“Creative Sentencing” For Corporations Convicted Of OH&S Offences Arrives In Ontario

An Ontario Court may have altered the legal landscape with respect to sentencing corporations convicted of offences under the **Occupational Health and Safety Act** (the “OHSA”).

Historically, fines have been the only penalty imposed by courts on corporations that have been convicted of OHSA offences. There have been a few, exceedingly rare and very fact specific cases where probation orders were imposed. However, virtually any corporate defendant convicted of an OHSA offence could reasonably anticipate facing a fine. It has been our experience that the Ministry of Labour almost never seeks a probation order against a corporate defendant under the OHSA.

However, one Court in a very recent case adopted an approach which has completely upended the historical approach to sentencing in Ontario OHSA prosecutions. In **Ontario (Ministry of Labour) v. Vixman Construction Ltd.**, the Court dealt with a tragic case where a worker was killed in an accident which took place at the Toronto Island Airport.

(i) Brief Summary of the Facts

The corporate defendant had been retained by the constructor on the project to install steel roofing over the new walkways at the airport terminal. Two workers were using a "self-retracting lifeline" (hereinafter "SRL") that was in good working order. To work properly, the SRL must be choked to a fixed support and the Court found that the SRL protecting the deceased worker was choked incorrectly around a steel column.

Further the SRL operating manual required that certain calculations be done prior to work commencing. The Court found that there was no evidence the Defendant employer required anyone to make the necessary calculations.

As a result, the Defendant was convicted after a full trial of two counts associated with: failing to ensure that a worker did not fall; and, failing to ensure that proper safe work procedures were in place. The matter was adjourned to a sentencing hearing.

(ii) Sentencing Hearing

The Crown and Defendant presented the Court with a joint submission on a fine of $125,000 plus the 25% victim fine surcharge. The Court has the final say in determining whether to accept a joint submission, but is required to accept the amount the parties agreed unless the suggested amount is contrary to the public interest and the sentence would bring the administration of justice into disrepute.

The Justice of the Peace expressed "serious reservations" on the following basis,

'the exclusive use of fines to the exclusion of other available sanctions earmarked for the explicit purpose for the prevention of "similar unlawful conduct or the rehabilitation of the offender" as is contemplated in the POA may in fact run

counter to the proper alignment of sentencing with the core objective of occupational health and safety legislation itself; to prevent and mitigate harm in the workplace.

It is our view that the Court fell into legal error when it sought to interfere with a joint submission on the basis that the Court was of the opinion that other sentencing mechanisms should be employed in the sentencing of OHSA matters generally. The jurisprudence is clear that a high bar must be met before a joint submission is interfered with. In our view, unless the Court felt that the quantum of the fine being imposed was well above or below the norm for other similarly situated corporate offenders, the Court ought not to have interfered.

The Court commented that since the Defendant was "receptive" to "creative" sentencing after the Court expressed concern about the joint submission, the usual limitations on interfering with a joint submission were not applicable. In our view, the Learned Justice of the Peace erred in saying the Defendant's response waived the usual limitations on interfering with a joint submission. In fact, it appears that the Defendant was only "receptive" to this idea when the Court itself expressed reservations about the sentence and advised the parties it was considering departing from the joint submission.

(iii) The Sentence

The Court cited academic literature which discussed alternative sentencing for corporations and referenced jurisprudence from other parts of Canada which allowed for the imposition of an order diverting part of the fine to a charitable organization. The Court held (correctly in our view) that the law does not allow it to impose such a sentence. We agree with the Court that such a penalty could very well be an appropriate disposition in some cases if the

Provincial Offences Act were amended to permit such a sentence.

However, the Court went on to impose a $125,000 fine and an order of probation. The probation order included some fairly standard probation terms that are often imposed on individuals convicted of criminal offenses, such as reporting to a probation officer and appearing before the Court when required to do so. However, the Court also imposed the following requirements:

1. The Defendant was required to contact the editor of Infrastructure Health and Safety Association (IHSA.ca), Health and Safety Magazine and inform the editor that the court has ordered it to publicly acknowledge the offence in an article to be featured in the IHSA.ca Magazine. The lessons learned from the workplace accident and the remedial actions taken by the Defendant to prevent future harm were required to be incorporated in the article. The article shall be dedicated to the memory of the deceased worker.
2. The Defendant will create a video to be used in the training and education of workers in fall arrest procedures and best practices which may be featured on the Ministry of Labour, Training and Skills Development Website and/or incorporated in any fall arrest protection courses or programs of study endorsed by the Ministry of Labour or the Infrastructure Health and Safety Association (IHSA). The video is to be dedicated to the memory of the deceased worker.

