Court of appeal refuses to reinstate jail sentence… this time

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Litigation, Canada

Introduction

In the thousands of Occupational Health and Safety Act prosecutions that have occurred in Ontario history, defendants have been jailed fewer than two dozen times. However, in its recent decision in *Ontario (Labour) v New Mex Canada Inc*, the Ontario Court of Appeal provided clarity on the sentencing principles in Occupational Health and Safety Act cases. The court clarified that just because jail terms are rare does not mean that they should not be imposed.

Facts

In 2013 a worker fell approximately 12 feet to his death from an order picker with an open-sided non-slip-resistant platform. The employer knew that the worker was epileptic and that he had fainted twice before at work. The worker had received no health and safety training, the order picker was not equipped with fall protection equipment and the worker was wearing dress shoes. The pathologist inferred that the worker had had a seizure on the forklift and fell while unconscious. The sentencing judge described the circumstances as showing "the highest level of negligence".

The Ministry of Labour laid multiple Occupational Health and Safety Act charges against New Mex as the employer and its two directors, Mr Purba and Mr Saini. Each of the three defendants pleaded guilty to two offences. On sentencing, the prosecutor asked for a total fine for New Mex of C$100,000 or higher. Despite that, the sentencing judge imposed a total fine on New Mex of C$250,000 (C$125,000 per count). For Purba and Saini, the sentencing judge concluded that, as the sole directors of New Mex, they would be paying the New Mex fine themselves, so to impose a fine on them personally would only cause more financial hardship. Instead, the judge imposed 25-day intermittent jail sentences and 12 months of probation on both Purba and Saini.

First-instance appeal

At first-instance appeal, an appeal judge sitting in the Superior Court of Justice allowed the defendants' appeal and held that the sentences imposed had departed substantially from appropriate sentences, making them "demonstrably unfit". The appeal judge varied the appealed sentences and imposed the following fines:

- C$50,000 on New Mex (C$25,000 per count); and
- C$15,000 on Purba and Saini (C$7,500 per count).

No jail time was imposed.

The Crown (Ministry of Labour) appealed to the Ontario Court of Appeal. While the Court of Appeal found that the first-instance appeal judge had made errors in principle which affected his conclusions, it found that the appeal judge had been correct in finding that the fines imposed by the sentencing judge were demonstrably unfit.

In its decision, the Court of Appeal discussed the principles of sentencing for regulatory offences at length and recognised the primacy of fines over incarceration in sentencing (ie, in most cases, fines will be more appropriate than jail time). However, the Court of Appeal clarified that just because incarceration is uncommon, this does not mean that it is inappropriate to achieve the goals of sentencing. Courts should not be treating the fact that incarceration is rarely imposed for regulatory offences as a principle of sentencing. In the circumstances of this case, the Court of Appeal's view was that the jail terms were "entirely fit" and "much to be preferred to the modest fines imposed by the appeal judge". However, based on fresh evidence put before the Court of Appeal on consent detailing the directors' difficult life circumstances, the fact that it had been close to six years since the incident and the fallout from the incident had been financially difficult for both directors, the Court of Appeal did not reinstate the jail time.

In terms of fines, the court held that a fine imposed on a corporation should not be treated as a fine imposed on a director, because a director is under no legal obligation to pay the corporate fine. The court held that the fitness of an Occupational Health and Safety Act fine can be determined by asking:

> *What amount of fine is required to achieve general and specific deterrence, and would otherwise be appropriate bearing in mind the principles of sentencing, including proportionality, and parity?*

The court stated that the "answer to that question does not remotely support a $250,000 fine", given that the company was small and financially weak and considering the range of fines imposed on similarly situated offenders in similar cases. Ultimately, the Court of Appeal held that although the fines imposed by the appeal judge against all three defendants had been lenient, they constituted sufficient deterrence and were not demonstrably unfit.

The Court of Appeal noted in its decision that jail time has historically been reserved to cases where defendants:

- are repeat offenders;
- do not plead guilty; and
- show no remorse.

In light of the court's confirmation that the rarity of jail time is not a sentencing principle and that jail time would have been appropriate in this case, it will be interesting to see how this decision is applied by courts in future.

