

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: Nova Scotia (Labour and Workforce Development) v.
O'Regan Chevrolet Cadillac Ltd., 2010 NSPC 68

Date: 2010/12/08

Docket: 2056788

Registry: Dartmouth

Her Majesty the Queen (Department of Labour and Workforce Development)

v.

O'Regan Chevrolet Cadillac Limited

Decision on Sentence

Judge: The Honourable Judge Pamela S. Williams

Heard: October 18, 2010 at Dartmouth, Nova Scotia

Written Decision: December 8, 2010

Counsel: James Clarke , for Her Majesty the Queen
Department of Labour and Workforce Development

Donald Murray, for O'Regan Chevrolet Cadillac Limited

By the Court:

Introduction

[1] On July 6, 2010 O'Regan Chevrolet Cadillac Limited, through Counsel appeared in Dartmouth Provincial Court and entered a change of plea to count # 1 of a 5 count information that had been set down for a 6 week trial due to commence in September, 2010. The offence to which a guilty plea was tendered is as follows:

That on or about March 13, 2008 at or near 201 Wyse Road, Dartmouth, Nova Scotia O'Regan's Chevrolet Cadillac Limited, as an employer, did fail to take every precaution reasonable in the circumstances to ensure the health and safety of persons at or near the workplace, contrary to Section 13(1)(a) of the *Occupational Health and Safety Act S.N.S.1996 c.7* and thereby did commit an offence contrary to Section 74(1) of the *Occupational Health and Safety Act S.N.S.1996 c.7*

[2] The Agreed Statement of Facts filed at the sentencing hearing on October 18, 2010 is set out below:

1. O'Regan Chevrolet Cadillac Ltd operates a new and used automobile dealership, as well as automotive repair and collision centres, in Halifax Regional Municipality.
2. Kyle Hickey was hired as an autobody "prepper" on August 13, 2007, and was assigned to work at the O'Regan's Collision Centre located at 201 Wyse Road, Dartmouth, Nova Scotia. Kyle had successfully completed Workplace Hazardous Material Information Systems (WHMIS) training on July 6, 2005 as part of the requirements of his Diploma in Automotive Collision Repair & Refinishing through the Nova Scotia Community College (successfully completed 2007).

3. O'Regan Chevrolet Cadillac Ltd acknowledges that it was aware on March 13, 2008, through prior safety committee meetings, that Kyle had been identified internally as being eligible for WHMIS refresher training since at least September 27, 2007. Joint Occupational Health and Safety Committee Minutes also noted on January 23, 2008, that that training opportunity had not been completed.
4. In addition to the WHMIS training that was required as part of his NSCC program, Kyle was also required, by applicable legislation and regulations, to receive site-specific training about hazardous materials in use at his workplace. O'Regan Chevrolet Cadillac Ltd did not have a formalized site-specific WHMIS training program in place during Kyle's employment, and is not able to document that Kyle received appropriate, site-specific WHMIS training during his employment.
5. Kyle's work at 201 Wyse Road required him to be exposed to a number of chemicals which carried the potential for explosion and fire. These chemicals included paints, Paint Equipment Wash Solvent (also known as "Gun wash solvent"), waste solvent, as well as DX330C and DX440 wax and grease remover. The gun wash as well as the wax and grease remover are classified as Class IB or IC flammable liquids under the National Fire Code, requiring specific precautions to be taken with their use and handling.
6. Material safety data sheets (MSDS) applicable to the chemicals in use at 201 Wyse Road were required, by applicable legislation and regulations, to be posted and legible and available so that employees at the workplace could inform themselves about the use, and handling, and the behaviour of those chemicals.

