

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**- and -**

**ALLEN SERVICES & CONTRACTING LTD.**

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**REASONS FOR SENTENCE  
of the  
HONOURABLE JUDGE GARTH MALAKOE**

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Heard at: Inuvik, Northwest Territories

Date of Decision: February 20, 2018

Date of Sentencing: December 5, 2017  
Submissions:

Counsel for the Crown: Roger Shepard

Counsel for the Accused: Robert O'Neill

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

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**A. INTRODUCTION**

**A.1 The Accident**

[1] On June 28, 2016, David Vinnicombe was employed by Allen Services & Contract Ltd. (“Allen Services”). Mr. Vinnicombe was operating a vibrating roller packer, a piece of heavy mobile equipment, which was being used to compact a new access road near the town of Inuvik in the Northwest Territories. The packer rolled over off of the road onto its side. Mr. Vinnicombe either fell or attempted to jump out of the packer as it was rolling over. The packer rolled over on top of Mr. Vinnicombe and he was killed.

**A.2 The Charge**

[2] Allen Services has entered a guilty plea for failing to ensure that Mr. Vinnicombe was properly supervised.

[3] In particular, Allen Services is being sentenced with respect to the following charge:

On or about the 28th day of June 2016, on a work site, being an access road to the Inuvik Satellite Station Facility, near Inuvik, in the Northwest Territories, being an employer, did unlawfully fail to ensure that work was sufficiently and competently supervised, in particular the work by David John Vinnicombe, in violation of section 16(1)(a) of the *Occupational Health and Safety Regulations* R-039-2015, as amended, and 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.

[4] On December 5, 2017, I heard submissions from the lawyers for the Attorney General of the Northwest Territories and Allen Services. Renee and

Robbie Vinnicombe, the parents of David Vinnicombe, attended via a television link and presented their Victim Impact Statements in Court. The lawyers jointly suggested that Allen Services should pay a fine of \$100,000. I reserved my decision until today.

[5] For the reasons set out in this decision, I have accepted the joint submission of the lawyers for the Attorney General of the Northwest Territories and Allen Services.

### **A.3 Organization of Decision**

[6] This decision is organized as follows. First, the applicable legislation is set out. Then, there is a discussion about how a Court deals with a joint submission regarding a proposed sentence. The principles of sentencing with respect to this type of regulatory offence are explained and then examined individually in the context of the facts of this case. The Agreed Statement of Facts provided by Crown and defence will be attached as Appendix “A” to the written version of this decision.

## **B. DESCRIPTION OF APPLICABLE LEGISLATION**

[7] The *Safety Act*, R.S.N.W.T. 1988, c.S-1, as amended is Northwest Territories legislation dealing with worker safety.

[8] The *Occupational Health and Safety Regulations*, R-039-2015, as amended (the “Regulations”) are made under the *Safety Act*. Section 16(1)(a) of the Regulations states:

16. (1) An employer shall ensure that, at a work site,
- (a) work is sufficiently and competently supervised;

[9] Section 22 of the *Safety Act* contains the charging and penalty provision:

22. (1) Every employer or person acting on behalf of an employer or person in charge of an establishment is guilty of an offence who

- (a) contravenes this Act or the regulations;

(2) Every employer or person acting on behalf of an employer or person in charge of an establishment who is guilty of an offence under this Act or the regulations is liable on summary conviction to a fine not exceeding \$500,000 or to imprisonment for a term not exceeding one year or to both.

[10] Section 22(6) of the *Safety Act* directs that any fine imposed under the Act goes to the Workers' Safety and Compensation Commission of the Northwest Territories (the "WSCC"):

22 (6) Every fine imposed under this Act shall, when collected, be paid over to the Commission and form part of the Workers' Protection Fund established under the *Workers' Compensation Act*.

[11] Pursuant to section 12(1)(a) of the *Victims of Crime Act*, R.S.N.W.T. 1988, c.9 (supp.), as amended and section 2 of the *Victims of Crime Regulations*, R-013-92, there is a 15% victim of crime surcharge with respect to each fine imposed under an act of the Northwest Territories.

