IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Meridian Construction Inc.; R. v. London, 2005 NSPC 40

Date: 20050307
Docket: 1306087-89 & 1306080-81
Registry: Kentville

Between:

Her Majesty the Queen

v.

Meridian Construction Inc.

and between:

Her Majesty the Queen

v.

Mr. Donald London

Judge:	The Honourable Judge Alan T. Tufts
Heard:	Feb.10, 11, 12, 16, 17, 25, 26, June 9, 2004 Sentencing hearing: March 7, 2005
Written decision:	October 18, 2004 Sentencing: September 30, 2005
Charge:	Meridian Const. Inc. - s. 15(d) Occupational Health and Safety Act x 2 s. 15(a) Occupational Health and Safety Act London - s. 17(1)(a) Occupational Health and Safety Act; s. 17(1)(f) Occupational Health and Safety Act
Counsel:	Richard M. Hartlen and Alonzo Wright, for the Crown David Bright, Q.C. and David Doyle, for the Defendants

By the Court (orally):

[1] The two defendants, Meridian and Donald London, are to be sentenced for offences under s. 15 and s. 17 respectively of the **Occupational Health and Safety Act**. Each defendant was convicted after an eight day trial. Other unrelated charges against each defendant were dismissed.

[2] These offences related to the tragic death of John Dillman, a worker with the roofing subcontractor. A complete description of the circumstances surrounding these offences are included in this Court's written decision dated October 18, 2004, which has now been reported at 2004NSPC51.

[3] The Crown seeks fines in excess of $ 100,000.00 for the corporate defendant and in excess of $ 10,000.00 for the defendant Donald London, together with victim fine surcharges.

[4] The defendant argues that the fines for these defendants should be similar to those imposed on Charlie MacIntyre Carpentry (CMC), the carpenters and Dan Magee, who pled guilty to offences arising out of the same incident previously. Those fines, restitution and surcharge totalled $ 28,000.00 for Charlie MacIntyre Carpenters and $ 8,050.00 for Mr. Magee.

[5] A brief summary of the facts is in order. The carpenters for CMC had removed the temporary plywood which covered two skylight openings which were under construction on the roof of the Avonview School here in Windsor, Hants County, Nova Scotia. They replaced the plywood with rigid Styrofoam insulation, ostensibly to keep the weather out of the building below. The Styrofoam remained in that position from January 17, 2003 to January 30, 2003 when Mr. Dillman tripped over the curbing surrounding the skylight opening, fell backward onto the covering over the skylight and fell some thirty feet to his tragic death, landing on the ice-covered floor below.

[6] Approximately a week earlier the Styrofoam had been jarred loose by the wind exposing the skylight openings. Repairs were ordered by the defendant Donald London, but when the need for further repairs were brought to the defendant's attention no further action was taken. The weather was particularly inclement at the time and no workers appeared to

be on the roof. When the workers returned to the roof later the necessary removal of the Styrofoam and more adequate securing of the skylight openings was never attended to.

[7] As the Court concluded previously the situation that was created by the presence of the Styrofoam was extremely dangerous and constituted “an accident waiting to happen”. The Court concluded that both the defendants' action consisted of its failure to:

> 1. Ensure the skylight openings were properly secured after Jordan Macumber brought the need to do so to Donald London's attention on January 22, 2003;
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> 2. Ensure that CMC held regular toolbox meetings wherein safety issues were raised, documented and forwarded to the JOSH meetings and thereby to the attention of MCI, Donald London and other officers whose responsibility it was to take corrective actions;
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> 3. Ensure that proper inspection of the work CMC was completed relative to the skylight openings given the temporary nature of the work, ie., the coverings and the inherent danger surrounding it; and finally,
>
> 4. To ensure that a system of formal reporting of safety concerns was in place for workers of MCI including Jordan Macumber, which would have allowed Jordan Macumber to record and report his concerns relative to the skylight openings on January 22, 2003 and there by ensure this concern was brought to the attention of MCI, Donald London and other safety officers.

[8] I will now review the purposes and principles of sentencing. The fundamental purposes and principles of sentencing as set out in s. 718, s. 718.1, s. 718.2 of the **Criminal Code** apply by reason of s. 7 of the **Summary Proceedings Act**, see **R. v. Milligan** [2005] N.S.J. No. 27 (NSSC).

