TC Cr. 91-012

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

GIANT YELLOWKNIFE MINES LTD.

Heard at Yellowknife, N.W.T.

Reasons filed: April 11, 1991

REASONS FOR JUDGMENT

of

His Honour Judge R. M. Bourassa

Counsel for the Crown: L. Charbonneau

Counsel for the Defence: J. Vertes, Q. C.

(Section 11 of the Mining Safety Act)

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B E T W E E N:

HER MAJESTY THE QUEEN

Plaintiff

- and -

GIANT YELLOWKNIFE MINES LTD.

Defendant

REASONS FOR JUDGMENT

The Defendant Giant Yellowknife Mines Ltd. (Giant) has pleaded guilty to an offence contrary to Section 11 of the Mining Safety Act and Regulations of the Northwest Territories, in that "it failed to ensure that all employees complied with the provisions of the Mining Safety Regulations governing the use, operation and maintenance of a motor vehicle in a mine." This court must now determine what is a fit and proper penalty for the offence.

FACTS

According to an Agreed Statement filed,

> "Shortly before midnight on April 11th, 1990, Mr. Gordon Kendall, an employee of Giant, parked a Toyota Jeep on a ramp in the mine. The vehicle, which contained an undetermined amount of powder, used as an explosive in the mine, had been left there by Mr. Gordon for his co-worker, Mr. Ron Celej, who was to use the vehicle to get more powder.
>
> Subsequent investigation by Mining Inspectors revealed that the vehicle involved was known to have had a defective parking break for several weeks prior to this incident. The vehicle also had developed a defective alternator, and as a result, it required boosting to be started. For that reason, the engine had been left running continuously for the three days immediately preceding the incident.

Almost as soon as Mr. Kendall exited the vehicle, it started to roll down the ramp. Mr. Celej, who was at the time walking down the ramp behind the vehicle, heard it strike a wall behind him. Mr. Celej tried to jump away from the vehicle but he slipped in the mud and fell. The vehicle ran over both Mr. Celej's legs, and then came to a rest against a wall.

Mr. Celej suffered severe bruising to his legs at the time of the incident. He also suffered injuries to both his knees, including cartilage degeneration, as well as a degeneration of both knee caps. It is doubtful that he will ever be able to return to his employment as a driller."

OFFENCE

Violation of the following Regulations made pursuant to the Mining Safety Act were involved:

"6.(1) Where there is a non-continuous shift operation in a mine area, the oncoming shift shall be warned of any abnormal condition affecting the safety of operations.

63.(1) No person shall refuel a vehicle while the engine of the vehicle is running.

76.(3) If an unsafe condition is noticed, the driver or operator shall tag the mobile equipment as unsafe and notify his immediate supervisor of the unsafe condition.

(4) No person shall use such tagged mobile equipment except for the purpose of repairing it, and then only under the supervision of a person authorized by the supervisor, until the unsafe condition has been rectified.

88. All mobile equipment must be equipped with an effective mechanical parking brake and, where this brake provides the only emergency means of stopping in the event of failure of the service brakes, it shall be capable of safely stopping and holding the mobile equipment under any operating condition.

143.(5) Every vehicle used to carry explosives shall be maintained in sound mechanical condition.

143.(13) Where a vehicle carries explosives, no person shall
(a) leave the vehicle unattended; or
(b) leave the ignition on or fail to set the brakes while the vehicle is parked or while explosives are being loaded or unloaded."

In a world of multi-national corporations with multi-jurisdictional operations, I note that these Regulations are not unique to the Northwest Territories.

> "Regulations governing the use of vehicles in mines vary from jurisdiction to jurisdiction but generally adhere to the following requirements: all vehicles must be equipped with audible warning systems, suitable mirrors, fire extinguishers, approved seatbelts, sufficient service and parking brakes and where necessary roll over protective structures and windshields. Brakes are subject to frequent testing and inspection and are to be implemented with wheel blocks where vehicles are used on an incline.
>
> Operators of all underground and surface mines vehicles are to be suitably trained and must take all precautions to ensure that their vehicles are operated safely with a clear field of vision at all times. At no time is an operator to leave his machine unattended during the course of operations. A log book is to be maintained of all vehicles maintenance and repair work. Safety cages or other protection devices must be used during split rim tire repair work." (**The Law of Occupational Health & Safety in Ontario**, Michael Grossman, 1978)

In other words, these Regulations are common and basic throughout the industry presumably known to corporations and experienced employees.

