CITATION: *Sellers v Alcan Gove Pty Ltd* [2007] NTMC 076

PARTIES: RICHARD SELLERS

v

ALCAN GOVE PTY LTD

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Mining Management Act

FILE NO(s): 20712762

DELIVERED ON: 8 November 2007

DELIVERED AT: Darwin

HEARING DATE(s): 24 October 2007

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

SENTENCING – MINING MANAGEMENT ACT

Mining Management Act s 29
Carroll v Tom's Gully Mining Pty Ltd [2007] NTMC 033
R v Howe and Son [1993] 2 All ER 249

REPRESENTATION:

Counsel:
Complainant: Mr Anderson
Defendant: Mr O'Loughlin

Solicitors:
Complainant: Department of Justice
Defendant: Corrs

Judgment category classification: C
Judgment ID number: [2007] NTMC 076
Number of paragraphs: 20

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20712762

[2007] NTMC 076

BETWEEN:

RICHARD SELLERS
Complainant

AND:

ALCAN GOVE PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 8 November 2007)

JENNY BLOKLAND CM:

Introduction

1. A plea of guilty was entered on behalf of the defendant Alcan Gove Pty Ltd to one count against s 29 *Mining Management Act,* namely that:

> "Between about 2 May 2006 and 10 May 2006, being the operator for a mining site, did fail to notify the Chief Executive Officer of the agency administering the *Mining Management Act* of the occurrence of a critical incident on the mining site as soon as practicable after it became aware of the occurrence of the critical incident, contrary to section 29(1) of the *Mining Management Act*.
>
> Particulars of critical incident.
>
> On 2 May 2006 the pipe failed to contain its caustic contents".

Agreed Facts

2. The agreed facts (Exhibit 1) give a succinct overview of the bauxite mine and refinery operation of the defendant company. Of particular interest is

the background to the critical incident indicating that on 2 May 2006 a pipe was being cleaned by being flushed with a strong caustic substance that is capable of causing burns when it comes into contact with human tissue. The pipe is approximately 200 metres in length – the refinery has many kilometres of pipe containing the caustic solution. A small hole developed on one pipe allowing the caustic substance to escape. A welder employed by a contractor to the defendant company who was working in the vicinity and came into direct contact with the mist sourced from the solution – the contact was with his face and neck, and wet his shoulders through his shirt. He immediately felt a stinging sensation when the mist came into contact with his skin. He washed under a safety shower; went to the medical centre and underwent first aid treatment consisting of a 20 minute shower in accordance with procedures. He did not suffer any injury or scarring, was given cream to apply to his affected skin and required no further treatment. His skin peeled a few days later.

3. Section 29(1) *Mining Management Act* (NT) provides:

> "As soon as practicable after the operator for a mining site becomes aware of the occurrence of a serious accident or critical incident on the site, the operator must notify the Chief Executive Officer of the occurrence".

4. Section 4 defines "critical incident" as "an event on a mining site that has the potential to cause a significant adverse effect on –

   (a) the safely or health of a person; or

   (b) the environment on the mining site".

5. Section 4 defines "environment" as land, air, water, organisms and ecosystems on a mining site and includes –

   (a) the well being of humans.

6. It was agreed on the facts under the *Mining Management Act* that the caustic mist incident of 2 May 2006 was a *critical incident* because it had the potential to cause a significant adverse effect on:

(a) the safety or health of the worker who came into contact with the caustic mist or other workers on the site; or

(b) the air on the mining site; or

(c) the wellbeing of people on the mining site.

The maximum penalty in these circumstances is $110,000.

7. Further, the prosecution alleges this is the third time the defendant has been before the Court for offences against the *Mining Management Act* (NT). The previous two times the defendant has been dealt with includes an offence against s 23(2) *Mining Management Act* (doing an act or failing to do an act in breach of statutory obligation that causes the death of a person); and an offence against s 23(4) *Mining Management Act* (doing an act or failing to do an act in breach of a statutory obligation that causes serious injury to a person). The defendant was dealt with for the second of these offences on 11 September 2006; for sentencing purposes it is not a *prior conviction* although in general terms it is an antecedent and impacts to some degree but in a less significant way on a claim of good character than that of a previous conviction.

8. Further, it is accepted a mining officer met with representatives of the defendant on 20 May 2005 to discuss the non-reporting of an incident where two workers at the site were sprayed with cold caustic mud while changing a pump: (Exhibit 2 *Field Visit Report*) and on 13 September 2005 a mining officer gave a power point presentation to the defendant and its contractors concerning accident and incident reporting obligations under the *Mining Management Act*.

Matters Put in Mitigation

9. The Court was reminded this is not a case concerning unsafe work practices. Further, it was submitted that given the previous court matters were for such different offences, (and, as acknowledged, one cannot be considered a *prior conviction*), the defendant must be regarded a first offender for this charge.

10. Counsel for the defendant company explained that the process of manufacturing alumina from bauxite requires processes that are essentially dangerous as it requires the use of the caustic solutions. He explained the refinery process utilizes pipes which block up with silica and a strong solution is needed to counter that process. He emphasised that risks in this process are unavoidable; that the defendant has placed significant controls in place including showering systems every 50 – 100 metres where workers can be rinsed if necessary. This was but one example exhibiting the engagement of the defendant with safety issues.