[9] The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society, in short, protection of the public and respect for the law. I will return to this later to explain how this applies to the occupational health and safety offences.

[10] The purpose of sentencing is achieved through the imposition of sanctions which have various objectives. The authorities to which I will refer later all suggest that the primary objective is deterrence - principally general deterrence. The principles of sentencing are parity, proportionality and restraint, see Alan Manson's Law on Sentencing, 2001. These principles are embodied in s. 718.1 and s. 718.2 of the **Criminal Code**. The application of these principles to the objectives to be achieved to carry out the purpose of sentencing have been the subject of consideration by authorities, in particular the various factors and considerations which a court is required to take into account in the sentencing process relative to occupational health and safety offences has been described and listed in various authorities which I will refer.

[11] In **R. v. General Scrap Iron and Metals Ltd.** [2003] A.J. No.13, Watson, J. embarks on a comprehensive analysis of the purposes, objectives and principles of sentencing for occupational health and safety offences, particularly relative to corporate offenders. At para. 35 he writes, in part, that there are three aspects that need to be considered:

> 1. The conduct, circumstances and consequences of the offence;
>
> 2. The terms and aims of the relevant enactment or regulations considered in larger context of comparable regulations ... corporate functioning in relevant areas, and finally,
>
> 3. The participation, character and attitude of the corporate offender considered in the larger context of corporations engaged in relevant industrial and business activities as to aspect number one.

Later, at para. 49 he sets out in detail what the court should consider:

(1) the conduct, circumstances and consequences of the offence, noting, for example

(a) *what were the specific facts which constituted the offence, and what aggravating and mitigating factors related to those specific facts.* The Court could consider whether the occurrence of those facts were isolated, or occasional, or regular, or programmatic. The Court could consider whether the facts were the product of corporate planning, corporate recklessness, corporate inattention, or corporate incompetence. The Court could consider the involvement of particular employees or agents of the corporation, including perhaps the persons who might have become victims of what occurred, and the degree of control of and responsibility for such persons that the corporation can realistically be said to have had.

(b) *what were the surrounding circumstances of the offence, and aggravating and mitigating factors related to those circumstances.* The Court could consider issues like the risk of collateral damage as well as the particular harm, and whether it was predictable. The Court could consider the relationship between the proscribed conduct and the functioning of the corporation, having regard to such issues as profitability, and also the relationship between the proscribed conduct and the functioning of the relevant industry. The Court could consider whether there was flagrance, or whether there was effort to suppress public awareness, or whether the events were unintended incidents occurring unfortunately in an otherwise ordinary and reasonable course of activity. The Court could consider the degree to which the activity is regulated or superintended by state agents. The Court could consider whether the corporation was in compliance with delegated supervisory duties, or with requirements for reporting to state agents connected with such activity.

(c) *what were the consequences of the offence, and aggravating and mitigating factors related to those circumstance*s. The Court could consider who were the victims or what damages were caused. The Court could consider the nexus between the damages and the offence. The Court could consider the degree of contribution by the corporation to the offence and through that to the damages. The Court could consider if the damages were irreparable, or were reparable only in part, or were reparable fully,

or were purely economic and compensable. The Court could consider if the corporation had maintained a compensatory capacity for unforeseen damage. The Court could consider if the corporation profited or could be expected to profit from the conduct, and if any such profit might be thought to outweigh the hazards of the conduct, noting level of risk of successful prosecution as well as sanction.

(2) the terms and aims of the relevant enactment or regulation, considered in the larger context of comparable regulation and legitimate corporate functioning in the relevant areas, noting, for example:

(a) *what is the extent of state regulatory involvemen*t. The Court could note if the corporate activity was or is highly regulated or loosely regulated, or largely delegated to the private sector. The Court could note the wording and implications of the applicable statute and regulations. The Court could note the objectives of the applicable statute and regulations. The Court could note whether the applicable statute and regulations relate to economic matters, general industrial regulation, occupational health and safety, the environment, or what have you. The Court could note the association of the applicable statute or regulation with any larger schemes of public welfare or governmental purposes.

