



# What's New in HR Law

## Sentencing for Regulatory Offences: Ontario Court of Appeal Clarifies Principles

February 28, 2019

### **BOTTOM LINE**

In a recent case, the Ontario Court of Appeal clarified several principles to be considered when sentencing corporations and individuals for regulatory offences such as those set out in the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1. (*OHSA*). The decision could lead to more sentences involving jail time for directors or supervisors, as well as less leeway for appellate Courts to change the initial sentence.

### **Facts: Employee with epilepsy suffered seizure, lost consciousness, and died**

Mr. Singh was working on a 12-foot high platform at New Mex Canada Inc. (New Mex), a furniture warehouse in Brampton, when he fell off the platform and died. The investigation found that Mr. Singh had suffered a seizure and lost consciousness.

Mr. Singh suffered from epilepsy, a condition his employer was aware of. Despite this, Mr. Singh had been assigned to stand on the platform without any fall protection equipment. Nor had he received any safety training from his employer. In addition, the platform was shoddy: it had an open side and sagged on its unsupported end.

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New Mex and two of its directors (who were also supervisors), were charged and pleaded guilty under *OHSA*.

As a result, New Mex was convicted of:

- failing, as an employer, to provide information, instruction and supervision to protect the health or safety of Mr. Singh, relating to fall protection and working from a height, contrary to *OHSA*, s. 25(2)(a); and
- failing, as an employer, to ensure that measures and procedures prescribed by s. 85(a) of *Industrial Establishments*, R.R.O. 1990, Reg. 851, as amended, were carried out at the workplace, contrary to *OHSA*, s. 25(1)(c).

The directors/supervisors were convicted of:

- failing, as directors, to take all reasonable care to ensure that New Mex complied with *OHSA*, s. 25(2)(a) as required by *OHSA* s. 32(a); and
- failing, as directors, to take all reasonable care to ensure that New Mex complied with s. 85(a) of *Industrial Establishments*, R.R.O. 1990, Reg. 851, as amended, also contrary to *OHSA*, s. 32(a).

The Justice of the Peace fined New Mex \$250,000.00 - \$125,000.00 for each charge. She sentenced the directors/supervisors to 25 days of incarceration (intermittent sentence) and 12 months of probation.

All three Defendants appealed their sentences.

On appeal, the court reduced the \$250,000.00 fine to New Mex to \$50,000.00 - \$25,000.00 per count. The court also removed the jail time from the directors/supervisor's sentences, replacing it with fines of \$7,500.00 each.

The Crown then appealed to Ontario's top court.

## **The Court of Appeal's Decision**

### Fines

The Court stated:

In my view, the fitness of an *OHSA* fine ... can be determined essentially by asking: "What amount of fine is required to achieve general and specific deterrence, and would otherwise be appropriate bearing in mind the principles of sentencing, including proportionality, and parity?"

Applying this test to the facts of Mr. Singh's death, the Court found that the \$250,000.00 fine to the corporation was proportionality appropriate. In fact, the court indicated that in a different case, depending on the offender, a fine "several times higher" could still be proportionate.

However, on the issue of parity, the Court found that the fine was excessive, and far above the amount required to achieve deterrence. With respect to specific deterrence, the Court stated

that the circumstances of the offender should be considered. Given the poor financial situation of New Mex, a smaller fine would still have achieved specific deterrence.

As for general deterrence, the Court pointed out that “the theory of general deterrence is that the sentence imposed and the relevant circumstances that support the sentence will become known to others.” The Court believed that should someone be aware of New Mex’s circumstances (it was a small, closely-held business that turned little profit) a \$100,000.00 fine would have served as an appropriate general deterrent. This is, in fact, what the Crown had initially requested.

With respect to the fines to the individual directors, the Court of Appeal noted that they were lenient but, ultimately, they opted not to change the amounts set out by the appeal judge because the Court felt they provided sufficient deterrence in the specific circumstances.

## Custodial Sentences

The Court reiterated that the circumstances surrounding Mr. Singh’s death were “outrageous.” Further, the Court pointed out that not only were the two individual defendants directors, they were also Mr. Singh’s supervisors.

However, based on the time that had passed since the incident, as well as other factors, such as the two defendants’ personal circumstances, the Court of Appeal opted not to incarcerate the men. However the Court made it clear that a sentence involving jail time would not have been inappropriate.

## Principles Addressed by the Court of Appeal

In the course of its decision, the Court of Appeal clarified a number of factors that should be considered in the sentencing of regulatory offences:

- Moral blameworthiness
- Restraint
- Primacy of fines over incarceration
- Relevance of corporate fines to directors’ ability to pay related fines in closely held corporations
- Relevance of compliance with orders issued after an accident

## Moral Blameworthiness

The principle of proportionality, which requires that the punishment “fit the crime,” requires a court to consider an offender’s moral blameworthiness. While moral blameworthiness will not be applied to regulatory offences in the same way as in criminal offences, it is still a consideration. The Court further clarified that for the purposes of a sentencing appeal, a lower level of moral blameworthiness does not mean a sentence should be reduced.

## Restraint

The principle of restraint stands for the proposition that a sentence should not be any harsher than it needs to be. The Court stated that the “first offender” principle – which calls for courts to try to avoid a custodial sentence for a first time criminal offender – may not be as relevant in

regulatory sentencing given that sentences are generally shorter and stigma is lower. The Court also stressed that the most important sentencing principle is deterrence, which could trump restraint in certain circumstances.

### Primacy of Fines Over Incarceration

Incarceration is extremely rare in the context of regulatory offences. Generally fines have been found to achieve the deterrence necessary for dealing with regulatory offenders, but if fines do not achieve the requisite deterrence, incarceration could be appropriate. The fact that regulatory offences rarely result in jail time is not a reason for a Judge or Justice of the Peace not to sentence someone to jail.

### The Relevance of Corporate Fines to the Ability of Directors in Closely Held Corporations to Pay Related Fines

The Court accepted the Crown's position that reducing a personal fine imposed on a director of a corporation due to the size of the fine issued to the corporation is an error. The Court discussed the possibility of directors winding up a corporation, thus absolving themselves from having to deal with the corporate fine and, as a result, walking away with a lesser personal fine. While not raised in this case, the Court acknowledged that there could be an argument that a direct fine on a closely held corporation could "indirectly impoverish equity directors

### The Relevance of Compliance with Orders Issued After the Accident

The fact that an employer complies with orders after an accident occurs should not be considered as a mitigating factor to reduce a sentence.

### Check the Box

Of course, the best way to avoid a hefty fine or potentially jail time is to ensure your company always complies with the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

If you are a director or supervisor, be sure that you are aware of your responsibilities (and potential liabilities) in regards to a safe workplace.

If you or your company does face regulatory charges, contact a qualified lawyer.

**Decision Date:** February 2019

**Forum:** Ontario Court of Appeal

**Citation:** *Ontario (Labour) v. New Mex Canada Inc.*, 2019 ONCA 30

## Need more information?

Contact [Darren Avery](#) at 519-435-7270, or your regular lawyer at the firm.

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