

R. v. Atlantic Towing Ltd. - A Prosecution for Jeopardizing the Safety of a Vessel

By David K. Jones

Introduction

A recent decision of the Provincial Court of Nova Scotia is of interest as the first prosecution of a relatively new provision of the *Canada Shipping Act, 2001* in a case where a dredge being towed by a tug flipped in heavy weather and the three crew members onboard the dredge were rescued by helicopter.

The case is *R. v. Atlantic Towing Ltd.*, 2011 NSPC 10. The provision of the Act under which the company was prosecuted is section 118, which provides that: No person shall take any action that might jeopardize the safety of a vessel or of persons on board.

Facts

The facts of the case are that on November 18, 2008 the tug *Atlantic Larch* towed the dredge *Shovelmaster* from Halifax to Saint John without incident. Later that day, the tug with dredge in tow departed Saint John bound for Halifax. Gale warnings for areas off the south-western coast of Nova Scotia had been issued by Environment Canada in marine forecasts for November 18 and 19. In the early morning hours of November 19, the wind had reached its predicted level of 35 knots, which continued throughout that day. Wave height forecasts had predicted seas from 1 to 2 meters on November 18 building to 3 to 4 meters by the afternoon of November 19. By the afternoon of November 19, when the tug and dredge were over 20 miles offshore, the wind and sea conditions experienced were worse than had been forecast.

The superstructure of the dredge included a “garage door”, which had been reinforced with plywood before the voyage. Shortly after noon on November 19, the garage door collapsed under the force of a wave. A pump failed and the dredge began to take on water. The three crewmembers on the dredge put on their survival suits. Approximately one hour later the tug requested assistance from the Coast Guard. The crewmembers

could not be hoisted from the dredge because of the equipment on deck and the movement of the dredge. The crew members were instructed to jump into the water and were successfully hoisted to safety. Shortly after, the dredge flipped.

The Offence: jeopardizing the safety of a vessel or of persons on board

The company was charged under s. 118. The maximum fine for such an offence is \$1,000,000 or imprisonment up to 18 months.

Since there had been no previous prosecutions under the newly enacted s. 118, the Crown counsel submitted that the Court should look to precedents in occupational health and safety cases, since the specific prohibition in s. 118 is a public welfare offence similar to legislation in the context of worker safety.

Public Welfare Offences

Since the company plead guilty to the offence, the Court's decision focuses on sentencing principles and the facts of the case. For the purposes of this article, before sentencing is considered, it is useful to outline the legal principles relating to "public welfare offences".

Public welfare offences are sometimes described as not being "true crimes", but as "regulatory" or "quasi-criminal" proceedings, based on the public policy of the safe operation of modern society for public safety and health. The Supreme Court of Canada described the importance of regulatory offences in the 1991 leading case, *R. v. Wholesale Travel Group Inc.* Select passages of that judgment are as follows:

It is through regulatory legislation that the community seeks to implement its larger objectives and to govern itself and the conduct of its members.

Regulation is absolutely essential for our protection and well-being as individuals, and for the effective functioning of society.

The more complex the activity, the greater the need for and the greater our reliance upon regulation and its enforcement. For example, most people would have no idea what regulations are required for air transport or how they should be enforced. Of necessity, society relies on government regulation for its safety.

Increasing regulation of society has resulted in the Courts applying a different standard to the enforcement of the regulations because the traditional criminal law standards were not seen as appropriate for regulatory offences.

In the 1978 leading case of *R. v. Sault Ste Marie (City)*, the Supreme Court of Canada considered regulatory offences and the difficulty in using the criminal law to enforce regulatory obligations. The Court distinguished between criminal, absolute liability and strict liability offences as follows:

The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them.

In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense yet be branded as a malefactor and punished as such.

The Court decided that regulatory offences fell in a third category between "true criminal offences" and "absolute liability offences". The Court created a third category of "strict liability offences". In these types of offences, if the Crown can prove the accused committed the *actus reus* of the offence, the accused will be found guilty, with the important exception that if the accused can prove due diligence, he will be found not guilty.

Strict liability offences and the defence of due diligence

The purpose of the strict liability offence and the defence of due diligence in regulatory offences was described by the Court as follows:

The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea* and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence.

It is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever.

In the *R. v. Atlantic Towing* case, the tug owner pleaded guilty to the offence of jeopardizing the safety of a vessel or persons on board. Consequently, the due diligence defence was not considered by the Court. The issue to be decided by the Court was the appropriate penalty.