(b) *what are the relevant terms of sanctio*n. The Court could note any maximum or minimum penalties, whether they have changed over time, and what related sanction capacities there might be. The Court could consider whether the offence as designed was intended to be closer to absolute liability or closer to *mens rea* on the scale of responsibility. The Court could consider whether the Legislature or Parliament intended that the sanctions mostly be routinized and regular and predictable, or whether the Legislature or Parliament intended for a wide discretion on the part of the Court. The Court could consider the nature and location of the offence and the sanctions in any overall architecture of offences and sanctions.

(c) *what would be the consequences of sanction*. The Court could note what the effect might be on the corporation or on innocent third parties arising from the sanction that might be imposed upon the corporation. The Court could consider options to more focus the sanction on those responsible for the offence. The Court could consider combining of sanctions, or emphasizing sanctions which

compensate or benefit those adversely affected by the offence. The Court could note what would be the effect of alternative sanctions on the efficacy or viability of the regulatory or statutory scheme as a whole.

(3) the participation, character and attitude of the corporation offender, considered in the larger context of corporations engaged in relevant industrial or business activity as to aspect (1), noting, for example:

(a) *what was the state of mind of the corporation at the relevant tim*e. The Court could consider whether the offence was the consequence of rogue activity by an individual or individuals inadequately supervised by the corporation, or was the consequence of a corporate culture which turned a blind eye to such activity, or was it the consequence of a corporate culture which encouraged such activity, or was the consequence of planned activity by the operating minds of the corporation. The Court could consider if the corporation had a single operating mind, or many, or what sort of managing or directorial levels of responsibility there were.

(b) *what was and is the physical structure of the corporatio*n. The Court could consider the size of the corporation, its position in the relevant industry, its market share, its profitability, its practices generally. The Court could consider the nature of management and other features of corporate operations. The Court could consider how long the corporation had been in business, whether its managers, directors and employees have had continuity. The Court could consider the relative significance of the corporation in the community generally.

(c) *what was and is the attitude and prior conduct of the corporation generall*y. The Court could consider the extent of corporate good conduct, such as attempts to comply with the law, or to foment safety or good business practices generally, and so on prior to as well as after the offence. The Court could consider prior examples of wilful misconduct, or recklessness, or carelessness, or obduracy, or incompetence. The Court could consider whether the corporation is, can be, or already has been rehabilitated or re-oriented. The Court could consider remorse, voluntary efforts to make amends or compensate, and so on.

> (d) *what message is intended for and can be given to other*s. This would include messages for the public generally, or for corporate leaders and participants in the same or related fields of endeavour.

[12] This court in **R. v. A.W. Leil** 2003 NSPC 60, also reviewed the factors and consideration which should be taken into account and referred specifically to the often-relied upon case of **R. v. Cotton Felts** (1982) 2 CCC (3d) 287 and the several factors listed in Canadian Health and Safety Law, Editor Norman Keith, which has been the subject of considerable submissions here today. Again it is not necessary for me to quote at length from that decision. The list of relevant factors just referred to are as follows:

(a) continuity of illegal actions;
(b) impact of the violations;
(c) profitability as a result of illegal action;
(d) background and attitude of the defendant, including safety record;
(e) post-offence actions by the accused;
(f) prior convictions;

[13] As I mentioned above the fundamental purpose of sentencing is the protection of the public and a respect for the law. In the context of occupational health and safety violations it is the protection of workers and the workplace and the integrity of the occupational health and safety regulatory scheme which is to be addressed. The workplace is an inherently dangerous environment. Much of the evidence in this proceeding demonstrates that a construction site is a “work in progress”. It is a dynamic situation. The materials, the heights involved and the ever-changing work conditions make safety a continuing challenge. Workers have very little power or leverage individually to control the safety measures which are necessary to protect them and minimize their risk of injury. They can only collectively bargain or rely on the legislative scheme such as the **Occupational Health and Safety Act** to protect them. The **Occupational Health and Safety Act** has as its' principle purpose, in my opinion, clearly, the protection of workers. The foundation of the **Act** is the internal responsibility system, which was the subject of considerable evidence during this trial, which is based on the principle that workplace safety is a shared responsibility and the primary responsibility is the function of each party's

authority and ability to control the workplace. Clearly the defendants here had the most authority and the greatest ability to control this work site.