SENTENCING GOALS

It must be remembered that sentencing is more than an afterthought, a ritual termination of a file. Sentencing is the culmination of the court process and must always be approached with the perspective of achieving or attempting to achieve certain goals, be it respect for the law, as advanced by the Sentencing Commission,

deterrence, rehabilitation or punishment. A court must always identify the goal and question the best method to achieve that goal dealing with the particular offender and offence.

Ideally, a proper and fit sentence will, inter alia, prevent repetition of the offence by this or other defendants similarly placed and encourage compliance. (See **R. v. Echo Bay Mines**, Ayotte TCJ, unreported 1983)

Commonly, a number of factors have been considered in the analytic process used to this end. In dealing with corporations, deterrence, both general and specific, has always played a significant role. Blameworthiness, stigma or criminality of conduct has also been of importance in assessing a penalty. These considerations are all premised on the theory that a fine will achieve the sentencing goals, the issue being how much. (This premise is perhaps worth questioning.)

In dealing with the sentence in this field of occupational health and safety, generally the emphasis remains deterrence, as in other fields involving corporate defendants.

Michael Grossman in **The Law of Occupational, Health and Safety in Ontario** writes (p. 13-1):

> "With very few exceptions, it is the Canadian practice to deal with OH&S transgressions in the administrative context of provincial offences, and not under the criminal law. This implicitly accepts a prosecution as an enforcement mechanism, for deterrence, with a rather limited character of moral stricture to it. Hence injury sickness and death in the work place are believed adequately countered by administrative intervention to force better OH&S by making it more profitable in view of deterrent fines -- the concept of no licence for illegality."

The precedent case as to the level of fines in Ontario, and certainly of persuasive value in the N.W.T. is **R. v. Cotton Felts** (1983) 2 C.C.C. (3d) 287 Ont. C.A. Here a fine of $12,000 was imposed at the Provincial Court level, reduced on appeal, and then was further appealed to the Court of Appeal. In upholding the original fine, Blair J.A. stated:

> "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 work place. 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 of such 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 extend 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: See **R. v. Ford Motor Co. of Canada Ltd.** (1979), 49 C.C.C. (2d) 1 at p. 16, 5 M.V.R. 237, per MacKinnon A.C.J.O., Nadin-Davis, **Sentencing in Canada** (1982), p. 368 and cases therein cited.
>
> With reference to these offences, deterrence is not to be taken only in its usual negative connotation of achieving compliance by threat of punishment. Recently my brother Zuber in **R. v. Ramdass**, a judgment pronounced in November 17, 1982 [since reported 2 C.C.C. (3d) 247], referred to deterrence in a more positive aspect. There he was dealing with a driving offence and he quoted an earlier unreported decision of this court in **R. v. Roussy**, unreported, released December 15, 1977 [summarized 2 W.C.B. 72], where the court stated:

> 'But in a crime of this type the deterrent quality of the sentence must be given paramount consideration, and here I am using the term deterrent in its widest sense. A sentence by emphasizing community disapproval of an act, and branding it as reprehensible has a moral or educative effect, and thereby affects the attitude of the public. One then hopes that a person with an attitude thus conditions to regard conduct as reprehensible will not likely commit such an act.'
>
> 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."

The corporate defendant is before this court and, while it is trite that corporations are managed by people, here the corporation's failure is a failure at all echelons, not solely management, in particular including the very workers the rules were designed to protect. They are not before the court (although they may have been); however, responsibility for the events that occurred must, in my view, be shared by the corporation -- for its lack of leadership and enforcement, and by the individuals -- for their neglect to comply or blindness to common established procedures. I do not think it is fair to penalize one for all. This contributory negligence is present in fact. Does the law recognize it as a factor for consideration by a court in its adjudication?

I raise this matter because the same factors present in this case were present in two other recent cases I dealt with (R. v. Echo Bay Mines, R. v. Aurora Quarrying) that is to say, contributory negligence by those whom the act is designed to protect.

In my view, these cases are not in the same category as other cases featuring corporate defendants e.g. R. v. Robinson Trucking, R. v.

Gulf, where the offences were against the public at large; the case at bar involves immediate injury and danger to the corporation's own employees.

This matter is an offence in which the employees -- ultimately the losers when accidents occur -- fail or are indifferent to prescribed practice and law. While the corporation bears the ultimate responsibility to ensure compliance and cannot hide behind window dressing then blame its employees, what role, if any, does the negligent workman, shiftboss or supervisor have in assessing the penalty against the defendant corporation?

In terms of guilt or innocence, clearly none.

