

# Winners & Losers: When Does a Company Deserve the Maximum Penalty for an OHS Violation?



A guilty verdict or plea isn't the end of an OHS prosecution. It merely brings the case to the sentencing stage. The way it works: The jurisdiction's OHS Act or statute lists the maximum penalty that a court can impose for the particular offence. The court then must decide whether the violation calls for the maximum or a lighter sentence. In making that determination, courts consider the following factors:

- How blameworthy or culpable the defendant was'for example, violations are dealt with much more harshly when they're deliberate;
- The damages or harm the violation caused;
- Whether the defendant has previous convictions;
- Whether the defendant acknowledged responsibility and expressed sincere remorse for the violation; and
- How big a fine is necessary to deter the defendant (and others) from committing similar violations.

The following cases illustrate how these factors play out in real life.

## EMPLOYER GETS MAXIMUM OHS FINE

### SITUATION

A conductor was supposed to deactivate 2 derail switches but, for some reason, deactivated only one, a mistake that cost him his life when a car being pushed aside derailed and ran him over. CNR was found guilty of failing to ensure that the sign located next to the second switch was retroreflective.

### RULING

The BC Provincial Court imposed the maximum \$100,000 fine + 2 years' corporate probation.

## EXPLANATION

Factors the court cited for its harsh sentence include CNR's:

- Blameworthiness: The derail sign was 'grossly deficient' and in violation of CNR's own safety policy requiring signs to be retroreflective and clearly visible;
- Acceptance of responsibility and remorse: CNR's new safety rules requiring monthly inspections of derails for reflectivity was a kind of acknowledgment of the problems that caused the conductor's death. But CNR waited 4 years to adopt the changes. And it did so just as the trial began, suggesting to the court that CNR's primary motive was to avoid probation;
- Previous record: CNR's dossier included:
  - 5 *Canada Labour Code* convictions for a workplace fatality;
  - 8 *Canada Labour Code* convictions for a workplace injury or death; and
  - 7 *Railway Safety Act* convictions, including a \$248,000 fine for a derailment spilling 250 tons of sulphuric acid;
- Harm: The defective sign wasn't the direct cause of the conductor's death, the court acknowledged, but it was a factor. And before the incident, CNR could and should have replaced the second derail with a stop block, which would have saved the conductor's life;
- Deterrence wasn't a factor in this case because \$100,000 would have a negligible financial impact on a corporate behemoth like CNR.

*R.v Canadian National Railway Company*, 2017 BCPC 448 (CanLII), March 24, 2017

## EMPLOYER GETS MUCH LESS THAN MAXIMUM OHS FINE

### SITUATION

Two quarry workers were killed when their truck flipped over while speeding down a steep slope at high speed. The employer pled guilty to one OHS mining regulation violation 'allowing workers to operate a vehicle on a steep road grade. The prosecutor asked for the maximum \$100,000 fine.

### RULING

The BC Provincial Court fined the employer \$20,000 for the violation + a \$50,000 charitable donation, with no corporate probation.

## EXPLANATION

Factors the court cited for the relatively light sentence:

- Blameworthiness: Unlike in the *CNR* case, it wasn't clear and the Crown didn't prove how the incident occurred or what the employer could have done to prevent it;
- Acceptance of responsibility and remorse: Unlike CNR which insisted it did nothing wrong, the employer in this case accepted responsibility and showed remorse by:
  - Closing the mine for a period at a cost of \$1 million in lost revenues;
  - Writing personal letters of apology to the victims' families;
  - Donating \$50,000 to a charitable organization that supports the

families of workers killed on the job called Threads of Life;

- Previous record: The employer had no previous convictions and had operated the site for 18 years without incident;
- Harm: Although 2 workers were dead, the Crown never showed exactly what the employer did wrong, let alone prove that it made a deliberate decision to commit an OHS violation;
- Deterrence wasn't a factor in this case because it wasn't clear what the employer needed to be deterred *from*.

*R.v Broda Construction Inc.*, 2019 BCPC 31 (CanLII), March 13, 2019