[12] Section 12(3) of the *Victims of Crime Act* states:

12. (3) A judge may waive or reduce the surcharge where
- (a) the judge has convicted a person of an offence under an enactment; and
  - (b) the person establishes to the satisfaction of the judge that the surcharge would result in undue hardship to the person.
- (4) Where the judge waives or reduces the surcharge, the judge shall
- (a) provide reasons why the surcharge is being waived or reduced; and
  - (b) enter the reasons in the record of the proceedings or, where the proceedings are not recorded, provide written reasons.

### **C. THE SIGNIFICANCE OF A JOINT SUBMISSION**

[13] As I indicated earlier, the Crown and defence have made a joint submission that the sentence should be a \$100,000 fine. In deciding whether or not to accept the lawyers' joint recommendation, the Court must follow the direction of the Supreme Court of Canada. In short, the Court has to recognize that a joint submission is normally the result of a negotiation process between lawyers which includes an assessment of the relevant statutory and case law, an assessment of the strength of the Crown's case and the relevant sentencing decisions in this and other jurisdictions. In so recognizing the importance of this negotiation process to the administration of justice, the Court then must normally defer to the joint submission which is the result of this process. There are situations, however, where a joint submission should not be accepted, i.e., when it is outside the bounds of what the Court can accept. These bounds have been established by the Supreme Court of Canada.

[14] In *R. v. Anthony-Cook (2016) SCC 43*, the Supreme Court of Canada stated that a trial judge should use the following test when determining whether or not to follow a joint submission:

32 “Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest...”

[15] The Court goes on to elaborate on the meaning of this test:

33 ...a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so “markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system”. And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19 (CanLII), at para. 56, when assessing a joint submission, trial judges should “avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts”.

[16] Accordingly, I must ask myself if the penalty being proposed is so markedly out of line with the expectations of reasonable persons aware of the circumstances of this case involving Allen Services and the tragic death of David Vinnicombe that they would view a fine of \$100,000 as a break down in the proper functioning of a justice system dealing with a regulatory offence. Given this test, if the proposed \$100,000 fine is in the range of what can be considered reasonable, I must accept the joint submission.

[17] In answering the question, the Court must review the principles involved in sentencing a corporation of this type of regulatory offence and apply them to the circumstances of this case.

#### **D. SENTENCING PRINCIPLES**

[18] In *R. v. GNWT (DOT) and Grizzly Marine Services Ltd.*, 2014 NWTTC 17, I spoke about the need to protect the public and more specifically workers in the Northwest Territories. Protection of the public is achieved by imposing a penalty which will denounce the offending behaviour; which will deter Allen Services from similar offences in the future (specific deterrence); and which will deter other employers from committing similar offences (general deterrence).

[19] Ultimately, the imposition of a significant fine will deter future offences and encourage a culture of safety. It is this behaviour modification which is the ultimate goal.

[27] In the context of sentencing individuals for criminal offences, the fundamental purpose of sentencing is that of proportionality, i.e., the sentence is proportionate to the

gravity of the offence and the degree of responsibility of the offender. In the context of public welfare legislation such as the *Safety Act*, an offender does not have to have *mens rea* or a “guilty mind” as is required in a criminal offence. An offender can be reckless or negligent or fail to be duly diligent. Although the seriousness of the offence and the responsibility of the offender play a role in sentencing for a *Safety Act* offence, the sentencing goal is not retribution; it is behaviour modification of the corporate entity.

[20] There is nothing that this Court can do which will replace the loss of David Vinnicombe. The loss of his life could have been prevented. The process of the investigation of the accident; the laying of charges under the *Safety Act*; the assessment of the evidence by Crown and defence counsel; the negotiation of a joint submission with respect to which charges should be withdrawn and what the fine should be; ends with this Court imposing a fine on Allen Services. The fine has to be substantial enough that it is not simply an “economic cost of doing business.” It has to be significant enough that Allen Services and every employer should evaluate and if necessary, change their safety practices to avoid the possibility of such a fine in the future.

