CITATION: *Ontario (Ministry of Labour) v. Vixman Construction Ltd.*, 2020 ONCJ 64
DATE: January 31, 2020
Information No.: 19100943

ONTARIO COURT OF JUSTICE

(Toronto Region)

The Queen in Right of Ontario,

(Ministry of Labour)

-AND-

VIXMAN CONSTRUCTION LTD.

Before Justice of the Peace G. J. Fantino

Trial: October 28 & 29, 2019

Reasons for Judgement released on December 19, 2019

Sentencing Reasons released on January 31, 2020

Wilson, W and Schiller, E. …… for the Ministry of Labour

Cohen, M. …… for Vixman Construction Ltd.

JUSTICE OF THE PEACE FANTINO:

[1] On March 27, 2018 William Dean Maguire was tragically killed in a workplace accident at the Billy Bishop Toronto Island Airport. The parties filed an *Agreed Statement of Facts* at trial which sets out the following particulars (Exhibit No.1):

> 1. Vixman Construction Ltd. ("Vixman") is a valid Ontario corporation. At all material times it was an "employer" as defined in the *Occupational Health and Safety Act* ("*OHSA*").

2. In March of 2018, Vixman was contracted to install steel roofing over new walkways from the terminal at Billy Bishop Toronto city Airport, 2 Eireann Quay, in the City of Toronto. The work being performed was part of a "project" as defined in the *OHSA*, and so the provisions of the *Regulation for Construction Projects (O.Reg. 213/91)* were applicable.

3. PCL was the general contractor of the project and was an "employer" within the meaning of the *OHSA*.

4. Chris Bramer was the superintendent for PCL and was a "supervisor" within the meaning of the *OHSA*.

5. Vixman employed Dean Maguire and Brad Chapin. Both were "workers" as defined in the *OHSA*. Mr. Chapin was also a "supervisor" as defined in the *OHSA*. Brad Chapin was the Vixman supervisor for this job and was paid for that role.

6. Mr. Maguire and Mr. Chapin began work at the site on March 26, 2018.

7. Both workers continued their work on March 27, 2018. At approximately 10:00 am, Mr. Maguire fell from the work surface which was approximately 3.6 metres above the ground. He died from blunt impact trauma to his head.

[2] At trial, the Crown conceded that the self-retracting lifeline (hereinafter referred to as SRL) manufactured by Norguard Fall Protection Equipment and personally issued by Vixman to Mr. Maguire was found to be in proper functioning working order as intended for use and free from any technical malfunctions or maintenance flaws. While the Crown takes no issue with the deployment of SRL equipment for the scope of work being undertaken, the Crown alleges that the work process was badly flawed. Specifically, the configuration of SRL use in conjunction with irregularities associated with the SRL anchoring position itself form the basis of the charges before the Court.

FINDINGS OF FACT AT TRIAL

[3] A Notice of Project was duly filed with the Ministry of Labour which identifies PCL as the lead general contractor. Vixman was subcontracted by a structural steel company to install metal decking over new passenger walkways extending from the main terminal building. Vixman successfully completed a segment of this work referred to as phase one at Billy Bishop on the east side of the airport on earlier dates which involved a different work crew. It was determined that the prior work crew used a "trap door method" for anchoring at foot level when working on other passenger gates (Exhibit No. 3 / Tab C, Photograph Nos. 53-71).

[4] Brad Chapin and Dean Maguire arrived on the job site for the first time on March 26, 2018 accompanied by Vixman's Construction Manager, Mr. Wayne Roskam. Mr. Chapin was also the supervisor or foreman for the project and Mr. Maguire was a worker and health and safety representative for Vixman.

[5] Shop drawings for the project were provided to Mr. Chapin.

[6] It was established that Mr. Chapin and Mr. Maguire are the workers depicted in the video excerpts obtained directly from the airport security office with the assistance of the Toronto Police Service from March 26, 2018 and March 27, 2018 (Exhibit No. 4). Mr. Chapin is wearing green coloured clothing and Mr. Maguire is wearing orange coloured clothing.

[7] Mr. Roskam did not at any point in time observe Mr. Chapin and Mr. Maguire performing their assigned work duties.

[8] Mr. Maguire at the time of his death was properly wearing a safety helmet, a five-point harness around his legs, torso and shoulders which was attached by a carabiner clip to a D-Ring, fastened to a three-foot shock absorbing lanyard which was ultimately connected to a SRL block and wire rope sling.

[9] The SRL operates much like a seatbelt in a motor vehicle to allow unrestricted travel when pulled slowly and smoothly to a prescribed range but will lock when a sharp or abrupt motion is detected thereby preventing a further fall when an initial fall has been detected.

