Case No. 4860 999 09 05002161

DATE: 2014-03-06

Citation: *Ontario (Ministry of Labour) v. J.R. Contracting Property Services et al.*, 2014 ONCJ 115

ONTARIO COURT OF JUSTICE

Toronto Region

In the matter of the *Provincial Offences Act*, R.S.O. 1990, c. P. 33.

B E T W E E N:

ONTARIO (MINISTRY OF LABOUR)

Crown

-and-

J.R. CONTRACTING PROPERTY SERVICES, TEISHA (TINA) LOOTAWAN,

AND ANDREW J. HANIFF

Defendants

JUDGMENT ON SENTENCE

Before: Her Worship Mary A. Ross Hendriks, Justice of the Peace

Appearances:

Ms. C. Ashton, Wilson Vukelich LLP, for Ms. Lootawan

Ms. K. Malabar, Crown Counsel (MOL)

Mr. S. Wisener, Barrister & Solicitor, for JR Contracting Property Services

Hearing Dates: June 27, 2013, July 18, 2013, and November 14, 2013

Judgment on Sentence: March 6, 2014

INTRODUCTION:

[1] A lengthy trial was conducted, concerning the defendants herein, with respect to seven charges laid against them under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended (the "OHSA"), as the result of the very serious fall of a worker. They were convicted on all seven charges, in my written Reasons for Judgment, dated April 18, 2013, 2013 ONCJ 202 (CanLII).

[2] Subsequent to the release of my Reasons for Judgment, each of the defendants appeared on different days to make submissions as to sentence. The following is a summary of the submissions that each defendant made, and that the Crown made, with respect to their convictions.

SUBMISSIONS:

Teisha Lootawan:

[3] Ms. Lootawan was convicted of two offences before this court, which may be summarized as follows: (a) failing as a supervisor to ensure that a worker wore fall protection devices as required by s.26.1(2) of Ontario Regulation 213/91 and contrary to s.27(1)(a) of the *OHSA*; and (b) failing as a supervisor to take every reasonable precaution to protect a worker in violation of s.27(2)(c) of the *OHSA*, and in particular, failing to take the reasonable precaution of ensuring that an adequate form of fall protection is provided to a worker where a worker is exposed to a fall hazard of falling more than three metres.

[4] On June 27, 2013, oral submissions and written materials were filed with respect to the sentencing of Ms. Lootawan. Ms. Malabar argued that because of the *Kineapple* principle, as articulated in *R. v. Kineapple*, [1975] 1 S.C.R. 729, the court should only impose a sentence on the count of failing as a supervisor to take every reasonable precaution to protect a worker, and in particular, failing to provide an adequate form of fall protection to a worker, who was exposed to a fall hazard of falling more than three metres.

[5] Ms. Malabar provided the court with a brief of documents, which outlines all of Ms. Lootawan's prior convictions under the *Provincial Offences Act*, R.S.O. 1990, c. P. 33 (the "*POA*"), which were admitted. Because of her four prior convictions, and her lack of payment toward almost all prior fines imposed, Ms. Malabar asked her to be placed into custody for a period of 90 to 120 days, and also asked, specifically, that the court not permit her to serve her sentence on an intermittent basis. Ms. Malabar stressed the need for specific and general deterrence, since Ms. Lootawan appears to defy court orders by failing to make any payments on any of her outstanding fines, which now clearly exceed $50,000 (Crown brief: tabs 8 and 9).

[6] In particular, Ms. Malabar noted the following details of her prior *POA* convictions:

> April 12, 1995: Ms. Lootawan was convicted of the offence of discharging, causing or permitting the discharge of a contaminant, namely construction and demolition waste, into the natural environment, that causes or is likely to cause an adverse effect, in contravention of s. 14(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E. 19, as amended (hereinafter the "*EPA*"), contrary to s.186 of the *EPA*. This judgment was upheld on appeal, on May 29, 1997. She was

sentenced to imprisonment for 30 days, on an intermittent basis, and put on probation for a period of two years.

September 20, 2001: Ms. Lootawan was convicted of one count of submitting a false information as to the applicant's address in an application for a Certificate of Approval made to the Ministry of the Environment, contrary to s. 184(2) of the *EPA*, thus committing an offence under s.186(1) of the *EPA*. She was fined $2000 as a result.