Sentencing principles in safety legislation

In deciding what an appropriate sentence would be, the Court reviewed the sentencing principles relevant to offences involving safety legislation. The Court referred to the sentencing principles set out in sections 718 – 718.2 of the *Criminal Code*, and previous occupational health and safety cases decided by Courts in which the emphasis in sentencing has been on denunciation of the conduct, and deterrence to others. The Court quoted a leading case in the Ontario Court of Appeal, *R. v. Cotton Felts*, for the considerations in deciding an appropriate fine for a safety violation by a corporation, as follows:

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.

The Court also referred to an Alberta case, *R. v. General Scrap Iron*, in which that Court had determined that when sentencing corporations for regulatory offences, the following factors should be considered:

- the conduct, circumstances and consequences of the offence;
- the terms and aims of the relevant legislation;

- the participation, character and attitude of the corporate offender.

Finally, the Court stated that any aggravating and mitigating factors must be considered in sentencing of the corporate offender.

Application of the sentencing principles to the facts

Conduct, circumstances and consequences of the offence

In considering the conduct, circumstances and consequences of the offence, the Court stated that this case was not about a wilful violation of safety requirements. It was a case where a safety hazard had been identified, but the risks were miscalculated. The weather and sea conditions were recognized as a danger, and plywood was nailed to the garage door, but decisions were made that compounded the risks, including the dredge was twenty miles offshore at the height of the gale, and it had three crew members on board. The sea conditions were worse than the weather forecasts.

One significant fact in this case was that the dredge did not have a valid Ship Inspection Certificate. The last certificate had expired in 1996, and it included provisions that the dredge was limited to voyages within fifteen miles of land, and the dredge be unmanned when under tow. The fact that the owner knew that these restrictions had been imposed on the dredge, and were not followed, appear to have been important in the Court's assessment of the conduct, circumstances and consequences of the offence.

The terms and aims of the *Canada Shipping Act*

The Court referred to the terms and aims of the *Canada Shipping Act* set out in section 6 of the *Act*, including: the protection of the health and well-being of individuals, the promotion of safety in marine transportation, and the protection of the marine environment. The Court also noted that section 118 of the *Act* is specifically focussed on "potential" hazards, prohibiting conduct that "might" jeopardize the safety of a vessel or persons on board. The penalizing of potentially harmful conduct is important, and the Court found that such conduct was present in this case.

The participation, character and attitude of the corporate offender

The Court stated that the owner of the tug had no prior safety-related convictions and operated to a high standard for safety. The owner gave evidence that it was the first tugboat operator in North America to achieve dual certification to the ISM Code and ISO 9002 and other ISO standards. The owner also presented evidence of its pre-departure procedures, its cooperation with authorities investigating the incident, and the measures it had taken after the incident to ensure compliance with all applicable regulations and its own safety procedures.

Aggravating and mitigating factors

The aggravating factors considered by the Court were the decision to undertake the voyage in the face of gale warnings, towing a dredge with crew onboard when it was supposed to be unmanned, and taking the dredge twenty miles offshore.

It was a mitigating factor that the company pleaded guilty, that the owner acted by taking steps to ensure it was operating a safe workplace, and its clean safety record.

The Penalty

The Crown submitted that a fine in the \$90,000 - \$100,000 range was appropriate. The company's counsel submitted that \$15,000 - \$25,000 was appropriate.

In assessing the level of fine, the Court returned to the principles set out above in the *R. v. Cotton Felts* case, including the size of the company, the scope of the economic activity, the extent of actual and potential harm to the public, and the maximum penalty set out in the legislation.

The Court found that the company was large in operating a multi-million dollar business. There was actual harm in this case in that three crewmembers lives were imperilled, and the dredge was lost. The maximum penalty under section 118 is \$1,000,000. The Court stated that this level of maximum fine indicates that Parliament's intention that low or nominal fines will not meet the goals of the legislation. The Court decided that the appropriate fine in this case was \$75,000.

Conclusion

The *R. v. Atlantic Towing* case is important because it is the first to consider section 118 of the *Canada Shipping Act*, a relatively new provision of the *Act* which establishes a general duty to avoid jeopardizing the safety of vessels and persons on board. The case also provides a view of the factors a Court will consider in deciding on an appropriate penalty when that duty is breached.

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