[10] Mr. Chapin and Mr. Maguire were working on gate three at the time of the incident and the structure was open and exposed with no guarding approximately 3.6 metres high and 8 feet wide. Mr. Chapin referred to this job as atypical to other projects because the structure was much lower and narrower. Mr. Roskam informed the court that Vixman's workers are usually exposed to heights from twenty five feet and even higher.

[11] The SRL device being used by Mr. Maguire was "leading edge approved" and bore the lettering "LE" confirming this application for use which for all intents and purposes is designed to arrest a fall in the event a worker goes past the edge. A leading edge is simply described as an exposed edge or opening on a roof, balcony or deck structure without any guardrail protection.

[12] The structure was essentially open to the ground below and the workers were installing the metal deck roof consisting of corrugated steel in segments. Leading edge gaps were present between various sections including to the sides, to the front and to the rear of the workers.

[13] To function properly and ensure worker safety, the SRL must be anchored to a fixed support. Multiple SRL blocks (as many as three units) were being used by the work crew and at least two of the SRL blocks including the SRL which was connected to Mr. Maguire were determined to be choked incorrectly around a steel vertical column. These deficiencies were

observed in the airport security video played at trial with corroboration from three witnesses; Mathew Neundorf, Ministry of Labour Inspector, Mr. Chapin, Vixman's foreman and Mr. Brisco, Vixman's President and Owner at the time.

[14] Mr. Chapin and Mr. Maguire were not untied at any point and were working collaboratively to progress along the top of the structure. Mr. Chapin assisted Mr. Maguire to transfer from one SRL block to another. Mr. Maguire used the wire rope sling situated within the SRL casement to choke the device around a vertical column with Mr. Chapin standing immediately beside him. Both workers incorrectly fastened their SRL's around vertical columns.

[15] Similar irregularities with regard to SRL anchoring were evident on the day prior to the accident and also captured on airport security video.

[16] ***Norguard's Instruction Manual*** (Exhibit No. 2 / Tab 9) explicitly details several critical requirements for the safe use and operation of a SRL:

A. The analysis of the workplace must anticipate where workers will be performing their duties, the routes they will take to reach their work, and the potential and existing fall hazards they may be exposed to. (pg.3)

B. Fall Clearance Limitations: There must be sufficient clearance below the anchorage connector to arrest a fall before the user strikes the ground or obstruction. When calculating fall clearance, account for a MINIMUM 3' safety factor, deceleration distance, user height, length of lanyard/SRL, and all other applicable factors. (sample fall clearance calculation diagram pg.6)

C. Prior to use, a Competent Person MUST calculate adequate fall clearance (see pg.6) (pg.11)

Competent Person is defined as "A highly trained and experienced person who is ASSIGNED BY THE EMPLOYER to be responsible for all elements of a fall safety program, including, but not limited to, its regulation, management, and application." (pg.2)

D. NEVER work on the far side of an opening that is opposite the LE SRL anchorage point. (pg.11)

The stated purpose of Vixman's Safe Work Practices - Working at Heights document (Exhibit #2, Crown Book of Documents at Tab #14, page not numbered) is to provide:

"… employees with Vixman's policy and set of guidelines or "Do's and Don'ts" that have been developed to mitigate hazards associated with working at heights."

[17] A standard operating procedure or protocol for "Calculating Fall Clearances" within the same text reads:

Fall clearances must be calculated prior to job start up using shop drawings for the project.

Calculated fall clearances shall be provided to the foreman and crew.

[18] All witnesses were consistent in their testimony which corroborates the finding that fall clearances were not calculated prior to job start despite the existence of shop drawings which were furnished to Mr. Chapin.

[19] The video evidence which captures the moments leading up to the accident supports the conclusion that Mr. Maguire was working at a significant distance away from the SRL block at the time of his fall (estimated by Mr. Neundorf to be approximately six metres) and that he was working on the far side of a fairly significant opening. Both of these deficiencies are in direct contravention of Norguard's operating instructions and Vixman's safety policies. There is uncontroverted evidence that Mr. Maguire, despite working on a roof structure only eleven feet, six inches (11.6) above the ground, extended his SRL well beyond twelve (12) feet which would have offered no fall protection whatsoever.

CONVICTIONS REGISTERED

[20] On December 19, 2019 following a two day trial, the defendant corporation, Vixman Construction Ltd. was convicted of the following regulatory offences under *section 25(1)(c) of the Occupational Health and Safety Act, R.S.O. 1990, c.O.1 as amended and corresponding Ontario Regulation 213/91 for Construction Projects, Revised Statutes* (hereinafter referred to the *OHSA* and/or *Act*) with *"failing as an employer to ensure that the measures and procedures prescribed are carried out in the workplace"*.

Count No.1 : *O. Reg. 213/91, s.26.6(2)*

The fall arrest system shall be attached to a lifeline or by the lanyard to an independent fixed support that meets the requirements of section 26.7.

Count No. 2 : *O. Reg. 213/91, s.26.6(3)*

The fall arrest system shall be arranged so that a worker cannot hit the ground or an object or below the work.

