

*Indexed as:*

**R. v. Clearwater Electric Ltd.**

**Between  
Her Majesty the Queen, and  
Clearwater Electric Ltd., accused**

[2001] M.J. No. 101

49 W.C.B. (2d) 348

Manitoba Provincial Court  
Winnipeg, Manitoba

**Joyal Prov. Ct. J.**

Oral judgment: March 2, 2001.

(59 paras.)

*Trade regulation -- Industrial safety -- Duty of supervision and training -- Particular offences -- Failure to provide information, instruction, training or supervision.*

Sentencing of Clearwater Electric following its guilty plea on a charge that it failed properly to supervise an employee, breaching the Manitoba Workplace Safety and Health Act. The employee, Sandenberg, was a young, probationary helper. His supervisor sent him into a room alone where the supervisor believed there was a power switch. In fact, no switch was available and Sandenberg, who wore no safety equipment, was killed in an accident. Clearwater's principal expressed great remorse. Clearwater was unfamiliar with the applicable legislation and therefore provided no training on it. As Clearwater was a small company and had no previous convictions, it sought a fine toward the low end of the range.

HELD: Clearwater was fined \$27,500 and given 27 months to pay. The paramount factor in sentencing in such cases was general deterrence. The fact that the provincial government recently had increased the maximum fine from \$15,000 to \$150,000 was a clear message that it intended to expand the options for deterrence. Here, Clearwater plainly breached its statutory duties. It was obliged to have a working familiarity with the legislation. The breach was not minimal. Clearwater's remorse and size were relevant mitigating factors, but, despite the company's modest size, the court was obliged to impose a sentence sufficient to be painful and educational.

**Statutes, Regulations and Rules Cited:**

Workplace Safety and Health Act, s. 54.

**Counsel:**

M. Goska, for the Crown.

R. McNicol, Q.C., for the accused.

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**1 JOYAL PROV. CT. J.** (orally):-- Let me thank both counsel for your considered submissions in a difficult case that required, I think, both counsel, perhaps in a way is quite unusual, to perhaps present submissions that are more starkly opposed and distinct than, as I say, is sometimes the case.

**2** I prepared reasons. I will read them. I will hopefully not be too lengthy.

**3** The accused corporation Clearwater Electric has entered a guilty plea to Count 1 on the Information pursuant to its responsibilities which flow from s. 54 of the Workplace Safety & Health Act. The scope of the objectives and purpose of the Act is broad. The Act by virtue of what it seeks to do is regulatory and it constitutes in law what is known as a public welfare statute. There is nothing arcane or mysterious about the object of public welfare statutes. Such statutes seek to establish standards of health and safety in various contexts, including the workplace.

**4** In that regard in its delineation of the relevant duties, responsibilities and requirements of a company the Act obliges businesses to adopt a duly diligent posture by which they are expected to act pro-actively and not reactively to risks in the workplace. These Acts do so in many ways, but more specifically, by stipulating for business, big and small, prohibited acts and omissions which however seemingly commonplace and benign, threaten worker, consumer and even citizen safety.

**5** As indicated in the case of R. v. Cottonfelts Limited reported at 2 C.C.C. (3d) 287 at 294:

In our complex inter-dependent modern society, such regulatory statutes are accepted as essential to the public interest. They ensure standards of conduct, performance and reliability by various economic groups and make life tolerable for all. To a very large extent the enforcement of such statutes is achieved by fines imposed on offending corporations. The amount of the fine will be determined by a complex of considerations, including the size of the company, the scope of the economic activity in question, the extent of actual and potential harm to the public and the maximum penalty prescribed by statute.

**6** The considerable but justified responsibility that falls to a business big or small to diligently regulate itself and take the necessary steps to avoid prohibited acts and omissions, is reinforced by the fact that public welfare statutes are among the group of statutes whose offences bear a legal standard of strict liability. While the standard of strict liability does not presuppose that in emphasizing diligent and reasonable care there will be an absolutely guaranteed absence of risk in a workplace, it does presuppose, I repeat, pro-active vigilance.

