PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Halifax Port Authority*, 2022 NSPC 56

Date: 20221216
Docket: 8453323
Registry: Halifax

Between:

His Majesty the King

v.

Halifax Port Authority

Judge:	The Honourable Judge Elizabeth Buckle,
Heard:	July 26, October 4, 13, 2022
Oral Decision:	December 16, 2022, in Halifax, Nova Scotia
Charge:	148(1) *Canada Labour Code*
Counsel:	Monica McQueen, Maile Graham-Laidlaw for the Crown Stan MacDonald, Paul Neifer for the Defence

By the Court:

Introduction

[1] On July 9, 2018, Michael Wile drowned when the dump truck he was operating went into the water while discharging material at the water's edge at the Fairview Cove Sequestration Facility (FCSF). The FCSF was the site of a marine infill project administered by the Halifax Port Authority.

[2] Federal regulations required a bumping block or a signaller at the water's edge to prevent dump trucks from tipping. On the day Mr. Wile drowned, neither of these were in use at the FCSF.

[3] Following a trial, I found the Halifax Port Authority (HPA) guilty of an offence under s. 148 of the *Canada Labour Code* for failing to install the protections required by the Regulation (s. 125 of the *Canada Labour Code*; and, ss. 14.40 of the *Canada Occupational Health and Safety Regulations,* SOR/86-304).

[4] The sole issue at trial was whether the water's edge at the FCSF was a Federal "workplace" as that term is defined in the legislation. A comprehensive agreed statement of fact was filed, all other elements of the offence were admitted and no due diligence defence was advanced.

[5] At the sentencing hearing, I had the benefit of submissions from capable counsel, a victim impact statement filed by Alyson Coady, Mr. Wile's widow, lengthy evidence from Captain Allan Gray, the current CEO of the HPA and materials detailing their efforts to respond to the safety shortcomings identified in the organization.

[6] I now have to determine a fit and proper sentence for the HPA.

Position of the Parties

[7] The Crown and Defence agree that a fine is required but disagree on the quantum. They also disagree on whether a probation order is required, and, if it is, what its terms should be.

[8] The Crown seeks the maximum fine allowable in these circumstances, $100,000, and a probation order for three years with conditions including that the HPA:

- make a charitable donation to the "Threads of Life" agency in the amount of $15,000;

- with input and approval of the Department of Labour, engage a consultant to study current practices in the organization and create and implement a Health and Safety Management Program for Contractors (and other external partners) and provide the Department of Labour with the results of the study and programs; and,

- publicize the Court's decisions in this matter and the results of the independent consultation on the main page of their web site.

[9] The Crown argues that these are necessary to satisfy the applicable sentencing principles. Specifically, that there are aggravating features that place the circumstances of the offence and the conduct of the offender at the high end of gravity and that the company has demonstrated an ongoing lack of appreciation for their obligations to protect non-employees who work on their premises.

[10] Initially, the Crown also sought a probation condition requiring the HPA to install a commemorative and educational plaque on the FCSF site which would include information about Mr. Wile's death, the resulting conviction and request that anyone with concerns about workplace safety contact an Occupational Health and Safety Authority. However, following submissions, Ms. Coady provided input that she would prefer that a bench bearing Mr. Wile's name be erected at the site. The HPA undertook to do this, and the Crown advised it was no longer asking that this term be imposed as part of probation order.

[11] I wish to thank her for her suggestion.

[12] The Defence submits that a fine of $50,000 is the appropriate sentence. In doing so, the Defence disputes the Crown's characterization of the gravity of the conduct of the organization, both with respect to this specific offence and in general. Further, the Defence argues that, due to the steps already taken by the HPA, no probation order is necessary to achieve the principles and purpose of sentencing, and if one is ordered it should be significantly less onerous than that suggested by the Crown. Specifically, the Defence argues that a charitable donation is not an appropriate condition, that publication in the manner suggested by the Crown would harm the economic viability of the HPA without furthering a legitimate sentencing objective and the measures relating to health and safety of contractors are overbroad and unnecessary.

[13] These submissions frame the issues that I have to address. Specifically,

1. What is the appropriate fine?
2. Is a probation order necessary?
3. If so, should it include a requirement that the HPA retain an independent safety consultant concerning non-employee safety, make a charitable donation, and publicize aspects of the trial and sentencing.

[14] I have concluded that proper application of the sentencing principles does not require the maximum fine in this case. In my view, a fine of $75,000 would properly reflect the relevant factors and accomplishes deterrence and denunciation, while still respecting the principle of restraint.

[15] I have concluded that a probation order is necessary but only to the extent that is required to effect a condition that the HPA make a charitable donation in the amount of $15,000 to the Threads of Life Agency. In my view, that condition is available and desirable to remedy the harm caused by the offence and necessary to address the principles of sentencing.

[16] Given the absence of a prior record for safety violations, the passage of time since the offence and the extensive steps taken by the HPA to address both the specific safety issues at the FCSF and the safety culture and systems across the organization, I do not believe that any further probation conditions are required or desirable to effect rehabilitation, address specific deterrence or remedy the harm.

Legislation

[17] The HPA was convicted of the following offence:

> On or about July 9, 2018, at or near Halifax, in the Province of Nova Scotia failed to install guards, guard-rails, barricades and fences in the work place in order to prevent rear-dumping motorized materials handling equipment from tipping at the edge of a sudden drop in grade level, as prescribed by subsection 14.40 of the *Canada Occupational Health and Safety Regulations SOR/86-304*, contrary to subsection 125(1)(b) of the *Canada Labour Code*, thereby committing an offence under subsection 148(1) of the *Canada Labour Code.*

[18] Sections 125 and 148 are found in Part II of the *Canada Labour Code* (the Code) which deals with Occupational Health and Safety.

[19] Section 148(1) contains the general offence provision. It simply says:

> s. 148(1) Subject to this section, every person who contravenes a provision of this Part is guilty of an offence and liable
>
> (a) on conviction on indictment, to a fine of not more than $1,000,000 or to imprisonment for a term of not more than two years, or to both; or
>
> (b) on summary conviction, to a fine of not more than $100,000.

[20] The provision that was contravened in this case is found in s. 125(1)(b) of the *Labour Code*:

> 125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> (b) install guards, guard-rails, barricades and fences in accordance with prescribed standards;

[21] The prescribed standard the HPA failed to comply with is found in subsection 14.40 of the *Canada Occupational Health and Safety Regulations* (SOR/86-304) (the Regulation) which, at the time of the alleged offence, read as follows:

> 14.40 Where rear-dumping motorized materials handling equipment is used to discharge a load at the edge of a sudden drop in grade level that may cause the equipment to tip and in order to prevent the motorized materials handling equipment from being backed over the edge,
>
> (a) a bumping block shall be used; or
>
> (b) a signaller shall give directions to the operator of the equipment.

[22] The Crown proceeded summarily. As such, the maximum penalty under s. 148(1) of the *Labour Code* is “a fine of not more than $100,000” (*Labour Code,* s. 148(1)(b)).

[23] Unlike other occupational health and safety legislation, such as the *Nova Scotia Occupational Health and Safety Act* (SNS 1996, c. 7), the *Labour Code* does not contain any creative sentencing options.

[24] However, a probation order under the *Criminal Code* is available and has been recognized as allowing for “creative sentencing” options when sentencing

under the *Labour Code* (s. 34(2) of the *Interpretation Act*, RSC 1985, c I-21; *Criminal Code,* ss. 731, 732 (1) & (3.1); *R v Del Mastro*, 2017 ONCA 711, para. 98; *R. v. Maple Lodge Farms*, 2014 ONCJ 212, para. 40; and, *R. v. Canada (Royal Canadian Mounted Police),* 2018 NBPC 1, para. 3).

[25] Where a probation order is imposed in respect of an organization, the optional conditions are set out in s. 732(3.1). That provision lists specific optional conditions and includes the ability to impose any other reasonable condition that is "desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence".

Principles of Sentencing

[26] The general purpose, objectives and principles of sentencing are set out in ss. 718 to 718.21 of the *Criminal Code*. Cases that have considered these provisions gives me guidance on how to apply them in the specific occupational health and safety context.