January 23, 2008: She plead guilty on January 17, 2008 and was convicted of committing the offence of submitting a false or misleading information in a statement, document or data, namely a draft CIBC Bond for $100,000, to the Ministry of the Environment, in respect of a matter related to s. 184(2) of the *EPA*, thus committing an offence under s. 186(1) of the *EPA*. She was sentenced on January 23, 2008, and she was ordered to serve a custodial sentence of 40 days, intermittently; fined $20,000; and put on probation, for the period to extend until her period of incarceration had been served. In his Reasons for Sentence, His Worship Bubba referred to the facts and synopsis being read into the record, on consent, as part of her plea. At that time, His Worship Bubba noted that Ms. Lootawan had three previous convictions under the *EPA*, two of which arose out of a waste disposal site she operated with her husband, and the third was a plea to providing a false address, which was noted above, as the conviction dated September 20, 2001.

May 13, 2008: While operating as "Mr. Trash," she was found guilty on counts 7, 8 and 9 of operating a waste management system without an approval certificate, contrary to s.27(1)(a) of the *EPA*, which was an offence under s. 186(1) of the *EPA*; and two counts of failing to comply with the Director's orders, both contrary to s.186(2) of the *EPA*. She was ordered to pay fines in the amount of $6000, and she was also placed on 2 years probation for count 7, as well as fined $6000, and $2000, respectively, for counts 8 and 9.

On May 13, 2008, upon her conviction for operate waste management system without a Certificate of Approval , she was given a suspended sentence, fined, and put on a 2 year probation order, on the following conditions, reproduced *verbatim*:

1. The defendant shall not commit the same offence or any related offence, or any offence under a statute of Canada or Ontario or any other province that is punishable by imprisonment.
2. The defendant shall appear before the court as and when required.
3. The defendant shall notify the court of any change of address.
4. Teisha Lootawan is prohibited from management and direct or indirect control, of any and all waste management activities, which include but are not limited to, the collection, transportation, transfer, storage, processing or treatment or disposal of waste, as that term is defined by the *Environmental Protection Act*.

In particular, her second probation order, dated May 13, 2008, was made six months prior to the date of the offences before me. In this probation order of May 13, 2008, she was clearly ordered not to manage or control the disposal of waste, including its collection or disposal.

[7] Ms. Malabar argued that of all the fines ordered to be paid, Ms. Lootawan only paid once, when forced to do so by the court. In all other circumstances, she has consistently failed to make any payments on her outstanding fines, and thus, these heavy fines are not a deterrent to her. In terms of specific deterrence, Ms. Malabar relied upon *R. v. Cotton Felts Ltd*. [1992] O.J. No. 178, 2 C.C.C. (3d) 287

(C.A.), in which the Court of Appeal, at paragraph 20, noted "the paramount importance of deterrence." Her second argument was that since Ms. Lootawan has been to jail twice, once for 30 days and once for 40 days, both times intermittently, it is time for her to serve her sentence continuously, because intermittent custodial sentences are also not a deterrent to her behaviour.

[8] Ms. Malabar admitted that she is seeking a very unusual sentence, but based it on the fact that Ms. Lootawan rarely complies with court orders. She referred to *R. v. Hoffman-La Roche (No. 2),* (1980) 30 O.R. (2d) 461, for the principle that the court should consider the character of the individual, when determining whether rehabilitation is an aim of punishment. She also referred to a number of other decisions that involved either paralyzed or deceased workers, and noted that *Cotton Felts* spoke of the potential for harm. In this case, the injured worker was permanently paralyzed, suffers daily pain and will do so the rest of his life. It was Ms. Lootawan who directed Mr. Stiff to go up on that roof. Ms. Malabar also called for denunciation, and noted that Ms. Lootawan has never expressed any sign of remorse in this matter.

[9] Ms. Ashton filed a large brief of jurisprudence with the court, as well as a letter from Dr. Frank D'Arcy, dated June 14, 2013, which indicated that Ms. Lootawan has an elderly, ill mother, for whom she "assists in her care in varying capabilities."

[10] Referring to *Cotton Felts*, at paragraph 19, Ms. Ashton said to look at the size of the company, the scope of the economic activity in issue, and asked that within the scope of economic activity, to consider that Mr. Stiff did not work for Ms. Lootawan as an individual. She urged the court to look at the actual and potential harm. She also asked the court to consider the parity principle, so that her client should be sentenced in a similar manner to others who find themselves convicted of the same charges, as per *R. v. Mann* [2010] O.J. No. 1924, 2010 ONCA 342, at paragraphs 15-17. Since the Crown is only seeking sentencing on one count, she had no submissions to make on the principle of totality in sentencing.

[11] Ms. Ashton submitted that her client is of limited means, since she owes the government over $50,000. She argued that the Crown seeking the penalty bears the burden of showing the defendant's ability to pay, and that there was no obligation on the defendant to adduce this evidence, see: *R. v. Topp*, 2011 SCC 43.