[21] In my view, and for the reasons set out in *R. v. GNWT (DOT) and Grizzly Marine Services Ltd., supra*, the factors which determine the quantum of the fine necessary to achieve the objectives of deterrence and behaviour modification are the following:

- (a) What was the nature of the offence? Was the activity risky? Was the result foreseeable? Was the offending action integral to the operations of the enterprise? Did the enterprise profit from the offending action?
- (b) What is the nature of the offender? What is the size of the enterprise in terms of number of employees, number of physical locations and economic activity?
- (c) What was the degree of blameworthiness of the offender?
- (d) What is the ability of the offender to pay a fine? How will a fine affect the enterprise?
- (e) What is the maximum fine under the legislation?
- (f) What is the range of fines for similar offences and similar offenders in the Northwest Territories?
- (g) What is the previous history of the enterprise with respect to this legislation?

- (h) What is the extent of injuries, if any, suffered by the worker? What was the potential harm of the offending activity to the workers?
- (i) What, if any, is the contributory negligence of the injured worker?
- (j) What is the post offence conduct of the enterprise? Were they cooperative with the authorities in investigating the incident? Was there a guilty plea? Were there changes in the operations of the enterprise as a result of the incident? Did high level management of the enterprise attend the sentencing hearing?

[22] Let me review these factors in the context of Allen Services and the accident of June 2, 2016.

## **E. APPLICATION OF FACTORS**

### **E.1 Nature of Offence**

[23] On June 28, 2016, David Vinnicombe was operating the Ingersoll Rand vibrating roller packer to compact the new access road. Mr. Vinnicombe had 150 hours of experience operating the packer prior to the date of the accident. There is no evidence before the Court that the packer was defective in any way or that the work being done with the packer was other than routine.

[24] The dangers associated with the operation of a packer in such a situation are obvious. Given the size and weight of this piece of heavy equipment, the packer poses a danger to two groups of people. First, people who are not operating the packer but who could come in contact with the packer and second, the operator of the packer. With respect to the operator of the roller, there is a recognized danger that the packer can roll over. Therefore, it is equipped with a rollover protection structure.

[25] There are three warning labels on the roller. All have drawings depicting the packer rolling over with the operator out of the protective structure. Two of the labels state:

Rollover of this machine can cause severe injury or death.

Do no operate this machine near or on an inclined surface. A rollover can occur.

With a Rollover Protection Structure (ROPS), seat belts must be worn to avoid severe injury or death from being thrown out.

[26] The other one states:

Warning. Avoid crushing. Do no jump if machine tips. Buckle up.

[27] It is clear that at the time of the accident, Mr. Vinnicombe was not wearing his seatbelt. Given that the seatbelt was tucked in between the frame of the seat and the retractor portion of the seat belt assembly, it appears that the seatbelt had not been used during that shift. There is no evidence before the Court that anyone, supervisor or otherwise, from Allen Services ever told Mr. Vinnicombe that he should wear his seatbelt.

[28] The presence of these warning labels is clear evidence that a rollover on an inclined surface is a recognized risk of operating the packer. The specific warnings indicate that the possibility of a rollover occurring and the operator getting crushed if he or she is not wearing a seat belt was completely foreseeable at the time of the accident. In fact, a rollover appears to be the most likely danger faced by the operator of the packer.

[29] It is hard to imagine what instructions could be given to an operator of this type of packer which did not address the possibility of a rollover. It is hard to imagine supervision which did not focus on the possibility of a rollover.

[30] David Vinnicombe should have been instructed to wear a seatbelt when operating the packer. If he had been competently and sufficiently supervised, his supervisor would have ensured that he was wearing a seatbelt at the time of the accident and that the packer was not operated “near or on an inclined surface.”

[31] Allen Services has, since the accident, changed its policies so that workers must wear their seatbelts when operating all mobile power equipment. There is no evidence that the failure of Allen Services to enforce the wearing of seatbelts prior to the accident was for the purpose of economic gain.

[32] Although there is no evidence that the operation of a packer is inherently dangerous, the possibility of a rollover and injury to the operator was foreseeable. The failure to address this in operator instruction and supervision is a serious omission.

## **E.2 Nature of the Offender**

[33] Allen Enterprises is a relatively small privately-held corporation, incorporated in the Northwest Territories with employees in the Northwest Territories and in Alberta. The corporation is owned by members of the McCarthy family and run by Brian McCarthy Sr. and his brother, Vince McCarthy. In the last three years, the number of employees in the Territories was 15 in 2015; 12 in



2016 and 4 in 2017. There is a small office staff in Alberta. In 2016, the total revenue was \$2,500,000. In 2017, the total revenue was slightly over \$1,000,000.