SENTENCING SUBMISSIONS

[21] At sentencing the parties presented me with a joint submission for the imposition of a $125,000 fine against the corporation supplemented by the 25% Victim Fine Surcharge. The Crown filed a Book of Authorities on Sentencing (Exhibit No. 11) consisting of the following

cases in support of the fine amount which stand for the proposition that fines are typically used to enforce regulatory matters for which the primary determinant of the amount is general and specific deterrence:

R. v. Cotton Felts (OCA 1982) O.J. No. 178

R. v. Inco Ltd. (OCA 2000) O.J. No. 1868

[22] For nearly four decades, the bedrock decision, *R. v. Cotton Felts, supra*, has stood as the pre-eminent authority setting out the goals and principles of sentencing in regulatory offences and the factors to be considered when imposing sentence. The Court of Appeal of Ontario held as follows at para.19:

> *The Occupational Health and Safety Act is part of a large family of statutes creating what are known as public welfare offences. The Act has a proud place in this group of statutes because its progenitors, the Factory Acts, were among the first modern public welfare statutes designed to establish standards of health and safety in the work place. Examples of this type of statute are legion and cover all facets of life ranging from safety and consumer protection to ecological conservation. In our complex interdependent modern society such regulatory statutes are accepted as essential in 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 involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence: see R. v. Ford Motor Company of Canada Limited (1979), 49 C.C.C. (2d) 1 (Ont. C.A.), per MacKinnon A.C.J.O at p. 26; Nadin-Davis, Sentencing in Canada, p. 368 and cases therein cited.*

[23] The core objectives of sentencing that apply to all offences include deterrence, rehabilitation and the protection of the public.

<u>*General Deterrence*</u>*:*

[24] General deterrence involves deterring the public generally from committing the offence. It is the most important sentencing goal for most regulatory offences: *R. v. Cotton Felts Ltd., supra,; R. v. Bata Industries Ltd., [1992] O.J. No. 667 (Ont. Prov. Div.).*

[25] Ultimately, "Without being harsh the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere license fee for illegal activity": *R. v. Cotton Felts Ltd., supra.*

[26] The paramount importance of deterrence in *OHSA* cases has been re-enforced in numerous decisions incl. *R. v. Inco Ltd., supra, para. 5:*

> *Any error in sentencing principle in this case was on the part of the summary conviction appeal court judge. By listing deterrence as but one of 12 factors he considered in his reasons for reducing the sentences, Poupore, J., diluted its importance.*

[27] General deterrence and denunciation are the most important factors in determining a sentence in a case of dangerous driving causing bodily harm. Other, like-minded people need to know that irresponsible use of a motor vehicle on our highways will not be countenanced: *R. v. Rawn, 2012 ONCA 487, [2012] O.J. No. 3096 (Ont. C.A.).*

[28] A fit and appropriate sentence can only denounce conduct and deter others to the extent that it is punitive and punishment is therefore the key essence of general deterrence. A fine imposed on a corporate regulatory offender should meaningfully take into account the size and economic activity of the corporation.

Rehabilitation:

[29] Rehabilitation of the offender has historically been assigned less weight with regulatory offences than criminal offences however, it is widely acknowledged that the prevention of similar unlawful conduct and mitigation of future harm can contribute to the rehabilitation of the offender.

Protection of the Public:

[30] Protection of the public is an important consideration for offences where public safety is an issue, such as careless driving and occupational health and safety offences.

[31] The purpose of public welfare or regulatory offences must be considered when imposing sentences under regulatory statutes. Regulatory offences are not criminal offences. Activity is not prohibited by regulatory offences because it is inherently wrong. The activity is regulated because, if left unregulated, it would result in danger to the public. These offences serve to protect the public from potentially harmful conduct by ensuring the safety of the food we eat, our work environment and the vehicles that transport us: *R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 (S.C.C.).*

WHAT CONSTITUTES AN APPROPRIATE SENTENCE?

[32] The determination of a fit and appropriate sentence for a corporate offender is fraught with many contradictions which invariably presents several unique challenges for the court. This inherent friction or tension in the law arises from the absence of clearly enunciated sentencing guidelines in the *Provincial Offences Act* which is in stark contrast to the *Criminal Code of Canada* which contains a declaration of purpose and identifies key sentencing principles applicable to criminal prosecutions.

[33] Sentencing in a criminal prosecution is quite different from sentencing for a regulatory offence. The criminal law is largely preoccupied with the moral blameworthiness of the

accused's conduct whereas in regulatory matters, the court is mainly concerned with the results of the defendant's conduct. Fundamentally, the statutory provisions governing the sentencing of corporations and organizations be they for profit or not-for-profit has been described as a "*patchwork quilt*" of common law principles and concepts that is badly in need of reform.

