ONTARIO COURT OF JUSTICE

CITATION: *Ontario (Ministry of Labour) v. New Mex Canada Inc.,* 2017 ONCJ 626
DATE: 2017 09 22
COURT FILE No.: Brampton 13-8487

IN THE MATTER OF an appeal under 116 (1) (d) of the *Provincial Offences Act,* R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

(MINISTRY OF LABOUR)

Respondent

— AND —

NEW MEX CANADA INC., BALDEV PURBA AND RAJINDER SAINI

Appellants

Before Justice J.W. Bovard
Heard on January 27, 2017
Reasons for Judgment released on September 22, 2017

D. Kleiman..... counsel for the prosecution
K. Fields …..… counsel for the defendant New Mex Canada Inc., Baldev Purba and Rajinder Saini

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On appeal from sentences imposed by Justice of the Peace J. Fletcher on January 13, 2015 under the *Occupational Health and Safety Act.*

Bovard J.:

The issues

[1] Did Justice of the Peace Fletcher err in imposing the amount of fine that she did on New Mex Canada Inc. and in imposing a period of incarceration on Mr. Purba and on Mr. Saini?

Disposition

[2] For the reasons stated below, I allow the appeal and vary the sentences as indicated in paragraph 56.

The charges

[3] On October 14, 2014, the appellants pleaded guilty to the following charges under the *Occupational Health and Safety Act* :

> New Mex Canada Inc.
>
> (1) Failing, as an employer, to provide information, instruction and supervision to protect the health or safety of the worker, contrary to s. 25 (2) (a) of the *Act.*
>
> (2) Failing, as an employer, to ensure that the measures and procedures prescribed by section 85 (a) of R.R.O. 1990, Reg. 851 were carried out at a workplace, contrary to s. 25 (1) (c) of the *Act.*
>
> Baldev Purba
>
> (1) Failing, as director of New Mex Canada Inc., to take all reasonable care to ensure that the corporation complied with s. 25 (2) (a) of the *Act,* contrary to s. 32 (a) of the *Act.*
>
> (2) Failing, as director of New Mex Canada Inc., to take all reasonable care to ensure that the corporation complied with s. 85 (a) of R.R.O. 1990, Reg. 851, contrary to s. 32 (a) of the *Act.*
>
> Rajinder Saini
>
> (1) Failing, as director of New Mex Canada Inc., to take all reasonable care to ensure that the corporation complied with s. 25 (2) (a) of the Act, contrary to s. 32 (a) of the Act.
>
> (2) Failing, as director of New Mex Canada Inc., to take all reasonable care to ensure that the corporation complied with s. 85 (a) of R.R.O. 1990, Reg. 851, contrary to s. 32 (a) of the *Act.*

The facts[1]

[4] I will summarize the facts briefly for ease of reference. Essentially, the defendants pleaded guilty to failing to provide information, instruction, supervision and equipment to their employees regarding working safely at height in their warehouse.

[5] Mr. Shangar Singh, one of their workers who they knew was subject to seizures, fell 12 feet to his death while attempting to retrieve merchandise in the warehouse. Neither he nor any other employee had ever been instructed or given information with regard to performing their job safely. Mr. Singh was not wearing any safety equipment when he fell, nor had the machine that he was using been equipped with safety protections.

[1] The parties presented Justice of the Peace Fletcher with a long agreed statement of facts, which is Appendix 1 to this decision.

[6] The defendants do not have records of previous convictions. They were quite remorseful. They assisted the deceased's family in making funeral arrangements and in sending his remains to India. They also helped them in getting immediate benefits payments from the WSIB.

[7] The corporation is a small business. It lost most of its employees and a substantial amount of business after the accident. Mr. Purba and Mr. Saini will have to pay the fine that the court imposes on the corporation as well as any fines that may be imposed on them. The defendants are not well off financially.

The sentences

[8] On January 13, 2015, Justice of the Peace Fletcher sentenced New Mex Canada Inc. to a fine of $125,000 on each count. She gave the corporation 60 days to pay. She sentenced Mr. Purba and Mr. Saini each to a period of incarceration of 25 days to be served on an intermittent basis.

[9] In addition, Her Worship put Mr. Purba and Mr. Saini on probation for 12 months. The conditions of the probation orders for each of them were that they complete the Construction Health and Safety intermediate programme and provide proof of this to their probation officer.

[10] The appellants appeal the fines on New Mex Canada Inc. and the jail terms imposed on Mr. Purba and Mr. Saini. They were taken into custody for the purpose of processing only on the day of sentencing and were released the same day. After that, the court stayed their jail sentences on consent pending the result of their appeals.

[11] Mr. Purba and Mr. Saini do not appeal the imposition of the probation order. In fact, they have completed the Construction Health and Safety intermediate programme.

The position of the appellants

[12] With regard to New Mex Canada Inc., the appellants argue that the appropriate fine in total for both charges is between $30,000 and $60,000.

[13] With regard to Mr. Purba and Mr. Saini, the appellants argue that the appropriate fine in total for both charges should be in the range of $10,000 for each of them.

[14] The appellants argue that the court should take into consideration that since Mr. Purba and Mr. Saini are directors of New Mex Canada Inc., they will have to pay its fine as well as their own.

[15] Mr. Purba and Mr. Saini have already paid $10,000 of the corporation's fine.

[16] In addition, there is an automatic 25% surcharge on the fines.

