previous maximum.

[18] These successive increases in maximum sentences indicate clearly the Nova Scotia Legislature's determination that *OHSA* offences are serious offences that must attract serious penalties, and signals to the Court that the penalties for *OHSA* offences should increase.

[19] As a result of these amendments, the available penalties for all *OHSA* offences were increased significantly. The sentencing judge was aware of the penalties under the *OHSA* and set out the maximum penalties at para. 5 of her decision. Specifically, she pointed out that offences that "resulted in a fatality" carry a maximum financial penalty amounting to double of that imposed in non-fatal injuries. She then considered, under the proportionality analysis, whether the offences resulted in a fatality (i.e., causation) (para. 42) and found that "Hoyeck's conduct played a role in Kempton's death (para. 59).

[20] I find the sentencing judge failed to give effect to the 2011 amendments by imposing a sentence that was significantly lower than the only post-2011 fatality

sentence, and even lower than pre-2011 fatality and non-fatality cases (see caselaw discussion under Issue 2 below).

[21] I will now consider the second part of the question in Issue 1 (i.e., whether the sentencing judge erred in principle by failing to properly consider the principle that Courts should generally impose higher sentences than the sentences imposed in cases that preceded an increase by the legislature in maximum sentences).

[1] Following counsel's submissions on February 25, 2020, but prior to the sentencing judge rendering her decision on June 5, 2020, the Supreme Court of Canada, on April 2, 2020, issued its decision in ***Friesen***, clarifying that successive increases by Parliament in maximum sentences for offences is a determination that these offences are to be treated as more serious than they had been in the past. A legislator's decision to increase maximum sentences should generally result in the imposing of higher sentences than the sentences imposed in cases that preceded the increases in maximum sentences. Therefore, the range of sentences pre-***Friesen*** are of limited value, as ***Friesen*** imposes on a sentencing judge the creation of a new range in line with the increased maximum sentences.

[22] In ***Friesen***, the Supreme Court of Canada discussed increased maximum sentences in relation to sexual offences against children and, in my view, their analysis applies equally to increases in maximum fines under the *OHSA*.

> (a) Increase in Maximum Sentences
>
> > 96 Maximum sentences help determine the gravity of the offence and thus the proportionate sentence. The gravity of the offence includes both subjective gravity, namely the circumstances that surround the commission of the offence, and objective gravity (*L.M.*, at paras. 24-25). The maximum sentence the *Criminal Code* provides for offences determines objective gravity by indicating the "relative severity of each crime" (*M.* (*C.A.*), at para. 36; see also H. Parent and J. Desrosiers, *Traité de droit criminel*, t. *III*, *La peine* (2nd ed. 2016), at pp. 51-52). Maximum penalties are one of Parliament's principal tools to determine the gravity of the offence (C. C. Ruby et al., *Sentencing* (9th ed. 2017), at § 2.18; *R. v. Sanatkar* (1981), 64 C.C.C. (2d) 325 (Ont. C.A.), at p. 327; *Hajar*, at para. 75).
> >
> > 97 Accordingly, a decision by Parliament to increase maximum sentences for certain offences shows that Parliament "wanted such offences to be punished more harshly" (*Lacasse*, at para. 7). An increase in the maximum sentence should thus be understood as shifting the distribution of proportionate sentences for an offence.

> …
>
> 99 These successive increases in maximum sentences indicate Parliament's determination that sexual offences against children are to be treated as more grave than they had been in the past. As Kasirer J.A. (as he then was) reasoned in *Rayo*, the legislative choice to increase the maximum sentence for child luring [TRANSLATION] "must be understood as a sign of the gravity of this crime in the eyes of Parliament" (para. 125). We agree with Pepall J.A.'s conclusion in *Stuckless (2019)* that Parliament's legislative initiatives thus give effect to society's increased understanding of the gravity of sexual offences and their impact on children (paras. 90, 103 and 112).
>
> 100 To respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than the sentences imposed in cases that preceded the increases in maximum sentences. As Kasirer J.A. recognized in *Rayo* in the context of the offence of child luring, Parliament's view of the increased gravity of the offence as reflected in the increase in maximum sentences should be reflected in [TRANSLATION] "toughened sanctions" (para. 175; see also *Woodward*, at para. 58). Sentencing judges and appellate courts need to give effect to Parliament's clear and repeated signals to increase sentences imposed for these offences.
>
> (*Emphasis Added*)