[12]Ms. Ashton argued that Ms. Lootawan's admitted "four prior convictions under the *EPA*" are of limited or no relevance to the sentence in this case, because it is a different statute. She referred to *R. v. Hershey Canada Inc*. [2005] O.J. No. 4147, 2005 ONCJ 404, at paragraphs 261-268, on the issue of the character of the defendant, when the convictions are under a different statute. She also referred to *R. v. Northwest Territories Power Corp*. [2011] N. W. T. J. No. 7, 2011 NWTTC 3, at paragraphs 66-68, for support of her argument that Ms. Lootawan's prior convictions under the *EPA* are not relevant in this matter.

[13] In terms of whether or not she violated her probation, the Crown has to prove that Ms. Lootawan violated her probation, and Ms. Ashton argued that the Crown has not done so. She cited *R. v. Di Franco*, [2008] O.J. No. 879, 78 W.C.B. (2d) 247, at paragraph 13, where the court made a distinction between negligence versus intentional flouting of the law, and held that imprisonment is seldom employed as sanction.

[14] She reiterated that the *EPA* is of limited value in this context, and referred the court to a number of decisions: *R. v. Demolition & Recycling Inc.* [2009] O.J. No. 5318, 45 C.E.L.R. (3d) 222, at paragraph 129, for the principle that incarceration is the exception in sentencing under the *POA*; *R. v. Pelligrini* [2006] O.J. No. 3369, 2006 ONCJ 297, at paragraphs 26-33, for the principle that imprisonment is appropriate

where the conduct is deliberate and intentional, for offences that resemble true crimes; and *R v. Wu* [2003] 3 S.C.R. 530, at paragraphs 34-38, the courts must avoid creating debtor's jail for the impecunious. She also noted that the Crown has power to collect outstanding fines, as per section 68 of the *POA*, for Civil Enforcement of Fines, and that there is no evidence that the Ministry of the Attorney General has taken steps to do so, or considered her ability to pay.

[15] Ms. Ashton argues that the lengthy incarceration period sought by Crown is inappropriate. She submits that the penalty should be a fine of $25,000, and requested that Ms. Lootawan be given time to pay.

[16] In the Crown's reply, Ms. Malabar submitted that if the court chooses to apply a fine instead of incarceration, then she agrees with the amount suggested. However, she urged me to consider the doctor's letter filed carefully, since Ms. Lootawan has previously falsified a $100,000 CIBC bond. Also, she submitted that others could potentially assist her elderly mother, since it is not clear she is the only one able to do so. As for the breach of probation issue, she submitted that I could find her guilty of failure to comply, since she was the supervisor of a waste management company when she told Mr. Stiff to go to roof, which is more evidence of her bad character. As for the submissions made on the principle of parity, she urged me to reject them, since Ms. Lootawan has a history of ignoring court orders.

Andrew J. Haniff:

[17] On July 18, 2013, I heard submissions with respect to the sentencing of Mr. Haniff. He was found guilty of hindering, obstructing, molesting or interfering with an Inspector in the exercise of a power or the performance of a duty under the *OHSA*, contrary to section 62(1) of that statute.

[18] Ms. Malabar argued that the Ministry of Labour takes this offence seriously, because it is unable to conduct workplace investigations if individuals refuse to cooperate with its inspectors. Ultimately, the Ministry of Labour is trying to ascertain the cause of accidents, which is why the legislation has provided inspectors with the power to obtain information requested, in order to ascertain the cause. The purpose of the legislation is to protect the safety of workers.

[19] Mr. Haniff received a telephone call from Mr. Kraus, the homeowner, and after that, Mr. Haniff refused to speak with the inspector or answer any of his questions.

[20] Ms. Malabar argued that this trial could have been much shorter if the inspector had received cooperation with his investigation.

[21] Ms. Malabar submitted that he has no prior convictions, although he was previously charged along with Ms. Lootawan, and her husband, operating as "Mr. Trash," but his charge with withdrawn, and she provided the court with a photocopy of the court record in that matter (see: May 13, 2008 order above). She submitted that although the maximum fine sought is $25,000, or 12 months incarceration, or both, the Crown is seeking a fine in the range of $3000 to $4000 for him, stating that the general range would be $2000 to $5000. In support of this general range, she provided excerpts from the online version of the *Annotated Occupational Health and Safety Act*, www.canadalawbook.ca, May 2013, for this offence. Within this range, she submitted that there are some aggravating factors in this instance, such as no sign of remorse, nor did he plead guilty.