(iv) Our Thoughts

The terms of the probation order represent to our knowledge the first time in the history of the OHSA that a sentence requiring a Defendant to publish a publicly available article and create a publicly available video about the offence and

the steps taken to prevent it. We agree that the creation of such materials may very well respond to the laudable goal of preventing future workplace accidents; but, we have considerable difficulty with the legal basis for imposing such a punishment.

Our concern with this sentence is twofold.

First, the Court held that there was a clear legal distinction on the treatment of a joint submission between cases where the Defendant pleads guilty and cases where the Defendant is convicted at trial. The Court held that the deference to a joint submission following a conviction at trial "'is not anywhere close to being on the same footing" as is the case where the accused pleads guilty. The basis for the Court's finding on the issue is that the accused is giving up the right to a trial by pleading guilty whereas that issue obviously doesn't arise after a conviction at trial. The Court essentially held that there is no quid pro quo in sentencing negotiations after a trial.

We disagree with the Court's finding on this issue. We acknowledge there is some judicial support for the concept that a joint submission is entitled to less deference following a guilty plea. However, even in that case the Court employed the usual test before departing from the joint submission.

It is our view that sentencing negotiations following a trial can be a complicated exercise in many cases. Arriving at a joint submission accomplishes the laudable goal of saving Court time and potentially avoids a lengthy hearing on the appropriate sentence. It also gives the accused some certainty with respect to penalty if they forthrightly engage in successful negotiations with the Crown about sentence while allowing the Court to ensure the sentence meets the bar of being in the public interest. It is our view that joint submissions following a conviction at trial ought to be

encouraged.

We also believe that the Court's approach to the joint submission issue has the potential to penalize defendants for exercising their constitutional right to make full answer and defence. It is a fundamental principle of law that a defendant shall not be subject to a harsher sentence for proceeding to trial as opposed to pleading guilty. Obviously, any defendant loses the benefit of the mitigating factor that is entering an early plea, if they proceed to trial and lose. But they are not to be penalized for exercising a constitutional right to plead not guilty.

Our concern is that by giving less weight to a joint submission following a trial, the specter of punishing the Defendant for proceeding to trial is a very real possibility if the advantages of a joint submission are taken away after a conviction.

Our second concern is that this sentence now puts defendants pleading guilty to OHS offences as a part of plea bargain in a state of uncertainty as to whether their proposed penalty that follows historical norms will be accepted. Defendants must now appreciate that if other Courts follow this approach then there is a real risk of probation orders with terms that neither the Crown or the defendant ever proposed or even anticipated.

We note that other Courts have questioned the historical approach of sentencing employers to fines. In one recent case, the Justice of the Peace discussed the concept of imposing an "imbedded auditor" on the defendant as part of a probation order. An "imbedded auditor" is an individual who is situated at the workplace at the corporation's expense to monitor compliance and provide reports to the Ministry of Labour on a privileged basis about compliance for a specified period of time.

The Justice of the Peace commented that he was "'at a loss to understand why the Ministry of Labour has not embraced its obvious benefits as described by Archibald, Jull and Roach, in favour of a continued reliance solely on fines." The Justice of the Peace reluctantly chose not impose an imbedded auditor on the basis that the joint submission did not rise to the level of not being in the public interest and that the victim's family supported the joint submission.

Ryan Conlin and Jeremy Schwartz will discuss what the new approach could mean for plea bargaining in Ontario under the OHSA in greater detail at a Complimentary Lunchtime HR-Law Webinar on February 26, 2020. Registration for the event is now open!

(v) The Legislature Could Weigh In

It is our view that the interests of justice are not served when Courts embark on a process of imposing terms of probation that have not historically been part of OHSA sentencing and have not been imposed by the parties in light of the high standard required to deviate from a joint submission.

It is our view that if the Legislature wished to enact changes in how corporations were sentenced, it could simply amend the Provincial Offences Act to include something similar to the detailed provisions which address probation for corporations and other organizations under the **Criminal Code**. The Legislature has not chosen to do so.

The legislative process would allow for public debate about when and if probation orders should be imposed against corporations, allow for stakeholders to comment and would make it possible for a detailed review of how corporations are sentenced in other jurisdictions in Canada and around the world. It would allow for a discussion of the concept discussed by the Justice of the Peace that parts of a fine could be directed to a charity.

We further believe that any discussion about corporate sentencing should consider whether Ontario should adopt the **Criminal Code** model for deferred prosecution agreements or "remediation agreements," which allows for charges to be withdrawn against a corporation in exchange for the corporation meeting certain strict conditions that are similar to what could be imposed in a probation order. We believe that this issue deserves to be considered ' by the Legislature ' if the sentencing regime is to be reviewed.

It is our view that the legislative process is the appropriate mechanism for considering and imposing substantial changes to the sentencing regime.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

by Ryan Conlin and Jeremy Schwartz