[14] The purpose of this proceeding therefore is to impose a sentence which will help to protect workers and respect the integrity of the legislative scheme set out in the **Occupational Health and Safety Act**. The primary objective through which this principle or this purpose can be achieved is, of course, deterrence, principally, general deterrence. All of the authorities support this conclusion. Accordingly, the sentence imposed must be sufficiently consequential to provide a meaningful deterrence to other employers or contractors who stand in a similar position to that of the defendant and who have similar authority and control in the workplace.

[15] The workplace is largely self-policing. The risk of detection of safety violations is low. Accordingly the imposition of significant consequences for offenders must be forthcoming if violations are discovered to deter others who fail to adequately fulfill their responsibilities under the **Occupational Health and Safety Act**.

[16] Principles of sentencing relative to this case:

(1) Proportionality: Clearly the gravity of these offences are significant. They resulted, as this Court found, in the death of Mr. Dillman. The impact of these violations are serious. The Court listed four specific areas where each defendant failed to act which could have prevented this tragedy. While the consequences of the defendants' failures, in this case Mr. Dillman's death, clearly need to be taken into account, it is also a measure of the defendants' action, or lack of action, which constitutes the offences, which also needs to be examined. Not all offences which result in a death are necessarily the same. In large measure the particular action or inaction of the defendant needs to be considered. Many of the considerations listed by Watson, J. in **R. v. General Scrap,** *supra* is directed at this issue. Here the failure of the defendant to insist upon regular toolbox meetings with CMC and the failure to adequately inspect the skylight openings after January 22, 2003 when the issue was brought to the defendant's attention, are the most serious failures of the defendant; although as the Court held earlier the other failures also contributed to the accident and could have prevented it.

[17] In my opinion the defendant's inaction of those two specific failures are not momentary or the result of a single incident of misjudgment. The failure of CMC to hold toolbox meetings and the presence of their employees at the JOSH meetings was a clear and apparent problem. As well, the failure to inspect and better repair the skylight openings after Jordan Macumber brought the same to the defendant's attention continued for eight days, notwithstanding that there were not workers presently on the roof this was, in my opinion, serious. This was more than a mere “slip” or an error in judgment. In my opinion it, together with the other incidences of inaction, represented a serious failure in the defendant's implementation of its' safety regime.

[18] I want to, as well, specifically refer to the length of time the Styrofoam covered the openings. It was from January 17 to January 30, almost two weeks - thirteen days. This, in my opinion, is aggravating because it demonstrates a critical weakness in the safety regime which the defendant had ultimate authority and control over. Also, it is apparent from the evidence that the presence of the Styrofoam on the openings was well-known by those on the roof. While it is difficult to properly gauge this given the weakness in some of the witnesses testimony, the obvious characteristics of the Styrofoam would have made its presence apparent, at least when it was first installed. Again, this suggests a gap in the safety regime that the detection of this significant hazard was not brought to the defendant's attention earlier.

[19] As I mentioned earlier in my remarks, this was an accident waiting to happen. This all goes to increase the gravity of the offence. At the same time, I might add, that I have not been able to conclude that the defendant did know in fact the openings were covered by Styrofoam. There was not sufficiently reliable evidence to reach that conclusion and particularly after January 22, 2003, and as I concluded I did not accept and specifically rejected the suggestion that the defendant Donald London told the carpenters to place the Styrofoam on the openings. It was originally suggested that the defendant either knew about the Styrofoam or directed the same to be installed, and that suggestion can simply not be supported. Accordingly, the seriousness and the gravity of the offence is certainly not as was originally alleged during the Crown's case at trial.

