Citation: *Yukon (Director of Occupational Health and Safety) v. Yukon Tire Centre Inc. and North 60 Petro Ltd. and Frank Taylor*, 2014 YKTC 19

Date: 20140404
Docket: 12-06231
Registry: Whitehorse

TERRITORIAL COURT OF YUKON
Before His Honour Judge Faulkner

IN THE MATTER of the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159, and the *Occupational Health and Safety Regulations*, O.I.C. 2006/178;

DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY

v.

YUKON TIRE CENTRE INC.
and NORTH 60 PETRO LTD. and FRANK TAYLOR

Appearances:

Michael Winstanley	Counsel for Director of Occupational Health and Safety
James Tucker	Counsel for Yukon Tire Centre Inc.
William McNaughton	Counsel for North 60 Petro Ltd.
André Roothman	Counsel for Frank Taylor

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): On November 15, 2011, Denis Chabot was killed when a highway tractor he was servicing rolled over him. Mr. Chabot worked for Yukon Tire Centre Ltd. and was working on a highway tractor owned by North 60 Petroleum Ltd. Around 3:11 p.m., Mr. Chabot had largely completed his work on the vehicle and so informed his supervisor. At North 60, Supervisor Frank Taylor was advised that the truck was ready, or nearly so. Yukon Tire had no lockout policy, as was required by

law, and the keys were left in the truck throughout. Indeed, the truck was started to warm it up before the job was entirely completed. Mr. Taylor drove another North 60 employee, Allan Lelievre, to the tire shop to pick up the truck. When they arrived, they found the truck running and no one around. Mr. Lelievre got into the cab. He did not do a walkaround. Mr. Taylor sat and watched. Meanwhile, Mr. Chabot came out of the tire shop to retrieve two bottle jacks that were still under the truck. As he reached under the truck to do so, the truck was driven away and Mr. Chabot's head and chest were crushed.

[2] Following an investigation, the Director of Occupational Health and Safety laid a number of charges against Yukon Tire Centre Inc., Paul Bubiak, North 60 Petroleum Ltd., and Frank Taylor. Mr. Lelievre was charged on a separate Information.

[3] The full facts of the matter are set out in my Reasons for Judgment dated January 29, 2014, 2014 YKTC 4, and need not be repeated.

[4] Those reasons were delivered following a trial after which I found Yukon Tire guilty on Count 4, which reads:

> On or about the 15th day of November, 2011, at or near the City of Whitehorse, YT, did unlawfully commit an offence as an employer by failing to develop safe, effective lockout procedures and train workers in the safe and effective use of those procedures contrary to Regulation 3.04(1) of the Occupational Health and Safety Regulations, O.I.C. 2006/178, *Occupational Health and Safety Act, R.S.Y.* 2002, c. 159.

[5] North 60 Petroleum Ltd. was convicted on Count 10 which alleged that:

> On or about the 15th day of November, 2011, at or near the City of Whitehorse, YT, did unlawfully commit an offence as an employer by failing to adequately train a worker in the safe operation and related safe work procedure of equipment to wit: a Kenworth truck contrary to Regulation 1.06(a) of the Occupational Health and Safety Regulations, O.I.C. 2006/178, *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159.

[6] Mr. Taylor was convicted on Count 13 which alleged:

> On or about the 15th day of November, 2011, at or near the City of Whitehorse, YT, did unlawfully commit an offence as a supervisor by failing to adequately train a worker in the safe operation and related safe work procedure of equipment to wit: a Kenworth truck contrary to Regulation 1.06(a) of the Occupational Health and Safety Regulations, O.I.C. 2006/178, *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159.

[7] The matter is now set for sentencing.

[8] The general principles applicable to sentencing in Occupational Health and Safety cases are well settled. As I stated in *Director of Occupational Health and Safety v. Government of Yukon, William R. Cratty and P. S. Sidhu Trucking Ltd.,* 2010 YKTC 97:

> [8] ... Sentences must be sufficient to act as a general deterrent. Fines should not be such as to be regarded simply as a cost of doing business. Rather, the penalties should create an incentive to comply.
>
> [9] Since *R. v. Cotton Felts Ltd.* [1982] O. J. No. 178, courts have fixed the level of fines having regard to the size of company involved, the scope of the economic activity being undertaken, the extent of

> actual or potential harm to workers or the public and the maximum fine permitted by statute. Subsequent cases have suggested regard should also be had to the defendant's prior record, the defendant's attempts to comply and the degree of intent or negligence involved.

[9] However, while stating the general principles of sentencing in such cases is easy, applying those principles to specific cases is less so. Cases involving fatalities are particularly difficult.

[10] First and, of course, most obviously, no sentence, whatever it is, can restore a lost life.

[11] Secondly, in fixing the amount of a fine, the Court is certainly not saying how much money a life is worth.