[22] Ms. Malabar referred to *R. v. Dignard*, September 8, 2000, Sudbury, Ontario Court (Provincial Division), unreported. His Worship LeClerc was presiding, and he accepted a guilty plea for the same

offence, hindering, obstructing or interfering with an inspector, contrary to s.62(1) of the *OHSA*. The particulars in that case included tampering with a witness, by asking him to provide false information to an inspector. His Worship LeClerc accepted a joint submission of a fine of $2000, although he expressed some reluctance at the low fine, because of Mr. Dignard's personal financial circumstances.

[23] Ms. Malabar also referred to *R. v. Misheal*, May 3, 2005, Burlington, Ontario Court of Justice, unreported, and September 21, 2005, *ibid*, for sentence, unreported. Her Worship Mills convicted Mr. Misheal of the same offence, and ordered him incarcerated for a period of 7 days, to be served intermittently, and 6 months probation.

[24] Mr. Haniff submitted that when "this whole thing happened," he was only 23 years old. He described himself as a "small fish" in this company, and that he no longer works with them. He has found new employment as a driver, for an unrelated corporation, which pays him only $15 per hour, and works 20 to 30 hours per week. He said he has one child and another one on the way, and his second child is due in September, 2013. He said he has no criminal history, and asked the court for "mercy." In contrast, he described "them" as a "couple who make a couple million a year."

[25] He reiterated that he was very young when this accident happened, and that he was not on the site when it occurred. He said, "I didn't tell him to go on the roof, "implicitly meaning that he did not send Mr. Stiff to the site, as did Ms. Lootawan. He denied taking the call from the homeowner, Mr. Kraus, which contradicts a finding made in my Reasons for Judgment. He stressed that he did not own the company, place the ad, or have a VISA card with them.

[26] He described himself as being, "a small guy in this." He said that he makes less than $20,000 per year, and that he is "trying to do the right thing." He said that he is "sorry if this caused problems" and asked for a fine of $1000.

[27] The Crown did not reply to his submissions.

J.R. Contracting Property Services:

[28] On November 14, 2013, I heard submissions with respect to the sentence for J. R. Contracting Services. It was found guilty of the following:

> (a) failing as an employer to ensure that the measure and procedures prescribed by s.26.1(2) of O. Reg. 213/91, as amended, were carried out at a project, contrary to s.26(1)(c) of the *OHSA*;
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> (b) failing as an employer to take every precaution reasonable in the circumstances for the protection of a worker at a workplace, contrary to s.25(2)(h) of the *OHSA*, in particular, failing to take the reasonable precaution of ensuring that an adequate form of fall protection was provided to a worker where a worker was exposed to the hazard of falling more than three metres; and
>
> (c) failing as an employer to provide information, instruction, and supervision to protect the health and safety of the worker at a workplace, contrary to s.25(2)(a) of the *OHSA.*

[29] Ms. Malabar submitted that the corporation should receive a fine in the range of $70,000 to $80,000 for the offence of failing as an employer to take every precaution reasonable in the circumstances for the protection of a worker at a workplace, in particular, failing to provide adequate

fall protection. She further submitted that because of the *Kineapple* principle, the remaining counts should receive a suspended sentence. She noted that the maximum fine available is $500,000 per count.

[30] While she conceded that this is a small company, and that defence counsel may argue it is now defunct, it nevertheless remains a registered corporation, even if it has no assets. It did not plead guilty, nor are there any mitigating circumstances to consider, such as expressions of remorse.

[31] The evidence indicates that after Mr. Stiff's fall, the company provided the workers a directive not to go onto roofs, but there is no evidence that any meeting took place, nor any real policy established, nor any safety checks put into place to monitor this change. There was no evidence that any of this was done at the time, nor at a later date.

[32] She referred to *Cotton Felts*, and noted that the harm in this instance was very significant, since the injured worker is now paralyzed. This was a life-changing injury for him, and the potential harm of this fall included death. She urged the court to view deterrence as the ultimate factor to consider. In terms of general deterrence, others in society need to take note of what happened and the consequences to this business.

[33] Ms. Malabar also referred to *R. v. Hoffman LaRoche Limited (No. 2),* 30 O.R. (2d) 461, in which Justice Linden, of the Ontario High Court of Justice, said when imposing a fine that it should be "more than nominal, but which is not harsh."