[34] As Justice Libman observes in *The Regulatory Cycle and its Role in Shaping Purposes and Principles of Sentencing for Regulatory Offences* (2012), 59 C.L.Q. 126 at pp. 126-27:

> *It is up to each court, in each case, to assess the circumstances of the offence, and the offender, and to impose a sentence that best reflects the mélange of principles of traditional sentencing theory, including denunciation, deterrence, protection of the public, rehabilitation, reparations, and promoting a sense of responsibility in offenders along with an acknowledgement of the harm done to victims and the community, all in juxtaposition to public welfare or regulatory offences.*

[35] A reasonable sentence for a corporate defendant must reflect the circumstances surrounding the unlawful conduct and the unique circumstances of the offender, particularly the scope of the organization's economic activity; the larger the corporation the higher the fine. Every case will have aggravating and mitigating factors. The tragic consequence of the offence that resulted in the death of Mr. Maguire is the single most aggravating factor in this case which is deserving of the most weight for a substantial monetary penalty. Despite his supervisory role at the job site, Mr. Chapin also faced similar potential harm from the fall hazard. Pursuant to Crown submissions, Vixman has no prior record for safety violations and it stands to reason that an accident or innocent mistake resulting from carelessness or inadvertence is less severe than a circumstance where willful neglect or deliberate violations are found to have contributed to death or serious injury. There was no suggestion that Vixman was not diligent in attempting to comply with the *OHSA* or failed to cooperate fully with the Ministry of Labour investigation. I also find that the personal appearance of Mr. Daryl Brisco in his official capacity as the former President of the corporation in conjunction with his very candid and sincere testimony, rather than merely dispatching lesser officials is an indication of genuine remorse.

[36] With the exception of four cases (three of which are over ten years old) that are highlighted in the Sentencing Book of Authorities, the Crown did not rely on any rational comparison of fines imposed in other cases following a trial where a fatality occurred and I was also troubled by the sparse details furnished by the defence concerning the size and scope of Vixman's economic activity. No financial statements were filed or even a profit and loss statement. In the absence of any information to the contrary however, I accept that the corporation is a small to medium privately held enterprise with $10 million in gross annual revenues with approximately 20-30 full time employees and an annual health and safety budget in the range of $30,000 to $40,000. There is no evidence to suggest that the corporation is feigning to be poor rather than be open with the court about its financial situation or has a history of concealing assets to avoid paying fines. The Crown undoubtedly has access to Vixman's *WSIB* payroll filings and I would expect that if a glaring anomaly existed concerning any of these representations that the submissions with respect to penalty would have been vehemently contested.

[37] ***Profiting From Risk Management and Compliance*** (formerly *Regulatory and Corporate Liability: From Due Diligence to Risk Management*) co-authored by The Honourable

Justice Archibald of the Superior Court of Justice of Ontario and Kenneth Jull is a leading text on regulatory law. At pages 12-1 and 12-2, the learned authors present a thought provoking notion which in my view represents a substantial change from traditional legal reasoning when evaluating the sentencing possibilities for corporate offenders:

> *The regulatory standards set by the legislature may be undermined or over-enforced by the courts at the sentencing stage, if the risk calculations are not performed correctly. For example, if the court assesses a fine that is too low, this will arguably have the effect of undercutting the risk assessment done by the legislature in creating the violation. To some defendants, it may be simply worth the price of the fine to engage in the activity. Alternatively, setting the fine too high may over-deter.*
>
> *In our view, the courts should start with a restorative and remedial remedies first, and then progress to the notion of deterrence. This is not to suggest that one principle trump the other, only that the focus should be on restorative solutions first. This approach avoids some of the mathematical and moral problems inherent in assessing the appropriate monetary value of fines.*

ANALYSIS OF SENTENCING TOOLS AND OPTIONS

[38] It is of critical importance to highlight that *s.66* of the *OHSA* sets forth the penalty provisions of the Act which stipulates that a defendant can be sentenced to a maximum fine of $1,500,000 for a corporation ($1,000,000 for an individual), to imprisonment for a term not to exceed 12-months or to both.

[39] Furthermore, it is settled case law that probation is a consideration for any regulatory offence where the proceedings are commenced by information even in circumstances where the named defendant is a corporation. While the legal pre-requisites and jurisdiction exists to impose a probation order, the duration of such an order and any accompanying terms must not be random, arbitrary or capricious but rather, rationally connected to the offence. Accordingly, the fashioning of a probation order is not automatic but rather discretionary and must not represent an additional punishment exceeding the proper scope of probation.

[40] In addition to the statutory conditions of the order, *s.72.(3)* of the *POA* empowers the court to prescribe as a condition in a probation order:

> *(c) where the conviction is an offence punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence as the court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant.*

[41] *s.72(3)(c)* poses several difficulties because the permissible conditions under this paragraph are not specified. The language employed in this section is often referred to as a "catch all" or "basket clause" which speaks to wide ranging, broad, unspecified conditions which may be included as an integral component of a probation order.