7. O'Regan Chevrolet Cadillac Ltd acknowledges that it was aware on March 13, 2008, that the use of chemicals on site that day was not compliant with the applicable MSDS. In particular, some storage equipment for the chemicals available for use on site were not appropriately labeled. The supplier label, which is attached to the gun wash barrels when delivered directs that the product is "flammable and to keep the product away from all sources of ignition." The label further states to "ground containers before use." Through the investigation it was determined that there was no evidence indicating that the barrels containing the gun wash were properly labeled, bonded or grounded. O'Regan Chevrolet Cadillac Ltd also acknowledges that the manner in which information was made available about chemicals in use did not comply with applicable regulations, nor with O'Regan's own "Safety Standards" as promulgated January 23, 2003.
8. On March 13, 2008, an explosion and fire occurred at 201 Wyse Road. Although an investigation by Halifax Regional Fire and Emergency identified a gun wash barrel as the point of origin for the explosion and fire, the reasons for the explosion and fire remain indiscernible.
9. As a result of the explosion and fire on March 13, 2008, Kyle Hickey suffered significant burn injuries. He succumbed to those injuries the following day.
10. By failing to provide Kyle Hickey with appropriate site-specific WHMIS training, and by failing to appropriately label and store some of the storage equipment for the chemicals used on site, O'Regan as an employer failed to take every reasonable precaution reasonable in the circumstances to ensure the health and safety of persons at or near the workplace, including Kyle Hickey.

Occupational Health and Safety Act

[3] Sections 2, 13(1) and 74(1) relating to an ‘Internal Responsibility System’, to ‘Employers’ Precautions and Duties’ and ‘Offences and Penalties’ are applicable:

Internal Responsibility System

2 The foundation of this Act is that the Internal Responsibility System which

(a) is based on the principle that

(i) employers, contractors, constructors, employees and self-employed persons at a workplace, and

(ii) the owner of a workplace, a supplier of goods or provider of an occupational health or safety service to a workplace or an architect or professional engineer, all of whom can affect the health and safety of persons at the workplace,

share the responsibility for the health and safety of persons at the workplace;

(b) assumes that the primary responsibility for creating and maintaining a safe and healthy workplace should be that of each of these parties, to the extent of each party’s authority and ability to do so; . . .

Employers’ precautions and duties

13(1) Every employer shall take every precaution that is reasonable in the circumstances to

(a) ensure the health and safety of persons at or near the workplace;

(b) provide and maintain equipment, machines, materials or things that are properly equipped with safety devices;

(c) provide such information, instruction, training, supervision and facilities as are necessary to the health or safety of the employees;

(d) ensure that the employees, and particularly the supervisors and foremen, are made familiar with any health or safety hazards that may be met by them

at the workplace;

(e) ensure that the employees are made familiar with the proper use of all devices, equipment and clothing required for their protection; and

(f) conduct the employer's undertaking so that employees are not exposed to health or safety hazards as a result of the undertaking.

Offences and penalties

74(1) A person who

(a) contravenes this Act or the regulations; or

(b) fails to comply with

(i) an order or direction made pursuant to this Act or the regulations, or

(ii) a provision of a code of practice adopted pursuant to Section 66,

is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred and fifty thousand dollars, or to a term of imprisonment not exceeding two years, or to both a fine and imprisonment.

[4] In addition *Section 75* establishes a range of additional sentencing options, often referred to as “creative sentencing options” that can include: directing the offender to pay to the Minister an amount for the purpose of public education in the safe conduct of the activity in relation to which the offence was committed, and principles of internal responsibility provided for in the *Act :s.75(1)(i)(ii)*; community service: *s. 75(1)(d)* and requiring the offender to comply with such other reasonable conditions as the court considers appropriate and just in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the same offence or committing other offences: *s. 75(1)(f)*. The total of any fine or direct cost incurred by the offender under the creative sentencing options cannot exceed the maximum allowable penalty of \$250,000.

The Positions of Crown and Defence on Sentence

[5] The Crown's position, it seems, is that this case is similar to cases where there has been a fatality which can be connected to an occupational health and safety infraction. However, there has been an acknowledgement on the part of the Crown that the violations "may or may not have caused or contributed to the explosion and fire" which led to the death of Kyle Hickey. The Crown relies on case law, both from Nova Scotia and elsewhere in Canada, where the range of fines imposed has been \$44,000 to \$123,000. The Crown recommends a global penalty in the amount of \$150,000, one-third fine and two-thirds *s. 75* creative sentencing options, stressing this would be "indicative of the court's abhorrence of their [O'Regan's] involvement in this offence and the unfortunate and horrific end to Kyle Hickey's life".