[34] She also referred to the principle that if the corporation expresses an inability to pay, the court should not lower the fine, but give it more time to pay, and that time to pay is the appropriate remedy, see: *R. v. Wu*, [2003] S.C.J. No. 78, 2003 SCC 73, at para. 31- 33. In particular, in *Wu*, the court held that it would be inappropriate to assume that the defendant's financial circumstances will not change, and thus more time was granted (paragraph 33). Even a corporation in receivership should be given a fine as a matter of general deterrence, see: *R. v. Brady Mechanical Systems Ltd*. (unreported, Aug. 25, 2005, Paris, J., Toronto, p.3,at para 4). She referred to the principle of general deterrence as the key principle in such cases, see: *R. v. Servello Carpentry Limited* (unreported, June 28, 2010, Hourigan, J., Newmarket), at p. 17. Finally, she referred the court to case summaries from the *Annotated Occupational Health and Safety Act, 2013,* Canada Law Book, *Sentencing Charts – Financial Harm*, where the convicted companies had gone bankrupt, and the fines imposed were nevertheless between $70,000 to $75,000 (Crown Brief, tab 14).

[35] The resulting paralysis to Mr. Stiff is a significant, aggravating factor in sentencing, see: the summaries of cases noted in the *Annotated Occupational Health and Safety Act, 2013*, Canada Law Book *Sentencing Charts – Paralysis* (Crown Brief, tab 12). These fines ranged from $50,000 to $75,000.

[36] In terms of the range of fines that are appropriate, she referred to *R. v. Lakeview Homes (Grand Bend) Ltd*., (unreported, June 26, 2003, Gay, J.P., Goderich), in which an injured worker fell off a roof and was permanently paralyzed. Even though the company was not functioning when he was sentenced, the company was fined $25,000. Similarly, in *R. v. CM Midway Limited*, (unreported, November 2, 2001, Baldwin, J. St. Catherines), the corporation received a fine of $75,000, which was based on $25,000 per count ((tab 12 –annotated). Other large companies, with many employees, have received fines from $90,000 to $120,000 (tabs 9 and 10), even when they have pleaded guilty, and had no prior convictions. Other employers have been fined between $50,000 to $75,000 for broken arms and legs, for example (Crown Brief, tab 13).

[37] Mr. Wisener appeared for J. R. Contracting Property Services. He agreed that the *Kineapple* principle should apply, as described by Ms. Malabar, and therefore he also submitted that his client should only be sentenced on one count.

[38] He submitted that the appropriate fine is $25,000 to $40,000, since the company has no prior convictions under the *OHSA*, nor any prior injuries. There is no evidence at this trial that Mr. Rossi or the company did not cooperate fully with the MOL inspector.

[39] He referred to *R. v. Con-Strada Construction Inc*., (unreported, June 4, 2008, Camposano, J.P., Newmarket) (J.R. Contracting's Brief, tab 1), in which an injured worker required his arm amputated, and the employer had 120 employees, in business for many years at the time of the accident, was fined $40,000. He referred to another case involving paralysis, *R. v. Lakewood Homes*, in which the employer was fined $25,000.

[40] He also referred to a 2009 case, *Ontario (Ministry of Labour) v. Cramer Farms*, (unreported, March 18, 2009, Zuliani, J.P., Thunder Bay) in which the worker died, as the result of a trench-digging accident at a farm. The parties filed an agreed statement of facts, noting lack of experience, and lack of common sense. The company was a dairy farm owned and operated by two brothers, and the fine imposed was $45,000.

[41] Mr. Wisener asked the court to consider the context in this case. Mr. Stiff admitted that he had consumed three beers prior to going on the roof, and that he had not been trained.

[42] While there was no affidavit, nor any *viva voce* evidence, before the court with respect to the company's circumstances, Mr. Wisener advised that he had advised the Crown prior to this trial that the company was not operating, had no employees, and had no assets. It is not an active company, and there is no evidence of any employees. The evidence at trial was of independent contractors. He referred to the sentence imposed on Sungate Construction, a subcontractor engaged in framing work, in *R. v. Homes*, (unreported, February 12, 2007), Baldwin, J.), in which a fine of $50,000 was imposed. Sungate had three full-time employees and between 12 and 24 subcontractors.

[43] He referred to *Ontario (Ministry of Labour) v. 755055 Ontario Ltd. Operating as Rodco Enterprises*, (MOL Court Bulletin, dated February 22, 2013), which was fined $50,000, as the result of a worker falling more than 3.66 metres and sustaining fractures and a back injury.

[44] The company is not bankrupt nor is it in receivership. It is a numbered company, "on the books," but he submitted that it "hasn't really existed for years." It has no assets currently, and has had no assets since 2008, to the best of counsel's knowledge.

