

# Two OHS Appeal Decisions To Be Aware Of



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*Contributed By: Norm Keith*

Two recent appeal decisions relating to serious Occupational Health and Safety ('OHS') prosecutions are ones to be aware of for every Occupational Health and Safety professional, Human Resources professional, In-house counsel, and Operations Managers responsible for implementing health and safety management systems.

The first was the appeal decision in the Sunrise Propane Energy Group prosecution. Sunrise had been found guilty, after a 14 day trial, of seven charges under the *Environmental Protection Act* and the *Occupational Health and Safety Act*, both of Ontario. Justice Akhtar, of the Superior Court of Justice, held that both the conviction and the sentence at the trial court was reasonably supported by the evidence, legal principles, and therefore was upheld. The Court held that the explosion and fire, that involved a fatality, at the Sunrise Propane Energy Group Distribution Centre in the north-east part of Metropolitan Toronto, did result in the contraventions of both the *Environmental Protection Act* and the *Occupational Health and Safety Act*.

With respect to the sentence appeal, the heavy double-barreled penalty, totalling \$5.3 million, was also upheld by the Superior Court of Justice. Affirming the fines and penalties, the Court said, 'it is clear that an Appellant Court must give considerable deference to a sentence imposed by a trial judge and only interfere if that sentence is manifestly unfit ... the widespread damage and effects caused by the Appellants' reckless behaviour in conducting truck-to-truck transfers without license and with full knowledge of the risks associated with the practice ... there is nothing in the trial judge's decision that indicates error and I agree with the Respondent that the fine was consistent with other fatality cases' [*R. v. Sunrise Propane Energy Group*, 2017 ONSC 6954.]

Clearly the aggravating factors of a fatality, as well as operating without a license, as well as unsafely, were major factors in the harsh penalty issued by

the trial court, and affirmed on the appeal.

The second appeal of note involves the tragedy of a criminal rampage in Moncton, New Brunswick, when four RCMP constables were killed in a targeted shooting, by gunman Justin Bourque in Moncton, New Brunswick. After the tragedy, the Federal Occupational Health and Safety Regulator investigated and laid charges under the *Canada Labour Code, Part II*. The Royal Canadian Mounted Police defended the charges at trial, but were convicted. The RCMP was ordered to pay \$550,000 for failing to properly arm and train its members arising from the shooting rampage. Judge Leslie Jackson handed down the sentence in a packed courtroom in Moncton, New Brunswick, that included acting RCMP Commissioner Daniel Dubeau. The trial judge gave a clear and strong rebut to the RCMP's leadership for not acting sooner to ensure that frontline police officers were equipped with high-powered rifles that could have made, possibly, a difference in the lethal shooting rampage by Justin Bourque.

The stinging reasons for judgement in the sentencing, placed little responsibility for the tragedy on Bourque, and more on the senior management of the RCMP, for the criminal actions of Bourque. The RCMP was criticised for not having adequate 'firepower' in the hands of RCMP officers, to deal with this unpredictable, unforeseeable event. The trial judge agreed that the RCMP had acted on 56 of the 64 recommendations in the report into the incident, but this was not necessarily sufficient to satisfy the prosecutor or the Court that there had not been a serious series of health and safety violations under the *Canada Labour Code*.

Recently, the RCMP announced it will not appeal the conviction, even though it was likely a difficult pill for the RCMP to swallow in that decision. The majority of the RCMP's penalty, \$300,000, will go towards a memorial scholarship fund at the University of Moncton, while another \$600,000 will go towards education funds for children of fatally injured RCMP officers. These 'alternative penalties', as opposed to revenue from penalties, that goes into the general revenue fund of government, are permitted in some jurisdictions, such as the Federal regime, but not in other jurisdictions, such as the Province of Ontario.

These two cases indicate that in both extreme and unusual cases, when workers are critically or fatally injured, that Health and Safety Regulators across Canada are becoming more aggressive in their enforcement of the legislation. These decisions also indicate that there is high monetary penalties available when health and safety laws are not complied with, even if the ultimate tragedy was not intended, not easily foreseeable, and undoubtedly random in its occurrence.



**About the author:**

Norm Keith, a partner at Fasken, practices labour, employment, regulatory, government investigations, white collar defense and constitutional litigation. He also has a broad advisory practice in the areas of his expertise and is a trusted advisor to boards, executives and for and not-for profit corporations.

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