[6] O'Regan's position is that this case is more akin to cases where no causal connection between the fatality and the occupational health and safety infraction has been established. Further, the Defence suggests that the Court ought to impose a 'base level' fine in accordance with recent Nova Scotia case law in the amount of \$25,000 and should consider imposing \$5,000 worth of *s. 75* options, taking into consideration the remedial work that has already been completed (\$19,000) and the memorial tribute to Kyle Hickey (\$9,000).

The Legal Framework for OHSА Sentencing

[7] Derrick J. in *R. v. Nova Scotia Power Inc* [2008] NSPC 72 sets out a very clear and succinct review of the law as it relates to a sentencing hearing under the *Occupational Health and Safety Act*, par 27-32:

27 The legal framework for this sentencing has been constructed by the purpose and principles of sentencing found in sections 718-718.2 of the Criminal Code (which apply here by operation of the Summary Proceedings Act, S.N.S. 1989, c. 450 as amended) and the occupational health and safety cases applying these norms. Norman A. Keith's treatise, "Canadian Health and Safety Law: A Comprehensive Guide to Statutes, Policies and Case Law" (Canada Law Book: 2008) references principles of sentencing for occupational health and safety violations that reflect those found in sections 718-718.2 of the Criminal Code:

There are three primary objectives of sentencing for a violation of the applicable health and safety legislation. First, there is the deterrence aspect of the sentencing process, both specific to the convicted party and generally for the community. Secondly, there is the retribution aspect of the sentencing process, indicating the moral wrong and the need to reinforce the value or standard that was violated. Thirdly, there is the rehabilitation-reform aspect of the sentencing process for the convicted party to be assisted in not repeating the offence.

28 In *Regina v. Cotton Felts Ltd.*, [\[1982\] O.J. No. 178](#), the Ontario Court of Appeal held that:

The amount of the fine will be determined by a complex of considerations, including the size of the company involved, the scope of the economic activity in issue, the extent of the actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence ... Without being

harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere licence fee for illegal activity. (paragraphs 19 & 22)

29 The Cotton Felts decision accorded deterrence in the occupational health and safety context a broad meaning encompassing an emphasis on community denunciation and stigmatization of an act with the result being a moral or educative effect that conditions the attitude of the public. In approving this model of deterrence taken from R. v. Roussy, [\[1977\] O.J. No. 1208](#) (Ont. C.A.), Blair, J.A. in Cotton Felts held that deterrence with an educative dimension is "particularly applicable to public welfare offences where it is essential for the proper functioning of our society for citizens at large to expect that basic rules are established and enforced to protect the physical, economic and social welfare of the public." (paragraph 23)

30 A sentence for an occupational health and safety infraction must communicate a message that emphasizes the essential responsibility of ensuring "corporate good conduct and [enhancing] the well being of the public." @. v. General Scrap Iron and Metals Ltd., [\[2003\] A.J. No. 13](#) (Alta. Q.B.) paragraphs 28-30) Watson, J. in General Scrap Iron concluded that sentencing corporations for regulatory offences should be approached with the following in mind:

- (1) the conduct, circumstances and consequences of the offence;
- (2) the terms and aims of the relevant legislation;
- (3) the participation, character and attitude of the corporation offender.

(General Scrap Iron, paragraph 35)

31 Watson, J. articulated an analytical framework constructed around these considerations, noting that aggravating and mitigating factors must be factored into the sentencing of the corporate offender. (General Scrap Iron, supra, paragraph 49)

This framework is detailed in *R. v. Meridian Construction Inc.*, [\[2005\] N.S.J. No. 379](#), a decision of the Honourable Judge Alan Tufts of this Court. In *Meridian*, Judge Tufts makes several noteworthy observations about sentencing in the occupational health and safety context:

... the fundamental purpose of sentencing is the protection of the public and a respect for the law ... The workplace is an inherently dangerous environment ... Workers have little power or leverage individually to control 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 ... the protection of workers. The foundation of the Act is the internal responsibility system ... which is based on the principle that workplace safety is a shared responsibility ... (paragraph 13)

32 In *Meridian*, Judge Tufts also noted that workplace safety risks can readily go undetected in a context that is "largely self-policing." (paragraph 15) Sentencing of a corporate offender in an occupational health and safety case is an exercise in balancing a number of factors to achieve a disposition that helps protect workers through deterrence and emphasizes respect for workplace safety and the legislative scheme that embodies this objective.