[42] The dilemma and potential for error arises when a court essentially by-passes a specific sentencing provision which in the circumstances provides for either a fine, imprisonment or both and then proceeds to substitute this pre-requisite in favour of an obligation which is not codified in the offence creating statute. Using the catch all approach under the *POA* can be construed as subjugating or defeating the legislation which constrains sentencing options.

[43] *R. v. Nasogaluak, SCC 2010* although not precisely on point as the offender is an individual (not a corporation) and the charge circumstance pertains to a criminal code offence (not a regulatory matter) does speak to sentencing principles generally and provides several guiding principles for the sentencing justice to consider. The Supreme Court in the judgement preamble stated:

> *No one sentencing objective trumps the others and the relative importance of any mitigating or aggravating factors will push a sentence up or down the scale of appropriate sentences for similar offences. The sentencing judges' discretion to craft a sentence which is tailored to the nature of the offence and the circumstances of the offender, while broad, is not without limits. His discretion is limited by case law, which sets down general ranges of sentences for particular offences which are to be used as guidelines in order to encourage consistency between sentencing decisions. It is also limited by statutes through the general sentencing principles and objectives enshrined in the Criminal Code and through legislated restrictions on the availability of certain sanctions for certain offences. Sentencing judges, while they can order a sentence outside the general range set by case law as long as it is in accordance with the principles and objectives of sentencing, cannot override a clear statement of legislative intent and reduce a sentence below a statutory mandated minimum, absent a declaration that the minimum sentence is unconstitutional.*

[44] This is not a closed or exclusive list and the court may consider any facts about the circumstances of the offence or the offender that impact on a principle of sentencing including but not limited to the purpose and nature of the statute, the extent of the measures the company took to avoid the wrong, the cost to avoid the wrong, and the attitude of the offender: *R. v. Mardave Construction (1990) Ltd., [1995] O.J. No. 4944 (Ont. Prov. Div.)*.

IS THE JOINT PENALTY SUBMISSION BINDING?

[45] I expressed concern and serious reservation with the proposal on the basis that 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.

[46] The most convenient approach to avoid any possibility for error and the path of least resistance obviously is to endorse the joint submission. In the totality of the circumstances however, I am not persuaded that it is just and proper to merely accede to the parties. Sentencing is not a rubber-stamping exercise and the hallmark characteristic of our justice system is

predicated upon *stare decisis* when required certainly but also the notion that the law is always speaking through thoughtful and considered reasons on a case by case basis.

[47] Subsequent to my expression of concern with regard to the $125,000 fine proposal, I provided the parties with the opportunity to make further submissions and it was the defence who in fact was receptive to receiving the court's guidance and direction on the possibility of tailoring a creative sentence alternative to minimize the risk of future harm. Accordingly, I take the position that the ensuing sentencing order does not constitute a circumstance analogous to jumping or undercutting a joint submission.

[48] I would be remiss however, if I did not make the clear distinction that a joint submission on penalty following a trial which results in convictions being registered against the defendant is not anywhere close to being on the same footing deserving of a much higher level of deference in a situation where the certainty of a resolution agreement was achieved and a guilty plea is entered. The seminal case on this issue was addressed by the *Supreme Court in R. v. Anthony-Cook, 2016 SCC 43 (CanLII); [2016] S.C.J. No. 43*. The court makes it abundantly clear at para. 58 and 59 that the justice "*may allow the accused to withdraw the guilty plea*" if it intends to depart from the joint submission. Clearly, this possibility does not exist once there has been an adjudication on the merits of the case which results in a finding of guilt.

[49] Regardless, I believe that the public interest consideration is a live issue here and find that a reasonable and informed member of the community aware of all the relevant circumstances including the applicable legislative provisions would be shocked that other available sentencing options were completely ignored and excluded on the basis of a Crown preference, procedural bias and historical precedence which although highly relevant does not rule out other sentencing possibilities. Absent a clear, compelling and logical explanation why the *status quo* should prevail, I am not persuaded that the imposition of a standalone $125,000 fine maintains public confidence in the administration of justice. No amount of fine can reverse the tragic consequences of the offence obviously but the regulatory process by its very nature is designed to prevent harm which suggests that sentencing a corporate offender must be authentically commensurate to the fundamental purpose of the statute itself to the extent permitted by law.