11. The Court was reminded that the worker in this case did not suffer any *injury*; steps were taken to isolate the pipe immediately by use of a barricade and the worker was provided first aid by way of a deluge shower. It is accepted that an employee misinterpreted the situation by thinking that as there was no injury and only *first aid* was provided, it was not a "critical incident". Exhibit 5 produced on behalf of the defendant notes that under "severity of injury" the incident is classified as a "first aid case" and under "treatment" it is noted "rinsed under shower for twenty minutes straight after. No burns reported and no follow up required" and under "outcome" it is noted "back to work". There is no reference to the use of creams. It was submitted that this is simply a matter of interpretation where one officer, perhaps understandably, thought it did not fall into the category of critical incident. It is submitted that there is room for interpretation under the section and some strict interpretations could lead to extreme results. (The example of a worker failing to wear a seat belt being regarded as reportable was raised). It is suggested that the power point presentation referred to in

the prosecution facts should not be regarded as a "warning" but rather a presentation to the defendant. Further, it is pointed out that the field visit report (Exhibit 3) concerned primarily the G3 workers involved in the expansion sites of the defendant's mine site.

12. Also tendered (Exhibit 6) were the notifications of reports by the defendant to the Department of Primary Industry, Fishing and Mining citing 58 notifications in 2005, 64 notifications in 2006 and 56 notifications in 2007 (covering both Alcan and G3). It was submitted that the defendant exhibits a high level of compliance with the *Mining Management Act*. Further, I was advised that the relevant department within Alcan has reviewed its processes and now has a policy of "when in doubt – report". It is conceded capacity to pay is not an issue in this matter. The plea of guilty and the fact that the defendant accepted responsibility for the breach was also raised.

Consideration of the Issues

13. General deterrence and a need to encourage compliance with the obligations directed at monitoring safety imposed under the *Mining Management Act* are the most significant considerations. Parity as between defendants is of significant relevance. Much has been made of a penalty imposed in *John Carroll v Tom's Gully Mining Pty Ltd* [2007] NTMC 033. In that case the defendant, after a clear warning, failed to notify the Chief Executive Officer of the occurrence of a serious accident on the mining site. The accident that wasn't reported had resulted in a serious injury to the a worker's finger. The worker was admitted to hospital and had surgery to repair his fingertip. In that case the medical report discloses that the worker's fingertip suffered a "near total amputation" but was able to be saved. The finger was fully functional within six weeks. In that matter, there was a question concerning the defendant company's capacity to pay, there were no prior convictions alleged, however there had been a warning about specific reporting

obligations. In that case, all matters considered a fine of $36,000 was imposed.

14. I agree that at first blush the failure to report in this matter is not of the same gravity as the *Carroll v Tom's Gully Mining Pty Ltd* matter. A significant injury not being reported is objectively more significant. It must however be noted that Alcan is a large operation and given the high level of risk involved in the refinery, even objectively low level breaches need to be reported in order to monitor the risks. As there is the potential for significant harm given the sheer size and high level of risk in the operation, even seemingly minor incidents need to be monitored. That is surely the purpose of the section. A precautionary approach is mandated by the section.

15. Although the prior matter that the defendant was convicted of on 11 September 2006 concerned a different section of the *Mining Management Act*, it is still a previous conviction under the *Mining Management Act* and justifies the Court taking a course that continues to encourage compliance on the part of the defendant and other mining operators with the whole of the *Mining Management Act*. The defendant is in a different position than if it had never been dealt with for an offence under the *Mining Management Act*.

16. I accept the explanation that an officer of Alcan essentially made the "wrong call" on the basis that there was a belief that there was no injury and the potential medical issue was simply resolved as a first aid case. That does mitigate the moral blameworthiness of the defendant and influences me strongly, however this legislation is designed to ensure the defendant and other operators encourage compliance on the part of all employees and relevant officers.

17. I agree that the power point presentation does not of itself operate as a "warning" in that it did not concern drawing attention to a specific incident

alleged to be a breach. It does give the Court confidence that a degree of education is occurring in the industry beyond leaving it to mining operators to educate themselves on their obligations and to self interpret. In my view the *Field Visit Report* (Exhibit 2) does amount to a warning as it specifically deals with the obligation of incident reporting in a similar incident. Even if the discussion occurred at the G3 project, this information should have been disseminated to other arms of Alcan that deal with these issues.

18. I of course take into account that Alcan does put significant resources into the area of Occupational Health and Safety, as is evident from its response to this charge. It is also note worthy that it has changed its standard for reporting. I also note there is evidence of sound compliance with the reporting provision over the last three years. That is all positive mitigation. Regrettably for the defendant the previous court matters and the warning chip away at mitigation that might otherwise be available. The previous court matters cannot aggravate the penalty beyond the objective seriousness of the offence. The warning serves to aggravate the offence in the sense explained in *R v Howe and Son* [1999] 2 All ER 249. Proportionality is still a relevant principle.

19. Clearly this defendant has the capacity to pay – there was a question over the defendant's financial resources in *John Carroll v Tom's Gully Mining Pty Ltd* however, the greater resources of Alcan does not justify a fine that goes beyond the objective seriousness of the offending. In *Tom's Gully Mining Pty Ltd,* in any event, regard was had to the resources of the parent company that financed the operation of Tom's Gully Mining Pty Ltd.

20. Balancing all of these matters, I consider a fine of $35,000 to be appropriate and given the plea of guilty I would impose a conviction and fine of $31,500.

Dated this 8th day of November 2007.

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Jenny Blokland
CHIEF MAGISTRATE