

Citation: *R. v. Procon Mining and Tunnelling Ltd.*, 2013
YKTC 21

Date: 20121120
Docket: 10-07741
Registry: Whitehorse

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

REGINA

v.

PROCON MINING AND TUNNELLING LTD.

Appearances:
Julie DesBrisay
James Sutherland

Counsel for the Territorial Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] FAULKER T.C.J (Oral): Yukon Zinc Corporation (“Yukon Zinc”) is the owner and operator of the Wolverine Mine, which is located approximately 190 kilometres north of Watson Lake, Yukon. Procon Mining and Tunnelling Ltd. (“Procon”) performs the actual mining at Wolverine under contract to Yukon Zinc. Procon entered into its initial contract with Yukon Zinc in 2009, when the mine was under development. It has continued to provide mining services up until the present.

[2] Procon is a large concern, with approximately 1,000 employees engaged in contract mining in a number of mines in North America. The Wolverine Mine is an underground polymetal mine. The ore is accessed and mined by means of stopes or tunnels excavated in the rock, away from the main mine ramp or shaft. As in any

underground mine, the risk of cave-in or collapse is an obvious danger. To prevent collapses, miners employ various ground control strategies, including drilling into the rocks and placing of bolts of various designs to hold the rock together; installing wire mesh; or spraying fibre reinforced concrete called shotcrete onto the walls or back, that is the roof, of the excavated cavities.

[3] Because of the geology of the mine site, Wolverine is particularly susceptible to what mining engineers, with classic understatement, call “ground failures”. The poor ground conditions at the mine site were known even before development and production mining began, having been noted in a 2007 feasibility study commissioned by Yukon Zinc. While there is no evidence capable of showing that Procon actually ever saw this feasibility study, it would clearly have been provided with some information about the geology of the site in order to develop its contract bid. Moreover, Procon would have become well aware of the nature of the mine from actual in-the-ground experience, having been involved from the development stage through to production mining. Indeed, there had been three rock fall incidents at Wolverine in the six month period prior to April 25, 2010.

[4] In the first, approximately six tonnes of material fell, but no one was hurt. In the second, a smaller quantity of material fell on two workers, but they were only slightly injured. In the third, approximately six to ten tonnes of rock fell, but, again, no one was injured. On April 25, 2010, at 3:45 a.m., there was a fourth collapse or ground failure in the Wolverine Mine. Approximately 70 tonnes of rock fell from the wall of the 1220 Stope. William Fisher, a 25-year-old mechanic employed by Procon, was killed.

Mr. Fisher was the second Procon employee to die at the Wolverine Mine in less than a year.

[5] In the days prior to the death of Mr. Fisher, Yukon Zinc had made a decision to vary the direction of Stope 1220 to better follow the ore body, and Procon's workers complied with these directions. The effect of the change was to increase the width of the excavation to approximately twice the normal width of four and a half metres. It also appears that the stope was excavated at an increased angle, effectively increasing the height of the walls beyond what was normal.

[6] During the night shift of April 24-25, 2010, the miners discovered that water seeping into the stope was causing the floor to become very soft. A bolter machine that had been placing protective bolts in the stope sides and back became stuck and had to be towed to firmer ground. The soft, wet material was mucked out and replaced with ore; however, this attempt to stabilize the floor failed and the ore was also in turn mucked out. The effect of all of this was to leave approximately three and a half metres of the wall unsupported, instead of the normal height of approximately one and a half metres. Meanwhile, the bolter machine was driven back into the stope to reinforce unsupported ground at the face or end of the stope. The bolter developed a hydraulic problem and the operator, Steve Richard, summoned Mr. Fisher and Michel Gionet to effect repairs to the machine.

[7] At the time of the collapse, Mr. Richard was in the cab of the bolter. Mr. Fisher was between the bolter and the stope wall, adding fluid to the hydraulic system tank. Mr. Gionet was at the front of the bolter making repairs to the boom. The ground fall

buried Mr. Fisher. Mr. Gionet was struck from behind and knocked down; however, he suffered only minor injuries. Mr. Richard, protected by the cab of the bolter, was unhurt. The ground in the area of the fall had to be stabilized before attempting to rescue Mr. Fisher, and it was not until 1:30 p.m. that he was located. He was pronounced dead a short time later. A subsequent autopsy found that the weight of material burying Mr. Fisher had made it impossible for him to breathe and he had died of asphyxia.

