

Citation: *Director of Occupational Health and Safety v.
Government of Yukon, William R. Cratty and P. S. Sidhu
Trucking Ltd., 2010 YKTC 97*

Date: 20100915
Docket: 09-04203
09-04204
09-04205
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Faulkner

DIRECTOR OF OCCUPATIONAL HEALTH AND SAFETY

v.

GOVERNMENT OF YUKON, WILLIAM R. CRATTY AND
P.S. SIDHU TRUCKING LTD.

Appearances:

Lenore Morris

Judy Hartling

Andre Roothman

Brian Beresh

Counsel for the Director of Occupational
Health and Safety

Counsel for Government of Yukon

Counsel for William R. Cratty

Counsel for P.S. Sidhu Trucking Ltd.

REASONS FOR SENTENCE

[1] In 2008 a roadway in Whitehorse known as the Hamilton Boulevard Extension was being constructed by the Yukon Territorial Government, Department of Community and Transportation Services (YTG). P.S. Sidhu Trucking Ltd. was awarded the contract to construct the subgrade and a base for the road. William Cratty was Sidhu's supervisor on the project.

[2] Construction required extensive blasting to remove rock along the roadway. YTG, Sidhu Trucking and Mr. Cratty were all convicted after trial of various charges under the *Occupational Health and Safety Act* arising from an incident on May 6, 2008 when one of the blasts rained rock down on an adjacent trailer court.

[3] Sidhu Trucking hired an experienced blaster, Peter Hildebrand, to design and conduct the blasting operations on the Hamilton Boulevard Project. Unfortunately, no one properly oriented Mr. Hildebrand to the site and he conducted the May 6th blast in ignorance of its proximity to the Lobird Trailer Court. The trailer court cannot be seen from the blast site as it is uphill and screened by trees, but it was only 150 metres away when Mr. Hildebrand thought he was four to five hundred metres away from structures or people. This problem persisted despite the fact that there had been an earlier incident of rock landing in the Lobird Trailer Court after a blast and despite the fact that detailed blast design plans were being prepared and forwarded to the YTG engineer acting as the overall project supervisor.

[4] After the May 6th incident, Sidhu Trucking and Mr. Cratty did not immediately inform the Director of Occupational Health and Safety as required. The Director was informed the following day.

[5] In the result, YTG was convicted of the following offence:

Count #1: On or about the 6th day of May, 2008 at or near Whitehorse, Yukon as a constructor during the Hamilton Boulevard Extension construction project, did lawfully commit an offence by failing to ensure that its contractor on the project, P.S. Sidhu Trucking Ltd., and P.S. Sidhu

Trucking Ltd.'s supervisor William Cratty and blaster Peter Hildebrand working on the project, carried out measures and procedures prescribed by the *Occupational Health and Safety Act* and regulations, contrary to subsection 4(a) of the *Occupational Health and Safety Act* R.S.Y. 2002 c. 159, which resulted in a blasting incident causing flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon.

[6] Sidhu Trucking Ltd was convicted of the following offences:

Count #1: On or about the 6th day of May, 2008, at or near Whitehorse, Yukon did unlawfully commit an offence as an employer during the Hamilton Boulevard Extension Construction project, by failing to ensure that the processes under its control were safe and without risks to health, contrary to paragraph 3(1)(a) of the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159, when it allowed its worker to engage in blasting activities in a manner that caused flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon.

Count #4: On or about the 6^h day of May, 2008, at or near Whitehorse, Yukon, did unlawfully commit an offence as an employer, by failing to ensure that an unusual occurrence with explosive materials involving flyrock falling into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon was reported immediately to the Director of Occupational Health and Safety, contrary to section 14.12(a) of Part 14 of the Occupational Health and Safety Regulations O.I.C. 2006/178.

[7] Similarly, Mr. Cratty was convicted of two offences:

Count: 1: On or about the 6th day of May, 2008 at or near Whitehorse, Yukon, did unlawfully commit an offence, as a supervisor hired by P.S. Sidhu Trucking Ltd., by failing to ensure that a worker holding a blaster's permit received proper instruction and performed his work without undue risk, contrary to paragraph 7 (a) of the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159, when he allowed his worker, holding a blaster's permit, to engage in blasting activities in a manner that caused flyrock to fall into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon contrary to section 14.04(3) of Part 14 of the Occupational Health and Safety Regulation, O.I.C. 2006/178.

Count #2: On or about the 6th day of May, 2008, at or near Whitehorse, Yukon, did lawfully commit an offence as a supervisor, hired by P.S. Sidhu Trucking Ltd., by failing to ensure that an unusual occurrence with explosive materials involving flyrock falling into areas that jeopardized the safety of persons at or near the Lobird Trailer Court, Whitehorse, Yukon was reported immediately to the Director of Occupational Health and Safety, contrary to section 14.12(a) of Part 14 of the Occupational Health and Safety Regulations, O.I.C. 2006/178.

[8] The principles in sentencing in Occupation Health and Safety cases are clear. 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.

[10] In this case, many of the factors are common to all the defendants. First, the maximum fine is \$150,000 per count. As well, it must be noted that the blaster, Mr. Hildebrand, who pleaded guilty to a single charge relating to his failure to conduct the blast safely, received a fine of \$1,000.00. However, Mr. Hildebrand also accepted responsibility and entered an early guilty plea. Second, none of the entities or persons charged has any prior record. Third, this was not a case of intentional malfeasance; rather it is one of negligence. The negligence amounted to a failure of oversight but it

occurred in circumstances where all those convicted in the trial before me had to rely to a considerable extent on the expertise and judgment of the blaster. Nonetheless, all failed to ensure that the blaster was properly informed or supervised in respect of one critical point – the proximity of the blast to people and structures. Fourth, no one was actually physically injured or killed, but the potential was very high. Fifth, all were aware of the prior incident involving flyrock landing in the Lobird Trailer Court, but there is no evidence that practices changed.

