Citation: *R.* v. *Procon Mining & Tunnelling Ltd.*, 2012 YKTC 100

Date: 20111020
Docket: 10-06003
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

REGINA

v.

PROCON MINING & TUNNELLING LTD.

Appearances:

Judith Hartling — Counsel for the Territorial Crown
James Sutherland — Counsel for the Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): Procon Mining and Tunnelling Limited provides contract mining services, including underground mining, at 15 mine sites in Western and Northern Canada. Among these sites is the Wolverine Mine located north of Watson Lake in the Yukon Territory.

[2] On October 19, 2009, Paul Leslie Wentzell was employed by Procon at the Wolverine Mine as an apprentice mechanic. Mr. Wentzell received a request to transport a piece of mining equipment into the underground shaft at the mine. To comply with the request, Mr. Wentzell was using a Toyota Land Cruiser owned by Procon and he drove the Land Cruiser into the mine shaft. The mine shaft itself slopes steeply downward from the surface at a 15 percent grade. As Mr. Wentzell drove down

the grade, his way was blocked by a tractor parked in the shaft. Mr. Wentzell stopped the Land Cruiser and got out to arrange to have the tractor moved. Before getting out, Mr. Wentzell engaged a button on the vehicle dashboard labeled “Park Brake.” After Mr. Wentzell got out and walked ahead of the Land Cruiser, it rolled down the slope and struck Mr. Wentzell, inflicting serious and ultimately fatal injuries.

[3] Subsequently, Procon was charged with, and has entered guilty pleas, with respect to two offences, the first being that it:

> 1. On or about the 19th day of October, 2009, at or near the site of the Wolverine Mine, Yukon, did unlawfully commit an offence as an employer, by failing to ensure that mobile equipment was maintained in a safe operating condition to wit: by failing to ensure that the emergency brakes on a Toyota Land Cruiser Unit ID# 03470 were maintained in a safe operating condition, contrary to Section 6.02(a) of the Occupational Health and Safety Regulations, O.I.C. 2006/178, *Occupational Health and Safety Act*, Revised Statutes of the Yukon 2002, c. 159.

Further that:

> 6. On or about the 19th day of October, 2009, at or near the site of the Wolverine Mine, Yukon, did unlawfully commit an offence as an employer, by failing to ensure that a worker had demonstrated competence in operating equipment to wit: a Toyota Land Cruiser Unit ID # 03470 to a supervisor or qualified person, contrary to Section 6.03(b) of the Occupational Health and Safety Regulations, O.I.C. 2006/178, *Occupational Health and Safety Act*, Revised Statues of the Yukon 2002 c. 159 when it permitted a worker to operate the Toyota Land Cruiser Unit ID # 03470.

[4] The Land Cruiser vehicle that Mr. Wentzell was operating was equipped with three braking systems. There was the usual service brake, operated by a foot pedal adjacent to the gas pedal. In addition there was the usual parking or emergency brake

which was operated by a pull-up lever between the front seats. In addition, the Land Cruiser had an auxiliary emergency brake activated by pushing in a button on the dashboard, and it was this brake that Mr. Wentzell engaged. The brake consists of a disc affixed to the vehicle drive shaft, and when the brake is applied, brake linings are moved into contact with the disc. Unfortunately, one of the brake linings was worn and it made insufficient contact to immobilize the vehicle, at least on a 15 percent slope. The unserviceable condition of the emergency brake had not been detected by the company, and the vehicle was overdue for a mechanical inspection. I hasten to add that the mechanical inspection, which was based on operating hours accumulated, was based on a company policy and was not specifically required by the manufacturer or by government regulation. Nevertheless, there was a clear failure to ensure that the vehicle was maintained in a safe operating condition.

[5] When Mr. Wentzell got out of the vehicle he left it running and out of gear. He did not engage the normal between-the-seats park brake, and he did not turn the front wheels toward the side of the mine shaft, and he did not chock the wheels.

[6] Mr. Wentzell had received general safety training, as well as some training specific to the operation of the Land Cruiser. He had been provided with a company safety manual which, amongst many other things, included procedures for brake testing and parking. Mr. Wentzell had been required to provide a written acknowledgement that he had studied this material. However, there is no evidence that Mr. Wentzell received any hands-on training in the actual operation of the Land Cruiser vehicle. He had been briefly checked out but only on level ground, and only for the use of the vehicle as an aid to mechanical servicing. Given these circumstances, the company

also admits that it failed to ensure that its worker had demonstrated competence in operating the vehicle in question.

[7] It should be mentioned that both counsel discussed at some length the fact that the drive shaft brake, the one that Mr. Wentzell engaged, is labeled as a park brake. It was suggested that this was misleading; however, in my view, nothing particularly turns on the labeling of this particular brake. The brake in question might well have functioned to hold the vehicle while it was parked on the slope had it been in proper operating order, but it was not. Moreover, the conventional between-the-seats-operated brake lever itself activates a system which is variously called a parking brake or emergency brake, and such brakes are, in fact, used for both purposes somewhat interchangeably. It may well be that Mr. Wentzell did not even realize that engaging the dashboard button activated an entirely independent brake system from the normal park or emergency brake. We will never know. Suffice it to say that the system in question was inadequately maintained and that Mr. Wentzell was clearly insufficiently familiar with the vehicle and the hazards associated with operating it on a steep slope in an underground mine environment.

[8] It remains to consider the penalty to be imposed. In that regard, I was presented with a joint submission for a total fine of $85,000 plus surcharges. I am prepared to accept the joint submission primarily in light of the following considerations: First, although there were clear failures of duty by Procon, it certainly was not a case where the defendant was aware of the risks and cavalierly chose to ignore them. Secondly, Procon has no prior convictions for Occupational Health and Safety violations. Indeed, the material provided to the Court showed that it, in contrast, had an

excellent track record in regard to workplace safety and the extensive safety programs already in place. Thirdly, it was shown that, since the accident, Procon has taken significant remedial steps to improve safety, including initiating a safety audit and creating a safety action plan in cooperation with Occupational Health and Safety authorities. The company has initiated specific protocols and training with respect to brake tests and site orientation. As well, the company has begun the process of obtaining what is commonly called COR certification on a company-wide basis. The company has put in place tracking systems to monitor training and incident response, and, as well, has hired new staff who are specifically tasked with safety training. All of these are to the good and certainly mitigate, to a considerable extent, the penalty that might otherwise be imposed.

[9] Nevertheless, there were significant failures of duty here, and, of course, it cannot be forgotten that a fatality was the ultimate result thereof. When it comes to Occupational Health and Safety violations, particularly in such circumstances, deterrence must be the name of the game. What is a deterrent naturally would vary depending on the size of the enterprise involved. In this case, the corporate defendant is a large company with multiple operations, and a thousand employees. In all of the circumstances, I find the fines jointly contended for is within the appropriate range.

[10] With respect to Count 1, I impose a fine of $40,000. With respect to Count 6, a fine of $45,000. In addition, the corporate defendant will forfeit and pay surcharges in the amount of 15 percent, which is a further $12,750.

[11] The remaining counts?

[12] MS. HARTLING: Stayed, if I haven't already stayed them.

[13] THE COURT: Thank you.

[14] MR. SUTHERLAND: Your Honour, if time to pay of three months could be imposed, please.

[15] MS. HARTLING: No objection.

[16] THE COURT: Three months' time to pay, in default, enforcement.

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FAULKNER T.C.J.