[23] The Court further went on to discuss the need for an upward departure from prior sentencing ranges when Parliament raises the maximum sentence for an offence at para. 108:

> 108 Courts can and sometimes need to depart from prior precedents and sentencing ranges in order to impose a proportionate sentence. Sentencing ranges are not "straitjackets" but are instead "historical portraits" (*Lacasse*, at para. 57). Accordingly, as this Court recognized in *Lacasse*, sentences can and should depart from prior sentencing ranges when Parliament raises the maximum sentence for an offence and when society's understanding of the severity of the harm arising from that offence increases (paras. 62-64 and 74).

[24] ***Friesen*** has changed the landscape. For Courts to give "the legislative intent its full effect" we cannot be bound to prior sentencing ranges that do not reflect the Legislature's view of the gravity of the offence and society's increased understanding of the severity of the harm arising from the offence (see paras. 108-109). An upward departure from prior precedents is appropriate to arrive at a proportionate sentence. The sentencing judge was aware of the Supreme Court of Canada's decision in ***Friesen*** (see para. 66 of the sentencing decision).

[25] I find that the sentencing judge erred in principle because she failed to properly consider the Legislative Assembly's decisions to repeatedly increase maximum sentences, especially the 2011 doubling of the maximum fines for OHSA fatalities to $500,000 and she failed to properly consider the principle from ***Friesen*** that Courts should generally impose higher sentences than the sentences imposed in cases that preceded an increase in maximum sentences.

Issue 2: Did the sentencing judge err in principle by relying on previous sentences in non-fatality cases in determining the applicable range for OHSA offences that result in fatalities?

[26] The sentencing judge referenced relevant caselaw and found some aspects of those cases and their outcomes helpful, but not all. The sentencing judge stated: "No two cases are identical. The case before me shares some but not all of the aggravating and mitigating factors identified in these cases" (para. 75).

[27] The sentencing judge considered many of the reported Nova Scotia cases on *OHSA* sentencing. She identified and discussed a number of cases she found were "particularly relevant to the circumstances of this case" (paras. 68 to 75). Below is a table from the Crown brief summarizing the sentencing details for the cases considered:

Case name	***Penalty***	***% of max***
Fatality cases - Post-2011	Max penalty: $500,000 max, plus Community Service Work ("CSW")	
R v Hoyeck, 2020 NSPC 24 Blameworthiness Para 40: High level of moral blameworthiness Para 77: Mr. Hoyeck had a reckless disregard or deliberate indifference to safety Para 77: Some of the violations were clearly ongoing issues and not momentary lapses or single incidents. Para 77: The safety violations were serious. Some played a role in Mr. Kempton's death and many posed a significant potential hazard.	**Fatality offence** 5: $5,000 fine+VFS $10,000 donation 25 hrs CSW **Non-Fatality offences** 2: $5,000 fine 11: $5,000 fine	5: 1-3% 2: 2%* 11: 2%