Principles of Sentencing

[8] It is well recognized that three principles of sentencing must be considered in determining a fit and proper disposition. They are proportionality, parity and restraint.

Proportionality

[9] The sentence imposed on O'Regan Chevrolet Cadillac Ltd must be proportionate to its moral blameworthiness for: (1) having failed to provide employee hazard awareness training (site-specific WHMIS training); (2) failing to store chemicals in the manner directed by the applicable Material Safety Data Sheets (no bonding or grounding of barrels containing gun wash) and (3) failing to make information about the chemicals in use available in the manner required by regulation (inadequate labeling of gun wash barrels).

[10] In order to assess the degree of moral blameworthiness of O'Regan the Court is compelled to consider whether, and if so, to what extent, Kyle Hickey's death is related or connected to the offences for which O'Regan Chevrolet Cadillac Ltd. is being sentenced.

[11] As stated by Derrick, J. in *R. v. Nova Scotia Power Inc, supra at p. 16* “a causal connection between the occupational health and safety violation and the worker's death is material to fixing the penalty”. This Court adopts, as did she, the comments of Watson, J. in *General Scrap Metal , supra* at paragraph 44 when he referenced the need to be “sensitive to the facts and circumstances” of the case in sentencing corporate offenders:

When the law speaks to corporations through sanctions, it should do so in a manner which is logically coherent with the factual level of culpability of the corporation.

[12] As in *Nova Scotia Power Inc, supra*, no causal connection has been established here between the offences and the fatality. O'Regan's failure to properly label and store chemical equipment or provide site-specific WHMIS training did not cause the explosion and fire which occurred on March 13, 2008 wherein Kyle Hickey suffered "significant burn injuries" to which he succumbed the following day. This is confirmed by way of paragraph 8 of the Agreed Statement of Facts:

On March 13, 2008, an explosion and fire occurred at 201 Wyse Road. Although an investigation by Halifax Regional Fire and Emergency identified a gun wash barrel as the point of origin for the explosion and fire, the reasons for the explosion and fire remain indiscernible.

[13] Therefore, O'Regan is not being sentenced for causing or allowing an event to occur which caused the death of Kyle Hickey. As Defence Counsel points out in his written submissions, "The plea entered by O'Regan's did not include an acknowledgment that any of its failures caused the fire or caused the death of Kyle Hickey". This Court further accepts and adopts the following comments found at p. 2 of his brief:

This is not to diminish the fact that an O'Regan's employee, Kyle Hickey, died as a result of a workplace incident. The point is that the sentencing process and its result must be strictly grounded in the failure that has been acknowledged by O'Regan's, and agreed by the Crown. It would not be appropriate to craft a sentence based on

consequences that were neither planned, contemplated, nor expected by O'Regan's - the cause of which remain unknown even today. The reason for the explosion and fire will forever remain indiscernible.

[14] This case is hence distinguishable from the line of case law, referred to me by the Crown, where significant fines have been imposed, in large part, due to the causal connection between the death and the failure of a company to comply with the occupational health and safety legislation. For example:

Ontario (Minister of Labour) v. Cox Construction Ltd [2009] OJ No 5976 where an employee was crushed by an excavator operated by a co-worker. The incident was related to the failure of the company to provide a signaller and appropriate communication. A fine of \$150,000 was imposed;

R. v. Bayview-Wellington Homes (Port Union) Inc. [2003] OJ No 1111 where a young construction worker was electrocuted to death when he placed a metal ladder too close to power lines. The court found that the employer should have taken steps to make hydro wires harmless and thus this failure was causally connected to the resulting death. A fine of \$200,000 per count was imposed;

R. v. Bertrand Faure Components Ltd [1996] OJ No 4848 where a worker was killed when a forklift operator hit a machine that fell on him. The company had failed to ensure that the nut clench press machine was secure against tipping and falling. A fine of \$150,000, jointly recommended, was imposed;

R. v. Canron Inc [1995] OJ No 4311 where a steel beam being moved by a crane fell and killed two workers. Given the confined space within which the

employees worked, together with the lack of appropriate training regarding the use of clamps, it was 'an accident waiting to happen'. Fines of \$300,000 and \$200,00 were levied;

R. v. Canadian MDF Products Co. [2002] AJ No 643 where the court found the company to have been negligent in the employee's death as the incident was foreseeable. The court imposed a fine of \$125,000;

R. v. Fiesta Party Rentals (1984) Ltd. [2000] AJ No 1679 where the court found the company to have been negligent for failing to assess the danger involved in erecting a tent near power lines. An employee died when the tent pole he was holding made contact with the power line. A fine of \$100,000 was ordered;

R. v. Petro Canada [2008] OJ No 5598 where an employee was burned by steam when the locking pin to an overflow valve had been removed. The court found that the company had failed to take reasonable precaution of ensuring the workers were not endangered by steam. The court set the fine at \$150,000.