The position of the respondent

[17] With regard to New Mex Canada Inc., the respondent, agrees that the fine that Justice of the Peace Fletcher imposed is at the "very, very high end of the range". But if

the court is inclined to reduce the fine, $100,000 should be the starting point. The fine should not be below $100,000.

[18] With regard to Mr. Purba and Mr. Saini, the respondent argues that the periods of incarceration were justified because this was a “highly egregious case”.

Analysis

Statutory provisions with regard to the orders that the court can make on *Provincial Offences Act* sentence appeals

[19] These are appeals pursuant to Part III of the *Provincial Offences Act.* Section 122 of the *Act* explains the orders that the court can make on an appeal from sentence:

> **122** (1) Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,
>
> (a) dismiss the appeal; or
>
> (b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,
>
> and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of the offence.

The jurisprudence

The standard of review

[20] In *R. v. Turcotte*[2] the Ontario Court of appeal cited *R. v. Shropshire*[3] to explain the “limitations on an appellate court in considering an appeal against sentence”. In order to overturn a sentence the sentence must be “not fit” or “clearly unreasonable”. It must fall "outside the acceptable range".

[21] *Turcotte* cited *R. v. M. (C.A.)*[4], for the proposition that “In the absence of an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit". The sentence must be a “substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes".

[2] [2000] O.J. No. 1316, para. 16
[3] [1995] 4 S.C.R. 227, 102 C.C.C. (3d) 193, paras. 46, 50
[4] [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, at para. 90, 92

[22] *Turcotte* noted that in *R. v. Proulx*[5] the Supreme Court of Canada stated that "The sentence imposed at trial "is entitled to considerable deference from appellate courts".

[23] Finally, *Turcotte* held that" "Although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so", appellate courts should not "second-guess sentencing judges unless the sentence imposed is demonstrably unfit".[6]

[24] Although these are criminal law cases, Justice Fairgrieve held in *R. v. Fagbemi*[7] that the same standard applies to appeals of sentence under the *Provincial Offences Act.* I am not aware of any authority that disagrees with him. Indeed, in *R. v. Cotton Felts Ltd.*[8], the Ontario Court of Appeal held that,

> It is now well established that the power of an appellate court to vary sentences under these two sections of the Criminal Code is not limited to cases where the sentencing judge has proceeded upon a wrong principle. The appellate court in a sentence appeal has the power and, indeed, the duty to form its own opinion on the fitness of sentence and to vary any sentence if it does not consider it to be fit. The same principle governs an appellate court acting under s. 105(1) of the Provincial Offences Act. (Emphasis added)

[25] However, it should be noted that regarding the extent of an appellate court's power in a sentence appeal, *Cotton Felts Ltd.* was decided in 1982. Since then, in 2000, the Ontario Court of Appeal decided *Turcotte*, which greatly limits an appellate court's ability to overturn a trial court's sentence. Justice Fairgrieve commented in *Fagbemi* that,

> Although Segal and Libman, The 2000 Annotated Ontario Provincial Offences Act (Carswell, 1999), at p. 217, continues to cite Cotton Felts, as authority mandating a broad scope of review that permits the appellate court to substitute its own opinion of the appropriate sentence, it is important to bear in mind that the case was decided in 1982. At that time, the Court of Appeal adopted an approach to sentence appeals in criminal cases that differs substantially from the one, dictated by recent judgments of the Supreme Court of Canada, that it now accepts. In my view, Cotton Felts can still be relied on only as authority for the proposition that the principles governing the assessment of the fitness of a sentence by a provincial offences appeal court are the same as those which apply to appellate courts under the Criminal Code. (Emphasis added)

[26] In their 2017 edition, Segal and Libman continue to cite *Cotton Felts Ltd.,* but they also cite *Fagbemi* and *Turcotte* and the cases to which *Turcotte* refers.[9]

[27] *Turcotte* did not refer to *Cotton Felts Ltd.*, but since it is the later of the two cases I find that it is more in keeping with the current view from the Court of Appeal concerning the limitations of an appellate court on a sentence appeal.

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[5] (2000), 140 C.C.C. (3d) 449, 182 D.L.R. (4th) 1, at para. 123.
[6] Proulx, at para. 125.
[7] [2000] O.J. No. 2550, para. 24
[8] [1982] O.J. No. 178, para. 13
[9] See pages 754, 757

[28] For example, approximately one and a half months after the Ontario Court of Appeal decided *Turcotte,* they upheld sentences in *R. v. Inco Ltd.*[10] for three offences under the *Occupational Health and Safety Act* because they did not reveal any "error in principle".[11]

Sentencing jurisprudence

[29] I will now turn to the case law that the parties cited with regard to the appropriate penalties in the case at bar.

[30] Deterrence is the cardinal principle in sentencing for offences under the *Occupational Health and Safety Act.* In *R. v. Cotton Felts Ltd.*[12], Blair J.A. stated that the *Occupational Health and Safety Act* is "part of a large family of statutes creating what are known as public welfare offences". They are "designed to establish standards of health and safety in the work place".

[31] Blair J.A. pointed out that,

> 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.[13]

[32] In *R. v. Di Franco,*[14] Clark J. stated that "Regulatory offences are concerned with attaining public policy objectives as opposed to punishing moral blameworthiness: *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at para. 129. Hence, the concept of deterrence is different in regulatory law than in criminal law: *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at para. 125".