ANALYSIS:

Generally:

[45] In terms of the jurisprudence, the key appellate case for sentencing with respect to breaches of the *OHSA*, and the key case for sentencing corporate defendants generally for breaches of public welfare statutes, is *R. v. Cotton Felts Ltd*., [1982] O.J. No. 178 (Ont. C.A.). Justice Blair, for the Court, set out the factors to be considered when assessing the fine, as follows: 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.

[46] In *Cotton Felts*, Justice Blair emphasized "the paramount importance of deterrence," in paragraph 20, and expanded upon the importance of the fine as a matter of general deterrence within the community, stating at paragraph 22, "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 for illegal activity."

[47] In *Ontario (Labour) v. Flex-N-Gate Canada Company*, 2014 ONCA 53, Justice Laskin of the Ontario Court of Appeal recently held, at paragraph 22 that, "Deterrence has long been regarded as the most important sentencing principle for *OHSA* offences. This court's decision in *R. v. Cotton Felts*…remains the leading decision on the sentencing of *OHSA* offenders."

[48] The *OHSA* provides a maximum fine for individuals of $25,000, and or imprisonment for a period of up to twelve months per offence. For corporations, the maximum fine is $500,000 per offence.

Sentence for Teisha Lootawan:

[49] Both Crown and defence counsel submit that the *Kineapple* principle should apply to the sentencing of Ms. Lootawan, which I accept.

[50] The only mitigating factor for Ms. Lootawan is her elder-care responsibility to her mother, which I am prepared to accept at face value, based on the doctor's note filed by her counsel. I also accept Crown counsel's submission, however, that no information was provided to me to indicate if anyone else was able to assist with her mother's care.

[51] In terms of aggravating factors, Ms. Lootawan has had several prior *POA* convictions, listed in detail in paragraph 6 of this Sentencing Judgment. Her previous sentences have included intermittent terms of imprisonment, and substantial fines, which have gone unpaid, with one small exception. Her outstanding fines total more than $50,000. While these previous convictions were made under other *POA* statutes, the genesis of the offences was always her work in the trash removal business, which appears to be a consistent source of revenue for her.

[52] In particular, I accepted the evidence of Mr. Richardson, during the trial, when he identified himself in two groups of photographs depicting a number of individuals in maroon t-shirts, standing next to a 1-866-Mr. Trash truck. See: *Ontario v. J.R. Contracting et al.,* 2013 ONCJ 202 (CanLII) at para. 205. Ms. Lootawan's three convictions under the *EPA*, dated May 13, 2008, occurred while she was operating "Mr. Trash."

[53] Similarly, at trial, I accepted the evidence of Ms. Hodgson, who testified that Ms. Lootawan had placed advertisements for garbage removal and hauling with her every week for about three years, under the name, "All-Can," and subsequent to the accident, had advised her the name was now "Mr. Trash." *Ibid*, at para. 204.

[54] These earlier convictions were not trifling matters, but serious offences that endanger public welfare generally. In some cases, her prior convictions required premeditation, e.g. her January 23, 2008 conviction for falsifying a $100,000 bond on CIBC letterhead to file with the Ministry of Environment, and her similar conviction, also under the *EPA* for falsifying or misleading information, with respect to her address, dated September 20, 2001.

[55] It is disturbing that the vast majority of her regulatory fines remain unpaid. Despite defence counsel's able submissions, there was no evidence or indication before me of any legitimate or logical reason for this apparent defiance of prior court orders.

[56] Section 15 of the *Regulatory Modernization Act, 2007*, S.O. 2007, c. 4, provides as follows:

> **SENTENCING CONSIDERATIONS**
>
> **Previous conviction**
>
> 15.(1) This section applies when a person who is convicted of an offence has previously been convicted of an offence under the same or another Act. 2007, c.4, s.15(1).
>
> **Same**
>
> (2) The previous conviction may have occurred at any time, including before the day this Act came into force. 2007, c.4, s.15(2).
>
> **Severity of penalty**
>
> (3) Where the prosecutor is of the opinion that the previous conviction is relevant to the determination of the appropriate penalty for the current conviction, he or she may request that the court consider the previous conviction to be an aggravating factor. 2007, c.4, s.15(3).
>
> **Response of court**
>
> (4) Where a court receives a request under subsection (3), the court shall, on imposing the penalty,
>
> (a) indicate whether it is imposing a more severe penalty having regard to the previous conviction; and
>
> (b) if the court decides that the previous conviction does not justify a more severe penalty, give reasons for that decision. 2007, c.4, s.15(4).
>
> **Other factors still relevant**
>
> (5) Nothing in this section shall be interpreted as limiting any factor, submission or inquiry as to penalty the court is otherwise permitted or required to take into account or make, as the case may be. 2007, c.4, s.15(5).