Tallis J., as he then was in **R. v. Echo Bay Mines**, W.W.R. [1977] Vol. 1 at 231, dealt with a similar situation. In that case, a worker entered a storage bin without wearing a safety line in violation of 201(1) of the Mining Safety Rules. Additionally, no second person was present. He died. In reversing an acquittal of the corporate defendant, Tallis J. quoted with approval Maxwell on the **Interpretation of Statutes**, 11th ed., p. 183 citing Lord Wright in **Wilsons & Clyde Coal Co. Ltd. v. English** [1938] A.C. 57:

> "The employer's duty to maintain a safe system of working is applicable -- perhaps even a fortiori -- to the positive duty on the employee created by the subsection:
>
> > 'I think the whole cause of authority consistently recognizes a duty which rests on the employer ... to take reasonable care for the safety of his workmen ... and whether or not the employer takes any share in the conduct of the operations.'"

Tallis J. went on to say:

> "In my opinion the contributory negligence of the deceased Thomas Hare is not a defence to the charge."

This position is echoed in Ontario Ministry of Labour v. Helmer Pedersen Construction Ltd. by Loukidelis DCJ (unreported February 1, 1990) who stated:

> "In my view hiring a competent foreman or superintendent is not the end of a company's responsibility. There must be, in situations where there are safety regulations, to see that the supervisory staff are aware of their responsibilities and fulfill their duties in that respect." (my emphasis)

In that case, a truck driver/sub-contractor operating under power lines was electrocuted when his dump box came into contact with overhead power lines. He was experienced and knowledgeable -- and apparently negligent. The defendant was fined $12,000.00.

Is it a factor in sentencing?

Contributory negligence in mitigation of sentence in criminal cases involving human defendants has been considered albeit with no clear cut direction at this time. In R. v. Dash (1948) 91 C.C.C. 187, the accused shot his brother with a rifle. The Nova Scotia Court of Appeal stated with respect to the accused's misconduct that:

> "... it should not be overlooked that the negligent act of the injured brother in going in a direction contrary to the one in which it had previously been agreed between himself and the accused that he would go, caused the accused to make a negligent mistake that he would not otherwise have made. While contributory negligence is not a defence, it is on the facts here a matter for consideration in determining sentence."

[See also R. v. Longbottom (1848-50), 3 Cox. C.C. 439 and R. v. Mitchell (1981), 29 Nfld. & P.E.I. R. 125 (P.E.I.C.A.)]

It is, in my view, open to consider contributory negligence in assessment of penalty in that it is relevant to the blameworthiness

or criminality of conduct of the defendant and therefore to sentence. I recognize that this must be done carefully so as not to detract from the overall responsibility of the corporate defendant to comply with the law, but just as importantly not to penalize a corporation for acts or omissions of an employee who deliberately ignores or frustrates the corporation's efforts in that regard. Safety and compliance with the law is in this regard a cooperative matter. (See particularly R. v. Esso Resources where this is precisely what occurred.)

On the facts, it appears to me that the non-compliance demonstrated in this case involved employees at numerous echelons. The incident occurred as a result of the cumulative effect of many breaches at a variety of levels. The conditions were allowed to persist and worsen by the direct workers involved and the supervisory staff. It was a failure throughout the system. I am of the opinion that Giant, while responsible in law overall, is not wholly to blame on the facts, and the presence of contributory negligence is a relevant factor to consider in mitigation.

Mr. Michael Gross, Vice-President of Royal Oak Resources which now owns and operates Giant Yellowknife Mines, was present and testified as to the initiatives and efforts by the new management to address the problems that led up to this contravention. A full review of Giant's operations has been conducted by him, and policy has been redrafted to make safety considerations of primary importance even though it may interfere with operations. Fire drills have been analyzed with reorganization being undertaken together with updated training and the purchase of necessary equipment; spot checks of operations by upper level executives has been instituted to ensure compliance with all corporate rules and Mine Safety Regulations; training programs are being instituted to drive home to supervisors their particular responsibilities under

the **Mine Safety Act**. In addition, record keeping of employee skills and qualifications is being modernized and made available to shift bosses. Further, Mr. Gross testified that employees who fail to live up to corporate and legal responsibilities will be subject to disciplinary action. All of these initiatives, in my view, demonstrate a positive attitude by management which presumably will filter down to all levels of the corporation's staff. The current management seems determined to inculcate in all employees the virtue and necessity of compliance with the law.

These actions, together with the fine I intend to impose, will I hope achieve the sentence goal of encouraging compliance with the law and general deterrence. I have considered as well the other factors commonly involved in the assessment of penalty in dealing with corporate defendants generally.

Balancing all of these factors and taking into account the position of the Crown, I assess a penalty of $4,500.00, in default distress.

Judge R.M. Bourassa