[33] Clark J. further explained that,

> …among the many thousands of prosecutions under the OHSA since its enactment, the parties were only able to find fewer than two dozen where the sentence has involved imprisonment for a natural person … those dispositions were for conduct that was willful as opposed to merely negligent ... the concept of deterrence has a very different complexion in regulatory law than in criminal law. That proposition is strengthened … by the fact that when the legislature increased the maximum fine that could be imposed on a corporation, they did not change the maximum imprisonment that could be imposed upon a person. As Carthy J.A. observed in *R. v. Ellis-Don Ltd. et. al.* (1990), 1 O.R. (3d) 193, (Ont. C.A.), the failure on the part of the legislature to increase the available term of imprisonment "makes it even more evident that the deterrent influence ... is intended to be in the pocketbook." That suggests to me that imprisonment, while it is clearly available in exceptional cases, is meant to be a sanction that is seldom employed (para. 13). (Emphasis added)

[10] [2000] O.J. No. 1868, para. 2
[11] Ibid., para. 4
[12] Para. 19
[13] Ibid., para. 19
[14] [2008] O.J. No. 879 (Ont. Sup. Ct.),

[34] In paragraph 17, Clark J. recalled the words of Rosenberg J.A. in *R. v. Priestly*[15], that "[t]he duty to explore other dispositions for a first offender before imposing a custodial sentence is not an empty formalism which can be avoided merely by invoking the objective of general deterrence."

[35] Clark J. noted further in that paragraph that *Priestly* was a criminal case and said “given the distinction between the concept of general deterrence in the criminal law and regulatory law contexts, it seems to me that the passage applies *a fortiori* respecting the sentencing of an offender for a regulatory breach, even where the results are, as in this case, profoundly tragic”.

[36] None of the appellate authority cited by the parties approximates the case at bar sufficiently that it would be an error not to follow it in the result. However, the facts of those cases will assist greatly in determining which factual situations lead to which types of sentences.

[37] Therefore, I will canvas the salient facts of the more useful jurisprudence that the parties provided in an effort to arrive at a reasonable conclusion based on this authority as to what a just sentence is for the respondents. In all of the cases the courts noted the mitigating and aggravating factors. I will not list most of them here because in many cases they are numerous, detailed and case specific. It would be cumbersome and of limited value for my determinations in the case at bar. In addition, reference can easily be made to the reported decision to see what they are.

1. *R. v. Inco Ltd.,* [2002] O.J. No. 1868 (C.A.)

   - Five day trial
   - Death of worker occurred
   - Judgment does not say whether Inco had a record or not
   - Fines imposed at trial, upheld on appeal
   - Inco was convicted of three offences under the Occupational Health and Safety Act: failing to provide information, instruction and supervision to a worker (count 1); failing to maintain equipment in good condition (count 2); and failing to leave a guard to protect workers from a moving part in equipment (count 3). The trial judge imposed a fine of $250,000 for each count.
   - The Court of Appeal stated, “The respondent Inco is not only a leader in the mining field in Canada but the world. Offences of this nature, which led to the death of an employee, call for penalty that acts as a deterrent to this respondent and as an example to the mining community as a whole” (para. 4). (Emphasis added)

[15] 110 C.C.C. (3d) 289, (Ont. C.A.), at 295

2. *R. v. Di Franco,* [2008] O.J. No. 879 (Ont. Sup. Ct.), Clark J.

- Guilty plea
- Death of worker occurred
- No record
- Fines imposed after guilty plea upheld on appeal
- After a guilty plea the judge imposed $15,000 on each of two charges under the *Occupational Health and Safety Act* against the supervisor of a construction company
- Two persons working on the 16th floor of a condominium fell to their deaths when a wall collapsed. The accused was a supervisor.
- The tragedy occurred because the respondent failed to have the formwork inspected by a professional engineer before allowing the cement to be poured and because he had ordered that the platform be constructed using materials that were inadequate to safely support the weight of the three workers, much less the weight of the spilled cement.
- The respondent, two corporate entities and others were charged with offences under the OHSA. The respondent and the corporate defendants pleaded guilty and received fines of $280,000 and $300,000, respectively.

3. *R. v. Ontario (Minister of Labour) v. Cox Construction Ltd.,* [2009] O.J. No. 5976, Nicklas J., on appeal from Justice of the Peace court.

- Conviction after a 5 day trial
- No record
- Death of worker occurred
- $150,000 fine with 60 days to pay
- Found guilty of (1) failing to ensure the measures and procedures prescribed by s. 104(3)(2) of Ont. Reg. 213/91 R.R.O. 1990 were carried out contrary to s. 23(1)(a) of the Act; and (2) failing to take every precaution reasonable in the circumstances for the protection of a worker contrary to s. 25(2)(h).
- Lorne Weber, an employee of Sittler Environmental Inc. ("Sittler"), sustained crushing injuries when he was struck by an excavator being operated by his co-worker and fellow Sittler employee, William (Bill) Sittler.
- After the accident:
    - the Appellant co-operated fully in the Respondent's investigation
    - the Appellant took steps to ensure the safety of workers in its direct employ

4. *R. v. Swartz,* [2012] O.J. No. 3648, Bigelow J.

- Guilty plea

- No record

- Death of worker occurred

- $150,000 fine with 60 days to pay

- The offences were contrary to the *Occupational Health and Safety Act* (charges are paraphrased)

    - failing to take all reasonable care to ensure, as a director of a corporation to ensure that a worker who may use a fall protection system is adequately trained in its use and given adequate oral and written instructions by a competent person;

    - failing to take all reasonable care to ensure, as a director of a corporation that the person who provides the training and instruction on the use of a fall protection system prepare a written training and instruction record for each worker which shall include the worker's name and the dates on which training and instruction took place;

    - failing to take all reasonable care to ensure, as a director of a corporation that no equipment shall be used while it is defective or hazardous;

    - failing to take all reasonable care to ensure, as a director of a corporation that no scaffold platform or other work platform shall be loaded in excess of the load that it is designed and constructed to bear.