Case name	***Penalty***	***% of max***
Para 12: The safety issues were an accident waiting to happen	*Treating the $25,000 in penalties as a global sentence, the global sentence is 5% of the $500k maximum*	
R v Oickle (unreported, NSPC, October 20, 2015) Blameworthiness Page 21: High level of moral blameworthiness Page 21: Not a momentary lapse in judgement. A prolonged flagrant abuse of the regulations. Page 21: An accident waiting to happen given the actions of the accused. Financial circumstances: Page 9: The incident had a financial effect on the accused's family Page 23-24: "The court has considered…the fact that the accused is not a wealthy individual…" Page 26: "…he does have a good attachment to the workforce and, over time, these financial obligations should be satisfied.	**Fatality offence** 1: $25,000 fine (+ $3,750 VFS) $5,000 donation $2,500 for 10 safety presentations $2,500 for Safety Ads **Non-Fatality offences** 2. (3.2%) $8k(+$1,200 VFS) + $2,500 donation 3. (3.2%) $8k(+$1,200 VFS) + $2,500 donation *Treating the $51,000 in penalties as a global sentence, the global sentence is 10% of the $500k maximum*	1: 5-7%* 2: 3.2% 3: 3.2%
Non-fatality cases – Post-2011	Max penalty: $250,000 max, plus CS	
R v RD Longard Services Limited, 2015 NSPC 35 2 OHSA offences Non-fatality: Para 30: "…absence of evidence that established a direct connection between its violation of the Act and Mr. Boyle's electrocution…" Blameworthiness: Para 30: Not a case of a specific hazard constituting an "accident-waiting-to-happen"	1: $17,500 fine (+$2,625 VFS) 75 hrs CSW 2: $17,500 fine (+$2,625 VFS) 75 hrs CSW *Treating the $35,000 in penalties as a global sentence, the global sentence is 14% of the $250k maximum*	1: 7% 2: 7%

Case name	***Penalty***	***% of max***
Financial circumstances Para 8: No longer a functioning company and had no funds. Para 8: Unaudited financial statements indicated total liabilities and equity of $15,872.03 and negative net income for the previous 12 months of $2,900. Para 8: Company's total liabilities were $193,817.96.		
Fatality Cases – Pre-2011	Max penalty: $250,000, including CS	
R v Busk, 2012 NSPC 17 Fatality Blameworthiness Para 26: Not a "reckless disregard or deliberate indifference to legislative safety measures" Para 29: Prior *OHSA* conviction with injury. Financial circumstances (Para. 34-37) Para 35: Mr. Busk operates a sole proprietorship, a small carpentry company where he works with his son. Para 35: 2009 and 2010 annual incomes of approx. $16,000, per NOA. Para 36: Went bankrupt in 2008. Discharged from bankruptcy in June 2009. No credit as a consequence of the bankruptcy. Para 37: "financially-strapped"	$25,000 • $10,000 fine (no VFS) • $15,000 donation • 200 hours (CSW)	10%

Non-Fatality cases – Pre-2011	Max penalty: $250,000, *including* CS	
R v Eagles, 2010 NSPC 18	$2,000 donation	0.8%

Para 50: No causal connection Blameworthiness Paras 60 and 63: Low level of moral blameworthiness Para 47: Not a case of reckless disregard or deliberate indifference to the legislative safety measures	18 1-hour Presentations	
R v O'Regan Chevrolet Cadillac Ltd, 2010 NSPC 68 Para 12: No causal connection Mid-size company with annual profits of $1,000,000+	$25,000 Fine (+$3,750 VFS) $5,000 donation $5,000 donation	14%
R v Nova Scotia Power Inc, 2008 NSPC 72 Para 44: Not a fatality case Dated previous OHSA conviction. Large company	$25,000 fine (+$3,750 VFS) $15,000 for 3 safety presentations (@$5,000 each)	16%
Notes: *X-Y% indicates fine only vs. global financial penalties		

[28] The other Nova Scotia cases cited by the sentencing judge were as follows:

1. ***R. v. Meridian Construction Inc. & London***, 2005 NSPC 40: Court imposed a $10,000 fine (plus VFS) on the individual, or 4% of maximum, and sentenced the corporate offender to a $77,000 fine (plus VFS) and $10,000 contribution to the Education Fund, or 35% of the maximum.
2. ***R. v. New Glasgow (Town)***, 2008 NSPC 15: Court imposed a $24,000 fine (plus VFS) and $85,000 in creative sentence penalties, or 44% of the maximum.