### **E.3 Degree of Blameworthiness**

[34] In assessing the blameworthiness of Allen Services, I recognize that this was not a situation where the corporation was taking chances to make money. It is a situation, however, where a young man with no formal training was put in charge of operating a piece of heavy equipment. The operation of the packer carried with it the danger of a rollover. Yet as mentioned earlier, the most likely danger to the operator of a roller was not addressed in operator instruction or supervision.

[35] Further, operation of heavy mobile equipment is the livelihood of Allen Services. The use of a packer to compact a road surface was not an unusual activity with which Allen Services did not have experience. To the contrary, instruction and supervision with respect to the safe operation of the packer and all heavy mobile equipment should have been integral to the company's operations.

### **E.4 Capacity to Pay a Fine**

[36] Counsel for Allen Services and the Attorney General did not provide the Court with an indication of the profit of the enterprise during 2016 and 2017. I am satisfied, given the total revenue, of \$2,500,000 and \$1,000,000 in 2016 and 2017, that a fine of \$100,000 is a significant amount and has a substantial deterrent effect on the corporation.

### **E.5 Maximum Fine under the Legislation and Range of Fines**

[37] The maximum fine under the *Safety Act* is \$500,000. In see *R. v. GNWT*, unreported decision, NWTTC, March 25, 1998, the GNWT received a fine of \$220,000 as a result of an accident where a worker was killed when a bulldozer backed over him in the eastern Arctic. In *R. v. Carter Industries Ltd.*, 2011 NWTTC 08, a worker's leg had to be amputated after a chain broke and a bridge fell on him. The corporation was fined \$55,000 after a joint submission from Crown and counsel for the corporation.

[38] In *SSI Micro Ltd.*, an unreported decision of the Territorial Court, the company received a \$150,000 fine for failing to supervise two workers who were moving a telecommunications tower which touched a high-voltage overhead power line. The workers were electrocuted. The offence was under section 124 of the *Canada Labour Code* which carries a maximum fine of \$1,000,000.

[39] I am satisfied that the proposed fine of \$100,000 is within the range of fines normally imposed for this type of offence under the *Safety Act*.

## **E.6 Previous Convictions**

[40] Allen Services has no history of safety or other regulatory infractions.

## **E.7 Harm and Potential Harm**

[41] David Vinnicombe died as a result of being crushed by the protection structure of the packer. Had he been wearing his seat belt, he would likely have been held within the protection structure and the structure would have protected him during the rollover, as it was designed to do.

[42] An onsite supervisor could have and should have ensured that Mr. Vinnicombe was wearing his seat belt. The offending activity contributed to his death. There are risks in working with and around heavy mobile equipment. The potential harm is always high given the size of the machines. In this case, the rollover resulted in the death of David Vinnicombe.

## **E.8 Contributory Negligence**

[43] David Vinnicombe should have been wearing his seat belt when he was operating the packer. I have to assume that he saw the warning labels to which I have referred earlier and which were prominently affixed to the packer. He chose not to wear his seat belt. The labels also referred to the danger of operation the packer on an inclined service.

[44] Mr. Vinnicombe had 150 hours of experience on the packer. There is no evidence that he was instructed to wear his seat belt. There is no evidence that the use of seat belts on mobile power equipment was ever required by Allen Services until after the accident. It is simplistic to say that David Vinnicombe should have known to wear his seat belt. He was a young man. He would have relied on those who worked with him and on those who supervised him. That no one else was wearing a seatbelt coupled with his inexperience and youth could have simply resulted in him believing that there was no real possibility of a rollover.

[45] For the same reasons, it is simplistic to say that the law requires people in cars and trucks on the highway to wear seatbelts; therefore, Mr. Vinnicombe should have known that he should wear a seatbelt while operating the packer.

