2011 NWTTC 08
Date: 2011 03 02
File: T1-CR-2009-000851

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

CARTER INDUSTRIES LTD.

REASONS FOR SENTENCE
of the
HONOURABLE CHIEF JUDGE ROBERT DAVID GORIN

Heard at:	Yellowknife, Northwest Territories January 7, 2011
Reasons Filed:	March 2, 2011
Counsel for the Crown:	J. Cliffe
Counsel for Carter Industries Ltd.:	S. Eichler

[s. 22(1)(a) of the *Safety Act*]

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Introduction

[1] On January 7, 2011, the accused corporation, Carter Industries Ltd. (Carter), pleaded guilty to one of 25 counts alleging offences contrary to the *Safety Act*, R.S.N.W.T. 1988, c. S-1, as amended. The charge, to which Carter pleaded guilty, stated that Carter:

> On or about the 3rd day of June, 2008, at or near the 5B Spillway Bridge, at the Snare Hydro facility of Northwest Territories Power Corporation, near Behchoko, in the Northwest Territories, being an employer, did unlawfully fail to take all reasonable precautions and carry out all reasonable techniques and procedures to ensure the health and safety of every person, including T.M., in its establishment, to sit: the 5B Spillway Bridge north abutment upgrade project site, at Snare Hydro facility of Northwest Territories Power Corporation, near Behchoko, in the Northwest Territories, by using insufficiently weighted link chain to raise the north end of the 5B Spillway Bridge, in violation of section 4(1)(b) of the Safety Act, R.S.N.W.T. 1988, c. S-1, as amended, and did thereby commit an offence contrary to section 22(1)(a) of the Safety Act, R.S.N.W.T. 1988, c. S-1, as amended.

[2] After the guilty plea was accepted, the 24 remaining counts against Carter were stayed by the Crown. The sentence I imposed was a fine in the amount of

$55,000 plus victims' of crime surcharge of $8,250. I advised written reasons would be provided. My reasons are set out in the following paragraphs.

The Facts

[3] An agreed statement of facts was provided to the court by counsel. For the purposes of these reasons, the essential facts are:

a) T.M. was an Employee of Carter Industries. He had received safety training from the Northwest Territories Power Corporation (NTPC) in a number of areas. NTPC hired Carter to upgrade a bridge at one of its Hydro facilities. Specifically, Carter was hired to repair the structure of the north end of the bridge, which had deteriorated over time.

b) In order to carry out the work, the north end of the bridge was to be raised and held in place by a temporary structure. While the end of the bridge was raised, a permanent structure was to be installed, onto which the bridge would then be lowered.

c) NTPC had not provided Carter with a manual on how to perform the upgrade.

d) A year prior to the date charged, Carter had successfully completed work of an identical nature on the south end of the bridge and raising it with heavy duty equipment.

e) On the date charged, Carter conducted a safety meeting before beginning work on the project. The meeting was attended among others, by T.M., two NTPC employees, and an employee of another company, which had been contracted by NTPC to provide site supervision services at the worksite.

f) After the safety meeting, Carter followed the same procedure to carry out the work on the bridge's north end as it had the previous year on the south end of the bridge. Using a front-end loader and an excavator, both owned by NTPC, and two lengths of 3/8" chain supplied by NTPC, Carter set out to raise the bridges' north end. The first attempt to raise the bridge was unsuccessful. A second attempt followed during which the bridge was lifted 2 to three inches. T.M. began to place a wooden beam underneath the bridge when the chain broke, causing the bridge to fall on T.M.'s right foot.

g) The chain used in raising the bridge was not sufficiently weighted.

h) T.M. was provided with first aid by an NTPC employee. He was flown to Yellowknife, where he was hospitalized approximately 2 hours after he suffered his injury.

i) Due to the extent of his injury, T.M.'s right leg was amputated below his right knee.

j) Carter fully cooperated with the employees of the Workers' Safety and Compensation Commission of the Northwest Territories and Nunavut, who investigated the matter. Carter then implemented additional training

programs and safety protocols in order to avert any similar incidents in the future.

