

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