[46] There is one other point that was raised in submissions by counsel for Allen Services. His office had spoken to Graham Jones, the chief toxicologist from the Office of the Chief Medical Examiner. Dr. Jones stated that the levels of THC in

Mr. Vinnicombe's blood indicated that Mr. Vinnicombe had consumed hashish or marijuana in the "previous few hours" before the accident. This was not evidence that was properly before the Court and even it was, this evidence does not establish that cannabis consumption had anything to do with Mr. Vinnicombe's death.

[47] I accept that there may have been an issue that could have been raised by defence had this matter gone to trial. Therefore, I accept that it may be one of the background matters which was part of the negotiations which led to the joint submission.

### **E.9 Post-Offence Conduct**

[48] When reviewing the post offence conduct of the Allen Services, I have been reminded that Allen Services spent \$37,181.84 to fly the Vinnicombe family to Inuvik on more than one occasion after the accident and created and installed a memorial to David Vinnicombe. Allen Services cooperated with the WSCC investigation.

[49] It is a mitigating factor on sentence that Allen Services has entered a guilty plea. Further, the presence of Brian McCarthy at the sentencing hearing is significant. Mr. McCarthy is an owner of the company. This is not a situation where a corporate entity is being sentenced in the absence of the people who actually run the company.

### **E.10 The Balancing of Factors**

[50] The balancing of the above-noted factors to determine an appropriate sentence is not a mechanical process. There is an interdependence among the factors. Together, these factors provide the description of the offender and the offence necessary for sentencing. Each factor cannot be considered in isolation from the other factors; nor does one factor override all others. In the end, all of the factors have to be considered to determine a penalty which will satisfy the sentencing objectives of deterrence and public denunciation given the offence and the offender before the Court.

## **F. THE FEBRUARY 8, 2018 LETTER**

[51] The Court received a letter dated February 8, 2018 from Robbie Vinnicombe and Renee Vinnicombe. A copy of the letter was provided to both legal counsel shortly after it was received. I asked legal counsel how the contents of the letter could be used by the Court and I received their submissions in this regard.

[52] Let me first acknowledge that I have read the letter. The letter and the Victim Impact Statements of Mr. and Mrs. Vinnicombe express clearly the parents' heart break as a result of the tragic death of their son and their dedication to preventing a similar death in the future. Mr. and Mrs. Vinnicombe are clear in their letter. They disagree that Allen Services should pay a \$100,000 fine. They disagree that the Attorney General should have withdrawn the eight other charges against Allen Services. They feel that a packer with an open cab such as the one that David Vinnicombe was driving should never be used in the North. They feel that there should have been a Coroner's inquest into the death of their son.

[53] Mr. and Mrs. Vinnicombe deserve a response to their letter although I recognize that my response will not ease their pain or give them what they have asked for. I know that Mr. and Mrs. Vinnicombe have legal counsel in Canada. If my explanation is not clear, they can certainly obtain further explanation from their counsel, if they have not already. The Court is dealing with this sentencing because the Attorney-General of the Northwest Territories has charged Allen Services with offences under the *Safety Act*. The Attorney-General has the power to lay these charges. The Attorney-General has the power to withdraw the charges. The Court must deal with the sentencing of the charge before it based on the statute and the case law and taking into account the facts as presented by counsel for the Attorney-General and the counsel for Allen Services.

[54] This Court has no jurisdiction to order an inquest. It has no jurisdiction to change the statutes and regulations dealing with the types of equipment that can be operated in the Northwest Territories. The Court has to deal with a guilty plea based on an agreed set of facts for which a joint proposal for sentence has been submitted.

## **G. SENTENCE**

[55] This Court recognizes the importance of deterrence and public denunciation in sentencing for offences under the *Safety Act* and has considered the factors indicated above. For the reasons that I have stated, the Court will accept the joint submission being suggested by the Attorney General and the lawyer for Allen Services.

[56] Allen Services shall pay a fine of \$100,000. Given the currently economic state of Allen Services, I am satisfied that the payment of the victim of crime surcharge would result in undue hardship to the company and therefore waive the surcharge.

[57] The deadlines for payment of the fine are as follows:

- (a) \$25,000 to be paid by February 27, 2018;
- (b) \$25,000 to be paid by June 5, 2018;
- \$50,000 to be paid by December 5, 2018.

Garth Malakoe  
T.C.J.