- On the 24th of December, 2009 a suspended work platform being used on the project collapsed. Six workers were on the platform at the time of the collapse. Five of the workers fell approximately 14 floors to the ground. The sixth worker, the only worker properly attached to a lifeline, was held by his lifeline and suffered no injuries. Four of the five workers who fell including the site supervisor died as a result of injuries sustained in the fall. The fifth worker suffered significant injuries but survived the fall.

- Justice Bigelow stated the following in passing sentence: “In the circumstances here, where I am dealing with serious breaches of health and safety legislation with horribly tragic consequences but an accused with over 20 years experience in the construction industry without any violations of health and safety legislation, I am satisfied that the imposition of the fines as jointly recommended by two senior and experienced counsel would not be contrary to the administration of justice and accordingly I impose fines of $22,500.00 on each of the 4 counts to which guilty pleas were entered along with the statutorily required 25% victim fine surcharge”.

5. *R. v. Reliable Wood Shavings Inc.,* 2013 ONCJ 712, Bourque J.

- Conviction after a trial

- Not mentioned but it does not appear that the defendant had a record

- Death of worker occurred

- $150,000 fine with 60 days to pay

- The convictions were for four offences under ss. 25 (1) (c), 25 (1) (a) and 25 (2) of the *Occupational Health and Safety Act.*

- Bourque J. found that “Reviewing the cases, where there is death, there is a general (and very large) range of sentence from $70,000.00 to $175,000.00, with extreme lows of under $50,000.00 and highs of over $200,000.00. The majority of the cases appear to be within a range of $100,000.00 to 150,000.00” (para 35).

6. *R v. Roofing Medics Ltd. and Paul Markewycz,* [2013] O.J. No. 5427, Nelson J.

- Guilty plea

- No record

- Death of worker occurred

- Jail imposed on the director of the corporation

    - 10 days for one offence and 5 days for the second offence to be served consecutively on an intermittent basis.

- Fines of $47,500 and $2,500 imposed on the corporation

- The accused corporation pleaded guilty to:

    - failing to comply with the prescribed regulation that required that a fall arrest system be in place at a workplace [s. 25(1)(c) *OHSA*]; and
    - failing to notify and send a report to the Director as to Mr. Hill's death within 48 hours [s. 66(1) *OHSA*]

- the accused director of the corporation pleaded guilty to:

    - In his capacity as a supervisor, failing to ensure his workers used a fall arrest system as required by the Regulations [s. 27(1)(a) *OHSA*]; and
    - Furnishing an inspector with false information [s. 62(3)(a) *OHSA*].

- John Hill was working for Roofing Medics, which is a small roofing company owned and operated by Mr. Markewycz. Mr. Hill was 45 years old when he died from injuries sustained from falling off a ladder. There were four workers on site. Mr. Markewycz was the workplace supervisor.

- Mr. Hill was working on a ladder about 6 metres off the ground. He was wearing a harness and a lanyard but the lanyard was not attached to anything. After Mr. Hill fell, Mr. Markewycz drove him to the hospital where he was pronounced dead shortly after arrival.

- When police later contacted Mr. Markewycz to investigate the circumstances of Mr. Hill's death, Mr. Markewycz lied and told police that at the time of his fall, Mr. Hill had been helping out as a friend at Mr. Markewycz' home installing roofing. The police and Ministry inspectors pursued an investigation based on this false information. Seven days after the fall, Mr. Markewycz told Ministry inspectors the truth. Roofing

Medics had not notified the Ministry nor filed a written report with the Ministry within 48 hours of the accident as required (paras. 8, 9, 10).

- Nelson J. observed that:

    - There is an abundance of case law at the trial level, particularly from Justices of the Peace of this Court, which provide some guidance. However, the case law reflects a wide and disparate sentencing range.

    - The typical sentence involves a fine, the amount of which varies widely.

    - It is rare that jail sentences have been imposed for individual offenders, and when jail sentences have been imposed, they are typically of short duration.

    - In many of the cases where jail sentences have been imposed, the defendant did not participate in the proceedings, and an ex parte trial was held … the presiding justice commented on the defendant's absence as an aggravating factor, viewing it as an indication of the defendant essentially thumbing his nose at the charge.

    - In other cases where a jail sentence was imposed, it was based on a joint submission of counsel. Given the deference that the Court must accord a joint submission, these sentencing decisions are of little precedential value.

- In deciding that a jail term was appropriate Nelson J. stated:

    - The major reason a jail sentence is necessary for Mr. Markewycz is to deter others from ignoring the legislated fall protection requirements … Since the industry has not been able to accomplish prevention to date, it is appropriate for the Court to send a message that offenders will be dealt with harshly (para. 23)

    - The reality is that fines have not been sufficient deterrence for these offences; not for Mr. Markewycz and not for others. The offence and its consequences are serious enough to warrant more intrusive sanctions (para.24).

[38] It is important to note that in imposing a term of imprisonment Nelson J. recognized that it was unusual to do so. But she was faced with a situation in which she felt imprisonment was required for the purpose of deterrence in the roofing industry due to a chronic failure of its members to adhere to the required safety requirements.