INNOVATIVE SENTENCING METHODS FOR CORPORATIONS IS DESIRABLE

[50] In a sentence appeal decision from the Court of Queen's Bench of Alberta, Justice Watson in *R. v. General Scrap Iron & Metals Ltd., 2003 ABQB 22,* plants the seed of corporate probation and seeks to rationalize *Cotton Felts* in a modern day light by quoting an earlier decision in *R. v. Panarctic Oils Ltd. (1983), 43 A.R. 199, 12 C.E.L.R. 78 (NWTTC) at paras.39 and 46*:

> *…corporations should be viewed "as something more than a person with money in terms of sentencing" so that "innovative methods of sanctioning corporations" are desirable.*
>
> *Fact-sensitive sentencing for corporations also seems to be necessary for other leading principles of sentence. In Panarctic Oils, the Trial Judge also associated the foregoing topics with rehabilitation and reformation as principles of sentence, when he said:*
>
> > *[34] Reformation and rehabilitation of a defendant must remain an element for the Court's consideration, even where the defendant is a corporation. Indeed, I*

> *believe this may be an area where it is most fruitful and most fertile for the concept of rehabilitation to be explored … A fine may deter, but it can also be passed on to others and leave the corporation unaffected. If true rehabilitation can be effected, then I believe society has ultimate protection--society will benefit, and the corporation will benefit. It would appear to me quite evident that this Corporate defendant is in a sense a candidate for rehabilitative measures because it is a corporation, it is a rational being, and reason will presumably work. It needs to re-establish itself and to wipe away the blemish …*

[51] Creative sentencing options have been advanced by several leading authorities on the subject and with limited frequency some of these concepts have begun to form part of our common law jurisprudence. ***Profiting From Risk Management and Compliance***, *supra*, at page 12:50:60.20 advocates for the use of embedded auditors as a condition of probation intended to meet the objective of rehabilitating a corporate offender:

> *The proposal would be superior to the imposition of fines in several respects. First, at present, fines go into the general revenue funds. There is no guarantee that a government will allocate these funds towards the increased enforcement in a particular area, whether it be securities, occupational health or the environment. Second, corporations would obviously abhor the prospect of the loss of privacy by being forced to have a State auditor on their premises. The presence of a State auditor would be the equivalent of a form of house arrest now used in the criminal justice system as part of a conditional sentence. Corporations might even challenge this order as constituting a violation of rights, but this challenge would likely fail. Our proposal would have a collateral benefit as a significant specific deterrent and as a general deterrent to other corporations.*

[52] Justice of the Peace Cuthbertson in a recent decision, *Ontario (Ministry of Labour) v. Lafarge Canada Inc., 2019 ONCJ 748* challenges the "*fine-fits-all"* approach and advocates for a major shift in the application of *OHSA* sentencing for cases involving critical injuries or fatalities by examining the use of an embedded auditor to increase deterrence. At paras. 72-75:

> *This is a concept which is available in the Criminal Code of Canada (see s. s. 732.1(3.1)(b). In R v. Maple Lodge Farms, [2014] O.J. No. 2085, Justice Kastner ordered (see para 18 of the Probation Order in Appendix "C" of Maple Lodge Farms) an independent expert (an embedded auditor by another name) "to oversee and report to the Court in relation to both expenditures and compliance with this Probation Order…".*
>
> *The embedded auditor concept has not yet expressly been set out in the Provincial Offences Act (POA). However, it has been ordered under s. 72 (3)(c) of the probation provisions of the POA in R. v. Quantex Technologies Inc, [2018] O.J. No. 4259; 2018 ONCL 546, a previous decision of mine.*
>
> *In crafting the probation order for an embedded auditor in Quantex, I recognized (with the agreement of counsel) that Ministry of Labour inspectors are not available to be seconded to corporations as State embedded auditors. Instead, the order designated a professional in private practice with the appropriate credentials, as the auditor. In addition, the sentence imposed did not eliminate the fine in lieu of the embedded auditor. Rather the cost to the corporation of the embedded auditor was in addition to a fine. In my view, this added to specific and general deterrence.*

> *Worth reading on the concept of an embedded auditor within the realm of the POA is His Honour Rick Libman's (Ontario Court of Justice) 2018 paper titled "No Body to Punish, No Soul to Condemn": Recent Developments in the Sentencing of Corporations under the Provincial Offences Act of Ontario (Humber Journal 2018): RegQuest, October 2018.*

[53] I do not find that the deployment of an embedded auditor is appropriate in the case at bar. Prior to this tragic occurrence, Vixman has never been charged with or convicted of a criminal or regulatory offence. The Crown did not lead any evidence of prior infractions for poor training or supervision of its employees. By all accounts Vixman has an exemplary safety record. The *Lafarge* prosecution previously mentioned can be readily distinguished from the case at bar based on the absence of aggravating factors which in *Lafarge* consisted of multiple prior fatalities and critical injuries.