R. v. J.D. Irving (an unreported decision of the Nova Scotia Provincial Court dated February 3, 2000) where the company was guilty of having failed to ensure that employees used fall protection devices in a lumber yard. An employee fell and died. MacDonald, J. imposed a fine of \$125,000, which had been jointly recommended.

Deep Sea Trawlers (unreported, 2003) where an employee drowned, not having been wearing a life jacket. A fine of \$100,000 was imposed.

R. v. Meridian Construction [2005] NSPC 40, where the roof worker's fall was caused by a breach of the occupational health and safety laws. A fine of \$98,550 was imposed.

R. v. Town of New Glasgow [2008] NSPC 15 where a worker died when a trench he was in collapsed due to inadequate safety policies. At par 41 Campbell, J. indicated, "The lack of proper policies and the lack of a culture that promoted workplace safety directly contributed to this incident". The total penalty imposed was \$110,000.

[15] In short, causation is relevant to penalty. Tufts, J. noted in *R. v. A.W. Leil Cranes & Equipment (1986) Ltd. [2003] NSJ No 525 (NSPC)* that if there is a fatality, it is clear that the fines are increased depending on the causal link between the infraction and the death. He had been referred to cases where \$100,000 was "well within the range" for the fines in cases of "death-causing" infractions of occupational health and safety legislation. But this is not a death-causing infraction case.

[16] Whereas actual harm is relevant to the degree of culpability, so too is potential for harm as was recognized in *Cotton Felts, supra, page 8, A.W. Leil Cranes & Equipment, supra, paragraph 14* and *Nova Scotia Power Inc, supra, paragraph 38*. The potential for harm is ever present whenever inadequate measures are taken to ensure the proper

labeling and storage of flammable liquids and whenever employees are not provided with site-specific WHMIS training.

Parity

[17] The principle of parity, as codified by *section 718.2(b) of the Criminal Code*, requires that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. As stated above, this is not a case where a causal connection between the infraction and the fatality has been established, as in *J.D. Irving, supra*. Nor is this a case where a hazard was identified and nothing was done as in *Meridian Construction, supra*. Although three identified safety policies were lacking at O'Regan Collision Centre on March 13, 2008, this is not a case where it can generally be said that safety policies were inadequate or lacking or that O'Regan was part of 'an impoverished safety culture' as was found to be the case in *Town of New Glasgow, supra*.

[18] The Defence argues that recent decisions of this Court suggest there may be a "base line fine" that ought to be imposed in the case of all reasonably large corporate or institutional offenders in the range of \$25,000, citing *Nova Scotia Power Inc, supra*, *Town of New Glasgow, supra* and *R. v. Sutherland, 2009 NSPC 21*. This Court does not share the view that a trend towards a base line fine of \$25,000 is emerging in the Nova Scotia case law for occupational health and safety cases. *Nova Scotia Power Inc, supra* included an order pursuant to s. 75 for creative sentencing options requiring the company to host three public awareness sessions costing \$15,000. The total sentence, including victim surcharge totaled \$43,750. In *R. v. Sutherland, supra*, there was a joint

recommendation for a penalty totalling \$25,000. However, the Court, recognizing the offender to be an individual family dairy farm operator and not a corporation, imposed a \$15,000 fine, no victim surcharge and 160 hours of community service work. And in *Town of New Glasgow, supra*, although the Court imposed a \$25,000 fine, it also levied remedial and educational section 75 orders bringing the total to \$110,000 plus victim surcharge. The global sentence was designed to be “sufficiently large to have an impact” on the Town and others and to “reflect the public nature of the defendant as a municipal unit, its level of responsibility and its readiness to accept responsibility both for what happened and for the future safety of its employees”(paragraph 43).