[20] (2) Parity: Parity is an important aspect of the sentencing process, and which has been specifically addressed by the defence. A large number of the authorities has been referred to me where a death of a worker has been involved, and while the circumstances of each case are different a clear range of fines appears from the authorities. Obviously the simple fact that a death occurred is not the only factor or necessarily the determinative factor, as all factors mentioned above were obviously considered. However, it is in my opinion a significant feature in each case. The following is a list of those cases which I have been referred to and all of which involve a death. It is not necessary for me to refer to details of the facts in all those decisions as some have been quoted at length by counsel in their written submissions. It is suffice to say that significant fines have been levied in those cases, many of which are in the hundred thousand dollar range, and span a range considerably more than that to some less than that. Not all of these cases of course are Nova Scotia authorities - many of them are from Ontario and Alberta and other parts of the country. The cases are as follows:

1. R. v. Canadian MDF Products [2002] A.J. No. 643 May 13, 2002
   Fine: $ 125,000.00 + $ 18,750.00 VFS

2. R. v. General Scrap Iron & Metals Ltd. [2003] A.J. No. 13 Jan. 9, 2003
   Fine: $ 100,000.00 + $ 15,000.00 VFS

3. R. v. Sage Well Services [2000] S.J. No. 448
   Fine: $ 25,000.00 + $ 1,000.00 upheld

4. R. v. C.H. Heist Ltd. [1999] No. 2607
   Fine: $ 100,000.00 + $ 50,000.00 + $ 5,000.00

5. R. v. Lawrence Meier Trucking Ltd. [2000] S.J. No. 868
   Fine: $ 20,000.00 + $ 3,000.00 VFS

6. R. v. Mar-Phyl Logging [1992] A.J. No. 1183
   Fine: $ 7,500.00

7. R. v. Bayview-Wellington Homes [2003] O.J. No. 1111
   Fine: $ 400,000.00 (similar death 8 months prior)

8. R. v. Surespan Construction Ltd. [2001] M.J. No. 100
Fine: $ 75,000.00 + $ 1,000.00 VFS

9. R. v. Bertrand Farm Components Ltd. [1996] O.J. No. 4848
Fine $ 150,000.00 (joint recommendation)

10. R. v. St. Lawrence Cement Inc. [1992] O.J. No. 3770
Fine: $ 50,000.00 & $ 500.00 (individual)

11. R. v. Fiesta Party Rental (1984) Ltd. [2000] A.J. No. 1679
Fine: $ 100,000.00

12. R. v. J.D. Irving Feb. 3, 2000 N.S. Prov. Ct. unreported
Fine: $ 100,000.00 + $ 15,000.00 VFS (joint recommendation

13. R. v. Charlie MacIntyre Contracting & Dan Magee
CMC - Fine: $ 20,000.00 + $ 5,000.00 Ed. Fund + $ 3,000.00 VFS
DM - Fine: $ 7,000.00 + $ 1,050.00 VFS

14. R. v. Inco. Ltd. [1999] O.J. No. 4648
Fine: $ 250,000.00

15. R. v. St. Mary's Cement Corp. [1999] O.J. No. 3951
Fine: $ 250,000.00 x 2 = $ 500,000.00
5 prior convictions - prior incident of death
- prior incident of legs cut off

16. R. v. Canrow Inc. [1995] O.J. No. 3543
2 deaths
Fines: $ 300,000.00 + $ 200,000.00 = $ 500,000.00

[21] The defence argues with some force that the Court should make particular reference to the fines imposed on the other offenders, CMC and Daniel Magee. I have had the advantage now today of reading the decision of my colleague, Judge MacDonald, who dealt ostensibly with a joint recommendation, but gave lengthy remarks with respect to the final disposition of the matter. However, it must be kept in mind that while those

offenders had significant responsibility and authority it does not compare exactly with the offenders here. Also the relative corporate sizes would appear to be different. I do, however, recognize that the gravity of these offences in the offender's action is very significant and in some way it can be considered more serious than these offenders. However as the Crown has quite ably pointed out, their actions were different because their roles were different and ergo their failures were different because of the different responsibilities that each had. It can be argued however that the other offenders' failures contributed more directly to the accident than the present offenders. In my opinion the disposition or sentencing of CMC and Daniel Magee can be taken into account and should be taken into account subject to the caveats and limitations that I just expressed, particularly the differing roles and differing features of their actions and the characteristics of the respective companies.

[22] (3) Restraint: Finally, before dealing specifically with the factors related to this case I wanted to refer to the principle of restraint. The court must always measure the imposition of any sentence with a degree of restraint. The fine to be imposed must only be as great as is necessary to meet the objectives and fulfill the principles of sentencing as I have described above.