[27] The best means of addressing these principles and attaining the ultimate objective of sentencing will always depend on the unique circumstances of the case. Because of that, it has been consistently recognized that sentencing is "one of the most delicate stages of the criminal justice process in Canada" and is an inherently individualized process (*R. v. LaCasse,* 2015 SCC 64, para. 1; *R. v. Parranto,* 2021 SCC 46, para. 9; and, *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at paras. 91-92). The goal, "in every case is a fair, fit and principled sanction" (*Parranto,* para. 10).

[28] The fundamental purpose of sentencing is to protect the public and contribute to respect for the law and the maintenance of a safe society. This purpose is to be accomplished by imposing just sanctions that have one or more of the following objectives: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community. (*Criminal Code,* s. 718)

[29] The fundamental principle of sentencing is proportionality (*Criminal Code,* s. 718.1). It requires that a sentence "reflect the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case" (*Criminal Code,* s. 718.1; and, *Parranto*, para. 12). It has been described as the central and "organizing principle" of sentencing and the place where all sentencing

starts (*R. v. Friesen*, 2020 SCC 9, at para. 30; and, *Parranto,* para. 10). It requires that a sentence not be more severe than what is fair and appropriate but severe enough to condemn the offender's actions and hold them responsible for what they have done (*Lacasse, supra.,* at para. 12; and, *R. v. Nasogaluak*, 2010 SCC 6, at para. 42).

[30] There are also important secondary principles that I am required to take into account: the principle that a sentence should be increased or reduced to account for relevant aggravating and mitigating factors relating to the offence and the offender; the principle of parity, meaning that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; and, the principle of restraint, meaning that a sentence should not be more punitive than is required to respond to the principles of sentence (*Criminal Code,* s. 718.2; and, *Parranto,* para. 10).

[31] In *Parranto,* the Supreme Court of Canada explained the relationship between proportionality, individualization and parity:

> **11** Despite what would appear to be an inherent tension among these sentencing principles, this Court explained in *Friesen* that parity and proportionality are not at odds with each other. To impose the same sentence on unlike cases furthers neither principle, while consistent application of proportionality will result in parity (para. 32). This is because parity, as an expression of proportionality, will assist courts in fixing on a proportionate sentence (para. 32). Courts cannot arrive at a proportionate sentence based solely on first principles, but rather must "calibrate the demands of proportionality by reference to the sentences imposed in other cases" (para. 33).
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> **12** As to the relationship of individualization to proportionality and parity, this Court in *Lacasse* aptly observed:
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>> Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. [para. 53]
>
> Individualization is central to the proportionality assessment. Whereas the gravity of a particular offence may be relatively constant, each offence is "committed in unique circumstances by an offender with a unique profile" (para. 58). This is why proportionality sometimes demands a sentence that has never been imposed in the past for a similar offence. The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case (para. 58).

[32] These general principles apply when sentencing for occupational health and safety offences and other courts have provided helpful summaries for how to apply them in that context: *Regina v. Cotton Felts Ltd.* (1982), 2 CCC (3d) 287; *R. v. General Scrap Iron and Metals Ltd.,* 2003 ABQB 22; *R. v. Meridian Construction Inc. &. London*, 2005 NSPC 40; *R. v. Nova Scotia Power, Inc.*, 2008 NSPC 72; and, *R. v. R.D. Longard Services Ltd.,* 2015 NSPC 35). These decisions involve provincial occupational health and safety legislation, but Crown and Defence agree that the principles also apply in the Federal context.

[33] In *N.S. Power*, Derrick, P.C.J. (as she then was) described the legal framework and governing principles when sentencing for occupational health and safety violations:

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

[34] The primary objective of sentencing in occupational health and safety cases is deterrence (*Cotton Felts Ltd*., p. 294; and, *R. v. New MexCanada Inc.* (2019

ONCA 30). This focus is also consistent with the purpose of Part II of the *Canada Labour Code,* which is preventative. It places a duty on every federal employer to "ensure that the health and safety at work of every person employed by the employer is protected" (s. 124), states its purpose as "to prevent accidents and injury to health …" (s. 122.1), and says the goal of preventative measures is to ensure "the health and safety of employees" (s. 122.2).

[35] In *R. v.* New *Glasgow (Town)* (2008 NSPC 15, para 36) the Court also emphasized the importance of both deterrence and retribution:

> While deterrence is a paramount factor, the court must also consider retribution. It is a way to condemn the behaviour involved and to reinforce the moral value of the standard that was violated. While to some, these may seem to be technical violations, the sentencing is a way to make clear that the failure to follow them and taking risks of the kind taken here, are not merely technical issues. These failures have very real human consequences.

[36] Despite this focus on deterrence and retribution or condemnation, courts have long recognized that a fit sentence in this context is not solely determined by what sentence would be an effective deterrent (*Cotton Felts Ltd.*; *NS Power*; and, *New MexCanada Inc.*, para. 97). The need for an individualized sentence continues to be an important part of sentencing in the public welfare context. This point was made by the Ontario Court of Appeal in 1982 in *Cotton Felts Ltd.*, where the Court said "[s]entencing for this type of offence cannot be achieved by rote or by rule" (para 18). It was made again more recently by that Court in the 2019 decision, *New MexCanada Inc.,* an occupational health and safety case involving a fatality, where Paciocco, J.A. said the sentencing "inquiry is more subtle" than simply determining whether a sentence would be an effective deterrent and involves "a careful examination of the circumstances of the offence and the offender, and a determination of what a fair and effective sentence would be in those circumstances (para. 97).

[37] More specifically, the principle of restraint remains relevant. As was said by Judge Derrick (as she then was) in *NS Power,* "[t]he principle of restraint requires the sentencing court to apply a measured response in determining the sentence that best satisfies the purpose and principles of sentencing" (para 56). This statement was endorsed by Paciocco, J.A., in *New MexCanada Inc.* (para. 82). He went on to say that the principle of restraint "reflects the inherent notion of fairness that although sentencing must at times occur in the public interest, punishment should not be more aggressive than the public interest requires.", can influence the

quantum of a fine, and "applies as much in sentencing for regulatory offences as it does in the criminal sphere" (para. 82)

[38] In addition to this sentencing framework, s. 718.21 of the Criminal Code sets out specific additional factors that must be taken into account when sentencing organizations for committing offences. The Crown submits that those that are engaged in this case are as follows:

> **718.21** A court that imposes a sentence on an organization shall also take into consideration the following factors:
>
> **(a)** any advantage realized by the organization as a result of the offence;
>
> **(d)** the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
>
> **(e)** the cost to public authorities of the investigation and prosecution of the offence;
>
> **(i)** any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
>
> **(j)** any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

[39] To determine a fit and proper sentence for the HPA, I have to apply this legal framework to the specific circumstances of this offence and this offender.

Circumstances of the Offence

[40] The circumstances of the offence are set out in more detail in my trial decision and in the Agreed Statement of Fact that was filed at trial.

[41] The infill project at the FCSF involved the dumping of slate near the edge of the water to extend the useable land into the Bedford Basin. The HPA administered the facility and was paid a fee to receive the slate which was transported to the site by contractors. The land at the edge of the water had a sudden drop in grade level, where dump trucks were at risk of tipping into the water. The HPA had a duty to provide protections in accordance with the prescribed standard. That prescribed standard required either a bumping block or a signaller to give directions to the equipment operator. Neither was present on July 9, 2018, when Michael Wile's dump truck went into the water.

[42] The HPA had hired SiteLogic Construction Management Inc. (SiteLogic) to oversee the FCSF and provide construction management services. David Seaboyer, the president and sole employee of SiteLogic, was responsible for ensuring that all processes, procedures, and protocols were observed at the site and had full authority over the dumping operations and procedures.

[43] The HPA also paid a second company for placement work, which involved providing equipment, operators, and supervision, as necessary for the reception, disposal, and sequestration of the slate. As part of the placement work and according to an explicit term of the tender agreement, that company provided a signaller, who operated under the direction of David Seaboyer.

[44] In December of 2017, David Seaboyer terminated the signaller position.

[45] A manager, employed by the HPA oversaw the operations at the FCSF. However, he was an environmental manager whose role at the HPA was to ensure that the organization was compliant with environmental laws and requirements. His focus at the FCSF was on the ongoing environmental concerns. Mr. Seaboyer otherwise managed the facility.

[46] Health and safety personnel from the Halifax Port Authority attended and evaluated the FCSF operations at various points in time, but not on a consistent basis.

[47] As will be discussed in more detail later, I find that the HPA simply assumed that everything was running as it should at the FCSF and failed to ensure that the facility was operating in accordance with all health and safety regulations.