[19] Each case is grounded in its own unique set of facts. However, this case is somewhat like *Nova Scotia Power Inc, supra*, in that O’Regan Chevrolet Cadillac Ltd is also a sizeable corporate entity, with no prior or related history of violations. Fatalities occurred in both instances but neither was causally linked to the infractions committed by the respective company. The infractions posed great potential harm. And finally, swift remedial action was taken by both, forthwith, to ensure compliance with occupational health and safety standards.

Restraint

[20] The principle of restraint dictates that the sentencing court apply a ‘measured’ response in determining the sentence that best satisfies the purpose and principles of sentencing. In occupational health and safety cases this translates into imposing a fine that is no greater than required to meet the objectives of sentencing.

Factors Considered

[21] *Cotton Felts, supra*, states that the factors to be considered when imposing sentence include the size of the company involved, the scope of the economic activity involved, the extent of the actual and potential harm to the public and the maximum penalty prescribed by statute.

[22] *General Scrap Iron and Metals Ltd, supra* states that when the principles of deterrence and denunciation are applied to corporations, the aim is to craft a sentence that maintains the “good instincts and social conscience morale of the participants in the corporation” and that innovative approaches are required to cover the full range of culpable corporations because they consist of innocent managers and employees as well as reckless ones. “Sanctions must clearly declare the wrongfulness of the conduct that constituted the offence”. The sentence has to “be based on the conduct, circumstances and consequences of the offence, the terms and aims of the relevant legislation and the participation, character and attitude of the corporate offender”.

Size of the Company and Scope of Economic Activity

[23] Kathleen O’Regan, director of Human Resources for O’Regan Chevrolet Cadillac Ltd. for the past 10 years, testified that O’Regan Chevrolet Cadillac Ltd operates a new and used automobile dealership, as well as two automotive repair and collision centres in Halifax Regional Municipality. There are currently 90 employees at the dealership, 11 at the Halifax Collision Centre and 22 at the Dartmouth Collision Centre, the latter

representing 1/5 of total employees, roughly the same as in March, 2008. The profit margin of the company is 2 % of the total yearly revenue before taxes (\$70 million) or about 1.4 million annually before taxes.

[24] The automotive sales industry is a very competitive marketplace. Ms. O'Regan testified that the collision centres themselves are not profit-generating enterprises. Rather they were created to provide a service to clientele wishing to have repairs done by the dealership directly, instead of services being contracted out. These collision centres, she adds, are costly to maintain as is evidenced by competitors having had to shut down their operations because the collision centres could not sustain themselves.

Actual and Potential Harm to the Public

[25] As discussed under the sub-heading of Proportionality, there is no causal connection between the infractions committed by O'Regan Chevrolet Cadillac Ltd and the explosion, fire and the resulting death of their employee, Kyle Hickey. Having said that, it is important to stress that the potential is ever present for harm to occur when employee hazard awareness training is not undertaken or 'refreshed', and when flammable liquids are not properly labeled or stored in the workplace. Great care and attention must be given to these issues at all times.

Maximum Penalty Prescribed by Statute

[26] The maximum penalty prescribed by law is to be imposed with great restraint. It is usually reserved for the worst case scenarios where the violations are flagrant, ongoing

and directly linked to a fatality. The maximum penalty under the *Occupational Health and Safety Act* is a fine not to exceed \$250,000, or to a maximum term of imprisonment of two years, or to both. In Ontario the maximum penalty is \$500,000. Perhaps this is one of the reasons why fine quantum is generally higher in that jurisdiction.

Conduct, Circumstances and Consequences of the Offences

[27] The conduct, circumstances and consequences of the offences have been set out in the Agreed Statement of Facts.

The Terms and Aims of the Relevant Legislation

[28] As stated in *Section 2* of the *Occupational Health and Safety Act*, the foundation of the legislation is the internal responsibility system based on the principle that employers and employees share the responsibility for the health and safety of persons in the workplace. Employers are mandated to take every reasonable precaution in the circumstances to ensure the health and safety of persons in the workplace as stated in *Section 13(1)(a)* of the *Act*. The standard of care is therefore high. The Dartmouth O'Regan Collision Centre, though perhaps not as inherently a dangerous workplace, as workplaces go, it nonetheless employs staff who are constantly exposed to flammable liquids. Therefore great care and attention must be focussed on workplace safety at all times.