**7** As a result of the guilty plea relating to the omission of failing to supervise, Clearwater Electric has accepted that its inaction was culpable. As the sentencing judge I must impose a fit and proper sentence, one which, as always, is proportionate to the mitigating and aggravating circumstances of the offence and the offender corporation, but also one which gives particular emphasis to what the jurisprudence has asserted is the paramouncy of the principle of general deterrence.

**8** In addition to considering the identifiable mitigating and aggravating circumstances, as well as the usual principles of sentencing with what must be the emphasis on general deterrence, I must also consider an array of factors which are peculiar to public welfare offences. Those are identified in various cases and those factors include the remorse of the accused, the record of the accused, the degree of culpability in respect of the offence, the impact on the victim, attempts to comply with the legislation and the maximum fine of the statute.

**9** Let me deal first of all with the remorse of the corporate accused. I have no doubt that Mr. Bruneau as directing mind of Clearwater Electric has extreme remorse with respect to the tragic outcome of this situation. I heard Mr. McNicol eloquently speak to sentence last week and I have no doubt that Clearwater Electric and

its principals regret profoundly the clear pain that has befallen the Sandenberg (phonetic) family. And to its credit, Clearwater Electric must be accorded credit for the assumption of responsibility that the guilty plea represents.

**10** Clearwater Electric comes before the Court with no previous record. The size of Clearwater has reduced since the time of this incident. It is clearly not a company that makes tremendous amounts of money, but as I will return to this issue in a moment, that factor ought not to be determinative.

**11** But let me now move to the question of degree of culpability as it relates to the particular offence in question. In considering the degree of culpability in these sorts of workplace and safety offences, the courts are inevitably considering what are in the broadest sense, tragic accidents. Yet given the object and purpose of the Act, the Court must in the particular circumstances of any given accident, evaluate the degree of corporate blameworthiness.

**12** Mr. McNicol stressed that the essence of the offence to which the accused corporation entered its guilty plea last week was in respect of an omission relating to its foreman failing to supervise Michael Sandenberg after assigning him a task in a different room. Mr. McNicol argues that the death occurred as a result of a tragic accident. While Mr. McNicol concedes the lack of supervision, he explains that the foreman assumed that there would be a switch on the wall in that other room which he believed Michael would use to de-energize the power. He was wrong. There was no switch. There was no shutting off of the power. There was no supervision and Michael Sandenberg is now dead.

**13** The Crown, for its part, in its initial submission recounted not only the circumstances of the incident in question, but also Ms. Goska made, in her submissions, a characterization of a pattern of conduct which according to that description, suggested that corners were cut routinely by Clearwater Electric in a work environment where expediency and time saving were given priority over safety.

**14** Mr. McNicol took emphatic exception to the submissions respecting those facts, which I must concede if established would surely be additional aggravating factors.

**15** Let me just say on that point as I indicated earlier this afternoon, Ms. Goska has done her characteristically skilled, conscientious and responsible job on behalf of the Crown. But as I indicated, it is not helpful to the Court in a case such as this, for the Crown to invoke in its submission as to sentence clearly provocative and aggravating facts about which the Crown does not have concessions from the defence or alternatively about which the Crown is not in a position to prove. The introduction of such unproven and clearly contested aggravating facts poses the very real danger of skewing and distorting the evidentiary foundation for members of the public and the victim's families who may have already their own reasons to question the legitimacy of legal outcomes.

**16** The credibility and confidence in judicial sentences require members of the public, like lawyers, to understand that a judge sentences on only those aggravating factors which have been conceded by the defence or proven in evidence by the Crown. The underlying fairness of our system requires nothing less.

**17** In these circumstances the defence concedes nothing respecting the earlier referred to patterns or habits of unsafe practice. Ms. Goska for the Crown has not proven those contested aggravating factors which clearly, as I said, would have rendered an already serious admission even more serious.

**18** The facts surrounding the culpable admission which I can consider in this case at this sentencing, including the obvious failure to supervise Michael Sandenberg, but also the following facts:

**19** There was on the part of Clearwater Electric an irresponsible absence of knowledge and familiarity with the relevant duties arising from the applicable provincial statute and the related regulations.