[57] Thus, I am relying on section 15 of the *Regulatory Modernization Act, 2007*, to consider her prior *POA* record in totality, with specific reference to her failure to comply with prior court orders, to wit, her substantial outstanding fines. More important than her outstanding fines is her pattern of toxic behaviour, that shows a serious disregard for public welfare statutes, and the consequences of her actions.

[58] Crown counsel made submissions with respect to what appears to be a breach of a prior probation order, made by His Worship Hunt on May 13, 2008, for a period of two years, to wit: Ms. Lootawan was ordered not to manage or control the disposal of waste (see: paragraph 6 of this Sentencing Judgment). Crown counsel asked that I consider it as another aggravating factor for sentencing. Defence counsel argued strenuously that she had not been charged with breach of probation, and that she had not had an opportunity to defend herself on this particular issue.

[59] I decline to make a finding that Ms. Lootawan has breached this probation order, as per section 75 of the *POA*, and I am not considering this allegation as a factor in her sentence. In so doing, I find that she was neither charged with nor convicted of breaching her prior probation. Moreover, while quite rare in *POA* trials, it is possible to seek a *Gardiner* hearing on a discreet issue, particularly where a custodial sentence is sought by the Crown, but one was not requested or conducted in this trial. (See: *Ontario (Ministry of Labour) v. Romanko*, (unreported *Gardiner* hearing, Dec. 14, 2010, Puusaari, A., J.P., Bracebridge; unreported judgment, Aug. 17, 2010.) Her Worship Puusaari conducted a *Gardiner* hearing on the admissibility of hearsay evidence, and declined to accept it. Also see: *R. v. Gardiner*, [1982] 2 S.C.R. 368, 1982 CanLII 30; as well as sections 723-724 of the *Criminal Code*, R.S.C. 1985

[60] In *R. v. Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154, Justice Cory held that imprisonment is a sanction available for regulatory offences, albeit one that is not routinely ordered.

[61] Given her troubling history with lack of compliance with prior court prior orders, the evidence before me that her convictions stem from her ongoing work in the trash removal business where she continues to flout various regulatory standards, and her lack of expression of any remorse for an accident that left a young man permanently paralyzed and fraught with pain, I accept the Crown's submission that only a term of imprisonment would fulfill the sentencing goal of deterrence, both general and specific. It would also further the sentencing goal of denunciation, given her pattern of behaviour. Regrettably, I do not foresee any hope of rehabilitation of Ms. Lootawan, given her antecedents.

[62] Under all the circumstances, I rely upon section 15(4) of the *Regulatory Modernization Act, 2007*, and find that a period of incarceration for 45 days, to be served continuously, would satisfy the requirements of both deterrence and denunciation, for the offence of failing as a supervisor to take every reasonable precaution to protect a worker, and in particular, failing to provide an adequate form of fall protection to a worker, who was exposed to a fall hazard of falling more than three metres. I hereby apply the *Kineapple* principle and suspend sentencing on the remaining counts against her.

Sentence for Andrew J. Haniff:

[63] Mr. Haniff refused to cooperate with the MOL Inspector, when required to do so by statute. Moreover, he did not participate in this trial, except for making final submissions with respect to sentencing, at which time he sought leniency. Nevertheless, he does not have any prior record, and he was only 23 years old when the accident occurred.

[64] I find that a fine, at the low end of the range, meets the principal of general deterrence. I find that a fine of $2000 is sufficient under all the circumstances.

Sentence for J. R. Contracting Property Services:

[65] With respect to the corporate defendant, I refer back to the four factors set out by Justice Blair in *Cotton Felts*. First, the company involved is a small company, that defence counsel submits is inactive, and has no employees, although it remains "on the books."

[66] In terms of the scope of the economic activity in issue, the only reliable evidence before me is the determination that I made at trial, that the corporate defendant had taken over the leases for eight trucks, including the truck found at the scene of the accident, that it had an office at 115A Toryork Drive, Toronto, that it had at least one telephone number registered to it, and that workers returned the bins, filled with trash, to the trash disposal site beside the corporate defendant's office, at which time they

were paid in cash. Moreover, after the accident, it was the corporate defendant that created a policy that no workers were permitted to go onto roofs. Despite the able submissions of counsel, it is difficult for me to accept that this corporate defendant is completely inactive, when the evidence at trial suggested that it was controlling the office and equipment required to dispose of the trash collected, and that the workers were paid cash at its premises. Since no one testified on behalf of the corporate defendant, and no financial documents were submitted by way of affidavit at the sentencing hearing, I am relying on the evidence gleaned from others during the trial.

