

# OHS VIOLATIONS: A Look at Sentencing Factors Applied in an Actual Case



The OHS laws and ‘case law’ that is, decisions by courts in other cases may spell out the factors that courts should or must consider when determining the appropriate sentence for a company or individual convicted of a safety offence. For example, many courts across Canada rely on the factors spelled out in the case *R. v. Cotton Felts Ltd.*, [1982] 2.C.C.C. (3d) 287 (ON C.A.), when determining the appropriate sentence for a defendant that committed a safety violation. These factors fall into two general categories: aggravating factors, which weigh in favour of a harsher sentence, and mitigating factors, which weigh in favour of a lighter sentence. Here’s a look at a case from the Northwest Territories that illustrates how courts balance these factors in imposing a sentence on a company for a safety violation. By understanding what these factors are and how courts analyze them, you can help put your company in the best possible position for sentencing should it face an OHS violation.

## Shipping Company Fined \$55,000 for Dangerous Goods Violations

A shipping company made 27 fuel deliveries to two separate mining camps, using fuel tanks that were larger than the maximum capacity of 230L set by the *Transportation of Dangerous Goods Regulation* (Regulation), in an aircraft that didn't have the proper certificate authorizing it. Each flight carried between 9,200L and 13,000L of diesel fuel. In addition, the company didn't display dangerous goods safety marks on its fuel tanks on any of these delivery flights and failed to fill out proper documentation for each of the return flights to indicate that they were transporting dangerous goods. As a result, the company pleaded guilty to three violations of the Regulation. The Crown asked the court to fine the company \$50,000 and order it to pay \$150,000 to Transport Canada for research. The defense asked the court to impose a fine between \$17,500 and \$30,000.

In determining the appropriate sentence, the Territorial Court of the Northwest Territories looked at the following factors:

**Damage caused or potential harm.** No direct damage was caused by the company's violations. But the potential harm was that using large means of containment that weren't compliant with the Regulation put the aircraft and its crew at risk, because liquid moving inside the tanks could create a weight imbalance on the aircraft and affect its stability, explained the court. There was also a heightened potential danger to the environment in the event of a crash, due to the transportation of large quantities of flammable liquid. And the fact that there were 27 fuel deliveries'54 flights in total'using large means of containment that weren't authorized under the law posed a higher potential risk than a single delivery, added the court. In addition, the lack of safety marks and proper paperwork created a risk because, in case of an accident or an emergency landing, personnel coming to assist the aircraft and crew wouldn't be properly warned that there were dangerous goods on board.

**Nature of the violations.** The Crown argued that the company 'flaunted' the Regulations by continuing to use the fuel tanks after being told by Transport Canada that they 'cannot be used to transport fuel inside an aircraft.' The court agreed that these words were clear and constituted a warning,

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### Bill C-45 Sentencing Factors

Bill C-45 amended the *Canada Criminal Code* not only as to how criminal negligence applied to serious safety incidents but also how defendants convicted of criminal negligence for such incidents should be sentenced. Specifically, it added Sec. 718.21, which spells out the following 10 factors courts *must* consider when determining sentences in such cases:

1. Any advantage realized by the organization as a result of the offence;
2. The degree of planning involved in carrying out the offence and the duration and complexity of the offence;
3. Whether the organization attempted to conceal its assets, or convert them, in order to show that it's not able to pay a fine or make restitution;
4. The impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
5. The cost to public authorities of the

which the company disregarded.

**Acceptance of responsibility.** In discussing the company’s ‘corporate attitude,’ the court noted that after the company was issued a notice regarding the fuel tank, it stopped using them and invested in two new large means of containment that complied with the Regulations, at a cost of \$44,000 each. The head of the company appeared in court, entered guilty pleas to the offences and collaborated in the preparation of an agreed statement of facts. The company also cooperated with the investigators from Transport Canada. The court found that the company’s attitude from the moment it was prosecuted showed that it took this matter seriously.

**Size of the company.** The company was small, operating eight aircraft. During fire season, it employed 80 people and used eight additional planes. The rest of the year, it employed 65 people.

**Any profits realized from the offence.** The contract for the bulk fuel delivery that resulted in the violations was worth about \$500,000, roughly 5% of its total revenue. After considering costs, the court concluded that the profit from the contract was about \$35,000.

**Deterrence.** The court noted that the company showcased its activities through a TV show. (See, ‘Ice Pilots NWT’ on the History Channel.) ‘This national, and potentially international, exposure imparts on them a heightened correlative obligation to set an example through scrupulous compliance with safety standards,’ said the court.

**Any prior record.** The company didn’t have any record or history of non-compliance.

In the end, the court fined the company \$55,000, relying on the following mitigating and aggravating factors:

Guilty plea	The illegal transportation of unauthorized containers was repeated 54 times and lack of proper documentation 27 times over 63 days

investigation and prosecution of the offence;

6. Any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
7. Whether the organization was’or any of its representatives who were involved in the commission of the offence were’convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
8. Any penalty imposed by the organization on a representative for his role in the commission of the offence;
9. Any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
10. Any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

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Positive corporate attitude	The tanks lacked proper safety marks for the entire period
Absence of a previous record	The company used the tanks despite having been warned not to do so
Lack of harm caused by the violations	The high potential harm due to the nature of the dangerous good and the quantity carried on each delivery

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*R. v. Buffalo Airways Ltd.*, 2014 NWTTC 22 (CanLII), Aug. 22, 2014