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Entertainment, Media & Sports

Pro sports leagues slow to allow players to use cannabis

CFL is only top-tier sports league to not test players for recreational drugs

By Glen Korstrom | April 10, 2019, 8:08am

Vancouver Canucks players are tested for cannabis at training camp, during the season and in the off-season | Shutterstock

Cannabis is forbidden to players in most professional and collegiate sports leagues despite an increasing number of jurisdictions across North America legalizing the plant for recreational use.

While most leagues have yet to change policies to enable players to use cannabis, the Canadian Football League (CFL) is the exception, and it is the most accepting of cannabis of the sports leagues that have Vancouver teams.

In a statement to *Business in Vancouver*, the CFL noted its drug-testing policy for players "has never included testing for marijuana or other recreational drugs." Instead, the league said, "it focuses on performance--enhancing drugs. That will continue to be the case."

The league added that it expects all players and staff to obey laws, act responsibly and not come to work impaired.

"We have faith our employees will display that sort of common sense," the league said.

Other leagues' policies vary in tolerance for pot consumption. Dentons employment lawyer Taylor Buckley told *BIV* that "recreational cannabis is not protected by human rights legislation," so the leagues have a free hand to enter into collective bargaining agreements (CBAs) with players that have no-cannabis provisions.

The National Hockey League (NHL), for example, has a CBA with the National Hockey League Players' Association (NHLPA) that stipulates that players who test positive for "drugs of abuse," such as the intoxicating ingredient in cannabis, tetrahydrocannabinol (THC), will not be publicly named but will be "referred" to a drug treatment program.

Attending that program, however, is voluntary, unless the test reveals "dangerously high levels" of THC, said NHLPA spokesman Jonathan Weatherdon.

He stressed that the league's tests are intended to spot performance-enhancing drugs, not cannabis.

The CBA says league officials conduct team-wide, no-notice testing on each NHL team once during training camp and once during the regular season. They also select individual players randomly for no-notice testing once during the regular season. Players must give team officials an email and phone number to use during the off-season.

If a player is unreachable for two weeks without a good reason during the off-season, the player is referred to a committee to determine next steps, which could include discipline, according to the CBA.

Major League Soccer forbids players from reporting for work "under the influence" of alcohol or illegal substances. It also forbids "performance-enhancing substances," and other drugs banned by the World Anti-Doping Agency (WADA).

Vancouver Whitecaps spokesman Tom Plasteras told *BIV* that the league tests players two to three times per year and that there has never been a case in which a Whitecaps player has been found to have a banned substance in his system.

WADA explicitly bans cannabis but notes that cannabidiol (CBD), a pain-relieving component derived from it, is an exception.

The result is that Whitecaps players could consume high-CBD cannabis and stay in compliance with league policies.

(Image: B.C. Place is home to the B.C. Lions and the Vancouver Whitecaps | Chung Chow)

The players of Vancouver's fourth professional sports team, the Vancouver Canadians, are officially employed by the parent Toronto Blue Jays and are therefore subject to Major League Baseball (MLB) rules.

"Marijuana, or cannabis, is not allowed in baseball," Canadians' president Andy Dunn told *BIV*. "Whether it's legal or not legal, it is a banned substance."

MLB does not regularly test players for what it calls drugs of abuse, but tests may be conducted if the league or players' union has reasonable cause. Positive tests can result in fines and suspensions.

In December, MLB announced that five minor-league baseball players received 50-game suspensions for violating the rules of a drug-prevention and treatment program.

Dunn said that Canadians players have been suspended in the past but that the team was never told the exact cause.

“We just understand that there’s a suspension,” he said. “It is all administered through MLB, minor-league baseball and Toronto.”

Athletes need to be just as wary at the collegiate level.

The University of British Columbia’s senior athletics director, Gilles Lépine, told *BIV* that the university follows Canadian Centre for Ethics in Sport regulations, which stipulate that cannabis is a banned substance.

“Cannabis could be used to cover another drug,” Lépine explained.

He said some athletes have been punished after THC was detected in their bloodstreams. Penalties can include suspensions from sports for up to two years, although the student would be able to continue to take classes.

Simon Fraser University’s senior director of athletics and recreation, Theresa Hanson, said the situation was similar at her university, which follows the National Collegiate Athletic Association’s (NCAA) rules.

The NCAA is stricter about performance-enhancing drugs than it is about street drugs, but students could be suspended for half a year for having cannabis active ingredients in their systems, she said.