[39] She make this clear by referring to “Event Reports” filed by the Crown, which indicated that “during the roofing season, hardly a week goes by without a report, or several reports, of a roofer falling off a ladder or a roof during the course of a project” (Para. 20).

[40] Nelson J. continued, saying “… roofers keep falling off roofs despite all efforts of the Ministry to educate and prosecute these types of offences. In 2011, Ministry statistics make clear that the majority of lost time injuries in the roofing sector were due to falls … 41% of all deaths at construction sites were due to falls” (Para. 20).

[41] Given this situation, she concluded that “Since the industry has not been able to accomplish prevention to date, it is appropriate for the Court to send a message that offenders will be dealt with harshly” (Para. 23).

[42] Nelson J. found that “The reality is that fines have not been sufficient deterrence for these offences … The offence and its consequences are serious enough to warrant more intrusive sanctions” (Para. 24).

[43] I find that these particular circumstances clearly distinguish *Roofing Medics* from the case at bar.

[44] In addition to the above cases, the respondents referred me to two other cases that state or imply that a jail term will be imposed when it is clear that a fine will not be a deterrent. See: *R. v. Misheal,* [2005] O.J. No. 6071, Mills J.P., para. 4; *R. v. Ontario (Ministry of Labour) v. J.R. Contracting Property Services,* 2014 ONCJ 115, para. 7, M. Ross Hendricks J.P.

Relevant sentencing factors

[45] Next, I will address the five factors outlined in *Cotton Felts,* as well as the other factors that defence counsel submitted to Justice of the Peace Fletcher.

Cotton Felts factors

1. The size of the company involved

- In its factum, the appellants stated that New Mex Canada Inc. is a small furniture import business. It had 5 employees at the time of accident (para. 23). In submissions to sentence before Justice of the Peace Fletcher, counsel for the appellants stated that “this is a small company … it had 12 employees at the time of the accident” (page 29, lines 12, 13, transcript October 14, 2014).

- Now the company has two employees.

- The defendants are the directors of the corporation. They are also workers and supervisors.

2. The scope of the economic activity in issue

- In 2012 the company turned a profit of $101,000 (no audited financial statement).

- In 2013 the company had a loss of $700,000 (no audited financial statement).

- The company had to close down for a time to comply with orders and training.

3. The extent of actual and potential harm to the public

In the case at bar, it is primarily the workers of the corporation that were in danger. No other members of the public were in jeopardy.

4. The maximum penalty prescribed by statute[16]

- Under s. 66 (1) of the *Occupational Health and Safety Act*, Mr. Purba and Mr. Saini were liable for each offence to a fine of not more than $25,000, or to imprisonment for no more than 12 months, or to both.

- Under s. 66 (2) of the *Act,* New Mex Canada Inc., was liable for each offence to a maximum fine of $500,000.

5. The need to enforce regulatory standards by deterrence.

- The jurisprudence in this area clearly states that deterrence is the cardinal principle in sentencing for offences against regulatory statutes.

Further factors

[46] Other factors that were before Justice of the Peace Fletcher when she sentenced the defendant were:

1. The defendant directors will have to pay the company's fine as well as their own fines. If they are incarcerated there will be no one to run the business.

2. The charges are the same for the company and for the directors.

3. Mr. Saini is married, has three children (18, 15 and 10 years old). He assists his elderly parents. He assists a brother who was severely injured in a car accident in 2009. And he helps his wife and children.

4. Mr. Saini's income for 2013 was $21,943.

5. Mr. Purba is married and has one child. He is the sole economic support for his family.

6. Mr. Purba's income for 2013 was $18,085.

7. The corporation began in 2005.

8. The defendants do not have a record of prior convictions.

9. The defendants took a leading role in arranging the funeral and assisted the deceased's family in having his remains sent to India. They also helped them in getting immediate benefits payments from the WSIB.

10. The defendants complied with all required orders issued after the accident.

[16] Occupational Health and Safety Act R.S.O. 1990, CHAPTER O.1

66. (1) Every person who contravenes or fails to comply with,
(a) a provision of this Act or the regulations;
(b) an order or requirement of an inspector or a Director; or
(c) an order of the Minister,
is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than twelve months, or to both.

(2) If a corporation is convicted of an offence under subsection (1), the maximum fine that may be imposed upon the corporation is $500,000 and not as provided therein.

11. After the accident the corporation lost employees and as a result lost business.

Justice of the Peace Fletcher's reasons for sentence

[47] In her reasons for sentence Justice of the Peace Fletcher took into consideration the following mitigating factors:

1. The defendants pleaded guilty and accepted responsibility.

2. Mr. Purba and Mr. Saini showed remorse.

3. Mr. Purba and Mr. Saini's personal circumstances.

4. Mr. Purba and Mr. Saini's assistance to the deceased worker's family.

5. None of the defendants has a record of prior convictions.

6. New Mex Canada Inc.'s financial status, loss of earnings and of employees.

7. Mr. Purba and Mr. Saini will have to pay the corporation's fine.

[48] Justice of the Peace Fletcher considered the penalties provided for the offences in the *Occupational Health and Safety Act*, and the case law submitted by the parties.

[49] Her Worship identified the following as aggravating factors.