[48] I accept that the HPA had implemented a system that included a signaller, however, it did not have a system in place to ensure that the system was adhered to. As a result, it failed to notice when the signaller was no longer being used and did not, in the alternative, ensure that a bumping block was used.

[49] In that, it failed to exercise due diligence.

Victim Impact Statement

[50] Ms. Coady submitted a victim impact statement and read it during the sentencing hearing.

[51] It is impossible to put into words the true impact that the loss of Mr. Wile would have had on Ms. Coady, his family and friends. However, statements like Ms. Coady's help and are a valuable part of the sentencing process.

[52] Ms. Coady described both the tangible and intangible impacts of Mr. Wiles death for her and her family.

[53] She described the devastating financial impact. But for the support of family, she and her daughter would have had no place to live and no food. She could not work for a time after his death and of course this made the financial impact of the loss of his income even worse.

[54] The less tangible, psychological and emotional, impacts are just as real and will last longer. For a time, she did not want to talk to or see anyone. She couldn't sleep and could not stop thinking about the accident – how and why it happened. She made unhealthy and self-destructive lifestyle choices. Not surprisingly, at the time of the sentencing, almost four years after his death, she continued to feel pain on special occasions and her daughter still thinks about him and misses him.

[55] I want to thank Ms. Coady for her statement, for attending the trial and sentencing hearing and for her thoughtful suggestion that a bench be placed on the site to commemorate Mr. Wile.

Circumstances of HPA

[56] The HPA is a federally regulated Crown corporation of the Government of Canada. Captain Allan Gray, who was appointed CEO of the HPA about 17 months after this incident, testified at the sentencing hearing that the HPA operates like a private company but has no shareholders. Rather, profits go back into the infrastructure and it pays a portion of gross revenue to government.

[57] It employees about 90 people, controls waterways and approximately six land sites but with different management arrangements that impact the HPA's level of control.

[58] In 2018, it had operating revenues of over $44 million.

[59] It has no previous *Labour Code* convictions.

[60] Following the incident, the HPA made immediate safety improvements to the operations at the FCSF and in the years since has taken measures across the

organization to improve health and safety. Detailed information about these measures were set out in the Defence Brief and the testimony of Captain Gray which were supported by material filed at the sentencing hearing (Ex. 1 – 5).

[61] I will describe those measures in more detail when I address the specific arguments.

Comments on Behalf of the Halifax Port Authority

[62] Pursuant to s. 726, at the conclusion of the sentencing hearing, Captain Gray, was given the opportunity to speak without the structure of being a witness. He joined the HPA as CEO well after Mr. Wiles death so is in no way responsible for the HPA's failures at the time. However, he now represents the organization.

[63] He apologized to Mr. Wile's family and friends for the fact that the systems failed him. He said that since joining the organization he and his people have been committed to change and making sure that this kind of tragedy doesn't happen again.

Analysis

Proportionality

[64] When addressing the need for the sentence to be proportionate, it must be said that no sentence can be proportionate to the loss of a life. No penalty, much less a financial one, could ever make up for the loss of Mr. Wile's life or measure its value. As Campbell, P.C.J. (as he then was) said in *New Glasgow*, "[i]t could be properly said of an amount, that it does not come close to being enough. It does not measure the grief of a family and of a community . . . " (at para. 53).

[65] As I have said, assessing proportionality requires me to consider the gravity of the offence. That includes both the objective gravity of the offence and the subjective gravity of HPA's specific offending behaviour (*Friesen,* para. 96; and, *R. v. L.M.,* 2008 SCC 31, paras. 24 - 25).

[66] Dealing first with the objective gravity of the offence. There is no doubt that violations of occupational safety legislation are generally viewed as serious offences. As was said by Tufts, P.C.J. in *R. v. Meridian Construction Inc.* (2005 NSPC 40), workplaces are dangerous and workplace safety legislation is often the only protection a worker has (paragraph 13). This is also reflected in the cases referred

to previously that discussed the need to deter, denounce and condemn this kind of offence.

[67] The relative objective gravity of an offence is informed by the maximum sentence set by Parliament. As the Supreme Court of Canada said, in the criminal context, in *Friesen* (para. 96):

> The maximum sentence the *Criminal Code* provides for offences determines objective gravity by indicating the "relative severity of each crime" (*M.* (*C.A.*), at para. 36; see also H. Parent and J. Desrosiers, *Traité de droit criminel*, t. *III, La peine* (2nd ed. 2016), at pp. 51-52). Maximum penalties are one of Parliament's principal tools to determine the gravity of the offence (C.C. Ruby et al., *Sentencing* (9th ed. 2017), at $S 2.18; *R. v. Sanatkar* (1981), 64 C.C.C. (2d) 325 (Ont. C.A.), at p. 327; *Hajar*, at para. 75).

[68] The maximum penalty for failing to comply with a provision of the *Labour Code* or a Regulation, where the Crown proceeds by summary conviction, is a fine of $100,000 (s. 148(1)). That can be compared to other maximums in the *Labour Code*. Where the Crown proceeds by Indictment for this same offence, the maximum penalty is a fine of $1,000,000 or imprisonment for two years or both (s. 148(1)(b)). Where the conviction is for a contravention of the *Labour Code* that directly results in death, serious illness or serious injury to an employee, or for a willful contravention with knowledge that it is likely to cause death, serious illness or serious injury to an employee, the maximum penalty where the Crown proceeds by summary conviction is a fine of $1,000,000 and where the Crown proceeds by Indictment is a fine of $1,000,000 or imprisonment for two years or both.

[69] So, while still serious, Parliament has signalled that the offence before me is not as objectively serious as when it has been proven that the contravention directly resulted in death or serious injury or when the contravention was willful and with knowledge that death or serious injury was likely.

[70] The Defence suggests that the Crown’s decision to proceed by summary conviction is also relevant to the proportionality analysis. To the extent that this impacts the maximum allowable penalty which, in turn, signals Parliament’s view of the relative objective gravity of the offence, I agree. However, the authorities tell me that the only impact of the Crown’s decision to proceed summarily is to reduce the maximum penalty. It does not ‘scale down’ the range. This point was made by the Supreme Court of Canada in *R. v. Solowan*, (2000 SCC 62, para. 15) where the Court said:

> 15 A fit sentence for a hybrid offence is neither a function or a fraction of the sentence that might have been imposed had the Crown proceeded otherwise than it did. More particularly, the sentence for a hybrid offence proceeded summarily should not be "scaled down" from the maximum on summary conviction simply because the defendant would likely have received less than the maximum had he or she been prosecuted by indictment. Likewise, upon indictment, the sentence should not be "scaled up" from the sentence that the accused might well have received if prosecuted by summary conviction.
>
> 16. … And when the Crown elects to prosecute a "hybrid" offence by way of summary conviction, the sentencing court is bound by the Crown's election to determine the appropriate punishment within the limits established by Parliament *for that mode of procedure*. ...

[71] The offence I have found the HPA guilty of captures a wide range of behaviour. The conduct and moral culpability of the HPA must be placed on the continuum of behaviour that could constitute the offence.

[72] The Crown argues that the conduct (or lack of conduct) is serious and relies on the following: the HPA seemed to be completely unaware of the applicable Regulation; there is no evidence that the HPA gave any consideration to the risk; the use of a bumping block would have prevented Mr. Wile's truck from going into the water; complying with the Regulation would have been easy and inexpensive; the serious risk was foreseeable and continued for years; and, the failure to comply with the Regulation resulted in a serious consequence, Mr. Wile's death.

[73] The Defence acknowledges the lack of due diligence in failing to ensure that there were systems in place to monitor safety which resulted in a failure to notice when the signaller was no longer in place and that this failure contributed to Mr. Wile's death. However, the Defence disputes the Crown's characterization of the gravity of their offending behaviour and takes issue with some of the Crown's specific arguments.

[74] First, the Defence disputes that the HPA gave no consideration to safety or risk. Specifically, the Defence submits that "the absence of a bumping block or signaller was not due to a purposeful or informed decision by the Halifax Port Authority nor was it due to complete ignorance or disregard of safety standards. Rather, the Halifax Port Authority failed to take reasonable steps to ensure that the system and protocols at the FCSF were operating as expected." (Defence Brief, para. 19).