[23] I will now deal with the remarks and the issues raised by counsel during their submissions today. These are considerations the Court is required to take into account based on the authorities that have been referred to me.

[24] The size of the defendant corporation and the individual defendant: Meridian is a large company, a large construction company in the Atlantic area. It is essentially a “broker”, if you will, and employs only a small number of individuals, twenty to thirty it was submitted today, and deals essentially with sub-trades, however, the size of the projects undertaken are significant and are pervasive in the region, although the various projects recited appear to have been extended over a number of years, some two or three in particular.

[25] The economic or size of the economic activity in question: The evidence revealed that the contract for this particular project was 10.2 million dollars.

[26] The profitability of the actions which resulted in the offence: In my opinion this is not a factor here. None of the actions or inactions by the defendants were motivated by cost-cutting or cost-saving measures and while certainly more money could have perhaps made any workplace safer, it is not a determinative factor, in my opinion, in this case.

[27] The defendant's background: The corporate defendant has no prior convictions. The individual defendant, Mr. London, has had a long experience in the industry and the Court received character reference letters today in support of his safety record. Neither the corporate defendant or Mr. London had ever experienced a worker death previously. Mr. London the defendant was described as being remorseful and his health has been significantly affected as a result of this tragic accident.

[28] Post-offence action by the defendant: The Court heard today, much to the defendant's credit I might say, that the corporate defendant has hired a dedicated safety officer now whose responsibility is to conduct the JOSH meetings and attend to safety concerns on every site on which the defendant has any authority.

[29] Maximum penalty: The maximum penalty under the legislation is $ 250,000.00 and that includes all remedies, including contributions to the Education Fund.

[30] The consequences to the defendants: have been described by counsel as affecting their insurance rating. I can only conclude that their Workers' Compensation rates would be affected by this. Their eligibility for bonding and receiving Government contracts I have been told may be affected by this conviction.

[31] Much was said about the lack of an early guilty plea and of course the lack of a guilty plea is not an aggravating feature as was ably pointed out by defence counsel, but this point was raised to distinguish this case from the other offender, the CMC and Mr. Magee. I would however note that the allegations originally made in the Crown's case were significantly more serious than those that ultimately were proven beyond a reasonable doubt to have occurred, particularly with respect to the allegations made by the carpenters with respect to Mr. Donald London's action and even to the extent

of Jordan Macumber's allegations, which were not fully proved beyond a reasonable doubt.

[32] I have also taken into account the Victim Impact Statements that were filed. The Court reviewed the Victim Impact Statement of Mr. Dillman's spouse and we heard today from another individual, the sister of John Dillman, who spoke quite eloquently about her relationship with her brother and the effect that this accident has had on her and her family.

[33] Finally, before concluding this matter I just want to refer again to the purpose and principles of sentencing, particularly the protection of workers and the respect for the occupational health and safety regime. I agree with much of what was said by the Crown Attorney that a sufficient deterrent, a message if you will, must be provided that will adequately protect workers in the future and accordingly a fine sufficient to represent that deterrent must be imposed. I am certainly mindful of Mr. London's particular circumstances and I have taken into account all of the considerations that have been made to me.

[34] I have also taken into account the totality of the fines with respect to Meridian. I intend to levy a fine, a contribution to the Education Fund - which in my opinion, notwithstanding what was said during submissions, is a laudable objective, and there will be victim fine surcharges imposed in both instances. The victim fine surcharge will be imposed only on the fine portion, not on the Education Fund.

[35] With respect to Mr. London, the fine is $ 10,000.00 and there will be victim surcharge of $ 1,500.00 for a total of $ 11,500.00.

[36] With respect to Meridian Construction Inc. the fine is $ 77,000.00. The victim surcharge is $ 11,550.00 and the contribution to the Education Fund is
$ 10,000.00, which totals $ 98,550.00. The total together is $ 110,050.00 and I will hear counsel with respect to the amount of time that's required to pay.

[37] With respect to Mr. London he will have until March 28,2006 to pay the fine in full. With respect to Meridian the date will be December 19, 2006 which is a little less than two years, and the corporate defendant can apply at that

time if further time is required and that would also apply with respect to the Education Fund payment.

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Alan T. Tufts, J.P.C.