COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Labour) v. Flex-N-Gate Canada Company, 2014 ONCA 53
DATE: 20140123
DOCKET: C52732

Laskin, Tulloch and Strathy JJ.A.

BETWEEN

Her Majesty the Queen in Right of Ontario
(Ministry of Labour)

Appellant

and

Flex-N-Gate Canada Company

Respondent

Gráinne McGrath and Jason Tam, for the appellant

Gino Morga, for the respondent

Heard: June 27, 2013

On appeal from the order of Justice Micheline A. Rawlins of the Ontario Court of Justice, dated April 15, 2009, allowing the appeal in part from the sentence entered by Her Worship Justice of the Peace Maureen Ryan-Brode, dated July 6, 2006.

Laskin J.A.:

A. INTRODUCTION

[1] An employer breaches a provision of the *Occupational Health and Safety Act* (*OHSA*), R.S.O. 1990, c. O.1, resulting in a workplace accident. A government inspector investigates the accident and orders the employer to

comply with the provision. The employer does so. In sentencing the employer for breach of the *Act*, should the court treat the employer's "corrective action" as a mitigating factor? If the employer breaches more than one provision of the *Act*, does the court have jurisdiction to impose concurrent fines?

[2] These two important questions came to this court with leave, following the sentencing of the respondent Flex-N-Gate for two breaches of the *Act*. These two breaches led to an accident in which a worker badly injured her foot. Flex-N-Gate was fined $50,000 – $25,000 for each offence. However, the appeal court judge ordered that the fines be paid concurrently – effectively reducing Flex-N-Gate's obligation by half – to "reward" the company for its compliance. The Crown was granted leave to appeal both on the question whether required compliance might be a mitigating factor on sentence, and on the question whether the court has jurisdiction to impose concurrent fines.

B. BACKGROUND

(a) The Accident: January 28, 2004

[3] Flex-N-Gate produces automobile parts at its factory in Tecumseh, Ontario. It processes metal sheets into vehicle bumpers. When the accident occurred in January 2004, Flex-N-Gate had 500 employees; with the downturn in the automotive industry, by the time of trial in July 2006, Flex-N-Gate's workforce was down to 250 employees.

[4] Two production lines process the metal sheets. On each line are bundles, each containing 120 to 170 sheets. An entire bundle weighs between 5000 and 5200 pounds. When the bundles are received from a supplier, they are held together by four bands.

[5] To get the sheets to the production lines, a forklift operator retrieves the bundles from the storage area and places them in a cradle in the production area. The accident occurred when the forklift operator was bringing a bundle of sheets to the production line. He first placed the bundles on the floor near the cradle. Then, the worker who was injured, Louisa Sarkisian, cut three of the bands, leaving only one band to secure the bundle. At the time she was following the company's standard procedure.

[6] Unfortunately, when the forklift operator tried to load the bundle into the cradle, the bundle slipped off the fork and fell to the factory floor. The sheets scattered "like a deck of cards" across the floor. One of the sheets struck Ms. Sarkisian's foot. She was taken to the hospital, and underwent surgery to repair several broken bones in her foot. She was off work for 4 ½ months, and on crutches for two months. She took physiotherapy for about a year, but she still has residual pain in her foot.

(b) The Compliance Orders

[7] A Ministry of Labour inspector investigated the accident and issued two orders for each of the two production lines. The first order required Flex-N-Gate to comply with the regulatory provision for the safe movement of material. The second order – a stop work order – prohibited Flex-N-Gate from using the equipment involved in the accident until it complied with the first order.

(c) Flex-N-Gate Complies with the Orders

[8] Flex-N-Gate immediately complied with the order for the safe movement of materials. It introduced a new procedure for moving bundles of sheets. This new procedure required that all four bands securing a bundle be kept in place until the bundle is in the cradle. Once the bundle is in the cradle, a worker can cut and remove all four bands. Significantly, there was no evidence that this corrective action taken by Flex-N-Gate went beyond what the compliance orders required.

(d) The Trial Proceedings

[9] After a three day trial before a Justice of the Peace in July 2006, Flex-N-Gate was convicted of two offences under the *Act*: failing to ensure that material was moved in a manner that did not endanger the safety of a worker as prescribed by s. 45(a) of the Industrial Establishments Regulation 851/90, and

contrary to s. 25(1)(c) of the *Act*;[1] and failing to provide information, instruction and supervision to protect the health and safety of workers, contrary to s. 25(2)(a) of the *Act.*[2]

[10] The Justice of the Peace imposed a $50,000 fine on Flex-N-Gate, $25,000 for each offence.