[75] In their Brief, the Crown submits that:

> There is some evidence that one of the reasons that the Port discontinued the specific job that included as one of its tasks the signalling of trucks as they approached the edge was because the positioning of an unprotected standing signaller near reversing and dumping trucks might have been dangerous to the signaller. This existence of this role suggests the Port might have been aware of the regulation, although other evidence points otherwise. However, one would think that common sense would have the persons making such decisions (to eliminate a position) asking themselves what danger the position was supposed to guard against. (para. 32, emphasis added)

[76] This suggests that there was a conscious choice on the part of the Port to discontinue the position of signaller. It is not clear what evidence the Crown is referring to in support of this submission. The ASF simply says that:

> "use of a signaller (also known as a checker) at the FCSF was added to the operation of the FCSF in 2014. Contract documents for the placement work provided that the position of checker was to be performed by ECL employees at the direction of David Seaboyer. No signaller was in use on July 9, 2018. The dedicated checker position was eliminated in December 2017 when the ECL employee who had been performing this task was terminated by Seaboyer. This dedicated position was not replaced and the other ECL employees were regularly tasked by Seaboyer with other duties that took them away from the working platform and out of line of sight of the dump truck operators on the active working face" (Trial Ex. 1, para. 20).

[77] No employees of the HPA testified at the trial but recordings and transcripts of interviews were filed on consent. When interviewing Paul MacIsaac, a vice-president with HPA, Mary Clark (the Department of Labour investigator) advised him that as the contract went on, there was a decrease in use of the checker/watcher position and asked if he knew why. He said:

> So I don't have direct knowledge as to why that changed, or if it was a good—valid reason. It could have been. Or if it was just a decision that was made in consultation between Dave and the Placement Contractor. I certainly wasn't aware that we weren't using a dumper/checker position on a regular basis. There is the possibility that—you know, we don't accept materials every single day. For instance, in January of this year we had very little material. So there would be certainly no need, that month, so that could be part of the reason as well. But I don't know exactly why. (Trial Ex. 4, Transcript, p.12)

[78] Later in the interview, Ms. Clark suggested to Mr. MacIsaac that someone who worked with the placement contractor told her that David Seaboyer "felt the spotter position was dangerous to the individual working in that capacity, and therefore, he couldn't substantiate the person on the ground" (Trial Ex. 4, p. 45 of Transcript). This is not posed as a question to Mr. MacIsaac and he does not

respond to the suggestion. Later in that interview, Ms. Clark suggested to Mr. MacIsaac that Chris MacDonald, environmental manager with HPA, had been told. However, in his interview (Trial Ex. 8), Mr. MacDonald did not say he knew or that he approved any decision to terminate the position. He said he recalled a conversation with Mr. Seaboyer in late 2017 about a particular individual whom Mr. Seaboyer wanted to let go. Mr. MacDonald said that he "was led to believe that the position wouldn't be terminated, it was just the individual, that another individual will fulfill that role when the facility was operational again" (Trial Ex. 8, p. 16 of Transcript).

[79] I accept the Defence submission on this point. There is some suggestion that Mr. Seaboyer may have included information about the termination of the signaller or possibly the position in a log that managers at the HPA had access to. Even if that was clear in the evidence, it does not establish that anyone from HPA took any direct part in the decision to discontinue the position of 'signaller' or actually knew that the position had effectively been eliminated when the individual who held the position was let go.

[80] The evidence establishes that the HPA hired Mr. Seaboyer and his company, SiteLogic, to oversee the FCSF. Mr. Seaboyer was experienced in the industry and it was not unreasonable for the HPA to have some degree of trust in his ability to manage the site. The HPA also paid a company for placement work. As part of the placement work and according to an explicit term of the tender agreement, the placement contractor provided a signaller, who operated under the direction of Mr. Seaboyer. The signaller position was required by contract and had been present, according to the safe work plan. The evidence before me is that the position of signaller was removed by Mr. Seaboyer, without input from the HPA and without their actual knowledge.

[81] As such, I accept that the HPA had a system in place that, if followed, would have resulted in compliance with the Regulation. Their culpability results from the fact that they did not ensure the system was being followed. They failed to properly monitor Mr. Seaboyer's activity, failed to notice that the signaller was no longer in use and, in a more general sense, failed to identify and correct the hazard that existed at the water's edge. In that, as the Defence acknowledges, they failed to exercise due diligence but I am not satisfied that the HPA made a conscious choice to discontinue the signaller or that they gave no consideration to risk.

[82] Second, the Defence takes issue with the way the Crown has characterized the relationship between the offence and Mr. Wile's death. The Defence acknowledges that the absence of a signaller or bumping block at the water's edge contributed to Mr. Wile's death and that this is a relevant factor on sentence. However, it submits that the Crown essentially suggests that the HPA's failure caused Mr. Wile's death which has not been proven.

[83] In their Brief, the Crown submits that "[t]he use of a bumping block … would have been one hundred percent effective in preventing rear dumping trucks engaged in the normal course of work activity from leaving the working platform accidentally" (para. 5), "[t]he presence of a bumping block or berm would have made the accident almost impossible" (para. 31), and refers to "the calamitous consequences to which the safety failure could and did lead" (para. 58). The Crown also noted the important distinction between cases where the conviction is for a "causing death" offence and those where death is related to the offence but where that offence had not been proven. In that context, the Crown wrote that "the *Canada Labour Code* did not permit a different charge against the HPA for "causing the death" of Mr. Wile, because he was not an employee of the HPA." (para. 51).

[84] The Defence submits that this implies or suggests that the more serious offence would have been proven if it was an available charge, a suggestion that is inappropriate. I agree that submission would be inappropriate. While it is not clear why the Crown included this information in their brief or how it is relevant to the sentencing process, given the context of the comment, I do not believe the Crown was intentionally suggesting this.

[85] The HPA was not charged with an offence under s. 148(2) of the *Code.* As such, the question of whether Mr. Wile's death was the "direct result" of HPA's failure to comply with the Regulation was not an issue in the trial (*Labour Code,* s.148(2)). As such it was not proven in the trial, the Defence was not required to mount a defence to that element and I am not sentencing the HPA for an offence under s. 148(2).

[86] However, as the Defence acknowledges, the offence did contribute to Mr. Wile's death. As Judge Derrick (as she then was) said in *Longard Services Ltd.*, the closer the connection between the offence and the death, the higher the penalty (para. 27).

[87] The Crown has the burden to prove an aggravating factor beyond a reasonable doubt. I have no specific evidence of why Mr. Wile's truck went into the water. No witness was called who saw it and I have no information about the mechanical fitness of Mr. Wile's vehicle or his health in that moment. The Regulation does not define 'bumping block' and no witness described what would qualify as a 'bumping block'. I infer it is some form of physical barrier. There is a common sense inference that such a barrier, assuming it was high enough, would have prevented a truck from going over the edge no matter the circumstances. However, the Regulation is also satisfied by use of a signaller who "shall give directions to the operator of the equipment" (*Regulation,* ss. 14.40 (b)). A signaller could alert the operator about the proximity of the water's edge but would not prevent a truck that was in motion, due to a mechanical fault, operator error or medical episode, from going over that edge. Therefore, I have no evidence and could not infer that a signaller would have prevented Mr. Wile's truck from going into the water.

[88] So, I cannot conclude that Mr. Wile would have lived if the HPA had complied with the Regulation. However, I do find that a bumping block would almost certainly have prevented his truck from going into the water. Further, it was agreed at trial that Mr. Wile drowned so I infer that he was alive when he went into the water (Agreed Statement of Fact, Ex. 1, para. 13). Unless he experienced a fatal medical event prior to going into the water, it is almost certain that a bumping block would have prevented his death. Due diligence on the part of the HPA would have alerted them to the hazard that existed at the water's edge. A proper assessment of the hazard would have informed them that use of a signaller, while compliant with the Regulation, would not adequately respond to the hazard. As such, on the evidence before me, I find that there is a relatively close connection between the lack of due diligence and Mr. Wile's death.

[89] That must be taken into account in assessing proportionality.

[90] I also have to assess the HPA's culpability as a function of their level of responsibility for the harm occasioned by the offence.

[91] As Judge Tufts said in *Meridian* when discussing the Nova Scotia *Occupational Health and Safety Act* (para. 13):

> The foundation of the Act is the internal responsibility system, … 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.