[12] I do want to thank Mr. Chabot's family and his partner, Kristy Lerch, for their participation in the proceedings. Their sharing of their loss and grief serves to remind us all of the real human cost of industrial accidents and, therefore, how vitally important it is to try and prevent them.

[13] Before turning specifically to the circumstances and considerations applicable to each defendant, I want to make a few general observations on the submissions of counsel with respect to sentence.

[14] Counsel referred extensively to other Occupational Health and Safety cases. This is entirely proper and useful, as consistency in sentencing is important. However, facts and circumstances are seldom, if ever, the same.

[15] In this case, two other matters with respect to precedents are worth mentioning. I was referred to a number of cases where the defendants were convicted on multiple counts arising out of a single accident. The fine imposed on one count was offered as a comparator since each defendant here stands convicted of only one count. However, to make such a comparison loses sight of the totality principle which serves to substantially mitigate the sentence on each count when there are multiple convictions.

[16] My other comment relates to cases where the Court accepted a joint submission. While such cases are not entirely irrelevant as precedents, their usefulness is greatly circumscribed because, in agreeing to a suggested fine, counsel have often had regard to matters quite beyond those apparent on the face of the record.

[17] Finally, I wish to comment on the issue of remorse. All of the defendants claim to be remorseful. However, I am bound to say that the claims of remorse should be assessed in light of the fact that all of the defendants pleaded not guilty, proceeded to trial, and fiercely contested each and every aspect of the case. A truer statement of the defendants' attitude might be that, while they are indeed very sorry that Mr. Chabot died, they have yet to accept that they had any role to play in what occurred.

[18] With respect to the defendant Yukon Tire Centre Ltd., I have previously noted that this employer was generally very safety oriented and tried to properly train its employees. There is absolutely nothing to suggest that here was a business that chose to flagrantly disregard safety in pursuit of production or profit, quite the contrary. Yukon Tire has no prior record of Occupational Health and Safety violations or even any administrative actions against it.

[19] However, at the end of the day, it did not have a lockout policy or train its workers in lockout procedures, as the law requires. A proper lockout policy, properly enforced, would have prevented this accident.

[20] Now, one might say that Mr. Chabot was rash in deciding to go under a running truck, but like much else that happened that day, it no doubt seemed a small thing -- a matter of moments to retrieve a forgotten tool. However, this is where the lack of policy and training become important. Workers' decisions are the product of their training, their experience, workplace policies, and real-life practices. Had there been a lockout policy, had Mr. Chabot been trained to use it, and had the use of lockout procedures been a part of the workplace culture, he may well have decided otherwise.

[21] Yukon Tire is not a large company. It has one place of business, two shareholders, employed 20 people at the time of the accident, and generates modest profits.

[22] Following the fatality, Yukon Tire acted very promptly to implement the changes required by Occupational Health and Safety, including the adoption of a lockout policy.

[23] The maximum fine that may be imposed in this case is $150,000. The Director sought a fine of $100,000. On behalf of the defendant Yukon Tire, Mr. Tucker suggested a fine of $35,000.

[24] At the end of the day and considering all of the factors that bear on the matter as best I can, I intend to impose monetary sanctions on this defendant totalling $48,750. How I came to arrive at that seemingly odd sum will be discussed later in the reasons.

[25] Turning to North 60 Petroleum Ltd., again, the Director seeks a $100,000 fine. Mr. McNaughton submitted that a fine of $30,000 would be adequate. North 60 is a somewhat larger organization than Yukon Tire and generates approximately ten times the net yearly revenues. Alaska-owned, it carries on business throughout the Yukon Territory and, no doubt, elsewhere in terms of at least procuring product, if not selling it. It has 31 employees. Still, North 60 Petro is not, as counsel noted during argument, "an INCO". Like Yukon Tire, North 60 Petro has no prior Occupational Health and Safety convictions.

[26] The situation of North 60 Petro in respect of this accident is somewhat different than that of Yukon Tire. North 60 did have a policy, i.e. a walkaround policy, that applied in the circumstances. However, as North 60 has undoubtedly now discovered, it is one thing to have a policy and quite another thing to make it a part of everyday practice.

[27] On behalf of North 60, Mr. McNaughton submitted that North 60's responsibility was less than the tire shop's since the accident did not occur at North 60's workplace; rather, it occurred at Yukon Tire's. In a narrow sense, that is true. Certainly the business of working on the truck was more under the control of Yukon Tire than North 60. However, with a piece of mobile equipment such as a highway transport truck that is used to move goods from one place to another, the workplace, and the employer's responsibilities extend to wherever the truck is sent.

[28] As I noted in the Judgment, the degree of neglect here is certainly less than would have been the case if, as the Director originally supposed, Mr. Chabot was lying

under the truck undetected when Mr. Lelievre got into it. However, the failure to do the walkaround and the resulting failure to detect the tools and the unfinished work, cost a chance to break the accident chain.