1. Justice of the Peace Fletcher said that prior to moving to the corporation's current location, they possessed what Mr. Purba referred to as a "green book", which was lost during the move. She said that she "went to look up the *"Occupational Health and Safety Act* when I did not have the case law with me because I was looking for something specifically. Lo and behold, that book is in fact green so I am clearly led to believe that it one in (sic) the same and they did have it at some point". [17]

However, they stated that they were not aware of their responsibilities as directors and supervisors. They did not know of the "fall protection requirements". Her Worship commented that Mr. Purba and Mr. Saini were responsible to ensure compliance with the *Act.* And "clearly [they] had this book on a prior occasion when at the other or previous location". [18]

Her Worship concluded that, if Mr. Purba and Mr. Saini's statements regarding their ignorance of their responsibilities regarding safety were accurate, "neither must have read nor reviewed the green book prior to it being misplaced. Neither had educated themselves in their duties and responsibilities as directors of New Mex Canada Inc., in order to protect their employees from injuries and, such as in this case, a death…"[19]

2. No one provided the employees with fall protection equipment.

3. There was "prior knowledge of Mr. Singh fainting in the past yet Mr. Singh was still permitted or required to continue using this altered lift… a lift with none of the required safety features ... no proper fall protection equipment was available to help protect Mr. Singh in the event of fainting such as he had on two prior occasions and that is what is most aggravating". [20]

[17] Transcript of reasons for sentence, January 13, 2015, page 5, lines 14 - 20
[18] Ibid., lines 28 - 31
[19] Ibid., page 6, lines7 -12
[20] Transcript of reasons for sentence, January 13, 2015, page 6, lines 16 - 25

> 4. Her Worship stated that "the lack of common sense by both directors on behalf of this company; that Mr. Singh, a person with a known history of fainting would be permitted to operate such a hazardous device is unacceptable. Even more aggravating is that he would be allowed to do so with the absence of any fall safety protections".[21] Justice of the Peace Fletcher found this to be "the highest level of negligence".[22]

[50] Justice of the Peace Fletcher identified specific and general deterrence as objectives of her sentence. She stated,

> This court must endeavour, and all courts must, to send a message to all companies employers, directors, supervisors of the specific need for the safety of their employees. The court must address the issues of not only specific deterrence but also of general deterrence in order to demand compliance before there are any further injuries or deaths.

[51] Justice of the Peace Fletcher indicated that she appreciated Mr. Purba and Mr. Saini's financial circumstances. She said "I find that to impose a fine upon them personally would only cause more financial hardship". She reiterated the need for the court to "impose a sentence that deals with general deterrence …"[23]

[52] Then Her Worship found that "a period of incarceration is warranted when considering the totality of the facts in this case". Her Worship ordered that they serve their sentences on an intermittent basis due to "the further difficulties a jail sentence would impose on each of these gentlemen as well as to the company".[24] She found that an intermittent sentence would "assist them in carrying on their day-to-day life, their assistance with their family, their extended family, the operation of the company".[25]

Disposition

[53] After considering all of the circumstances, I find that Justice of the Peace Fletcher erred in imposing the amount of fine that she did on the corporation and in imposing a period of incarceration on Mr. Purba and on Mr. Saini.

[54] The jurisprudence cited above demonstrates that these sentences are significantly out of the range of sentences regularly imposed by the courts for these types of offences and for these types of offenders. Consequently, the sentences imposed are a "substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes". As such, I find that the sentences imposed are "demonstrably unfit".

[55] In addition, with regard to the period of incarceration for Mr. Purba and for Mr. Saini, I find that it was an error to impose a jail term because a fine would cause "more financial hardship". Nelson J. also makes this point in paragraph 20 of *Roofing Medics.* There was no jurisprudence before Justice of the Peace Fletcher or before me that justifies this type of sentencing.

[21] Ibid., lines 25 - 32
[22] Ibid., page 7, line 1
[23] Ibid., page 8, lines 29 - 31
[24] Ibid., page 9, lines 8 - 14
[25] Ibid., 15 - 18

[56] The court should not shy away from imposing financial severity on persons convicted of these types of offences. This is exactly what puts deterrent teeth in fines for breaches of regulatory statutes.

[57] Furthermore, I find that Justice of the Peace Fletcher did not pay sufficient heed to the fact that the courts have repeatedly found that significant fines act as a deterrent in these types of cases, and that sentences of incarceration are more appropriate for defendants with prior convictions for whom fines have not had a deterrent effect.

[58] I agree with Justice of the Peace Fletcher that the facts show that Mr. Purba and Mr. Saini demonstrated a very concerning lack of care for their employees. However, as *Clark* J. stated in *Di Franco* (supra), "Regulatory offences are concerned with attaining public policy objectives as opposed to punishing moral blameworthiness".

[59] After considering all of the circumstances, the law, the parties' submissions, and Justice of the Peace Fletcher's reasons for sentence, I allow the appeal and vary the sentences as follows:

New Mex Canada Inc.

(3) Failing, as an employer, to provide information, instruction and supervision to protect the health or safety of the worker, contrary to s. 25 (2) (a) of the *Act.*

- $25,000 fine

(4) Failing, as an employer, to ensure that the measures and procedures prescribed by section 85 (a) of R.R.O. 1990, Reg. 851 were carried out at a workplace, contrary to s.25 (1) (c) of the *Act.*

- $25,000 fine

Baldev Purba

(3) Failing, as director of New Mex Canada Inc., to take all reasonable care to ensure that the corporation complied with s. 25 (2) (a) of the *Act,* contrary to s. 32 (a) of the *Act.*

- $7,500 fine

(4) Failing, as director of New Mex Canada Inc., to take all reasonable care to ensure that the corporation complied with s. 85 (a) of R.R.O. 1990, Reg. 851, contrary to s. 32 (a) of the *Act.*

- $7,500 fine

Rajinder Saini

(1) Failing, as director of New Mex Canada Inc., to take all reasonable care to ensure that the corporation complied with s. 25 (2) (a) of the Act, contrary to s. 32 (a) of the Act.