[92] His comments are equally relevant to the *Labour Code.* The HPA delegated it supervision of the site to Mr. Seaboyer and, as I said, given his experience, it was reasonable for them to put some trust in him. However, they had ultimate authority and absolute ability to control the site. Therefore, their responsibility for the offence is high.

<u>Deterrence – General and Specific</u>

[93] The primary objectives in sentencing the HPA are general deterrence and denunciation. The sentence should send a message to other employers about the importance of safety.

[94] Given the circumstances of the HPA including the lack of a prior record for safety violations and their post-offence conduct, specific deterrence is not a real concern in this case.

<u>Aggravating and Mitigating Factors</u>

[95] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender. Many of these have already informed the proportionality analysis.

[96] The HPA did not plead guilty so does not have the benefit of that as a mitigating factor. The Crown acknowledges that this cannot be used as an aggravating factor. A guilty plea spares participants the impact of an emotionally difficult trial and is generally viewed as an indication of remorse and acceptance of responsibility. Remorse and acceptance of responsibility are relevant to sentencing, specifically to rehabilitation and specific deterrence. The Crown submits that remorse and a clear acceptance of responsibility are absent in this case. Certainly, the absence of a guilty plea in this case meant that there was a trial which would have had an emotional toll on Mr. Wile's loved ones. It also means that remorse and acceptance of responsibility for the offence and its consequences were not demonstrated through the plea. However, the absence of a guilty plea cannot be equated with lack of remorse or refusal to accept responsibility. Both can be demonstrated in other ways. Including, as will be discussed in more detail later, concrete actions taken by an offender following an offence. Further, I accept Captain Gray's comments at the sentence hearing and the HPA's agreement to install a commemorative bench at the site to be genuine expressions of remorse.

[97] The Crown also acknowledged that the fact that the HPA exercised their right to have a trial cannot be used as an aggravating factor but submitted that the defence put forward in this case demonstrated a failure to accept responsibility and a continuing lack of insight by the HPA into their duty to protect non-employees who access their sites.

[98] I disagree. The argument advanced at trial on behalf of the HPA disputed legal responsibility for the offence. That does not demonstrate a failure to accept factual responsibility for Mr. Wile's death. Further, the argument depended almost entirely on the statutory interpretation of the word "workplace" in the *Labour Code*. It was available to the Defence, in part, because the *Labour Code* itself differentiates between employees and non-employees in various ways. That includes in the definition of 'workplace' as a place where an 'employee' is engaged in work for their employer. The Defence argument that the FCSF did not meet that definition in no way suggests that the HPA lacks insight into their duty to protect non-employees. Finally, the manner in which the defence was conducted in this case could not have been more reasonable and responsible. They conceded every element but one, agreed to the material facts necessary to determine the only element that was in issue, and did not pursue a due diligence defence.

[99] I agree with the Crown that the absence of a guilty plea is relevant when considering comparable cases but, given the conduct of the defence, that is less of a distinguishing factor here than it is in some cases.

[100] The failure to ensure that a bumper block or signaller was present is an element of the offence and therefore is not to be considered as an aggravating factor on sentencing (*R v Lacasse*, paras 42 & 146). However, the fact that it should have been seen as a very basic form of protection and one that was relatively easy to comply with, does aggravate the failure.

[101] The *Criminal* Code, in s. 718.21 sets out additional factors that I must take into consideration in sentencing the HPA. I agree with the Crown that five of those factors are potentially relevant here.

[102] First, whether the offence gave the HPA any advantage (s. 718.21(a). In some occupational health and safety cases, there is evidence that the safety violations were financially motivated which would be an aggravating factor. I have no evidence that the offence before me was motivated by cost-cutting and there is evidence that the HPA did not pressure Mr. Seaboyer to reduce costs (statement of Mr. Macdonald, Ex., p. 31 of transcript). However, the Crown

submits and I accept that there were probably some cost savings to not having a signaller and not having to maintain a berm and some operational advantage to not having to deal with fixed bumping block. Given the overall scale of the operation, I agree with the Defence, that any such advantage would not have been significant.

[103] Second, the impact the sentence would have on the economic viability of the organization and the continued employment of its employees. Given the size of the HPA and the maximum fine available, I do not believe the quantum of fine would have a significant impact. The Defence argues that a probation condition requiring the HPA to post a link to this case on the main page of its website could have a chilling impact on entities that do business with the Port, which could have an economic impact. The Crown disputes that this is a realistic concern, but I cannot dismiss it. The main page of an organization's website would be a common starting place to learn about the organization. It seems reasonable that information about the organization's involvement in a safety violation where someone died, albeit four years ago, might make the organization less attractive to do business with. Obviously, that potential impact would have to be balanced against the benefit that would result from the educational benefit such a condition might have.

[104] Third, I must consider the cost to public authorities of the investigation and prosecution (s. 718.21(e)). I accept that the cost to the public for the investigation, prosecution and trial would not have been negligible. However, the manner in which the trial was conducted would have significantly reduced the costs associated with trial time.

[105] Fourth, I have to consider any restitution that has been made or ordered (s. 718.21(i). In this case there is no evidence of restitution and the Crown is not seeking any.

[106] Finally, I have to consider any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence (s. 718.21(j).

[107] The Defence argues that in the circumstance of this case, measures taken after the incident to reduce the likelihood of a subsequent offence are mitigating. In general, that kind of post-offence 'reform' is mitigating because it can be an indication of remorse and acceptance of responsibility and can lessen the need for sentencing measures that address specific deterrence and/or rehabilitation.

[108] In response, the Crown argues that post-offence corrective action should not always be considered a significant mitigating factor (*Ontario (Labour) v Flex-N-*

Gate Canada Company, 2014 ONCA 53, paras. 21, 23 and 30; and, *R v New Glasgow (Town)*, 2008 NSPC 15, paras. 51-52, 54). The reason was explained by the Ontario Court of Appeal in *Flex-N-Gate*:

> [21] The philosophy of the *OHSA* is to promote a health and safety system that relies on the internal responsibility and voluntary compliance of individual employers. In other words, workers are best protected when their employers install procedures in their workplaces that will prevent accidents from occurring. Rewarding an employer for taking corrective action only in response to an inspector's order reduces an employer's incentive to take this action before an accident occurs.
>
> …
>
> [23] Deterrence is undermined by treating statutorily required compliance as a mitigating factor on sentence. Rewarding an employer for action that it should have taken before an accident happened creates an incentive to put off compliance.
>
> …
>
> [30] If, after having contravened a safety standard, an employer then acts to correct the problem, it is not "doing the right thing"; it is doing what the statute requires it to do. It ought not to be "rewarded" for its compliance.

[109] The Defence does not dispute this but submits that the HPA's corrective action was immediate, went well beyond what was required to respond to the Direction issued by the Department of Labour or the specific default identified in the charge, and is ongoing.

[110] The 'Direction', issued on July 13, 2018 pursuant to s. 145(2)(a) of the *Labour Code*, required the HPA to inform the truck drivers of the exact location of the embankment at the FCSF (referencing s. 125(1)(z.14) of the *Labour Code*). It did not address the absence of a signaller or bumping block, the violation that the HPA was eventually charged with (Ex. 1, Tab 1).

[111] The HPA was not charged with that offence until July of 2020. Prior to that, it did the following:

- Immediately retained a professional geotechnical engineer to review and report on the FCSF site and operations. His report, filed July 17, 2018, recommended the installation of a berm at the water's edge and other safety protocols (Ex. 1, Tab 2). His recommendations were implemented immediately, meeting or exceeding his requirements (Ex. 1, Tab 3).

- On July 23, 2018, the HPA wrote to all generators and truck drivers: advising them of the incident, that a berm would be maintained, and outlining a new procedure; requiring each driver, generator and representative of the HPA to

acknowledge and agree to the new procedure; and, instructing any driver who felt uncomfortable, unsure or unsafe to raise their concern with the site manager (Ex. 1, Tab 4);

- On July 30, 2018, the Placement Contractor provided an updated Safe Work Plan for the FCSF and the HPA revised the Generator contracts to specifically require a safety orientation for all truck drivers and anyone else visiting the FCSF which were provided by a health and safety specialist employed by the HPA (Ex. 1, Tab 5; interview of Mr. MacIsaac, Ex. 4 and transcript, p. 32; and, current version of contract at Tab 6); and,

- In late July 2018, SiteLogic was removed as manager of the FCSF and replaced with a new management system with greater oversight by HPA managers.

