Jail Time And Fines Are Always On The Table For Workplace Health And Safety Violations

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The *Occupational Health and Safety Act* (OHSA) sets the rules that businesses in Ontario must follow to ensure the health and safety of their workers. It also sets the penalties that apply when these rules are broken.

These penalties can be significant, including fines of up to $1.5 million per offence for corporations, plus fines of up to $100,000 per offence and jail time up to 12 months for individual company directors. In its recent decision in *Ontario (Labour) v. New Mex Canada Inc*., 2019 ONCA 30 (*New Mex*) the Ontario Court of Appeal considered when and how these more significant penalties are to be applied.

The good news? The decision in *New Mex* provides added clarity to sentencing principles under the OHSA, such that business owners will know what to expect in the event of a contravention. On the other hand, the Court of Appeal also recognized that all options are always on the table for egregious violations — even for first-time offenders.

In other words, the fact that an employer company or its directors receive a significant fine does not preclude its directors from also serving a jail sentence.

The facts in *New Mex* surrounded a workplace fatality that involved a worker who fell from an order picker after having an epileptic seizure. Operating the order picker required the employee to stand on a small, elevated platform, and the employer was aware of the worker's condition. Despite this, the worker was not wearing safety equipment such as a harness or tether or received fall-prevention training when he suffered a seizure and fell headfirst to the ground.

The employer company pleaded guilty to multiple charges brought against it under the OHSA, including failure to provide information, instruction, supervision and safety measures to ensure the worker's protection. Two individual directors of the employer company also pleaded guilty to similar offences. Each of the defendants were first-time offenders under the OHSA.

The sentencing court imposed a total fine of $250,000 on the employer company, and sentenced each of its two directors to serve an intermittent 25-day jail sentence alongside 12 months' probation. As the employer company was a small, closely-held

company, it was noted that any fines against the company would likely be paid by the individual director defendants themselves. The prison sentences were therefore intended to alleviate the financial burden that would result from imposing fines against both the company and the directors. In other words, the sentencing court treated fines and jail time under the OHSA as if they were interchangeable.

The sentences were appealed to a provincial offences appeals court, which reduced the fines imposed against the employer company down to $50,000 and set aside the jail sentences against the individual directors — substituting fines of $15,000 per director.

That decision was further appealed by the Crown to Ontario's Court of Appeal.

In its decision, the Court of Appeal upheld both the reduction in fines against the company and the decision setting aside the jail sentences against the directors. In doing so, however, the Court of Appeal also set out the following principles to be applied to future sentencing under the OHSA:

- Imprisonment constitutes a significant penalty under the OHSA and should be reserved for significant offences;
- Imprisonment is also **not** a substitute for fines, regardless of a defendant's financial hardship; and
- Even first-time offenders under the OHSA may be sentenced to jail time if their offence is sufficiently egregious.

In the Court of Appeal's view, the actions of the directors leading to the employee's death in *New Mex* had been "outrageous" and "blithely ignorant to their obligations." Despite this, imposing prison sentences against the directors based on financial hardship alone amounted to an error in law, and the prison sentences therefore could not stand. Had the sentences been instead imposed to punish the directors' failure to comply with the basic requirements of the OHSA, those sentences likely would have been considered "entirely fit" and upheld. The Court of Appeal also commented that the $50,000 fine against the company, while not demonstrably unfit, nevertheless represented a "lenient" amount.

For companies doing business in Ontario, the decision in *New Mex* is an important reminder of the severity of penalties that can impact both corporations and their directors in response to egregious violations of the OHSA. Such violations can range from failures to provide proper safety equipment and training, to failures to provide adequate protections from workplace violence and harassment. The sentencing principles set out by the Court of Appeal in *New Mex* provide a definitive set of rules when it comes to determining these penalties, but also affirms that all options are always on the table. Jail sentences are available even for first-time offenders and, according to the Court of Appeal, may be particularly appropriate where employers are determined as having shown obvious disregard for workplace health and safety.

The sentencing principle that remains unchanged by *New Mex*, however, is courts' overriding interest in ensuring compliance with the OHSA. Despite these new developments, it remains the case that employers who do what it takes to comply in the present will always be better off if they find themselves facing a court in the future.

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