**20** There was, in addition, on the part of Clearwater Electric the connected and consequent total absence of training given to the supervisor and other employees.

**21** Furthermore, there was in these particular circumstances, given that Michael Sandenberg was a very

young junior and inexperienced employee and given his status as a mere helper, not only a statutory duty but a common sensical obligation on the part of Clearwater Electric to oversee and watch over its now deceased employee.

**22** This obligation can be seen as all the more pressing in a context where Clearwater Electric's expressed requirement concerning hourly efficiency placed a logical pressure on an employee like Michael Sandenberg to accept and perform tasks in satisfaction of expectations.

**23** In addition to those facts, I also consider on the question of degree of culpability the fact that not only was Michael working without the required supervision, he was doing so without certain protective equipment. Needless to say, I must when considering the degree of culpability, give consideration to the horrible and tragic loss of human life that is represented by Michael Sandenberg's death.

**24** Mr. McNicol for his part argued that this court ought not to make too much of this small company's lack of knowledge or understanding of the main Act and the related applicable regulations. While quite obviously a court cannot expect a sophisticated knowledge and subtle understanding of every provision in every related Act and regulation, it is, in my view, absolutely reasonable to expect of a company, a familiarity with and a pro-active implementation of those duties, procedures and safeguards that govern the particular risks associated with a particular trade.

**25** I do not direct these comments to Clearwater Electric, but I must say that a company that cannot understand or has not adequately apprised itself of the practical and particular duties and safeguards that attach to its industry's activities and practices is a company that, quite simply, has no business being in business.

**26** In the absence of such knowledge of the statutory responsibilities and in the absence of the correspondingly required communication to and training of its supervisor and supervisory employees, an accused company, big or small cannot deflect blame by hiding behind what that company might sincerely believe were its day-to-day policies of common sense and safety first. However sincere a company is in invoking phrases like common sense and safety first, those phrases risk becoming subjective and hollow concepts if there is not some clearly objective understanding of the basic safety measures always and uniformly required by statute.

**27** The Workplace Safety & Health Act and the related regulations are, I repeat, designed as a purposeful attempt to ensure that companies and their agents proactively and diligently avoid those acts and omissions which result in the one time tragic accident which belatedly shock those companies into the recognition of their responsibilities.

**28** In the circumstances of the case at bar, the factual backdrop to the tragic death of Michael Sandenberg involves more than the misjudgment that caused the foreman to not adequately supervise Michael, thereby enabling him to make the mistakes that led to his death. That backdrop also encompasses those facts which created the conditions that made possible the deadly decision to not supervise Michael on the occasion in question.

**29** Clearwater Electric had no knowledge of the formal statutory safety duties regulating its practices. Accordingly, Clearwater Electric did not train its supervisors in a way mindful of those duties; in a way that would have resulted in specific and appropriate policies and practices which when in place, would have safeguarded against the lack of supervision that led to Michael Sandenberg's death.

**30** Let me also observe that even if Michael Sandenberg had, as Mr. McNicol suggests, achieved the requisite level of hourly speed with respect to the installation of lights, it is not unreasonable to conclude that his probationary status put him in a vulnerable position whereby the tasks assigned to him required from his perspective, immediate and prompt attention. Insofar as this young man was but a mere helper, the company was required, even where the task was self-generated, as here, to ensure that Michael's work was done under the watchful eye of a properly trained supervisor. Such was not the case here. The lack of knowledge and training on the part of the company and its tragic impact on an inexperienced probationary employee in a

workplace under the company's control, constitute factors which aggravate the culpable non-supervision of Michael. Accordingly, I cannot conclude that the degree of culpability or blameworthiness in this case is minimal.

**31** Let me deal with the question of the increased fine and the now maximum fine of \$150,000, as a relevant factor in my determination.