[11] In imposing this fine, the Justice of the Peace noted that the maximum fine on a corporation for each of these offences was $500,000. She also noted that Flex-N-Gate "is a significant operation but not huge", and that "this court is familiar with many graver workplace injuries". She found expressly "that this accident did not occur from wilful disregard of a known hazard" and, finally, she acknowledged the steps taken by Flex-N-Gate "to establish a safe working environment".

(e) Appeal Proceedings

[12] Flex-N-Gate appealed both its convictions and its sentence to the Ontario Court of Justice. On April 15, 2009, in brief reasons, the appeal court judge dismissed the conviction appeal, but allowed the sentence appeal. She did not change the amount of the fine for each offence – $25,000 – but she made the

[1] Section 25(1)(c) of the *OHSA* provides: (1) An employer shall ensure that, (c) the measures and procedures prescribed are carried out in the workplace.
[2] Section 25(2)(c) of the *OHSA* provides: (2) Without limiting the strict duty imposed by subsection (1), an employer shall, (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker.

fines “concurrent”, meaning that Flex-N-Gate was required to pay only $25,000, instead of the $50,000 fine ordered by the Justice of the Peace.

[13] In reducing the amount of the fine to be paid, the appeal court judge relied on the corrective action taken by Flex-N-Gate. She said:

> …and I would find that general deterrence is the paramount consideration. But, little weight was given to the corrective action taken by the appellant. The ameliorating action was taken prior to trial, even though it could have been construed as consciousness of guilt or wrong-doing.
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> For those reasons, because the same way we like to punish with respect to general deterrence we also, as courts are concerned, like to reward with respect to people doing what I consider to be the right thing, I will not interfere with the sum of $25,000 but I will make it concurrent on counts one and three.

(f) The Motion for Leave to Appeal

[14] The Crown sought leave to appeal under s. 131 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33. In a short endorsement dated September 20, 2010, Armstrong J.A. granted leave to appeal on the two issues I referred to in the introduction: (1) “[t]he issue of mitigation after an order has been made by an inspector under the *Occupational Health and Safety Act*”; and (2) “the issue of concurrent fines under provincial legislation”.

C. ANALYSIS

First Issue: Should the court treat Flex-N-Gate's corrective action as a mitigating factor on sentence?

[15] Once the Ministry inspector issued compliance and stop work orders, Flex-N-Gate had two choices: appeal the orders to the Ontario Labour Relations Board, or comply with them. Failure to comply with an inspector's order is itself an offence under the *Act*.[3]

[16] Flex-N-Gate did not appeal the orders. It chose to comply with them. It put in place a new procedure for the safe movement of bundles of sheets. Its corrective action rectified the flaws in its existing procedures.

[17] The Justice of the Peace gave no weight to Flex-N-Gate's compliance with the inspector's orders. The appeal court judge, however, considered Flex-N-Gate's compliance to be a mitigating factor on sentence: she held that Flex-N-Gate ought to be "rewarded" for doing "the right thing".

[18] The Crown submits that the appeal court judge erred in treating Flex-N-Gate's compliance – which was required by the *Act* – to be a mitigating factor. Flex-N-Gate submits that the appeal court judge was entitled to take Flex-N-Gate's compliance into account in exercising her discretion to impose an appropriate fine.

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[3] Section 66(1) of the *OHSA* provides: Every person who contravenes or fails to comply with…(b) an order or requirement of an inspector or a Director is guilty of an offence…

[19] I agree with the Crown's position. The court should not have discretion to treat an employer's post-offence compliance, though statutorily required, as a mitigating factor on sentence. Doing so would undermine one of the most important goals of the *OHSA* – accident prevention – and the statute's most important sentencing principle – deterrence.

[20] This court discussed the objectives of the *OHSA* in *R. v. Ellis-Don Ltd.* (1990), 1 O.R. (3d) 193 (C.A.). At paras. 81-82 of his reasons, Carthy J.A. emphasized the objective of accident prevention:[4]

> The preceding analysis of the statute and the defence of due diligence leaves me in no doubt of the pressing and substantial objective of the Act, generally, to prevent accidents in the workplace, and, as to s. 37(2) specifically, that the balance of probabilities test furthers that objective. The Act is directly focused on accident avoidance through measures taken in advance of mishaps and because it applies to a segment of commercial society where there is necessarily a dependence upon profits, measures are needed to assure that workers' safety is not forgotten.
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> …
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> Vigilance, expense, effort, attention and record-keeping are an absolute mandate to keep such incidents to a minimum. The odds of an accident happening are inevitably reduced by the time, attention and expense devoted to avoidance.