- $7,500 fine

(2) Failing, as director of New Mex Canada Inc., to take all reasonable care to ensure that the corporation complied with s. 85 (a) of R.R.O. 1990, Reg. 851, contrary to s. 32 (a) of the *Act.*

- $7,500 fine

[60] A victim fine surcharge of 25% will apply to all of the fines. Each defendant will have six months to pay their fines.

Released: September 22, 2017

Signed: Justice J. W. Bovard

APPENDIX 1
Agreed Statement of Facts

1. The corporate defendant, New Mex Canada Inc., is a corporation in the Province of Ontario with a registered address of 286 Rutherford road south, Brampton, Ontario, L6W 3K7.

2. At all material times, the corporate defendant was an employer within the meaning of the *Occupational Health and Safety Act.* Baldev Purba and Rajinder Saini were at all material times directors of the defendant corporation.

3. Shangar Singh was employed by New Mex Canada Inc. on January 16th 2013, when he was fatally injured by a fall from a height in a warehouse. He fell from an open side of the platform of an elevated order picker. Mr. Singh was 56 years old at the time of his death.

4. The corporate defendant is an importer and retailer of furniture and furniture accessories. The premises has two main sections; a furniture showroom at the front, and a large warehouse at the back. Imported goods packed in cardboard boxes of different sizes and weights are stored on steel storage racks in the warehouse. Retrieval of the boxes is based on customer's orders. The corporate defendant's premises at 386 Rutherford Brampton is in industrial establishment as defined by the *Occupational Health and Safety Act. The Industrial Regulation,* Revised Regulation of Ontario 851/90 applies.

5. On January 16th, 2013, Mr. Singh's assigned job was to unload boxes containing furniture components from racking in Aisle 5, using an order picker. An order picker is a type of lift truck that is commonly used for picking orders from storage racks in a warehouse. The forks of an order picker and the operator platform are attached together as a unit, which can be moved up and down, to allow the operator to store or retrieve stock at a height.

6. One of the most obvious hazards associated with operating a forklift with an operator up platform, such as the order picker involved in the incident is fall hazard. The manual for this order picker requires the operator to, "Attach safety belt and tether" before operation.

7. The equipment operated by Mr. Singh on January 16th, 2013 was an order picker that had been modified. It had a platform added as an extension to the original operator platform. The added platform was supported by the forks and was tack-welded to the manufacturer equipped operator platform. The added platform did not have a guard rail around it. Mr. Singh was not wearing fall protection equipment and was not tired off to any equipment or structure. He was wearing dress shoes, not safety shoes. The platform was elevated approximately 12 feet from the ground.

8. Mr. Singh fell from the platform and was found by co-worker Harinder Singh. Harinder Singh had been asked to assist Mr. Singh. When Harinder Singh arrived at Aisle 5, he noticed that the platform of the order picker was raised to the same level as the second level beam of the racking but did not see anyone on the platform. He looked down and saw Mr. Singh lying on the floor under the raised platform. Emergency personnel attended. Mr. Singh was pronounced dead at the scene by the Regional

Coroner. It appears that Mr. Singh had fallen straight onto his head. The cause of death, as later determined by Dr. Hunt, pathologist, was blunt force craniocerebral trauma.

9. Mr. Singh had a history of seizure disorder and had been taking an anti-epileptic medication at the time of his death. There were no fractures or other injuries that suggested that Mr. Singh used his outstretched hands to protect himself during the fall. Dr. Hunt noted that the absence of such injuries supports the notion that Mr. Singh was unconscious when he fell and that a seizure precipitated the fall.

10. In a statement to a Ministry of Labour inspector, defendant Purba was asked the following questions and gave the following answer.

> Question: "Do you know how he fell?" referring to Mr. Singh.
>
> Answer: "I don't know but people say he may have fainted and fell off. We have called an ambulance twice for him in the past due to his fainting. One time they took him and the other time he was okay when they came."

11. As other personnel arrived at the scene, someone told Harinder Singh, the co-worker who found the victim, to lower the platform. Harinder Singh climbed up on the racking and got onto the operator platform of the order picker. He backed up the machine and lowered the platform to the ground, along with the two boxes of goods on it. Harinder Singh was sure that there was no lanyard attached to the order picker at the time. The Ministry of Labour was notified of the accident.

12. When a Ministry of Labour – excuse me, when a Ministry or Labour inspector attended at the scene the same day, there was now a safety lanyard attached to the order picker. In addition to the observations made by Harinder Singh that there was no lanyard present at the time of the event, it was clear for other reasons that Mr. Singh had not used this. It was not attached to Mr. Singh. Mr. Singh was not wearing any fall protection equipment. The lanyard was not long enough for the task of unloading boxes from the racking. The lanyard was frayed and had two knots in it, making it unuseful *(sic).*

13. Because the identity of the person who placed the lanyard on the order picker is unknown, there are no charges relating to the disturbing the scene, or attempting to obstruct the investigation with respect to the lanyard.

14. Inspector Hardeep Randhawa, the lead inspector with respect to this incident, arranged for testing of the order picker that had been used by Mr. Singh at the time of the event. A Ministry of Labour engineering consultant observed the testing and prepared a report.

