

NWT Decision Makes Interesting Points on Contractors & Government Liability



Across Canada, violators of the OHS laws are routinely prosecuted and fined. Some of the court decisions in these cases are reported, more often in some jurisdictions, such as Ontario, than in others. The three territories don't typically produce a lot of OHS cases. But a recent sentencing decision from a court in the Northwest Territories includes some interesting comments on the liability of government agencies for safety offences and the use of contracts as protection from such liability. Here's a look at the decision and its observations.

THE CASE

What Happened: The Department of Transportation (DOT) owns the ferry, landings and incidental shore equipment at the ferry crossing of the Peel River. But the DOT contracts out the ferry's operation to a company. Driftwood and debris got tangled in the ferry cable. To deal with the problem, three company workers began loosening nuts securing the cable. The cable suddenly started whipping back and forth, striking and injuring two workers. At the time, a marine engineer employed by the DOT was supervising the workers. The DOT, ferry operator and engineer were charged with 17 OHS violations. The DOT and the ferry operator pleaded guilty and the charges against the engineer were 'stayed,' that is, dismissed. The court fined the ferry operator \$7,500 for failing to report the incident.

What the Court Decided: The Territorial Court of the Northwest Territories fined the DOT \$75,000 for failing to ensure the workers were properly instructed and supervised.

The Court's Reasoning: In determining the appropriate sentence, the court noted that the incident was foreseeable and so there should have been a safe work procedure for loosening the clamps on a cable that was still under pressure. The failure of the workers to secure the end of the cable and to wear PPE, and the DOT's failure to properly instruct and supervise them made their task risky from a safety point of view. The court then considered various factors, but focused on two:

Nature of the offender. The court said that there's a 'fundamental distinction between a private corporate offender and a government offender.' The DOT both

manages its own employees and oversees numerous contracts. As a government agency, it has a responsibility to all of the workers in the Territories. And part of this responsibility is to ensure that it obeys the OHS laws. As a result, the DOT has a heightened responsibility compared to that of a private company. Quoting a decision in a prior case, the court observed, 'If the Government is not seen to be a safe employer, then how can industry be expected to respect and to obey the law'

Blameworthiness. The court commented on the relationship between the DOT and the ferry operator as it related to the DOT's blameworthiness. Under the contract, the ferry operator provided a blanket 'indemnity' that is, protection against liability' to the DOT. The contract required the ferry operator to comply with all laws, perform its services in a safe manner and employ a superintendent to direct and supervise these services. But in reality, on the day of the incident, a DOT employee (the engineer) was supervising three ferry operator workers, removing the 'protective curtain' between the DOT and the operator, said the court. When the DOT began instructing and supervising the workers, it also assumed the duty of ensuring that the work was performed safely. So although the contract put safety in the ferry operator's hands, the DOT could no longer say it was protected by the contract, concluded the court [*R. v. GNWT (DOT) and Grizzly Marine Services Ltd.*, [2014] NWTTC 17 (CanLII), June 27, 2014].

ANALYSIS

Government agencies and entities are employers and so are subject to the OHS laws. But they aren't often prosecuted for regulatory offences. Nevertheless, the court's point in this case is well-taken that when government entities *do* violate the very laws they create and enforce, they should expect to be held to a higher standard.

For non-governmental organizations, the court's comments on liability for OHS violations when dealing with contractors are more pertinent. Many companies contract out some work to other companies. Companies may be able to assign some of their OHS duties in these contracts and get some protection for liability for safety offences. But the lesson from this case is that if you take actions that contradict the contract's terms, you may lose this protection. Here, under the DOT's contract with the ferry operator, it was supposed to take a hands off approach, essentially leaving it to the operator to not only supervise and do the work but also to do so safely. When the DOT took on some of the operator's duties by having its own supervisor instruct and oversee the workers, it also took on the responsibility for performing those duties safely. So when the DOT failed to do so, it could no longer rely on the contract for protection from liability. *Bottom line:* When dealing with a contractor, read the contract's terms carefully and don't take actions that undermine or contradict its assignment of responsibilities or else you run the risk that you'll lose any protection from liability you may otherwise have had. (For more information and advice on dealing with contractors, go to the OHS Insider's Contractors Compliance Centre.)