[4] *Ellis-Don* dealt with the constitutionality of the due diligence defence in s. 37 of the *OHSA*. The majority of this court held that the section was unconstitutional because it was not justified under s. 1 of the *Charter*. Carthy J.A. in dissent held that s. 37 was constitutional. The Supreme Court of Canada allowed the Crown's appeal and also upheld the constitutionality of the section. See *R. v. Ellis-Don Ltd.,* [1992] 1 S.C.R. 840.

[21] The philosophy of the *OHSA* is to promote a health and safety system that relies on the internal responsibility and voluntary compliance of individual employers. In other words, workers are best protected when their employers install procedures in their workplaces that will prevent accidents from occurring. Rewarding an employer for taking corrective action only in response to an inspector's order reduces an employer's incentive to take this action before an accident occurs.

[22] Rewarding post-offence compliance with an inspector's order also reduces the deterrent effect of sentences for breach of the *OHSA*. Deterrence has long been regarded as the most important sentencing principle for *OHSA* offences. This court's decision in *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.) remains the leading decision on the sentencing of *OHSA* offenders. At paras. 19-20 and 22, Blair J.A. discussed the relevant considerations and stressed the "paramount importance" of deterrence:

> 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 facts 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.
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> The paramount importance of deterrence in this type of case has been recognized by this Court in a number of recent decisions.
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> …
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> 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 licence fee for illegal activity.

See also *R. v. Inco Ltd*. (2000), 132 O.A.C. 268.

[23] Deterrence is undermined by treating statutorily required compliance as a mitigating factor on sentence. Rewarding an employer for action that it should have taken before an accident happened creates an incentive to put off compliance.

[24] In a comparable regulated field, the environmental field, several sentencing courts have rejected the argument that a company's remedial action after a mishap has occurred should be mitigating. For example, in *R. v. Echo Bay Mines Ltd.* (1980), 12 C.E.L.R. 38, a judge of the Territories Court held, at para. 13:

> Similarly, while the response to the spill and the subsequent plans and efforts to upgrade and change the fuel handling system show a serious concern to prevent any future occurrences such as this, they are after the fact, as it were. This legislation is not intended to encourage compliance after an environmental mishap but rather to demand compliance before those mishaps occur so as to prevent them.

[25] And, in *R. v. Van Waters & Rogers Ltd.* (1998), 220 A.R. 315 (Prov. Ct.), Fradsham J. of the Alberta Provincial Court wrote, at para. 45:

> The fact that there were things that could have been done to prevent the spill, and that they were capable of being discerned and implemented, may well aggravate, and not mitigate, the offence. In my view, the expenditures made by Van Waters for remedial action are monies it should have spent before the spill. I do not consider those expenditures particularly mitigating. The best that can be said is that Van Waters has not evidenced recalcitrance in acknowledging its previous failures.

[26] The reasoning in these two cases is persuasive. Indeed, in this province, the legislature has expressly prohibited courts from treating compliance with an order under the *Environmental Protection Act,* R.S.O. 1990*,* c. E.19 as a mitigating factor on penalty. Section 188.1(4) of that *Act* now states:

> Subject to subsection (5), in determining a penalty under section 187, the court shall not consider compliance with an order issued under this Act in response to the offence to be a mitigating factor.

[27] This provision puts the issue beyond debate for environmental offences. However, for the reasons I have discussed, even without a legislative prohibition,

the same principle should apply to the sentencing of employers for *OHSA* offences. For these reasons, I do not agree with the sentencing decision of the appeal court judge.

[28] In my opinion, the appeal court judge erred because, in rewarding Flex-N-Gate for "doing the right thing", she seemed to equate sentencing for the commission of a crime with sentencing for the commission of a regulatory offence. However, the two contexts are quite different. Criminal law is concerned with the moral blameworthiness of an accused's conduct; regulatory law is concerned not with the defendant's conduct but with the results of its conduct.

[29] If, after having committed a crime, an offender does some laudable act that he or she is not statutorily required to do – in other words, "does the right thing" – a court may take that act into account in sentencing the offender. The act may be seen as mitigating the offender's moral blameworthiness or as a step towards the offender's rehabilitation.