**32** The clear and purposeful amendment made by the provincial government in 1997 increased the maximum fine from \$15,000 to \$150,000. This, in my view, is a clear message from the legislative branch that a greater range in fines was needed in order to provide more options for appropriate generally deterrent dispositions. This range was designed to ensure, mindful as always of the relevant circumstances and factors in these particular cases, that companies big and small, be educated concerning the responsibilities involved in their pro-active protective duties as good corporate citizens.

**33** As the Ontario Court of Appeal suggested in the case of *R. v. Cottonfelts* that I cited earlier on, the general deterrent disposition must, without being harsh, be a fine that is substantial enough to warn others that the offence will not be tolerated, and also not appear to be a mere licence fee for illegal activity, careless or otherwise.

**34** Particular emphasis is placed generally on fines because of their potential to possibly ensure compliance through not only threats of punishment, but also through the educative effect of such substantial fines. That is the function of what we call the deterrent disposition in the context of these fines and public welfare statutes.

**35** In this context where paramount importance is given to general deterrence, the fact that one accused company may be big and the other small is a factor that must be considered. But it cannot be over emphasized to the point of blunting the aspect of general deterrence, specifically in relation to the companies of a similar size.

**36** Moreover, it is obvious that a death suffered as a result of a workplace and safety violation involving a small company, is a death no less acutely felt by the family, friends and the community than that death suffered at the hands of a big company. Although the Court must consider the size of an offender company, the fine to be borne by the convicted corporation must still involve some pain sufficient so as to bring home the gravity of the offence not only to that company per se, but as well, to serve as a deterrent to other companies. General deterrence, not specific deterrence remains the most important factor. In the case of *R. v. Fiesta Party Rentals*, rendered November 15th, 2000 and cited by the Crown, the Alberta provincial judge Lamoureux (phonetic) cited the Alberta Court of Queen's Bench case of *R. v. Techno Corrosion Services* reported 1986, 43 Alta. L.R. (2d) 88, in support of the proposition that the size of the company and the impact of the fine on that company while a factor, is not a factor to be given over emphasis and is generally a factor, to be given less weight than the other relevant factors in the determination of a court sentence.

**37** Given the new amendments respecting the maximum fine and the available range it suggests, to over emphasize in this case the comparatively small size of the company, Clearwater Electric, risks, in my view, neutralizing the required general deterrent effect of a meaningful fine. It also leaves large portions of the labor force of Manitoba feeling comparatively exposed and vulnerable simply because they do not work for a company with deep pockets.

**38** While proportion must be present in a fit and proper sentence, a small company must understand that workplace violations where culpability is not minimal and where a death has occurred, will involve dispositions that represent not just a legal inconvenience, but a painful and educative message to other companies of like size.

**39** Mr. McNicol submits that the amendment in 1997 with its now \$150,000, maximum represents an effort to deal more effectively with the worst offender in the worst circumstances. That undoubtedly is so, but that submission requires me to ignore the vast middle range of fines also now available. It would be, in my view, incongruous to impose the earlier level of fines in cases like the case at bar where culpability is not minimal,

given the extraordinarily new range and increase of the fines available as a result of the 1997 amendment.

**40** I must also obviously deal with the question of previous jurisprudence and the whole notion of uniformity and parity of sentence. This second last factor relates to my consideration obviously, of what has to be a fit and proper or proportionate sentence. The case law in this area, particularly since the 1997 amendments is not plentiful. Most of the cases that have been referred to me have involved fines in the area of \$5,000 to \$10,000. Indeed, Mr. McNicol seeks a fine in the area of \$7,000 to \$10,000.

**41** The 1998 case of *R. v. Pine Falls Paper*, [1998] M.J. No. 52, a case of this provincial court decided by Her Honour Chief Judge Webster, involved an offence which occurred in 1996 prior to the amendment in 1997. Accordingly its application and potential use is somewhat limited.

**42** In my view the most applicable post 1997 case, one where the increased maximum fine was given new consideration, involves the decision of *R. v. Gateway*, a sentence imposed by Her Honour Judge Everett of this court in January of this year 2001. In that case, the accused company was charged with not having properly trained its employee. The employee in question was a forklift driver of 20 years experience. An accident involving his forklift resulted in a death. Importantly in that case the company was aware of its regulatory obligations and had begun the process of training its employees and had simply not yet gotten to the forklift driver. The size of that company had also reduced significantly by the time of the sentencing. The Court imposed in that instance a fine of \$20,000.