[54] The genesis for the imposition of creative sentencing measures in regulatory offences in Ontario can be traced back to *R. v. Bata Industries Ltd., supra,* which was upheld by the *Ontario Court of Appeal, OCA R. v. Bata Industries Ltd. [1995] O.J. No. 2691*. The decision of Justice Cosgrove in *Bata,* a prosecution under the *Ontario Water Resources Act*, to impose a probation order against the corporation was endorsed by the court and reaffirmed the principle that an additional term can be included as part of the order provided that it does not represent an additional punishment and that the condition does not offend the statutory criteria "to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant". The *OCA* struck down the indemnification condition of that order on the basis that it represented an additional punishment or collateral purpose exceeding the proper scope of a probation order but the condition that Bata pay $30,000 (reduced on appeal from $60,000) to the local Waste Management Board, which funded a program known as "*Toxic Taxi*" that was used to collect materials from member municipalities remained.

[55] In another decision *R. v. Van-Rob Stampings Inc., 1996 CarswellOnt 2475 (Prov. Div.)* cited in the Case Law addendum under *s.72* of the *POA*:

> *It may entirely appropriate for a corporate accused to be placed on probation in addition (or as an alternative) to being fined. Applying R. v. Bata Industries Ltd., supra, the court designated terms of probation which would require the defendant to publicize within the metal forming industry what had gone wrong in this case and what short – and long-term steps the company had taken or would be taking to ensure that such a tragedy would not be repeated.*

[56] In *Woods v. Ontario (Ministry of Natural Resources), [2007] O.J. No. 1208 (S.C.J.),* a probation order with a term that the defendant pay $50,000 toward a forest maintenance and restoration is a reasonable, even laudable, remedy for harm done as a result of the cutting of Crown forest.

SHOULD A PROBATION ORDER WITH CONDITIONS BE IMPOSED?

[57] Despite the existence of sentencing alternatives to fines alone in occupational health and safety act prosecutions in other jurisdictions namely, the Provinces of Alberta and Nova Scotia, there are clear limitations to a court's sentencing discretion in Ontario. *s.72.(3)(a)* of the *POA* precludes compensation or restitution that is not authorized by any Act and there is no specific statutory reference which makes compensation or restitution a potential sentencing possibility

under the *OHSA*. Seemingly, it stands to reason that a court of civil jurisdiction is better equipped to apportion fault for the economic loss sustained by a member of society as a consequence of a negligent act or omission committed by an at-fault party as well as assess and ultimately determine the quantum of compensation owing and/or restitution amounts.

[58] I would have preferred to be in a position to consider the option for instance to divert a portion of the amount of penalty ordinarily payable as a fine be directed in the form of a charitable donation in memory of Mr. Maguire for a specific purpose or program earmarked to improve safety at construction sites. Such a provision is specifically contemplated in the ***Occupational Health and Safety Act of the Province of Alberta under Part 10, Offences and Penalties*** which reads as follows:

Additional powers of court to make directions

75(1) Where a person is convicted of an offence against this Act, the regulations or the OHS code, in addition or as an alternative to taking any other action provided for in this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order directing the person

(a) to pay, in the manner and the amount prescribed by the court, a sum of money to a party named by the court to be the recipient of such funds, for any of the following purposes:

> ***(i) training or educational programs regarding the health and safety of workers;***
>
> ***(ii) research programs into the diagnostic, preventative or remedial aspects of worker health and safety;***
>
> ***(iii) any worker health and safety initiative by a non-profit organization;***
>
> ***(iv) the establishment and maintenance of scholarships for educational institutions offering studies in occupational health and safety and related disciplines;***
>
> ***(v) any other purpose that furthers the goal of achieving healthy and safe work sites,***
>
> ***or***

(b) to take any other action the court considers proper.

[59] I believe that the workers in the Province of Ontario would derive enhanced protections from workplace hazards if our elected officials carefully evaluated these sentencing provisions and considered their viability in Ontario's occupational health and safety legislation thereby giving effect to the idea that:

> *Corporations should be viewed as something more than a person with money so innovative methods of sanctioning corporations are desirable. Law Reform Commission of Canada, Working Paper, Criminal Responsibility for Group Action, 1976*

[60] While I recognize that Ontario's *OHSA* directs that a fine, imprisonment or both be imposed upon a conviction and that the ranking of legislation prescribes that the determination of paramountcy commences in the first instance from the federal to provincial and flows from the specific to the general and from the most recent to the oldest, I find that that *s.72* of the *POA* is highly relevant and deserving of some degree of prominence in the mix of sentencing alternatives.

[61] The judiciary has a role to play to prevent and mitigate harm and it is of vital social importance to ensure that workers who are exposed to high risk working environments such as those found within the construction industry receive the necessary protection to be in a position to safely return home to their loved ones and families at the end of their shifts. The value of constant training, education and research particularly as these considerations relate to examining the causal factors of a serious workplace accident must be at the forefront of any initiative intended to alleviate risk. I find that the mitigation of risk through court imposed conditions earmarked to prevent similar unlawful conduct and contribute to the rehabilitation of the defendant is not mutually exclusive to the principle of deterrence.