Participation, Character and Attitude of the Corporate Offender

[29] The CEO of the company, Sean O'Regan attended the sentencing hearing, as well as most, if not all, of the previous court appearances.

[30] Kathleen O'Regan told the Court that the company's first response was to their employees and to the Hickey family. Shortly after the incident Sean O'Regan and the vice president of the company went to the Hickey home to offer support in whatever manner possible. Grief counsellors were also made available to employees.

[31] The second response, according to Ms. O'Regan, was to commemorate Kyle Hickey who she described as "a wonderful employee" and "well-liked within the organization". After consulting staff employees it was decided that whereas Kyle was an outdoor enthusiast, a park bench with an accompanying name plate would be erected on the Timberlea Trail. The thought was that it was a place nearby where people could go to remember Kyle.

[32] The company then put considerable efforts into developing a more robust supervisory and compliance system. The first step was to ensure they were in compliance with the labeling and grounding requirements of the gun wash barrels. The second step was to undertake a complete overhaul of internal training, overseen by Ms. O'Regan herself. By the end of March, 2008 the company had engaged the services of an external professional engineering company to do a risk and fire assessment. Findings were implemented and a second company was hired to strengthen O'Regan's internal safety program. Site-specific requirements were met. A one-half day orientation with site-specific training was instituted for all employees, as were WHMIS refresher courses.

[33] The cost of services offered to the Hickey family and O'Regan employees together with the commemorative bench and plaque totaled \$9,000. The improvements and investments in safety undertaken by the company were both an impressive and costly \$19,000.

[34] Ms. O'Regan indicated that in addition to any fine imposed by the Court, the company is willing to support the "Threads of Life Organization" which provides ongoing support for survivors and family of persons involved in workplace tragedies. O'Regan Chevrolet Cadillac Ltd is also prepared to sponsor an expert to speak at the upcoming Nova Scotia Auto Dealers Association Conference in April 2011 to further educate people in the industry on collision centre workplace safety.

Determining an Appropriate Sentence

[35] Imposing a just and appropriate sentence is never an easy task. It is especially difficult in a case, such as this, where there has been a loss of life.

[36] This Court echos the sentiments of Campbell, J. in *Town of New Glasgow, supra*:

[65] As a judge facing a grieving family, I am struck by a profound sense of helplessness. No sentence will deal with that grief in a way that reflects its depth and magnitude. The comments contained in the Victim Impact Statements in this case, are a glimpse into the private pain of one family. To the extent that . . . [Kyle's parents, grandparents and friends] are willing to allow their private words and expressions of

grief to be used publicly, they have the potential to be a powerful statement about the incalculable costs of failing to place a premium on occupational health and safety . . .

[37] This Court takes into consideration the principles of sentencing, and in particular, the factors relevant to an occupational health and safety sentencing hearing, together with the submissions of counsel, both written and oral and the *vive voce* evidence offered. A global penalty in the amount of \$38,750 is deemed appropriate, having taken into consideration the remedial efforts (in areas of both human resources and workplace safety) undertaken by the company in the days, weeks and months following the tragedy. The breakdown is as follows: (1) There will be a fine in the amount of \$25,000 with a victim surcharge of \$3,750. (2) A donation in the amount of \$5,000 is to be made to the Threads of Life Organization. (3) Finally O'Regan Chevrolet Cadillac Ltd is to contribute \$5,000 toward the educational program at the Nova Scotia Auto Dealer's Association to be held in April 2011. The company is also directed, with the assistance of the Department of Labour, to help plan, organize and present a session on related workplace safety.

[38] This sentence expresses deterrence and denunciation for the lapses in O'Regan's workplace safety policy and procedures in March of 2008. The quantum of the penalty also reflects a sizeable expenditure to O'Regan both in terms of time and money which follows on the heels of the extensive time, money and resources used to attend to the necessary human resource issues and to perform remedial improvements.

[39] And finally, this sentence illustrates the diligence with which employers must act to ensure workplace safety is, and remains, a priority at all times.

Pamela S. Williams

Judge of the Provincial Court of Nova Scotia