

**FOGLER, RUBINOFF WELCOMES ENVIRONMENTAL LITIGATOR JACK COOP**

By Albert Engel, B.Sc., LL.B., M.E.S.

Jack is a senior member of the Environmental Bar with over 30 years of experience and is certified by the Law Society of Upper Canada as a specialist in Environmental Law. His practice with the firm involves all aspects of environmental litigation: civil actions, prosecutions, class actions, administrative hearings, and judicial review applications, including advice on how to avoid such litigation.

Jack's environmental litigation expertise has been refined through more than twenty years as a lawyer with the Ontario government and 10 in private practice. Jack's government experience includes 10 years with the Ministry of the Environment conducting prosecutions and hearings and 10 years with the Ministry of the Attorney General representing all ministries of the Crown in civil litigation.

Jack has appeared at every level of court in Canada, including the Supreme Court. He has written and taught extensively in the fields of environmental law and regulatory liability, including as an Adjunct Professor at both the University of Toronto Faculty of Law and Osgoode Hall Law School.

Please join us in welcoming Jack to Foglers' team of Environmental Law professionals!

**FOUR RECENT DECISIONS RAISE CONCERN ABOUT PARITY IN SENTENCING**

By Jack D. Coop, B.A., J.D., Certified Specialist Environmental Law

Four recent Ontario Provincial Court sentencing decisions - two under the *Occupational Health & Safety Act* ("**OHSA**"), and two under the *Environmental Protection Act* ("**EPA**"), throw into high relief the disparity of sentencing approaches under the two statutes, and suggest that environmental offences may be drawing disproportionately high fines.

Consider the following four news releases, issued by Ontario within days of each other:

[https://news.ontario.ca/mol/en/2016/09/m-fuda-contracting-inc-fined-60000-after-worker-killed-from-fall-in-trench.html?utm\\_source=ondemand&utm\\_medium=email&utm\\_campaign=p](https://news.ontario.ca/mol/en/2016/09/m-fuda-contracting-inc-fined-60000-after-worker-killed-from-fall-in-trench.html?utm_source=ondemand&utm_medium=email&utm_campaign=p)

[https://news.ontario.ca/mol/en/2016/09/crane-company-fined-120000-after-worker-permanently-injured.html?utm\\_source=ondemand&utm\\_medium=email&utm\\_campaign=p](https://news.ontario.ca/mol/en/2016/09/crane-company-fined-120000-after-worker-permanently-injured.html?utm_source=ondemand&utm_medium=email&utm_campaign=p)

<https://news.ontario.ca/ene/en/2016/09/sarnia-refinery-and-chemical-plant-fined-650000-for-environmental-protection-act-violations.html>



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<https://news.ontario.ca/ene/en/2016/09/northern-region-companies-fined-150000-for-fly-rock-violations.html>

**Death.** The first news release details sentencing in a recent case in which a contractor was fined \$60,000 for the death of a worker. The company had failed to "provide information, instruction and supervision to a worker to protect the health or safety of the worker" contrary to s. 25(2)(a) of the OHSA. Under section 66 of the OHSA, the company faced a maximum potential fine of \$500,000.

**Permanent Injury.** The second news release details sentencing in a recent case in which a crane operator was fined \$120,000 for violating precisely the same section of the OHSA, in circumstances where a falling crane caused critical and permanent injuries to a worker.

**Odour.** By contrast, the third news release indicates that Imperial Oil Limited was fined \$650,000 for a discharge of pollution, contrary to s. 14 of the EPA, where the discharge caused only discomfort and inconvenience for 3 1/2 hours to some people, but no permanent injury. The company discharged "coker stabilizer thermocracked gas" when a frozen flare line ruptured - apparently accidentally. The gas contained hydrogen sulphide gas. While exposure to very high levels of hydrogen sulphide can cause death, no such exposure occurred here. The news article details that the "foul odour from the gas affected some people in central and north-end Sarnia. Some experienced burning eyes, sore throats, headaches, light-headedness, nausea and dizziness. Some residents were also forced to remain in their homes." In addition, a nearby hospital had to turn off its external air intakes for a brief period of time.

**Fly-rock.** In an equally curious case, which indicates how seriously the Ontario Ministry of Environment and Climate Change is now taking s. 14 EPA discharges of "fly-rock" since the decision in *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52, the fourth news release details a \$150,000 fine against two companies involved in blasting at an aggregates quarry. As a result of one blast, "Fly-rock landed on the residential driveway about 25 feet from where the homeowner and an employee from Bruman Construction were standing. There was no property damage and no one was injured." No indication is given of how far the driveway was located from the blast area, or how large (or small) the particles of fly-rock were.

### **Discussion.**

The confluence of the four news releases, and the enormous disparity in sentencing, leaves one scratching one's head. Death and permanent injury warrant only fines of \$60,000 and \$120,000, while odours and some stones on a driveway warrant fines of \$650,000 and \$150,000. How can this be?

Part of the answer may lie with the maximum fines available under each statute. As noted above, the maximum corporate fine under the OHSA is \$500,000. By contrast, the EPA, s. 187(4), provides for minimum fines of \$25,000, \$50,000 and \$100,000 on first, second and subsequent convictions, as well as much higher maximum fines of \$6M, \$10M and \$10M on first, second and subsequent convictions. The news releases do not tell us whether the offences in question were first, second or subsequent offences for each accused.

Equally, the news releases do not detail what aggravating or mitigating factors were considered by the court in each case. Were the OHSA offences closer to being "accidents" that were not easily foreseen by their respective defendants, while the EPA offences were egregious, reasonably foreseeable and easily preventable? It is possible, but the coincidence seems unlikely.

### **Parity in Sentencing.**

The juxtaposition of the four cases certainly causes one to ask whether prosecutors at the Ontario Ministry of Environment and Climate Change are comparing notes with their colleagues at the Ministry of Labour, before demanding such high fines. It also causes one to ask whether any of the legal counsel involved in these cases asked the court to consider established principles of consistency and parity in sentencing. As noted by Justice Brecknell in *R. v. First Pro Shopping Centres Inc.*<sup>1</sup>:

I am persuaded...that I must carefully consider the concept of parity in arriving at an appropriate penalty to be imposed. 134 From the case law I conclude:

- (a) the principle of parity applies to environmental offences (see *Sandover-Sly*);
- (b) that parity does not require identical sentences to be given to co accused and that different circumstances can justify different sentences (see *Wilson*); and
- (c) that if one offender was to be treated substantially different than another offender in the same set of circumstances both the offenders and the community would not perceive the result as fair and that could lead to a lack of respect for the administration of justice (see *Laronde*).

One may also ask whether these principles of consistency and parity in sentencing apply to not only fines under one statute (the EPA), but should also require a consistent approach across many regulatory statutes. According to Justice R. Libman, of the Ontario Court of Justice, they should as a matter of justice, but unfortunately often do not<sup>2</sup>.

This author believes that environmental lawyers on both sides of a case need to take off the blinders, and adopt a broader perspective of what statutes and fines are relevant in a given case, if some semblance of justice is to be achieved. The principles of consistency, parity and the fair administration of justice, require it.

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<sup>1</sup> (2006), 22 C.E.L.R. (3d) 80 (B.C. Prov. Ct.), at para. 134.

<sup>2</sup> The Honourable Mr. Justice Rick Libman, *Sentencing Purposes and Principles For Provincial Offences - The Modernization of the Provincial Offences Act* (Commissioned by the Law Commission of Ontario, June 2010).