[4] In dealing with the facts of the offence, it is also important to note that Mr. Cliffe, on behalf of the Crown, advised that he was not alleging recklessness or gross negligence on the part of Carter. Rather, Mr. Cliffe described the incident giving rise to T.M.'s injuries as an accident. I find the Crown's position appropriate given the facts I have before me.

Analysis

[5] The maximum penalty provided for under s. 22(2) of the *Act* is a maximum fine of $500,000 and/or one year in jail. Counsel jointly submitted that a fine of $55,000 plus a victims' of crime surcharge of $8,250 would be appropriate. I accepted the joint submission since I found it to be fit and found no compelling reason to depart from it.

[6] The paramount principle in regulatory matters such as these is deterrence, both specific and general. In the often cited case of *R. v. Cotton Felts Ltd.*, [1982] O.J. No. 178, 2 C.C.C. (3d) 287, 8 W.C.B. 447 (O.C.A), the Ontario Court of Appeal dealt with an offence similar to the one committed by Carter. Beginning at the final sentence of paragraph 18, Blair J., on behalf of a unanimous court, stated:

> Sentencing for this type of offence cannot be achieved by rote or by rule. In every case it is the responsibility of the sentencing judge to impose a fit sentence, taking into account the factors upon which I now propose to comment.
>
> 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 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.

[8] I agree with Crown counsel that given the facts of the case before me a fine which is more than nominal but not harsh is appropriate. The penalty imposed must be substantial to the extent that it will not be seen as a mere cost of doing business in an illegal manner. Given what I have heard about Carter's financial means, I find the amount of the fine and surcharge suggested by both counsel to be reasonable. As well, Carter has no record of prior convictions. The guilty plea to the charge was entered after the Accused had previously pleaded not guilty. However, I have considered that the guilty plea was entered well before the matter was set down for trial.

[9] I find the joint submission to be appropriate given the lesser degree of the moral culpability possessed by the offender when committing the offence. However, I do not accept the suggestion that Carter's culpability is mitigated because it had done similar work on the south end of the bridge the prior year without mishap. The natural reply to such an argument is that it may well have been that Carter was simply lucky throughout this prior occasion. If, as stated in

the agreed facts, the chain was insufficiently weighted, this would seem to quite likely have been the case. However, as ultimately submitted by Carter's counsel, it is impossible to answer the question with certainty one way or the other.

[10] I agree with the submissions of Carter's counsel to the extent that if, as a result of having carried out similar work the prior year, Carter had become aware of the risk and then subsequently carried out similar work without modifying its procedures, Carter's moral culpability would have been far greater. Still, the mere absence of an aggravating factor is not the equivalent of a mitigating factor.

[11] Having said that, I find that Carter did not have knowledge of the risk it ran when it used the chain, which it later discovered to be insufficiently weighted. I have also taken into account that NTPC had not provided Carter with a manual to perform the work.

[12] Also, as pointed out by Carter's counsel, Carter's conduct since the date of the offence has been positive. It has implemented additional training programs and protocols to lessen the risk of similar incidents in the future.

[13] I have not overlooked the severe nature of the injuries suffered by T.M., their tragic consequences, or the overall impact, which the incident has had on T.M. However, as previously stated, I must bear in mind that Carter was not reckless or grossly negligent in its conduct.

[14] In sentencing the offender on the within regulatory offence, I am not able to deal with the issue of appropriate compensation to T.M. for his injuries or

their consequences. This question of compensation is one that must be answered through a separate process.

[15] It is for the foregoing reasons that I have accepted counsels' joint submission on an appropriate sentence.

Robert D. Gorin
C.J.T.C.

Dated at Yellowknife, Northwest Territories
This 2rd day of March, 2011.

R. v. CARTER INDUSTRIES LTD.

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