[112] Since the offence, the HPA has also made significant changes at the FCSF and across the organization:

- Made significant changes to the dumping procedure at the FCSF (Ex. 1, Tab 7; video of new procedure, Ex. 5);

- The new management system that replaced SiteLogic is integrated with the HPA, so HPA management is engaged in the project daily, monitors the operations and reviews reports, conducts regular safety spot checks, has weekly 'Tool Box Meetings' as well as informal safety meetings conducted at the site, conducts regular Joint Risk Assessments, and has a clearer authority structure which allows for better communication and better understanding of individual roles and responsibilities (Ex. 1, Tabs 7, 8, 9 and 10; evidence of Captain Gray);

- The Board became involved in safety and, in September of 2018, an internal safety audit was completed with a report to the Board of the steps that had been taken to improve safety for the entire organization and specifically at the FCSF (Ex. 1, Tab 11). These include quarterly meetings of the senior management team to review safety, including incident reports (e.g. Ex. 1, Tab 12), a monthly review of any incidents by a risk management and incident review committee who raises issues with the senior management team where necessary, a review and update of health and safety procedures, reporting, documentation and training, site hazard assessments and correction of deficiencies for all sites, monthly and random spot checks, an increase in the

> number of positions in the HPA health and safety department, revision to the responsibilities of the health and safety specialist (Ex. 1, Tab 14 and 15), creation of a manager position for safety and compliance and staffing it with a highly qualified professional who has authority to go directly to the CEO with any pressing safety concern, a requirement that a vice president who has authority to grant budgetary approval for safety corrections attend Joint Occupational Health & Safety Committee meetings, monthly meetings of the JOHS Committee with minutes distributed to all staff, safety statistics are maintained and shared with employees, a safety survey for employees, a contractor safety checklist that must be reviewed by the safety and compliance team before contractors start work and the safety policy statement on its website was updated to reflect the new process (Ex. 1, Tab 16 & 17), contractors are required to comply with HPA safety systems including hazard identification, attending toolbox meetings etc. and HPA randomly audits contractors, and HPA retained a health and safety compliance company to do pre-qualifying safety checks for all large contractors during the RFP process (Ex. 1, Tab 18).

[113] Perhaps most significantly, in November of 2019, Captain Gray was appointed as the President and CEO of the HPA. He has a great deal of experience managing a port. He testified that he was taken aback by the safety ‘maturity’ of Nova Scotia as a whole. He was advised of Mr. Wile’s death at the FCSF and that caused him to look deeply at the HPA. Since his appointment, he has taken significant steps to modernize the safety systems and culture. I will not address every aspect of his evidence or the material filed at the sentencing hearing. Suffice to say that I am satisfied that he has a demonstrated passion for safety. He has taken a hands-on approach to leading the HPA and has required the managers who work under him to do the same. He personally examined the procedures at the FCSF, instigated new procedures and has taken steps to ensure ongoing compliance, including visits, conversations and audits. His efforts have not been limited to the FCSF. He has taken a similar approach across the organization, including its physical sites and the culture of its managers and employees.

[114] He testified about the steps to improve safety for contractors. For large companies the pre-qualifying safety check requires the company to have safety systems in place and show evidence they are being applied before they can be considered for work by the HPA. For smaller companies or individuals who are too small to go through that process, the HPA supervises them and requires that they work under the HPA safety systems when they are working with HPA.

[115] Captain Gray continues to work on safety with the HPA. He aspires to have the HPA obtain ISO 45001 Certification, an international standard for occupational health and safety management systems. That Certification requires the company to have systems or processes in place in a wide variety of safety areas and to be able to document those measures. The organization that controls certification requires audits prior to certification but also mandates annual audits in selected areas to maintain certification.

[116] The HPA now has an internal audit department to examine systems, procedures, and practices, including health and safety. It uses the ISO 45001 standard, which includes clear guidance and requirements for management, to assess its safety management system. Relevant to this case, the ISO 45001 standard addresses the importance of extending oversight to external operational entities like suppliers, contractors, and sub-contractors. The audit department uses a rolling audit plan and completed an internal safety audit in September 2021 in conjunction with consultants from KPMG Canada, who have expertise in audits, risk management, regulatory compliance, and transformation management for large organizations. (Ex. 1, Tab 19 & 20. Pp. 1 & 3).

[117] The HPA also retained an external consultant to conduct a Gap Analysis of the Occupational Health and Safety Management System based on the ISO 45001 standard (Ex. 1, Tab 21). That analysis was completed in 2021 and the HPA is in the process of addressing the gaps that were identified. Captain Gray testified that the Gap Analysis was shared with the Board. The initial plan was to have Certification by the end of 2022, but that was delayed slightly by Covid.

[118] Captain Gray has also implemented other measures including: a Safety Steering Committee to coordinate the strategy and execution of the safety improvements at the HPA; adding 'safety' as a standing item in his President's Report to the Board for all meetings; members of the Board are required to visit HPA work sites; he engages in regular safety discussions with staff using an internal social media platform; conducts 'town hall' meetings for staff which always includes safety; and, discusses safety incidents at the Port liaison committee which he created to engage with members of the public who are affected by port activities. (Ex. 1, Tab 22, 23 & 24).

[119] All of this satisfies me that this is an appropriate case to consider the post-offence efforts of the company as significantly mitigating in respect of specific

deterrence and rehabilitation and I accept it as a strong indication that the company takes responsibility for its failure.

[120] In summary, the aggravating and mitigating factors I have considered are as follows:

Aggravating Factors

- There is a relatively close connection between the offence and Mr. Wiles's death; and,
- The HPA had the ultimate control over the FCSF and could have easily required a bumping block to be installed.

Mitigating factors

- The HPA has no previous record despite being a large company with many employees and multiple sites,
- The HPA took significant, immediate and ongoing action to correct the issue that contributed to Mr. Wile's death but also to address safety at every conceivable level across the organization,
- The directing minds of the organization have demonstrated an acceptance of responsibility and remorse through both their actions, which started immediately after the offence and are ongoing, and the comments of Captain Gray at the sentencing hearing.

Parity / Range of Sentences

[121] Section 718.2 also requires that I consider the principle of parity. Within reason, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Decisions rendered in other similar cases are useful and help me assess proportionality but they are not determinative (*R. v. Lacasse,* 2015 SCC 64; and, *R. v. Friesen,* 2020 SCC 9). Each sentence has to reflect the unique circumstances of that offence and that offender (*R. v. LaCasse,*; and, *R. v. Chase,* 2019 NSCA 36, at para. 41). However, as was said in *Parranto,* I must "calibrate the demands of proportionality by reference to the sentences imposed in other cases" (para. 33).

[122] The Crown and Defence have each provided me with cases to support their respective positions. The cases they've provided on quantum of fine reflect their respective perspectives on the gravity of the offence. Many of these cases are decided under other legislation and for other offences, including those that have different maximum penalties. As such, I have assessed them carefully.

[123] As the Crown noted, there are few reported sentencing cases under the *Canada Labour Code.* The Crown provided summaries of unreported cases derived from the Department of Labour's website. Each includes a summary of facts, the charges and sentence imposed. The Defence objects to their use because there is little detail about the nature of the violations, mitigating or aggravating factors and many are the result of joint recommendations.

[124] It is clear from the cases provided to me and others that whether and to what extent the violations contributed to a death is a significant factor in determining the quantum of the fine. (*Longard Inc.*, *supra*, at paras. 23 – 26; *New Glasgow (Town)*, *supra*, at para. 41; *R. v. The Royal Canadian Mounted Police*, *supra*, at paras. 26, 34 & 38). (see: *R. v. O'Regan Chevrolet Cadillac Ltd., supra*, at para. 14).

[125] The Crown submits that typical sentence in cases where the conviction is for an offence that includes the "causing death" element have higher fines than that sought by the Crown in this case

[126] I have reviewed all the cases provided by the Crown and Defence and others. I will refer here to only a few that are relatively recent and particularly relevant to the circumstances of this case.

[127] First, the unreported decision relating to Mr. Seaboyer and his company SiteLogic (*R. v. Seaboyer and Sitelogic,* NSPC, October, 2020, Judge Lenehan). They each pleaded guilty to two offences under s. 74(1)(a) of the *Occupational Health and Safety Act*. Specifically, failing to take every precaution that is reasonable in the circumstances to ensure the health or safety of persons at or near the workplace as required by s. 14(a) by failing to ensure there was a "spotter" in place at the working face when operators were dumping slate and failing to ensure the site-specific safety requirement of a "safe dump ramp" was in place at the working face.