Dated at Inuvik, Northwest  
Territories, this 20<sup>th</sup> day of  
February, 2018.

## Appendix “A”

### **Agreed Statement of Facts**

For the purpose of dispensing with the proof thereof, the accused, Allen Services & Contracting Ltd. (hereinafter “Allen Services”), does hereby agree to the following facts:

1. On or about May 10, 2016, Allen Services had been contracted by Public Works and Government Services Canada to complete construction work on an addition to the Inuvik Satellite Station Facility Access Road Project located near the town of Inuvik, Northwest Territories. Allen Services was to construct an all-weather main access road between the Dempster Highway to the Inuvik Satellite Station Facility. The access road was to be approximately 5.5 metres wide, with the ability to widen the road in the future, and with crushed rock to be spread as the top layer of the road. The value of the contract was \$1,197,012.80 (GST Included).
2. On or about June 28, 2016, Allen Services was the employer of David John Vinnicombe and a small number of other employees who were working on the construction of the access road. On that date, Allen Services was engaged in constructing the access road to the Inuvik Satellite Station Facility (hereinafter the “Work Site”).
3. Allen Services unlawfully failed to ensure that the work being completed by David John Vinnicombe, on June 28, 2016, was sufficiently and competently supervised.
4. David John Vinnicombe was 19 years of age and would have turned 20 years of age on July 14, 2016. He was born and raised in Longreach, Australia and had been living and working in Inuvik for less than a year up until June 28, 2016. He had been employed by Allen Services since October of 2015.
5. He was initially employed as a general labourer when he began work with Allen Services. He worked for some time in Allen Services’ shop in Inuvik performing tasks such as sweeping and cleaning up the shop, moved into servicing and repairing machinery and equipment and began to operate powered mobile equipment such as a lift and loader in the shop yard and eventually the Packer, described below. Mr. Vinnicombe operated the Packer for an estimated 75 hours in February and March, 2016 during Phase

- 1 of the construction of the all-weather access road and again between June 15 and June 28, 2016 at the Work Site for an estimated 75 additional hours.
6. On June 28, 2016, David John Vinnicombe and other Allen Services employees met at the shop belonging to Allen Services in Inuvik where they held an informal tailgate meeting where they discussed their daily schedule and such things as the number of trucks that would be on the worksite, the area being used to load the trucks with material, where it was going to be dumped, etc. At that time, there was no formal documentation with respect to the informal tailgate meeting and no identification of job hazards had been done on that day or any time prior with respect to identifying and making employees aware of any specific hazards in respect of the work they would be performing at the Work Site. There was a general discussion regarding the necessity to perform radio call outs when going in and out of the pit area and the T-intersection at the Work Site.
  7. Shortly after 8:00 am on June 28, 2016, the employees left the shop and proceeded to the Work Site to work on construction of the access road. At approximately 3:10 pm, at the head of the under-construction access road at the Work Site, a D6 Cat bulldozer (hereinafter the “Push Cat”) and an Ingersoll-Rand vibrating roller packer (hereinafter the “Packer”) were present. These were used to compact the new access road while four dump trucks hauled and dumped the necessary materials at the location.
  8. The Push Cat was used to push and level the construction materials dumped by the trucks while the Packer was used to compact the freshly pushed materials. In order for the dump trucks to safely empty their loads of material, the road must be clear of equipment so the truck drivers are able to back-up their loaded trucks to the immediate work area. This required the Push Cat and the Packer to be out of the way of the dump trucks.
  9. At approximately 3:10 pm that day, a new load of material was to be delivered by a dump truck. To provide the necessary room, the operator of the Push Cat parked in a newly constructed truck turn around spot while the Packer was on the opposite side of the road.
  10. David John Vinnicombe was operating the Packer at this time in a forward motion and was finishing rolling over some previously dumped and spread material. When he came to the end of the material, he stopped the Packer and was backing up to make another pass. At this time, the Packer got too close to the edge of the under-construction road which was raised from the ground below. Although Mr. Vinnicombe attempted to stop, the Packer rolled over off of the road onto its side.

