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UPDATE

Sky High Mandatory Fines: Answers to Frequently Asked Questions about the Proposed Mandatory Minimum Fines for Repeat Offenders Under the OHSA

By Ryan J. Conlin and Jeremy D. Schwartz

The Ontario government has announced a proposed amendment to the OHSA which would impose a mandatory minimum fine of $500,000 (plus the applicable victim fine surcharge) for corporate employers convicted of second or subsequent offences that result in the death or serious injury of one or more workers in a two-year period.

Q. When does the new mandatory minimum fine apply?

A. Every corporate employer that is convicted of two or more offences that result in the death or "serious injury" to a worker is subject to a minimum $500,000 fine.

Q. How much is the fine after the victim fine surcharge is imposed?

A. The victim fine surcharge is 25% of the fine and thus the total fine is $625,000.

Q. Does the Victim Fine Surcharge go to the victims of the workplace accident?

A. No. Under Ontario's *Victims' Bill of Rights*, money paid into the VJF is used to help victims of *Criminal Code* offences.

Q. Can the Court impose a higher fine?

A. Yes. $500,000 is the mandatory minimum fine. The maximum fine for a corporate employer is currently $2,000,000.

Q. What is a "serious injury"? Is it the same thing as a "critical injury"?

A. Unfortunately, "serious injury" is not currently defined. A "critical injury" is defined by regulation as the type of accident that is reportable to the Ministry. By using a different term, the government seems to be proposing including a broader range of accidents than what is defined as a "critical" injury.

In British Columbia, OHS Guideline #G-D10-172-1 defines a "serious injury" as,

> **A serious injury is any injury that can reasonably be expected at the time of the incident to endanger life or cause permanent injury. Serious injuries include both traumatic injuries that are life threatening or that result in a loss of consciousness, and incidents such as chemical exposures, heat stress, and cold stress which are likely to result in a life threatening condition or cause permanent injury or significant physical impairment.**

> **Injuries that require a critical intervention such as CPR, artificial ventilation or control of hemorrhaging or treatment beyond First Aid, such as the intervention of Emergency Health Services personnel (e.g. transportation to further medical attention), a physician and subsequent surgery, or admittance to an intensive care unit should also be considered "serious injuries."**

Unless the proposed legislation is amended, the Courts will decide what the term actually means. We would not be surprised if the Courts used criteria similar to the passage referenced from the B.C. Guideline above.

Q. Does this provision apply to parties other than corporations?

A. No. Only corporate defendants are subject to this provision. It should be remembered that partnerships cannot be named as defendants in OHSA proceedings.

Q. Do you see any basis for a *Charter* challenge?

A. There have been successful *Charter* challenges to mandatory minimum penalties imposed under the *Criminal Code*. Many of these challenges have been advanced under section 12 of the *Charter* which prohibits cruel and unusual punishment. Unfortunately for corporate defendants, the Supreme Court of Canada held that Section 12 of the *Charter* does not protect corporations from cruel and unusual treatment or punishment on the basis that the term "cruel and unusual" speaks to protection that only human beings can enjoy.

It remains to be seen whether the provision could be challenged on other grounds under the *Charter*.

Q. Does the Court have any discretion to lower the fine?

A. No.

Q. Does this legislation represent a departure from how corporate defendants have been historically sentenced under the OHSA?

A. Yes. For years the Courts across Canada followed a landmark Ontario Court of Appeal decision which set out a number of factors including the seriousness of the injury, the prior record of the accused, steps taken to prevent a recurrence of the offence and ensuring that fine was sufficient to act as a deterrence to both the accused and the broader employer community. Recent amendments to the OHSA provided further guidance on the relevant sentencing factors.

Historically, the size of the defendant (in terms of number of employees, revenues etc.) played a significant role in the size of the fine. Smaller corporations were generally subject to a lower range of fines than larger ones. The new mandatory sentencing regime takes away any discretion on the part of the Court to impose a fine below the mandatory minimum. This means that defendants could be forced to shut down and the Court cannot consider that to lower the fine.

The Court of Appeal has stated in the context of fining corporate defendants under the *Criminal Code* that "*…economic viability of a corporation is properly a factor to be considered*". Ironically, a corporate defendant convicted under the OHSA does not have the same right to make the economic viability argument that a defendant convicted under the more serious criminal process is entitled to make.

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