15. The platform that had been added to the order picker was made of polished steel sheet with no slip-resistance features. The added platform had approximate dimensions of eight feet long, by three feet nine inches wide, by eight inches high. There was no guardrail on the added platform. When working from the added platform, a worker would be exposed to at least two, and potentially three, open sides of the platform depending on the position of the platform in relation to the racking. When the added platform was in the raised position, its unsupported end sagged, creating a down grade of approximately one degree towards the far edge.

16. The emergency unloading valve was tested and found difficult to activate. The other control function were checked and found to function normally.

17. There were two boxes on the added platform of the order picker at the time Mr. Singh fell. With the additional weight of the operator and the boxes, one was 105.6 pounds, the other was one – excuse me, 41.8 pounds. The unsupported end of the platform would have sagged further than one degree. This, together with the smooth surface of the added platform, would present a slip hazard for an operator handling bulky and heavy items.

18. Defendants, Purba and Saini, are directors of the defendant corporation. They also run the day-to-day operation of the business. Defendant Saini told Inspector Randhawa that there was no supervisor in the workplace apart from them.

19. With respect to training, there had been no health and – no health and safety training of the workers in the warehouse.

20. Worker Parwinder Singh Mander, who had worked for the defendant for five years, was a driver but also worked inside the warehouse and drove the order picker. He had received no safety training at the workplace. He had no training on the use of the order picker before the event. When asked if he has ever worn fall protection at the workplace prior to the accident, he told the inspector, “No there was no fall protection in the workplace to use.”

21. Worker Pal Singh told Inspector Randhawa that he was not trained in health and safety and that the workers were not provided with fall protection equipment.

22. Three days after the event, worker Balvir Singh Tathgar told the Ministry of Labour inspector that he had worked for the employer since 2006 and had not received any safety training. When specifically asked about training and fall protection or order picker use he said, “I have never been trained in order picker or fall protection use. I was just trained yesterday in order picker and fall protection.”

23. Defendant Purba told Inspector Randhawa that the workers were not trained in health and safety before the accidents and that workers were not trained in order picker use, or provided with fall protection equipment.

24. In a statement to a Ministry of Labour inspector, Mr. Purba was asked the following questions and gave the following answers.

> **Question**: “Did Shangar [the victim] receive any safety training when he was hired, or any time thereafter?”

[Comments on the transcript between the prosecutor and the court that are not part of the agreed statement of facts are omitted]

> **Answer**: “No.”
>
> **Question**: “Did Shangar receive fall protection or order picker training?”
>
> **Answer**: “No.”
>
> **Question**: “Was Shangar ever trained in order picker use of fall protection?”

Answer: “No.”

Question: “Prior to Thursday, January 17, 2013, was any worker here trained in order picker use or fall protection?”

Answer: “No.”

Question: “Are you aware that it is a legal requirement to wear and use fall protection when working at heights greater that three metres in the Province of Ontario?”

Answer: “No.”

Question: “How come there was no safety information posted at the workplace prior to the accident?”

Answer: “I don’t know. We had the green book on Bethridge and we lost it in the move to this location.”

25. Defendant Saini also told Inspector Randhawa that he was not aware of fall protection requirements. Ministry of Labour inspectors continued to see health and safety hazards after the fatal event. For example, on January 31, 2013, when Ministry of Labour inspectors were at the workplace following the accident, they saw that two workers were standing on an order picker that was designed for only one person.

26. In another area of the warehouse, the inspectors again saw two workers on an order picker, only one of whom was wearing fall protection.

27. Workers told Ministry of Labour inspector that the father of another director, Mr. Sethi, would attend at the workplace and issue directives to the workers to work unsafely.

28. In February 2013, more than one month after the fatal event, Inspector Randhawa received another complaint from a worker that this man had been threatening to send workers home if they did not follow his direction. The corporate defendant had been operating at 386 Rutherford Road, Brampton for approximately three years before the offence date having moved there in April of 2010.

29. Before this, the corporate defendant had been located at 195 Bethridge road in Rexdale, in Toronto. A Ministry of Labour inspector had visited the Rexdale location. In 2007, the corporate defendant was ordered to inspect its lifting devices and inspect its racking.

30. The corporate defendant was issued a second order in 2007 to have its lifting devices inspected and was issued a notice of non-compliance in 2008 for failing to provide an Engineer’s Report with respect to the racking as had been ordered.

31. The corporate defendant failed to provide information, instruction and supervision to a worker to protect the health or safety of the worker as required by section 25(2) (a) of *the Occupational Health and Safety Act.* In particular, the defendant failed to provide information, instruction and supervision to a worker regarding fall protection and/or working from a height, this relates to count one.

32. Furthermore by failing to ensure that the worker was protected by fall protection, the corporation failed to ensure compliance with section 85(1) of the *Industrial Regulation*, contrary to section 25(1)(c) of the *Occupational Health and Safety Act*. Section 85(a) of the *Industrial Regulation* requires that,

> Where a worker is exposed to the hazard of falling, and the surface to which he or she might fall is more than three meters below the position where he or she is situated, the workers shall wear a serviceable safety belt or harness and lifeline that is adequately secured to a thick support and so arranged that the worker cannot fall freely for a vertical distance of more than 1.5 meters.

33. Baldev Purba and Rajinder Saini failed as directors to take all reasonable care to ensure that the corporation complied with section 25(2)(a) of the *Occupational Health and Safety Act,* relating to counts 12 and 24, and failed to take all reasonable care to ensure that the corporation complied with section 85(a) of the *Industrial Regulation,* count 14 and count 26.

- END -