[67] In the alternative, assuming without deciding that defence counsel is correct that the corporation is inactive, I rely upon the Court of Appeal's judgment in *R. v. Metron Construction Corporation*, 2013 ONCA 541 (CanLII), at paragraph 108, where Justice Pepall held that the "economic viability of a corporation is properly a factor to be considered but it is not determinative."

[68] In terms of the extent of actual and potential harm to the public, this accident was completely preventable. The worker injured in this accident has been paralyzed and now suffers chronic pain, and he will for the rest of his life. Other than the meager policy created, post-accident, that required workers to refrain from going onto roofs, there is no evidence of any health and safety training, equipment or other policies or procedures that would reflect some type of due diligence on behalf of the corporate defendant at the time of the accident.

[69] Justice Laskin has recently held in *Ontario (Labour) v. Flex-N-Gate Canada Company*, at paragraph 30, that employers who correct a health and safety contravention are "not to be 'rewarded' for its compliance," since the public policy goal of the *OHSA* is accident prevention.

[70] The maximum penalty set out by the statute is $500,000. Both Crown and defence counsel submit that the *Kineapple* principle should apply, which I accept. The corporate defendant does not have a record, and it did cooperate with Inspector Lomer, as required by law. However, no one testified at this trial, nor did anyone express remorse on behalf of the corporate defendant.

[71] As I previously held in my Judgment, dated April 18, 2013, at paragraphs 191-199, the fact that Mr. Stiff admitted that he had consumed three beers before going onto the roof, as ordered by Ms. Lootawan, does not change in any way the employer's obligation under the *OHSA*, nor do I find that it is a mitigating factor in sentencing, to provide an adequate form of fall protection. There was no fall protection equipment available for the workers at the scene of the accident, whether they were sober or intoxicated. I reiterate my findings at paragraph 196 to 197 of my Judgment, where I held as follows:

> In doing so, I rely upon the Court of Appeal's judgment in *R. v. Dofasco Inc*., 2007 ONCA 769 (CanLII), in which it quoted Laskin J.A.'s decision to grant leave to appeal, at para. 24, that "workplace safety regulations are not just designed for the prudent worker. They are intended to prevent workplace accidents that arise when workers make mistakes, are careless, or are even reckless.' In our view, the principle also extends to deliberate acts of employees while performing their work."
>
> In other words, "employee misconduct does not go to the *actus reus* of the offence," *Ontario (Ministry of Labour) v. Reid & Deleye Contractors Ltd.*, 2011 ONCJ 472 (CanLII), at para. 50, relying upon *R. v. Dofasco, supra.*

[72] The Crown is seeking a fine which is in the mid-range for an accident of this nature, based on the jurisprudence filed at the sentencing hearing. The jurisprudence referred to by defence counsel in support of a lower range of fines are distinguishable, however. While the fine in *R. v. Con-Strada*

Construction Inc., was $40,000, it was multiplied by three counts, and was therefore $120,000 in total. Similarly, in *Ontario v. Cramer Farms*, while the fine was only $45,000, it was the result of a guilty plea, the filing of an agreed statement of facts, an expression of remorse, and an indication to the court that the two brothers who ran the farm had taken all steps to comply with regulatory standards. The lesser sentence to Sungate in *R v. Homes* was also part of a joint submission with respect to all parties.

[73] While the corporate defendant did cooperate with Inspector Lomer, it did not take any of the steps that the defendants in *Cramer Farms* took, which would cause the court to apply mitigating factors at sentencing.

[74] Given all the circumstances before me, I find that a fine of $75,000 for the offence of failing as an employer to take every precaution reasonable in the circumstances for the protection of a worker at a workplace, in particular, failing to provide adequate fall protection, meets the principles of deterrence and denunciation required, and that the sentences on the other two counts are hereby suspended.

ORDER:

[75] For the reasons set out above, I hereby make the following Order:

(a) Ms. Lootawan must serve 45 days in custody, to be served continuously, commencing today;

(b) Mr. Haniff must pay a fine of $2000, plus the statutorily imposed surcharges, within one year of the date of this Order; and

(c) J. R. Contracting Services must pay a fine of $75,000, plus the statutorily imposed surcharges, within one year of the date of this Order.

Dated at Toronto, this 6th day of March, 2014.

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Mary A. Ross Hendriks, J.P.