NHL Alumni Association urges cannabis research

Pro sports leagues may be slow to accept players using cannabis but the National Hockey League Alumni Association (NHLAA) is showing that it is willing to consider that the plant could be helpful for players who have had concussions or injuries.

The NHLAA in March hatched a partnership with the world’s largest publicly traded cannabis company, Canopy Growth Corp. (TSX:WEED; NYSE:CGC), and commissioned a team of neuroscientists to conduct research to determine whether former players could benefit from using cannabis, or more specifically CBD.

NHLAA president Glenn Healy stressed to *BIV* that the study would not include tests on the therapeutic value of THC, the intoxicating substance in cannabis.

Neurosurgeon Amin Kassam will head a team of scientists who will conduct the tests as part of a new organization known as Neeka Health Canada – which Healy calls “an all-star team.”

The 100 or so players who will take part in the testing have been promised confidentiality. It will include some brain scanning early on and then some vestibulo-ocular reflex and neurofascial testing.

“[I’m] quite frankly getting tired of getting calls from players’ wives and kids saying, ‘I want my dad back,’” Healy said. “That’s why we’re being proactive with it.” •

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VIEW COMMENTS

Benefits CANADA

How will 2018's employment law changes play out for employers in 2019?

Alethea Spiridon | February 7, 2019

In 2018, several significant employment and labour law changes were rolled out across Canada, especially in Ontario, which saw a change of government in June.

"These changes will no doubt have an important impact on your workplace," said Chelsea Rasmussen, an employment and labour law associate at Dentons LLP, speaking during a webinar hosted by the law firm last month. "However, in addition to these changes, we saw employers grapple with allegations of sexual harassment in the workplace in light of the #MeToo movement."

Read: How #MeToo movement is changing way employment law views harassment

In late 2018, Ontario's amendments to its Employment Standards Act included replacing the 10 days of personal emergency leave introduced by the former Liberal government with three days of personal illness leave, three days of family responsibility leave and two days of bereavement leave, all of which are unpaid. As well, the changes brought back the option **for employers to request a medical note** from employees taking sick leave, family responsibility leave or bereavement leave.

The amendments also removed equal pay for equal work on the basis of employment status, but the requirement for equal pay on the basis of sex remains under the new bill, said Catherine Coulter, an employment and labour lawyer at Dentons. "This provision has nothing to do with the Pay Equity Act. The Pay Equity Act, of course, requires equal pay on the basis of sex and remains in force and governs all Ontario private sector employers with 10 or more employees."

As well, collective agreements will now be made available to the public through the Ontario government's website, and the province's new leaves of absence — child death and domestic or sexual violence — will remain in place, said Coulter.

Read: Ontario government unveils new labour standards bill

Also in 2018, Alberta overhauled its employment standards for the first time in 30 years. The changes included guaranteed job protection for new unpaid leaves, such as five days of personal and family responsibility leave, three days of bereavement leave and a 36-week leave for the critical illness of a child.

“Luckily for Alberta, the changes have not been nearly as much as Ontario, but we’ll wait to see if we get a new government coming up in the next year and maybe we’ll be in the same position,” said Adrien Elmslie, head of Dentons’ labour and employment group in Edmonton. “For now, for the most part, I think the changes that came into place last year . . . employers have generally [been] getting used to those changes.”

Quebec has also undergone a revision to its employment standards, said Virginie Dandurand, an employment and labour lawyer at Dentons in Montreal. “The main purpose is to help employees find a balance between their work and family obligations, she said, noting part of those amendments came into force in June 2018.

The changes expanded an employee’s right to take a leave of absence for family or parental reasons by adding the term ‘relative,’ she added. In Quebec, ‘relative’ now includes the child, father, mother, brother, sister and grandparents of the employee or their spouse, including the spouses of those mentioned, their children and the children’s spouses.

Read: Employer-paid benefits to be subject to new B.C. health tax

British Columbia is seeing rumblings of the changes in other provinces, but it isn’t there yet when it comes to employment standards, according to Taylor Buckley, an employment and labour law associate at Dentons. What’s coming down the pipeline, though, is a new “payroll tax on employers which is paid regardless and helps subsidize the program everywhere, similar to what we see in other provinces.”

The health tax, which took effect on Jan. 1, 2019, aims to eliminate the province’s medical services plan premiums.

The province is also seeing a move for the return of a Human Rights Commission since B.C. is the only jurisdiction in the country without one, added Buckley.