[128] They were sentenced to total fines of $60,000. In imposing that sentence, the Court was influenced by consideration of Mr. Seaboyer's ability to actually pay any fine imposed, given his financial circumstances and the size of the company. That

factor is not relevant to the HPA. Mr. Seaboyer had a more limited scope of authority over the site than the HPA. However, he did have direct knowledge of the ongoing failure to comply with the legislation.

[129] In *N. S. Power*, the company pleaded guilty to one safety violation, again under the Nova Scotia *OHSA,* for failing to ensure proper fall protection equipment. The Court imposed a total financial penalty of $43,750 (fine, victim fine surcharge and payment for public awareness sessions). It was not proven that the violation caused the death so the maximum fine was $250,000. However, the Court found that the violation caused a real hazard with the potential to cause serious injury or death. The employer was a large company with only one dated previous conviction for an *OHSA* offence. The employer took significant steps after the death to improve safety and was able to show that it was committed to a safe workplace.

[130] There are similarities between *Nova Scotia Power* and the case before me: the companies are large companies with very good safety records; both took significant steps to improve safety at the workplace after the offence; both had trials that involved focused and triable issues; both involve fatalities where the direct cause of the death is unknown, but the protections may have prevented a death.

[131] In *R v Broda Construction Inc*, 2019 BCPC 31, the company pled guilty to failing to take all reasonable and practicable measures to ensure a safe workplace by allowing employees to operate vehicles on a steep road grade. A truck lost control and plunged over a nine-meter vertical drop, killing two occupants. The company complied with orders by the Inspector of Mines and conducted and implemented an engineering assessment of all roadways, which cost over $1 million. The company had no previous convictions. The principal cause of the accident was unknown, and the Crown did not prove beyond a reasonable doubt that the hazardous condition caused the deaths. The Court ordered a total fine of $70,000 (which included a $50,000 charitable contribution).

[132] There are similarities between *Broda Construction Inc.* and the case before me: neither company had previous convictions; both took significant steps after the accident to improve safety; both involved a nexus between the offence and the death, but not proof beyond a reasonable doubt of a direct causal link; and the maximum penalty was the same. Unlike the case before me, Broda Construction Inc. pled guilty to the offence.

[133] In *R v Canada National Railway Company*, 2017 BCPC 448, the Court ordered the maximum fine of $100,00 and placed the company on probation for two years. The company was sentenced after being convicted for a summary offence under section 148(1) of the *Canada Labour Code* for failing to ensure the health and safety of its employees. An employee failed to "deactivate the second derail and one of the rail cars derailed and fell on [him], causing his death. The specific failure was that the "sign located next to the second derail was not retroreflective". While the non-reflective sign was not found to be a direct cause of the death, the Court found that it took "little imagination to consider how defective signage might well be a factor, directly or indirectly, in contributing to an injury or a fatality…".

[134] There are similarities between *CNR* and the case before me: both involved violations of the *Canada Labour Code* with the same maximum penalty; in both there is a relatively close connection between the offence and the death; and both went to trial. However, unlike in the case before me, CNR had an extensive record of safety violations, having been convicted five times previously under the *Canada Labour Code* for failing to ensure worker safety in relation to a workplace fatality, eight times in relation to injury or death, and seven times under the *Railway Safety Act* (para 33); CNR knew that the second derail contravened its own standards yet argued at trial that it was sufficient, which the Court found was disingenuous (paras 24-27, 49 & 56); post-offence changes to the procedure for monthly inspections were inadequate and not made until four years after the incident and were "inspired primarily by the defendant's efforts to avoid the imposition of a probation order" (para 40 and 49); and, the Court found that CNR made informed decisions to act in a way that was inimical to the legislative intention of the *Canada Labour Code* (paras 48-50).

[135] In *R v. Bell*, unreported, March 27, 2009, Justice R.J. LeDressay, Ontario Court of Justice, the company pled guilty to three counts under s. 148(1) of the *Labour Code*, relating to paragraphs 125(1)(w) and 125(1)(g). Two workers of a sub-contracting company died after entering a confined space (manhole) where special safety rules apply because potentially toxic or oxygen deficit air can be present. Following a joint recommendation which included agreed facts, a total fine of $280,000 was imposed for the three counts.

[136] In accepting the joint recommendation, the Court noted the failure of the company to properly train persons (and obviously workers) granted access to their sites, the victim impact statements which highlight the harshest consequences of

workplace safety failures, the guilty plea, the significance of safety systems the defendant company had in place before the accident, as well as corrective changes made after, and, the size of the defendant company.

[137] There are similarities between *Bell* and the case before me: both involved the death of non-employees who died on the job after being granted access to a Bell workplace; both involved violations of the *Canada Labour Code* with the same maximum penalty; in both there is a relatively close connection between the offence and the death; both took corrective action after the offence; and both included victim impact statements. Unlike, in the case before me, the company pleaded guilty and the cases proceeded as a joint recommendation which somewhat reduces its value as a precedent.

[138] In *R v. The Royal Canadian Mounted Police*, 2018 NBPC 1, the RCMP was found guilty after trial of an offence under the *Labour Code* for failing to provide officers with adequate safety equipment. Three officers died. The Court did not find that the equipment would have prevented their deaths, but there was a relationship between the offence and the deaths. The Crown had proceeded by Indictment so the maximum fine was $1,000,000. The RCMP were ordered to pay a fine of $100,000, $300,000 to establish a scholarship in the names of the slain officers, a total of $60,000 into educational trusts for the children of those officers. In addition, the RCMP was to make charitable contributions totalling $90,000 to two organizations dealing with workplace injury and injured police officers. The total monetary penalty was $550,000. A 30 day probation order was imposed, but seemingly just to enforce the payment of the ancillary amounts. The Court refused to grant an order obligating the RCMP to publicize the fact of its own conviction and sentencing, indicating that the case had garnered extensive media coverage already, including nationally and internationally.

[139] The circumstances of the RCMP case are quite unique but they do involve a large organization, a sentence imposed after trial, the offences involving a link between the offending conduct and the deaths and the RCMP had made some efforts to implement the recommendations in the review they had commissioned. Unlike the case before me, the maximum penalty was much higher.

[140] No two cases are ever identical. The case before me shares some but not all of the aggravating and mitigating factors identified in these cases. My task is to determine where it fits within the range identified in these and other cases.

<u>Restraint</u>

[141] Finally, s. 718.2 requires me to consider restraint. This principle requires that a sentence be a measured response to crime. In this case, that means that a fine should not be more than what is required to meet the objectives of sentencing (*Meridian,* para. 22).

Application of Principles to Specific Sentencing Recommendations

Quantum of Fine

[142] The Crown submits that a total fine of $100,000, the maximum, is required to address the principles of sentence and relies specifically on the following factors:

1. The large size of HPA in comparison to the personal defendant in the related case against SiteLogic and Mr. Seaboyer who had imposed on them a global fine of $60,000;
2. The apparent cavalier attitude of the HPA in relation to the safety of sub-contractor and "granted access" workers;
3. The absence of a specific safety training program for such incoming workers;
4. The serious consequences to which the safety failure was foreseeably related; and,
5. The extent of economic activity and economic benefit to the HPA of the work being done at the site by the workers granted access.

[143] The Defence submits that to impose the maximum fine in the circumstances of this case would not be proportionate and would not take into account the secondary sentencing principles, including restraint.

[144] In *Solowan,* the Supreme Court confirmed that the maximum penalties are not reserved for the 'worst offender and worst offence', saying (para. 10):

> The "worst offender worst offence" principle invoked by the appellant in the Court of Appeal has been laid to rest. It no longer operates as a constraint on the imposition of a maximum sentence where a maximum sentence is otherwise appropriate, bearing in mind the principles of sentencing set out in Part XXIII of the *Criminal Code*, R.S.C. 1985, c. C-46: *R. v. Cheddesingh*, [2004] 1 S.C.R. 433, 2004 SCC 16; *R. v. L.M.*, [2008] 2 S.C.R. 163, 2008 SCC 31. Unwarranted resort to maximum sentences is adequately precluded by a proper application of those principles, notably the fundamental principle of proportionality set out in s. 718.1 of the *Code*, and Parliament's direction in s. 718.2(*d*) and (*e*) to impose the least restrictive sanction appropriate in the circumstances: see *R. v.Gladue*, [1999] 1 S.C.R. 688.