[8] Subsequent investigation revealed that Yukon Zinc had essentially no plan for the installation of ground support in the Wolverine Mine. The 2007 feasibility study had recommended that such a plan be developed and that a system be put in place to monitor rock and ground conditions. Based on this monitoring, the ground control program could be modified and refined over time in light of actual performance. The study also recommended the training of mining personnel so that they could better assess geological structures in the mine and understand the direction that was given to them for the layout of the mine and the installation of ground control measures. Finally, the study recommended that a staff geotechnical engineer oversee the design and installation of ground control. Despite these recommendations, and despite the fact that a ground control plan is also required by s. 15.06 of the *Occupational Health and Safety Regulations*, O.I.C. 2006/178, essentially, nothing was done. There was no plan, no monitoring system, no training program, and no engineer.

[9] At the date of the accident, the mine was operating on the basis of a generic one-page diagram entitled "Yukon Wolverine Zinc Mine Standard Ground Support". It cannot even be determined at this point who authored this document or whether it was intended to apply to the whole mine or just to the main ramp. It was understood that

miners could install additional support if they thought it was necessary, and they often did so. However, the diagram, apparently, provides little to no guidance. Indeed, I was advised that it did not even refer to the use of shotcrete or expanding Swellex bolts, two recognized ground support methods which were, in fact, commonly employed in the mine. Procon's miners were experienced, but were not qualified to understand the geotechnical aspects of the ground conditions or to design ground support on their own. With no plan and no ready access to those with the appropriate expertise, they appear to have confronted each problem as best they could.

[10] The ground support that had been placed in the area of the rock fall that killed Mr. Fisher was later examined by a geotechnical engineer and found to be inadequate. In the engineer's opinion the accident need not have happened. Subsequently, Yukon Zinc, the mine owner, was charged with failing to ensure, so far as is reasonably practicable, that the health and safety of workers at the Wolverine Mine was protected, contrary to s. 4(c) of the *Occupational Health and Safety Act*, R.S.Y. 2002, c 159.

[11] On November 13, 2012, Yukon Zinc entered a plea of guilty to this charge and was fined \$150,000, the maximum fine under the *Act*. Five additional charges against Yukon Zinc were stayed. The fine I imposed was based on an agreed statement of facts and a joint submission on sentence by the Director and Yukon Zinc.

[12] The present accused, Procon Mining and Tunnelling Ltd., was charged with four infractions of the *Occupational Health and Safety Act* and the regulations thereunder. On November 13, 2012, the corporation entered a guilty plea to a charge under s. 3(1)(a) of the *Act* for failing to ensure, so far as was reasonably practicable, that the

workplace under its control was safe and without risk to the health of the employees.

However, in distinction to the situation with Yukon Zinc, there was no full agreement as to the facts and no agreement as to the sentence to be imposed.

[13] The factual differences between the parties, in the main, centred on two issues. The first was whether or not Procon was privy to the 2007 feasibility study prepared for the mine owner. The Crown conceded that it could not prove that Procon had seen it. The second dispute had to do with a safety management system audit prepared for the Director and referred to by both parties as the “Duda Report.” To state the matter shortly, Procon disputes some of the findings of the Duda Report. Eventually, the document itself was tendered as an exhibit.

[14] Having reviewed it, I find it of minimal assistance in determining a fit disposition in this matter. Firstly, the report was prepared with respect to the overall mine operation and thus blurs the distinction between Yukon Zinc Corporation, Procon Mining, and other contractors on the site. Moreover, the audit, if that is what it is, deals with the overall safety management of the mine, which included, at the time, extensive mill and other construction operations unrelated to the underground development of the mine. At the end of the day, I find that I can make my decision without reliance on the report in question.

[15] In so far as the matter of sentence is concerned, I have already indicated that there was a lack of agreement. The Director sought the same fine as that imposed on the mine owner, that is to say \$150,000. For its part, Procon contended that a fine of \$100,000 would be fit. Procon argued that it was primarily the mine owner’s

responsibility to provide the ground support plan and supervise the design and placement of such support. While this is undeniably true, it is far from an answer to say, in effect, that Procon was just following orders and going where Yukon Zinc directed it to go. Procon was well aware that the ground support plan was inadequate if not non-existent. Procon was well aware that no monitoring system was in place. Procon was well aware that the mine owner was not providing a geotechnical engineer or otherwise providing any effective oversight of ground support measures in the mine and, at the end of the day, it was Procon's employees who were actually being placed in harm's way.