[11] With respect to YTG, it is obviously (at least in Yukon terms) a large organization and the size of the work undertaken was of considerable scale. Although the construction contract required blasting plans and such plans were submitted to the YTG project manager, they were not reviewed in any meaningful way.

[12] The parties could not be much further apart on their submissions as to the appropriate fine. The Crown seeks a fine of \$50,000.00 while the defence suggests \$5,000.00.

[13] In my view, having regard to the penalty imposed in such cases as *R. v. Minister of Transportation of Nova Scotia* 2003 CarwellINS 647 (N.S.S.C.) a fit fine, were I to impose one, would be \$30,000.00.

[14] With respect to Sidhu Trucking, I note that the defendant is somewhat larger than the proverbial “Mom and Pop” operation although the two shareholders of the corporation are, indeed, a husband and wife with children. Sidhu Trucking normally

employs approximately 20 to 25 people, though many are seasonal. It undertakes contracts of considerable size. By local standards Sidhu Trucking can be said to be a small to medium-sized business. Like YTG, Sidhu Trucking's fault is a failure of oversight, but it must be pointed out that, as the actual contractor, its opportunity and responsibility for hands-on supervision was greater than the constructor's. I take into account that there were financial consequences for Sidhu Trucking due to work on the project being stopped as a result of the May 6th accident.

[15] I find that a fine of \$20,000.00, were I to impose one, would be appropriate on count 1.

[16] With respect to Mr. Cratty, he is, of course, an individual and, of the several defendants, may be safely presumed to have the shallowest pockets. Nonetheless, as Mr. Hildebrand's immediate supervisor, Mr. Cratty had the best opportunity to ensure the blaster's activities were conducted safely. I find that a fine of \$2,000.00 would be appropriate, were I to impose a fine.

[17] With respect to the charges of failing to immediately report the incident to the Director, I find that the offences were at the low end of the scale. Although Sidhu Trucking and Mr. Cratty did not report as soon as required, they did report the next day. There is no suggestion that the site was disturbed or that the investigation was impeded by the delay in reporting. A fit fine for the corporate accused would be \$1,000.00 and for Mr. Cratty, \$500.00, if I were to impose fines.

[18] As I indicated earlier in the proceedings, the imposition of fines in this case poses some difficulty. Section 33 of the *Summary Convictions Act*, R.S.Y. 2002, c. 210 provides:

33. Any duty, penalty, fine, or sum of money or the proceeds of a forfeiture under any enactment, if no other provision is made respecting it, constitutes revenue of the Government of Yukon, and shall be paid into and form part of the Yukon Consolidated Revenue Fund. R.S., c. 164, s. 33.

Effectively, the YTG would be paying a fine to itself and would, in addition, be the beneficiary of the fines paid by the other defendants¹. No one could think this to be a proper or just result.

[19] Consequently, in my view, the monetary penalties should be paid in such a way as to benefit the community – not one of the defendants.

[20] In response to the concerns expressed by the Court on this issue, all three defendants submitted that the money should go to the Northern Safety Network Yukon (NSNY). The NSNY is funded by the Yukon Workers' Compensation Health and Safety Board (YWCHSB). The goal of NSNY is to foster a commitment to occupational health and safety among Yukon workers and employers.

[21] On behalf of the Crown, it was suggested that the money be used to, in part, fund a proposed memorial to workers who have been injured or killed. The memorial is proposed by the Yukon Federation of Labour. While I take no issue with the

¹ I do not lose sight of the fact that the defendant YTG ultimately gets its fiscal resources from the taxpayers.

appropriateness of the suggestion, I see serious practical problems with it. The suggested fines in total represent only a fraction of the total estimated cost of the memorial. Thus, it is uncertain when or if the memorial will actually be built. The Court (or probation services) cannot undertake to superintend the use of the funds in such circumstances.

[22] In the result, I intend to structure the sentence to be imposed in such a way as to benefit the NSNY. I pause to add that monies realized by NSNY as a result are not intended to simply offset the YWCHSB's contribution to NSNY. Rather, any funds realized should be used to fund additional projects or services.

[23] In each case the passing of sentence is suspended for a period of one year. During that time each defendant will be subject to a probation order. The terms will be as follows:

1. Each defendant shall not commit the same or any related or similar offence, or any offence under a statute of Canada or Yukon or any other province of Canada that is punishable by imprisonment;
2. Each will appear before the Court as and when required;
3. Each will report in person or through a designated representative to a probation officer within 2 working days;
4. Each will notify the Court of any change of name;
5. Each will pay into the Clerk of the Territorial Court in trust for the Northern Safety Network Yukon the following sums:

YTG	\$30,000.00
-----	-------------

P.S. Sidhu Trucking Ltd.	\$21,000.00
--------------------------	-------------

William Cratty \$2,500.00

Such sums are to be paid within three months after the order comes into force.

[24] Any offender who has paid the above-mentioned sum in full may apply to the Court pursuant to s. 22.3(c) of the *Summary Convictions Act* S. Y. 2008, c.9, s.2 for an order terminating the probation order forthwith.

FAULKNER, T.C.J.