[29] The Crown submits that the unreported decision in ***R. v. Oickle*** (unreported, NSPC, October 20, 2015) is the only *OHSA* sentencing case since the 2011 amendments -- excluding joint recommendations -- where the Court found the offence "resulted in a fatality".

[30] In ***R. v. Nova Scotia (Transportation and Public Works)***, 2003 NSSC 274, one of the errors Justice Warner found was a failure to recognize a change in the maximum penalty made by the Legislature and how that resulted in an unfit sentence: paras. 55 to 58:

> 55. I do not believe that the learned sentencing Judge recognized the change in the maximum penalty made by the Legislature. I further do not believe that there is any indication in her decision that she considered the fact that the breach of the Order in this case was a deliberate breach by a misguided supervisor who believed he knew more about safety than those in Transportation and Labour who agreed to modify Labour's regulations by the code of practice Order. I have not heard today, and did not see in the transcript of the evidence, what steps were taken remedially by the Department of Transportation to deal with that supervisor or this kind of circumstance.
>
> 56. I really am at a loss, and have been at a loss since opening the file twenty-four hours ago, as to what a fit sentence would be. The sentence appealed from is not a fit sentence.
>
> 57. The fine and contribution to an education fund should have been at least twice the amount that was imposed in the Court below. Even at that, the penalty would only amount to about 18% of the maximum penalty that could be imposed under the *Act*. It certainly would still not be a penalty at the high end of the range.
>
> 58. This is an oral decision and probably omits some analysis. I grant the appeal and vary the sentence by imposing a fine of $30,000.00 and a contribution to the education fund of $15,000.00, double the amount of the Court below.

[31] Considering only the fatality cases relied upon by the sentencing judge, which also include cases involving offenders with much lower moral blameworthiness (e.g. where there was not a "reckless disregard or deliberate indifference to legislative safety measures"), Hoyeck's sentence is substantially *lower* than sentences imposed in fatality cases both before *and* after the doubling of penalties in 2011.

[32] Considering the non-fatality cases relied upon, which again included offenders with much lower moral blameworthiness, Hoyeck's sentence is also substantially *lower* than sentences imposed in these non-fatality cases, including penalties imposed prior to the 2011 changes to sections 74 and 75 which increased penalties for all *OHSA* offences including non-fatality offences.

[33] I conclude that the sentencing judge erred in principle by relying on previous sentences in non-fatality cases in determining the applicable range for *OHSA* offences that result in fatalities.

Issue 3: Did the sentencing judge err in principle by failing to give sufficient weight to Hoyeck's blameworthiness?

[34] The sentencing judge found:

1. Mr. Hoyeck's blameworthiness was high (para. 40).
2. Mr. Hoyeck had a reckless disregard or deliberate indifference to safety. She found that some of the violations were clearly ongoing issues and not momentary lapses or single incidents. The safety violations were serious. Some played a role in Mr. Kempton's death and many posed a significant potential hazard (para. 77).
3. This offence "resulted in a fatality" for the purposes of s. 74(1)(b).
4. Mr. Hoyeck's offensive conduct played a role in, and contributed to, Mr. Kempton's death in more than a trivial way (para. 51).

[35] I find that the sentencing judge's conclusion that $15,000 was within the range for a highly blameworthy OHSA offender, whose reckless disregard or deliberate indifference to legislative safety measures resulted in the death of a worker, was unreasonable and an error in principle because it did not properly consider the 2011 increase in penalties for *OHSA* fatalities given Hoyeck's blameworthiness.

Issue 4: Did the sentencing judge err in principle by making unreasonable findings regarding Hoyeck's financial circumstances, and overemphasize the impact of financial circumstances on quantum?