[29] As is not unusual in accidents, the accident chain here was forged by any number of persons and entities. Indeed, there were circumstances relevant to what occurred that go back years. No one acted egregiously and no one bears total responsibility for what occurred. There were a series of failures, which cumulatively led to the tragedy.

[30] Having regard to North 60's role in the overall sequence of events, which may be somewhat lesser than the tire shop's, but noting that it is a larger entity than its co-defendant, I fix the total monetary penalty to be paid by North 60 Petro at $43,000.

[31] That leaves Mr. Taylor. He also has no prior Occupational Health and Safety record. He, of course, is an employee, not an owner, and though he was a supervisor, he was certainly not very high up the chain of command. He is 57 years old, married, a father, and grandfather. He says that Mr. Chabot's death haunts him and that his upcoming retirement will, in the circumstances, begin on a very low note.

[32] On behalf of Mr. Taylor, Mr. Roothman submits that Mr. Taylor did not create the hazard here. This is absolutely true but, in the end, misses the point. A walkaround is not designed to detect the hazards you make, quite the contrary; it is intended to detect the hazards you are not aware of, ones which inevitably were created by others. Still, Mr. Taylor's role in the events was limited and he was candid enough to admit that he

sat and watched Mr. Lelievre get into the truck without doing a walkaround. He could have just as easily said he drove off immediately.

[33] The Crown sought a fine of $10,000. Mr. Roothman suggested $2,500. I intend to impose a monetary penalty of $3,000.

[34] During the course of the sentencing submissions, Mr. Roothman suggested the Court should consider something more meaningful than simply imposing fines. The Chabot family, for their part, also expressed interest in the monies doing more good than simply enriching the YTG. They suggested perhaps that monies could be donated to charity.

[35] It would have been better had this aspect of the case been better explored, but counsel had not done any leg work and it appeared that seeking better submissions on the point would result in an unacceptable delay in concluding this matter, which has already been going on for far too long. However, counsel were agreed that the Northern Safety Network should be considered, as was the case in *Director of Occupational Health and Safety v. Yukon et al*, *supra*.

[36] Accordingly, the penalties will be as follows:

[37] Yukon Tire Centre Ltd. will forfeit and pay a fine of $25,000 and a surcharge of 15 percent, or $3,750. It will further be subject to a probation order for a period of six months with the statutory terms as set out in s. 22.1(2) of the *Summary Convictions Act*, as well as an additional term requiring that the offender make a contribution of $20,000

to the Northern Safety Network within three months. The total monetary penalty therefore is $48,750.

[38] North 60 Petroleum Ltd. will forfeit and pay a fine of $20,000 and a surcharge of $3,000. In addition, it will be subject to a probation order for a period of six months requiring it to make a contribution to the Northern Safety Network of $20,000 within three months for a total monetary penalty of $43,000.

[39] With respect to Mr. Taylor, the passing of the sentence is suspended and he will be subject to a probation order for a period of six months. In addition to the statutory terms, he will make a contribution in the amount of $3,000 within three months to such charity as the Chabot family shall select and his Probation Officer will approve.

[40] To be clear, the probation orders will include the statutory terms and the contribution clause and will as well contain a clause requiring that the offender or representative thereof report to a Probation Officer within two working days and thereafter when and in such manner as the Probation Officer shall direct.

[41] Upon proof of payment of the required amounts of fines, surcharges, and contributions or donations, each offender subject to a probation order will be at liberty to apply by desk order for the immediate termination of the probation order.

[42] My intention is that the sums paid to the Northern Safety Network be used exclusively to educate those engaged in the tire, truck, and mobile equipment servicing industries in the Yukon about the importance of lockout procedures.

[43] I trust that, at the end of day, considering the costs in loss and grief, the costs of litigation, the costs of paying fines, and the costs of complying with the other orders of the Court, these defendants would now say that safety does not cost, it pays.

[44] Now, the final matter is time to pay. Mr. Tucker, you had asked for three months?

[45] MR. TUCKER: I asked for two, Your Honour.

[46] THE COURT: Two?

[47] MR. TUCKER: But more would be more acceptable, but we asked for two.

[48] THE COURT: Three months with respect to the fine, surcharge, and the contribution.

[49] Mr. McNaughton.

[50] MR. McNAUGHTON: I was going to say two months but -- I was going to say two months, Your Honour.

[51] THE COURT: Two months' time to pay.

[52] MR. ROOTHMAN: Excuse me, Your Honour. Just in respect of the election by the family as to the charity, how will that be conveyed to me or to my client? We can just set up a --

[53] THE COURT: The Probation Officer, I am assuming, will be in touch with Mr. Chabot's sister who appeared to be the family's representative, and their wishes can be expressed in that manner.

[54] MR. ROOTHMAN: The family --

[55] THE COURT: If there turns out to be some problem, we can speak to it further but I do not anticipate that there will be.

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FAULKNER T.C.J.