[145] However, it has also been noted that the maximum fine is “to be imposed with great restraint”, as it “is usually reserved for the worst case scenarios where the violations are flagrant, ongoing and directly linked to a fatality” (*R v O'Regan Chevrolet Cadillac Ltd*., 2010 NSPC 68, para 26). In *R. v. Canadian National Railway Company*, 2017 BCPC 448, a case involving a violation of the *Canada Labour Code,* the Court did impose the maximum fine of $100,000, but said:

> In my respectful opinion, and having reviewed the case law, those cases which attract a maximum fine are those in which the defendant has made informed decisions to act in a way or ways that are inimical to the legislative intention of the public welfare statute in question.

[146] In *R v Broda Construction Inc*, 2019 BCPC 31, the Court declined to impose the maximum fine because the Court found no evidence to suggest the company had made an informed choice to act contrary to the legislation and no clear connection between the violation and the two deaths (para. 56 and 57).

[147] I have concluded that proper application of the sentencing principles does not require the maximum fine in this case. In my view, a fine of $75,000 would properly reflect the factors outlined in *Cotton Felts* and accomplishes deterrence and denunciation, while still respecting the principle of restraint. In arriving at that result, I have considered the maximum penalty, the large size of the HPA and the extent of the economic activity and economic benefit to the HPA of the work being done at the site, that the offence is closely connected to Mr. Wile’s death, and there is a significant need to impose a fine that deters and denounces the conduct. However, the HPA’s conduct was not flagrant or ongoing and not the result of a conscious choice to ignore the legislated safety requirements. Further, the company has no record for safety violations and has taken concrete steps which demonstrate remorse and an acceptance of responsibility. I do not agree with the Crown’s characterization of the attitude of the HPA as cavalier in relation to the safety of sub-contractor and “granted access” workers.

Probation

[148] The available optional conditions when an organization is being sentenced are set out in s. 732 (3.1). Those that are relevant to the Crown’s submissions include the following:

> **s. 732 (3.1)** The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:

> **(b)** establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
>
> **(c)** communicate those policies, standards and procedures to its representatives;
>
> **(d)** report to the court on the implementation of those policies, standards and procedures;
>
> **(e)** identify the senior officer who is responsible for compliance with those policies, standards and procedures;
>
> **(f)** provide, in the manner specified by the court, the following information to the public, namely,
>
> > **(i)** the offence of which the organization was convicted,
> >
> > **(ii)** the sentence imposed by the court, and
> >
> > **(iii)** any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
>
> **(g)** comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.
>
> **(3.2)** Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.

[149] The statutory aims of a probation order for an organization appear to be specific deterrence, rehabilitation and remediation of harm.

[150] Given the absence of a prior record for safety violations, the absence of any offences or Department of Labour directions during the four years since this offence and the remarkable post-offence remedial steps the HPA has undertaken, both at the FCSF and across the organization, I do not believe that a court order is required to accomplish specific deterrence or rehabilitation.

[151] Therefore, I am of the view that a probation order can only be imposed to impose reasonable conditions that would be desirable to "remedy the harm caused by the offence".

Charitable Donation

[152] The Crown has asked that the HPA be ordered to make a charitable donation of $15,000 to the Threads of Life agency, which is dedicated to supporting families after a workplace fatality or serious injury. There is no stand-alone provision that would allow for this so it could only be ordered as a condition of a probation order.

[153] In its Brief, the Crown argues the donation is required for the HPA to "acknowledge the human cost of safety failure" and that it will "spread the rehabilitative effects of the disposition to a broader audience by spreading the word generally about the serious consequences of workplace hazards left unchecked" (para 59).

[154] The Defence does not take any issue with the appropriateness of the specific charity identified by the Crown. Rather, the Defence argues first, that the Crown's goal in imposing the condition is general deterrence, which the Defence submits is inappropriate in a probation condition and second, that a charitable donation is essentially a fine by another name, so the Crown cannot have both the maximum fine and an additional financial penalty. Since, I am not imposing the maximum fine, I do not have to address that argument.

[155] In arguing that a charitable donation is not appropriate in a probation order, the Defence relies on *R v Hardenstine*, 2008 BCCA 474, para 7 and *R v Choi*, 2013 MBCA 75. The Defence submits that in *Choi*, the Manitoba Court of Appeal held that charitable donations are not an available sentencing option as a condition of probation under section 732.1(3) of the *Criminal Code*. In doing so, the Defence relies on the following comments of Justice MacInnes, writing for the unanimous court::

> 50 In my opinion, the imposition of a condition in a probation order which forms part of a conditional discharge sentence requiring that an accused make a donation of $6,000 to each of two named charities is not a sentencing option available under the *Code*.
>
> …
>
> 53 Moreover, the jurisprudence makes clear that the conditions of a probation order may not be punitive. …
>
> 54 A condition requiring an offender to pay $12,000 is clearly a punitive condition. In my opinion, to so order amounts to an error in principle and results in the imposition of an unfit sentence.
>
> [Emphasis added]

[156] Other cases that have considered optional probationary conditions for individuals have found that it is permissible to impose a probationary term that has a collateral punitive or deterrent effect, as long as its primary goal is to address one of the statutory aims (for e.g. see *R. v. Voong,* at paras. 37 - 38; and, *R. v. Shoker*, 2006 SCC 44 at para. 13). All that is required is a "nexus" between the term and the statutory aims (*Shoker,* para. 13).

[157] In my view, *Choi* is not inconsistent with this. Rather, it says, in part, that a charitable donation cannot be included as a probationary term if its <u>sole</u> purpose is punitive.

[158] A charitable donation is not listed as a specific optional condition under s. 732(3.1) but could be imposed under the general provision if there was a nexus between it and remediation of harm.

[159] The purposes for which the Crown seeks the charitable donation are not closely aligned with the permissible statutory aims. However, I do see a nexus between a charitable donation to the "Threads of Life" Agency and remediation of the harm caused by the offence. Given the information provided in Ms. Coady's victim impact statement, I believe this organization would help remedy the harm caused by this type of offence.

<u>Safety Consultant and Reporting Condition</u>

[160] The Crown's request for a condition requiring the HPA to hire a safety consultant and report to the Department of Labour is very far-reaching. It includes reference to hiring a safety consultant who is approved of by the Department of Labour, the creation of a program relating to the safety of contractors, sub-contractors and any other worker granted access to <u>all</u> HPA worksites, reporting back to the department of labour and publishing the results on its website (Draft Probation Order, Appendix A, paragraph(a)).

[161] I have concluded that this condition is not required for any deterrent or remedial purpose. The evidence I heard and reviewed in the materials submitted by the Defence has satisfied me that the HPA has essentially already essentially accomplished what would be ordered under s. 7232(3.1) (b), (c), (d), and (e). The issue at the FCSF has been reviewed and remedied so there is no need for court-ordered remedial action there. There is no evidence that the HPA has a general lack of respect for the safety of non-employees so no proven need for remedial action at other sites.

Publishing Condition

[162] The Crown has proposed a condition whereby the HPA must publish the decisions of the Court, both on conviction and sentencing, and the results of on its website with a clear hyperlink from the main page of the website, for at least three years (Crown Brief, para 68; Draft Probation Order, Appendix A, paragraph(b)). That type of condition is specifically permitted in s. 732.1(3.1) (f).

[163] My trial decision was published and reported on in the media. My sentencing decision will also be published.

[164] In my view, the publishing condition sought by the Crown would not, in this case, further the rehabilitative or remedial aims of probation, beyond what has already been accomplished.

Conclusion on Probation

[165] I am satisfied that a charitable donation in the amount of $15,000 to the Threads of Life agency would be a reasonable condition and would be desirable to remedy the harm caused by the offence.

[166] Therefore, I will order that the HPA be placed on probation for a period of sufficient duration to permit that payment to be made.

[167] The sentence is as follows:

1. A fine of $75,000 to be paid on or before December 23, 2022
2. Pursuant to section 732.1(3.1)(g) of the *Criminal Code*, a Probation Order with the mandatory conditions and the following optional condition:
    - The HPA shall make a charitable donation in the amount of $15,000 to the Threads of Life Agency

Elizabeth Buckle, JPC.