11. The operator of the Push Cat observed Mr. Vinnicombe either fall or attempt to jump out of the Packer as it was rolling over. However, the Packer unfortunately rolled over on top of Mr. Vinnicombe, with the open rollover protective structure landing on Mr. Vinnicombe, at which time the weight and force of the Packer caused lethal injuries and he was pronounced dead on the scene. The cause of death was determined to be from lethal blunt force type injuries, with the most significant injuries including a large fracture at the skull base and bilateral rib fractures.
12. A series of eight photographs are attached with [sp.] show the location where the roll over occurred along with the Packer that was being operated by Mr. Vinnicombe at the time. The first six photographs were taken on June 28, 2016 by a Safety Officer appointed under the *Safety Act*. The last two photographs were taken on July 1, 2016 by a Safety Officer and show the Packer in an upright position. [Note: These photographs are not included in the sentencing decision.]
13. The Packer did have an open rollover protective structure along with a seatbelt. The seatbelt was designed to prevent the operator from being thrown outside of the protective structure where Mr. Vinnicombe was seated while operating. The Packer, including the rollover protective structure, was original as manufactured. It was a requirement that the employer, Allen Services, ensured that all employees, including Mr. Vinnicombe, used a seatbelt when operating powered mobile equipment of this nature. The Packer was a piece of powered mobile equipment. Allen Services did not ensure that David John Vinnicombe used his seatbelt when operating the Packer on June 28, 2016. At the time of the roll over, the seatbelt on the Packer was tucked between the frame of the seat and the retractor portion of the seat belt assembly which houses the belt and tongue portion of the seat belt on the left side of the operator's seat. It was not being worn by Mr. Vinnicombe at the time of the roll over.
14. Allen Services had a duty to ensure that all work being done on the Work Site was sufficiently and competently supervised. At the time of the incident, there were no supervisors on this Work Site and Allen Services failed in that duty. The supervisor for the Work Site on that day, Brian McCarthy, was at another of Allen Services' nearby work sites, approximately 1.5 miles away, at the time of the incident but was available via radio communication and had been checking in at the site from time to time during the day in question. He arrived at the Work Site shortly after the roll over after being advised of the incident via radio.
15. Allen Services was required pursuant to section 16 of the *Occupational Health and Safety Regulations* to ensure that, at a work site, all of their



supervisors have completed an approved regulatory familiarization program. The *Occupational Health and Safety Regulations* came into force on June 1, 2015. Neither Brian McCarthy, or any other supervisors employed by Allen Services, had completed an approved regulatory familiarization program as of June 28, 2016.

16. Allen Services did have an occupational health and safety program applicable to workers on the Work Site. However, the program did not have any information with respect to workers using seatbelts when operating a Packer and supervisors employed by Allen Services, including Brian McCarthy, did not have sufficient knowledge of this program. Allen Services was required by section 16 of the *Occupational Health and Safety Regulations* to ensure that all supervisors at the Work Site had sufficient knowledge of this program.
17. Although David John Vinnicombe was operating the Packer on June 28, 2016, he did not receive any formal operational or safety training or instruction from Allen Services, as required, with respect to the safe operation of the Packer. Further, David John Vinnicombe did not have any formal operational or safety training with respect to the operation of a Packer, or any other powered mobile equipment, at any time outside of his employment with Allen Services. Allen Services failed to properly evaluate, monitor and supervise Mr. Vinnicombe's skills and operation of the Packer and failed to ensure he was a competent operator of this powered mobile equipment.

Agreed to this "5<sup>th</sup>" day of December, 2017.

"Rob O'Neill"

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Rob O'Neill  
Counsel for Allen Services &  
Contracting Ltd.

"Roger Shepard"

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Roger T. Shepard  
Counsel for the Attorney  
General of the Northwest  
Territories

*R. v. ALLEN SERVICES & CONTRACTING LTD., 2018  
NWTC 03*

*Date: 2018 02 20  
File: T-1-CR-2017-000922*

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**IN THE TERRITORIAL COURT OF THE  
NORTHWEST TERRITORIES**

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**BETWEEN:**

**HER MAJESTY THE QUEEN**

**- and -**

**ALLEN SERVICES & CONTRACTING LTD.**

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**REASONS FOR SENTENCE  
of the  
HONOURABLE JUDGE GARTH MALAKOE**

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