**43** Insofar as most of the cases cited represent a consistent pre 1997 approach to sentencing, I believe it would be inappropriate in the name of uniformity and parity of sentence to ignore everything I have said about the degree of culpability, the increased maximum and a paramouncy of general deterrence. To impose the fine requested by Mr. McNicol would be tantamount, in my view, to reinforcing the predictability of the lower sentences that the legislative branch clearly sought to make more significant.

**44** Let me deal very briefly with the impact on the victim. While it was Michael Sandenberg who lost his life, the family, friends and community he left behind are in many, many ways, no less appropriately described as victims. As victims in both a broad and narrow sense, they belong to a community whose provincial workplace and safety legislation is designed to protect and efficiently regulate. When the worst result of a violation under the Act occurs, such as in this case, not only is the public welfare aspect of the legislation compromised, but so too are the lives of the friends and family of the accused's victim forever altered. Their support and participation at this sentencing, as I indicated last week, dignified the memory and premature death of Michael Sandenberg. Their submissions and memories of Michael have ensured that Michael will never be but a mere statistic.

**45** In the face of such a moving and honorable contribution to this process, I as a sentencing judge doing what I must always do, must nonetheless be careful to not permit my sentence today, to become unfit or disproportionate because of an over emphasis on what is obviously the unspeakable pain felt by the family and surviving victims. But at the same time in taking such care, because Michael's death and the circumstances in which it occurred was as a result of legal culpability, and given that it occurred, in my view, in the context of the increased fines available, the sentence requires a message be sent not only to the accused corporation, but the corporations of Manitoba of similar size. My sentence cannot permit the death of Michael Sandenberg to become a mere footnote in the narrative which will one day describe the somewhat unsteady march towards achieving a safer workplace for all Manitobans.

**46** Having regard to all of the factors that I have touched upon in my reasons, having regard to the paramouncy of general deterrence and having regard to what is obviously the remorse of the accused corporation, it is the order of this court that a fine in the amount of \$27,500 be paid by the accused corporation. Given the amount of the fine I will waive costs and surcharge if they are applicable.

**47** Mr. McNicol, did you want to speak to the question of time to pay?

**48** MR. MCNICOL: I did, Your Honour. Thank you. As I indicated to you last week, Your Honour, and I am advised as of today the situation hasn't changed, the company presently has no new work in which it is

gauged and therefore no current cash flow. It doesn't know what the future holds but it certainly hopes and anticipates that it will secure work in the course of this year.

**49** In the circumstances, Your Honour, would you consider permitting the corporation to pay the fine on a monthly basis at the rate of \$1,000 per month?

**50** THE COURT: Ms. Goska, do you have any submission on that point?

**51** MS. GOSKA: I would believe it's Your Honour's determination.

**52** THE COURT: I think that my comments are clear in respect of what the legislation requires. As I indicated, I think a certain amount of pain has to be absorbed by the corporation. By using the word "pain" I do not want to sound unduly callous, but there has to be discomfort. At the same time I do not want, in a retributive way, to put the accused corporation out of business, and I think the solution proposed by Mr. McNicol insofar as it proposes a plan of payment, is one that will not blunt the affect of my disposition, but at the same time will provide, I think, Clearwater Electric with a fighting chance of staying in business notwithstanding the disposition I have imposed today.

**53** I will permit Clearwater Electric the 27 -- what are we looking at? I guess let's do the math. It's 27 --

**54** MR. MCNICOL: Or there could, Your Honour, be an initial payment of \$1,500 and thereafter the balance at the rate of \$1,000 per month, if that's satisfactory.

**55** THE COURT: Why don't we use that phraseology then, madam clerk.

**56** THE CLERK: Fifteen hundred dollars by?

**57** THE COURT: The end of March of 2001.

**58** THE CLERK: Thank you.

**59** THE COURT: Thank you very much.

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