CONCLUSION

[62] I carefully read and considered the victim impact statements submitted by Mr. Maguire's family members and I was profoundly touched by these heartfelt expressions of emotion. I extend my sincerest condolences to Connor, Mae, Christine, Tim, Michael, Heather and Kym and acknowledge the painful loss that you have suffered as result of Dean's passing in a tragic workplace accident. I want you to know that despite the emphasis in favour on monetary penalties which has been the preferred practice grounded in common law jurisprudence when sentencing corporate offenders for violations under the *OHSA*, Dean's value can never be adequately measured in terms of money. He was a father, a brother, a husband, a partner, uncle and a friend and although his untimely passing has left a considerable void, the precious memories that you shared are priceless. I hope these memories will bring you a measure of comfort as you continue to rebuild your lives.

[63] In view of the totality of the circumstances, I feel compelled to render a decision which deviates from the conventional deterrence and fine paradigm. It is my sincere belief that this approach strikes a more appropriate balance for the benefit of all stakeholders which not only adheres to the sentencing principles established in *Cotton Felts* but also furthers the interests of justice through the implementation of a creative sentencing alternative intended to prevent future harm and contribute to the rehabilitation of the defendant while honouring Mr. Maguire's life. **Dean's life mattered and the loss of a human life should not be measured solely in terms of financial currency.**

[64] In addition to fining Vixman Construction Limited $125,000 to be apportioned equally between Count 1 and Count 2 ($62,500 respectively) and supplemented by the mandatory 25% Victim Fine Surcharge with up to 6 months to pay from today's date, Vixman shall be bound by a probation order for a term of 18-months subject to the following statutory conditions:

The defendant shall not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other Province of Canada that is punishable by imprisonment;

The defendant shall appear before the court as and when required; and

The defendant shall notify the court of any change in the defendant's address.

[65] Pursuant to *s.72.(3)(c) and (d) of the Provincial Offences Act*, the court will impose the following conditions relating to the circumstances of the offence and of the defendant that

contributed to the commission of the offence, to prevent similar unlawful conduct and to contribute to the rehabilitation of the defendant with a reporting obligation to a responsible person designated by the court for the purpose of implementing the conditions of the probation order:

1. Within 14-days from the date of this order, The President of Vixman Construction Limited or designate shall report to the Ontario Court of Justice Metro West Courthouse located at 2201 Finch Ave. West in Toronto, Ontario for an initial intake appointment with a probation officer and cause a copy of this order to be presented.

2. Following this initial reporting obligation, the President or designate shall report to probation at all times and places as directed by the probation officer or any person authorized by a probation officer to assist with compliance of this order.

3. Vixman's reporting obligations will end when all conditions of this order have been fulfilled in their entirety with proof of compliance to the satisfaction of the probation officer or designate.

4. Within 30 days from the date of this order, Vixman shall contact the editor of ***Infrastructure Health and Safety Association (IHSA.ca), Health and Safety Magazine*** and inform the editor that the court has ordered Vixman to publicly acknowledge the offence in an article to be featured in the *IHSA.ca Magazine* with specific emphasis on the development of an enhanced fall protection safety talk *("tool box talk"*) and pre-safety inspection worksheets *("PSI"*) necessitating that fall height calculations and the precise technique required to safely anchor at foot level be duly recorded on PSI worksheets prior to the commencement of work. Further, the lessons learned from the workplace accident and the remedial actions taken by Vixman to prevent future harm shall be incorporated in the article.

The article will be dedicated to the memory of William Dean Maguire and it is the court's expectation given the importance of safety in the workplace and the benefits of sharing this information with all industry partners that Vixman tender a final submission to the editor or designate no later than May 1, 2020.

5. A copy of this article and public acknowledgement with the revamped safety talk and PSI worksheet shall also be shared with the Ministry of Labour, care of Mr. Mathew Neundorf or designate for dissemination on the Ministry of Labour, *Training and Skills Development Website* as deemed necessary and/or appropriate by the Ministry.

6. Within 6-months from the date of this order, Vixman shall cause a video to be produced 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 will be dedicated to the memory of William Dean Maguire and as a minimum will incorporate the following integral components:

(i) identify the project with specific focus on the low, narrow and irregular features of the structure with leading edge gaps present in multiple areas and in multiple directions;

(ii) isolate what went wrong leading up to the fall;

(iii) highlight the lessons learned from the accident and the remedial actions taken by Vixman to prevent any future harm;

(iv) review the proper use and configuration of self-retracting lifelines with specific emphasis on fall clearance limitations, the importance of calculating and recording fall clearances prior to the commencement of work, safe anchoring procedures at foot level and special requirements when leading edge exposures are present.

7. Upon prior written notice to the court and the Crown, the defendant may at any time apply for clarification and/or direction regarding the satisfactory completion of Condition Nos. 4, 5 and 6.

Released January 31, 2020
Signed: Justice G. J. Fantino