[36] Regarding the Respondent's financial circumstances, the sentencing judge invited counsel to call further evidence and both parties declined. The sentencing judge was left to rely on the agreed facts and to draw reasonable inferences therefrom. The relevant findings regarding the financial circumstances included:

(a) that the business Mr. Hoyeck was operating at the time of the offence was a small business with two employees (para. 80); it has since gone out of business (para. 80);

(b) that Mr. Hoyeck still has a business in automotive repair and sales but no longer has employees (paras. 28 and 80); that Mr. Hoyeck has suffered due to extensive media attention surrounding the case (para. 79); and

(c) that Mr. Hoyeck has outstanding fines (para. 80).

[37] The sentencing judge's finding that $15,000 was an "amount (that) will be difficult for (Mr. Hoyeck) to pay but not oppressive, given time", overemphasized his financial circumstances instead of giving proper consideration to the 2011 increase in penalties for *OHSA* fatalities.

Issue 5: Is the sentence imposed "clearly inadequate" such that it is demonstrably unfit?

[38] Considering the guidance in ***Friesen***, the Crown argues that a sentence that is at least 15-25% of the $500,000 maximum is appropriate for Hoyeck given his high moral blameworthiness and the fact that this offence resulted in Kempton's death. This would mean a sentence in the range of $75,000 to $125,000.

[39] The Crown is only seeking an increase in the sentence for Count 5 to a sentence of $50,000 ($40,000 fine plus a $10,000 donation) and a $6,000 VFS. This represents 10% of the maximum. In addition, it seeks 100 hours of community service work.

[40] The $5,000 fine imposed on Hoyeck represents 1% of the maximum fine available for an *OHSA* offence that results in a fatality. If the Court ignores the 2011 amendments that make creative sentencing amounts additional to a fine, adding the $10,000 ordered donation results in a $15,000 penalty which represents 3% of the statutory maximum fine of $500,000. This sentence of 1-3% of the available penalties under the *OHSA* is clearly inadequate and thus demonstrably unfit for an offender whose "reckless disregard or deliberate indifference to legislative safety measures" resulted in the death of his employee.

Issue 6: Does the sentence imposed represent a "substantial and marked departure" from a proportional sentence properly arrived at based on the correct application of the principles and objectives of sentencing such that the sentence is demonstrably unfit?

[41] I am guided by two decisions that outline the principles and objectives of sentencing in occupational health and safety cases.

[42] In ***R. v. Nova Scotia (Minister of Transportation & Public Works), supra***, Justice Warner allowed a Crown appeal from sentence in a non-fatality OHSA case and *doubled* the sentence imposed by the trial judge (increasing the penalty to 18%

of the maximum). Justice Warner, at para. 23, cites the Ontario Court of Appeal's decision in ***R. v. Cotton Felts Limited***, (1982), 2 CCC (3d) 287, where the Court discusses the general principles of how the Court should deal with occupational health and safety issues:

> [23] ….
>
> The *Occupational Health and Safety Act* is part of a large family of statutes creating what are known as public welfare offences. The Act has a proud place in this group of statutes because its progenitors, the Factory Acts, were among the first modern public welfare statutes designed to establish standards of health and safety in the workplace. Examples of this type of statute are legion and cover all facets of life ranging from safety and consumer protection to ecological conservation. In our complex interdependent modern society such regulatory statutes are accepted as essential in the public interest. They ensure standards of conduct, performance and reliability by various economic groups and make life tolerable for all.
>
> To a very large extent the enforcement statutes is achieved by fines imposed on offending corporations. The amount of the fine will be determined by a complex of considerations including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public and the maximum penalty prescribed by statute. Above all the amount of the fine will be determined by the need to enforce regulatory standards by deterrence... The paramount importance of deterrence in this type of case has been recognized by this Court in a number of recent decisions...
>
> The main factors in the computation of a fine expressed in these decisions are the same as those expressed by Judge Dnieper. Without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere license fee for illegal activity...
>
> This aspect of deterrence is particularly applicable to public welfare offences where it is essential for the proper functioning of our society for citizens at large to expect that basic rules are established and enforced to protect the physical, economic and social welfare of the public.
>
> [*Emphasis in original*]

