

# Rare Creative Sentence Imposed in Nova Scotia Safety Prosecution



In most OHS prosecutions, companies and individuals are fined if they're convicted. In addition, individuals may face possible jail sentences. However, courts may also impose so-called 'creative' sentences, in which a defendant may be, say, ordered to publish an article on the incident and what it learned in an industry publication or to invest in the development of a safety training program on a specific topic for the industry sector. Although creative sentences are fairly common in *environmental* prosecutions, they're rarely imposed in safety prosecutions. But in a recent OHS case from Nova Scotia, the court decided that a creative sentence was appropriate. Here's a look at the court's reasoning.

## THE CASE

**What Happened:** An electrician was electrocuted while installing electrical service for a tenant at a strip mall. He'd been working on an electrical cabinet while it was still live. His employer was charged with two OHS violations. It argued that it had exercised due diligence and wasn't responsible for the experienced electrician's lapse in judgment. The court disagreed, convicting the company of both charges. The court noted that the company didn't have a formal OHS program or written safe work practices. It also didn't provide safety training to junior workers. Thus, the company didn't take all reasonable precautions for the electrician's safety or to ensure compliance with the Canadian Electric Code [*R. v. R.D. Longard Services Ltd.*, [2015] NSPC 20 (CanLII), April 17, 2015]. At sentencing, the prosecution requested a \$75,000 fine and a creative sentence.

**What the Court Decided:** The Provincial Court of Nova Scotia fined the company \$35,000 and ordered it to make a series of presentations about the case.

**The Court's Reasoning:** The court acknowledged that the company was insolvent. So what wouldn't be a significant amount to a prosperous company would be significant for a company such as this one with no current ability to pay. But although the court took the company's financial situation into account, the court said it wasn't appropriate to weight this factor too heavily. The company still existed and hadn't surrendered its certificate of registration. And the 'sentencing imperative of deterrence must be accorded prominence,' added the

court. Thus, considering all the relevant factors, including the harm caused and the company's culpability, it concluded that a \$35,000 fine was appropriate.

As to the creative sentence, the court said, 'The facts of this case lend themselves to the imposition of a 'creative sentencing option.'" The worker's tragic death and the lack of formal safety policies at the company constituted 'a sobering message' for other small businesses in the construction trades, it reasoned. So the court ordered the company to make a series of presentations on the facts of the case, the applicable regulatory requirements, the workplace safety issues involved and the required due diligence. In addition, the presentations had to total 150 hours and be completed within 18 months from sentencing [*R. v. R.D. Longard Services Ltd.*, [2015] NSPC 35 (CanLII), June 12, 2015].

### ANALYSIS

As noted above, creative sentences are not uncommon in environmental prosecutions. Courts may be authorized to impose creative sentences in safety prosecutions as well. For example, in an Alberta log yard, a worker was seriously injured after falling approximately 25 metres when the portal crane he was operating partially collapsed. His employer pleaded guilty to an OHS violation. The court fined it \$10,000 and ordered it to pay \$90,000 to the Alberta Forest Products Association for the development of a training program on the inspection, use and maintenance of portal cranes [*Gordon Buchanan Enterprises Ltd.*, Govt. News Release, Aug. 22, 2011].

But in OHS cases, the vast majority of sentences solely involve fines. The argument for imposing fines, particularly high ones, is deterrence. But the payment of fines'some in the hundreds of thousands of dollars'don't seem to be making workplaces much safer. So although creative sentences aren't always appropriate, perhaps more courts should follow the Nova Scotia court's lead and, when suitable, impose creative sentences that can have a real impact on workplace safety overall, such as using real cases as teachable moments for other employers.