[16] Despite this, there is no evidence that Procon took any steps prior to February 11, 2010, to remedy the situation. On that date, Procon, having completed its investigation of a rock fall that occurred on February 7, 2010, forwarded its report to Yukon Zinc, with the finding that no system was in place to get review and approval from mine engineers or geologists of ground support measures, and ended with the recommendation that Yukon Zinc puts such a system in place "In order to ensure that headings are designed safely and to requirements". Yukon Zinc's rather tepid response to this report was that the mine's engineering and supervision personnel needed more time to "...discuss design alternatives and conduct risk assessments before going forward." When Mr. Fisher reported for his last shift on April 24th, no changes had been made.

[17] On behalf of Procon, Mr. Sutherland suggested that there was little his client could have done short of stopping work, a step he candidly admitted Procon would have been reluctant to take, in view of the cost. However, Procon had been on the mine site

since April 2009, but did nothing prior to mid-February 2010 to bring matters to the attention of the mine owner or to seek rectification of the obvious defects in the ground support program. Short of abruptly laying down tools, as Mr. Sutherland suggests, there were many avenues open to Procon during this period to address the issue. If it were to be argued that the inadequacies of the program were not that obvious to Procon, it is clear that they should have been and would demonstrate a serious failure of Procon's system of safety management. After all, as things stood, it was being left, more or less exclusively, to the miners themselves to design and install ground support, and Procon was well aware that that was the practice. In the result, I am not persuaded that Procon is less culpable than Yukon Zinc.

[18] Mr. Sutherland also contended that the efforts Procon has undertaken since Mr. Fisher's death to improve workplace safety throughout its operations should mitigate the penalty to be imposed on it. I completely agree that steps taken by an offender, corporate or otherwise, to reform and/or to prevent the repetition of the offence are a relevant consideration in sentencing. I also agree that the materials supplied by Mr. Sutherland establish that Procon has taken significant steps to improve its safety record.

[19] On the other hand, the same could be said for Yukon Zinc, the mine owner. The agreed facts show that Yukon Zinc accepted all the recommendations of the Director in regard to its ground support measures, has developed a comprehensive ground support plan, and provided for proper engineering oversight of these operations. Now, a cynic might say that Yukon Zinc had to make these changes or they would still be subject to

the stop work order issued by the Director. Nevertheless, the fact remains that Yukon Zinc, like Procon, has taken significant remedial action since the fatality.

[20] Then we come to the sad fact that Mr. Fisher was the second Procon employee to die at the Wolverine Mine. The earlier fatality occurred on October 19, 2009, when Procon employee Paul Wentzell was struck and killed by a Land Cruiser vehicle he was operating in the mine. One of the brake systems on the vehicle was defective and Mr. Wentzell had parked it on a slope with the engine running and the vehicle in neutral. In that case, fines totalling \$95,000 plus surcharges were imposed. I hasten to add that the circumstances of Mr. Wentzell's death are in no way similar to those in this case in the sense that the fatality in the earlier case did not result from a failure of the ground control program. However, both accidents are similar in that they resulted in good measure from failures in Procon's duty to provide a safe workplace. I note, of course, that the convictions against Procon Mining as a result of the Wentzell fatality were not entered until after Mr. Fisher's death. Nonetheless, Procon is not now able to stand before the Court, as it did then, claiming to have an unblemished record. It should also be noted, that at the time of the sentencing in the earlier case involving Mr. Wentzell's death, Procon relied on many of the same safety improvements that it puts forward as mitigation in this case.

[21] At the end of the day, in light of the serious and continuing nature of the default in duty, the size of the undertaking, the penalty imposed on the mine owner, the relative degree of responsibility of Yukon Zinc and Procon, and the fatal consequences of what occurred, I am satisfied that the fine imposed should be the same in each case.

Accordingly, Procon Mining and Tunnelling Ltd. will forfeit and pay a fine in the amount of \$150,000. In addition, there will be a victim surcharge of 15 percent, or \$22,500.

[22] MR. SUTHERLAND: Your Honour, if they may have 60 days to pay that fine, please.

[23] MS. DESBRISAY: The Crown agrees.

[24] THE COURT: 60 days' time to pay and default enforcement.

[25] MR. SUTHERLAND: Thank you.

[26] MS. DESBRISAY: Thank you, Your Honour.

FAULKNER T.C.J