[30] If, after having contravened a safety standard, an employer then acts to correct the problem, it is not "doing the right thing"; it is doing what the statute requires it to do. It ought not to be "rewarded" for its compliance.

[31] Accordingly, I would allow the Crown's appeal on this first issue and hold that an employer's corrective action taken in response to an inspector's order is not a mitigating factor on sentence.

[32] I would, however, add two points. First, if an employer takes corrective action that goes beyond what was required by an inspector's order, then a court may take that additional action into account in sentencing the employer. "Rewarding" remedial steps not required by an inspector's order would be consistent with the goal of accident prevention.

[33] Second – and perhaps this is an obvious point – in sentencing an employer for breach of the *OHSA*, action taken to promote health and safety before an accident occurs should be treated differently from corrective action taken only in response to an inspector's order. Action taken beforehand is an appropriate mitigating factor on sentence. Treating it as one is consistent with the goal of accident prevention and with the principle of deterrence.

[34] In this case, in November 2003, just months before the accident, Flex-N-Gate retained a health and safety consultant to do an independent audit of the company's health and safety program and compliance with *OHSA* standards. The consultant reviewed Flex-N-Gate's procedures, inspected its factory and then prepared a report, which listed safety concerns and recommended changes to some of the company's procedures. Flex-N-Gate implemented the

recommendations. In sentencing Flex-N-Gate, the Justice of the Peace acknowledged, appropriately in my view, the steps taken by Flex-N-Gate "to establish a safe working environment".

Second Issue: Does the court have jurisdiction to impose concurrent fines?

[35] The Justice of the Peace ordered Flex-N-Gate to pay a total fine of $50,000, $25,000 for each of the two offences. The appeal court judge did not disturb the amount of each fine but made them concurrent, effectively reducing Flex-N-Gate's obligation by half. The second question on this appeal is whether the court has jurisdiction to impose concurrent fines for a contravention of the *OHSA*. I conclude that it does not have jurisdiction. I rest my conclusion on the case law that governs the imposition of fines in criminal proceedings.

[36] The *OHSA* and the *Provincial Offences Act* are silent on the question. So too is the *Criminal Code*. However, our court has held that in proceedings under the *Code*, the court has no jurisdiction to impose concurrent fines. It may impose concurrent custodial sentences for two or more counts, but if the sentence is a fine, it must impose separate fines for each count, but ensuring that the overall fine is appropriate.[5] Martin J.A. set out those principles in *R. v. Ward* (1980), 56 C.C.C. (2d) 15 (Ont. C.A.), at para. 9:

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[5] Under the *Code*, if sentences are intended to be consecutive, the court must so direct. Otherwise, sentences will be treated as concurrent, since they begin when they are imposed.

> We observe, firstly that there is no authority to impose a concurrent fine as the learned trial judge did, in respect of separate offences: see *R. v. Dedarin et al*., [1966] 1 C.C.C. 271. Where it is appropriate to impose a fine, either in lieu of or in addition to, a custodial sentence, a separate fine must be imposed on each count in respect of which it is intended to impose a fine taking care, of course, that the total amount of the fines does not exceed what is appropriate.

[37] I would apply these principles in *Ward* to proceedings under the *OHSA*. I see no rational basis to do otherwise.

[38] Accordingly, I would allow the appeal, set aside the appeal court judge's order making the fines concurrent, and reinstate the total fine of $50,000 ordered by the Justice of the Peace. That fine is fit. It is consistent with the principles and case law for sentencing employers for breach of the *OHSA*.

D. CONCLUSION

[39] Leave to appeal to this court was granted on two issues: whether an employer's compliance with an inspector's order after an *OHSA* offence has been committed should be a mitigating factor on sentence; and whether the court has jurisdiction to impose concurrent fines for breaches of the *Act*.

[40] I would allow the Crown's appeal on both issues and reinstate the fines of $25,000 for each offence ordered by the Justice of the Peace.

[41] First, the appeal court judge erred by "rewarding" Flex-N-Gate for simply complying with the inspector's orders. Second, the appeal court judge had no jurisdiction to impose concurrent fines.

[42] In oral argument, we were advised that Flex-N-Gate paid the $50,000 fine years ago, and that after the appeal court judge's decision, received a $25,000 refund. Assuming that to be so, I would not require Flex-N-Gate to repay $25,000 to the Crown. The Crown took this appeal not because of the money in question, but because of the sentencing principles at stake.

Released: January 23, 2014 ("JL")

"John Laskin J.A."
"I agree. M. Tulloch J.A."
"I agree. G.R. Strathy J.A."