[43] In ***Ontario (Labour) v. New Mex Canada Inc., supra***, the Court discussed the fact that, while jail sentences are appropriate for certain *Occupational Health and Safety Act* offences, deterrence through fines remains the most common sentencing option, at paras. 84 to 86:

> [84] Sentences of incarceration are uncommon in regulatory prosecutions. In Wholesale Travel, Cory J. observed, at p. 250, that imprisonment is only rarely sought for such offences. This court recognized in 1982 in Cotton Felts, at p. 294, that "[t]o a very large extent" the enforcement of the OHSA is achieved by imposing fines, and this court again made the same observation in 2013 in Metron, at para. 78. Nothing has changed. The Crown acknowledged before us that in the thousands of OHSA prosecutions that have occurred, fewer than two dozen sentences of incarceration have been imposed.
>
> [85] In my view, the rarity of incarceration for regulatory offences is a descriptive observation, not a prescriptive one. In other words, recognizing that incarceration is rare is factually correct, but going beyond the principles of restraint and parity and using the rarity of incarceration as an independent sentencing principle that influences a sentencing outcome is an error. As Cory J. observed in Wholesale Travel, at p. 250, "[imprisonment] must be available as a sanction if there is to be effective enforcement of the regulatory measure." Where a sentencing judge, applying proper principles of sentencing, determines that incarceration is required to achieve the goals of sentencing, the judge is not forestalled from imposing a sentence of incarceration simply because incarceration is uncommon.
>
> [86] The reason why fines are typically imposed in regulatory prosecutions is that fines tend to be sufficient to achieve the deterrence required. When this fact is combined with the general principle of restraint just described, and with the principle of parity, the natural outcome is that sentences of incarceration are not apt to be common. However, the proposition that "incarceration is rarely imposed" for regulatory offences is not a principle of sentencing.

[44] The sentencing judge's failure to give effect to the 2011 amendments was an error that impacted the sentence imposed. The $15,000 in penalties does not satisfy the principles of deterrence and retribution that are paramount for *OHSA* offences generally, and these offences specifically. It does not send a message that denounces this extreme behaviour and provides general deterrence. A fit sentence must be substantial enough to warn others that the offence will not be tolerated. The sentence must not appear to be a "mere license fee" for illegal activity.

[45] I conclude that the sentence imposed in this case represents a "substantial and marked departure" from a proportional sentence properly arrived at based on the correct application of the principles and objectives of sentencing in occupational health and safety cases and, as such, is demonstrably unfit.

Conclusion

[46] Sentencing decisions are subject to deference on appeal and sentencing judges should enjoy wide discretion but, based on my review of the facts and the caselaw, I can only conclude that the sentence is demonstrably unfit because it does not respect the Legislative Assembly's decision to increase maximum sentences for fatalities and all *OHSA* offences.

[47] Sentencing judges and Appellate Courts need to give effect to the Legislative Assembly's clear and repeated signals to increase sentences imposed for these offences: ***Friesen*** at para. 100. Sentences can and should depart from prior precedents when the legislature raises the maximum sentence for an offence to give "the legislative intent its full effect": ***Friesen***, at paras. 108-109.

[48] The appeal is allowed and I grant the Crown's request that the sentence, with regard to Count 5, be set aside and the following sentence imposed, representing a global sentence of $67,500, inclusive of VFS:

Count 2	$5,000 fine	$750 VFS	No change
Count 5	$40,000 fine $10,000 donation to Minister's Education Fund 100 hours of community service	$6,000 VFS	Increase
Count 11	$5,000 fine	$750 VFS	No change

[49] In consideration of Hoyeck's financial circumstances and the current COVID-19 pandemic, I am allowing Hoyeck four years from the date of this decision to make payment of both the fine and donation. In addition, he shall have one year from the date of this decision to complete the video. Further, Hoyeck will be required to appear before me in court to provide a status report in nine months.

Bodurtha, J.