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R. v. Metron Construction Corporation: Failure (of the Company) is an Option

By: Cynthia R.C. Sefton and Vedran Simkic

On September 4, 2013, the Ontario Court of Appeal sentenced Metron Construction Corporation ("**Metron**") to pay a fine in the amount of $750,000. At trial, Metron pled guilty to criminal negligence causing death and received a fine of $200,000. The Court of Appeal described this penalty as "manifestly unfit" as it found the incident to be completely preventable.

Background

The sentence was imposed as a result of Metron's role in the deaths of four workers and serious injuries to another on Christmas Eve, 2009. These workers had been restoring concrete balconies on a high-rise building. This involved the use of a swing stage. Five workers and the site supervisor were on the swing stage when it collapsed fourteen floors. The normal, usual and safe practice was for only two workers to be on a swing stage at any one time. There were only two lifelines. A worker wearing one of the lifelines survived uninjured. In addition, the swing stage bore no identifying seals and had not been erected in accordance with design drawings. The parties agreed that the deceased Metron site supervisor failed to take reasonable steps to prevent bodily harm and death. As he was a "senior officer" of Metron within the meaning of the *Criminal Code*, Metron pled guilty to criminal negligence causing death. The Crown appealed the trial sentence.

Decision and Reasons of the Court of Appeal

The Court of Appeal held that though the trial judge could consider the sentencing range for provincial health and safety offences, the imposition of a $200,000 fine (itself at the lower end for provincial fatality cases) reflected "a failure to appreciate the higher degree of moral blameworthiness and gravity" associated with Metron's criminal conviction. Section 718.1 of the *Criminal Code* states that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

The Court further held that the trial judge erred in holding that the corporation's ability to pay was determinative of penalty for a *Criminal Code* offence, especially in this case where the defendant's financial information was less than persuasive. Although s.718.21(d) requires the Court to consider the impact the sentence would have "…on the economic viability of the organization and the continued employment of its employees…", it is only one item in a list of factors.

The Court of Appeal also found that the fine of $200,000 was disproportionate to the gravity of the offence and to the responsibility of Metron, whose actions were a marked and substantial departure from the standard expected of a reasonably prudent person. The Court emphasized that corporate criminal liability for criminal negligence in the *Criminal Code* is not intended to duplicate, replace, or interfere with provincial health and safety legislation. Rather, it is intended to provide additional deterrence for morally blameworthy conduct that amounts to a wanton and reckless disregard for the lives or safety of others. There is a greater degree of moral blameworthiness and gravity associated with a criminal conviction than that associated with provincial legislation.

Practical Implications

An appeal court is generally reluctant to interfere with trial sentencing, but this decision sets out a clear analysis of the principles of sentencing corporate criminal defendants under former Bill C45. The dramatic increase in the penalty demonstrates the appropriately high value and importance placed on workplace health and safety in a criminal law context. When corporations are convicted of a criminal offence, the gravity of the offence will certainly be a key factor when assessing a sentence. A Court will understandably aim for the sentence to be proportionate to the reprehensible and repugnant nature of a corporation's actions.

Quite apart from the potentially terrible consequences of an accident, and the impact on a corporation's reputation and goodwill, an important message for businesses is that the ability (or inability) to pay a fine is not determinative of sentence under the *Criminal Code*. The Court of Appeal held that, "…the

economic viability of a corporation is properly a factor to be considered but it is not determinative" and further that "...while bankruptcy [of the defendant corporation] may be considered, it is not necessary preclusive," of a penalty amount.

General deterrence and denunciation of conduct are at the core of the sentencing principles under the *Criminal Code*. The Court of Appeal has now said that the prospect of the defendant corporation going bankrupt by the imposition of the penalty does not automatically disqualify the penalty. And, as the Court of Appeal pointed out, an order of discharge under the *Bankruptcy Act* does not release the bankrupt corporation from any Court imposed fine.

If you have questions regarding this issue or any suggestions for future article topics, please contact:

Cynthia R. C. Sefton
416.865.4730 • csefton@airdberlis.com

Cynthia represents a variety of industries in the investigation and defence of claims related to large disasters, including fires and explosions. Over the past 30 years she has assisted clients, including municipalities and public utilities, with risk assessment and management issues, and with issues related to product liability, construction projects, due diligence, environmental liability, occupational health and safety, employment law and contract issues

AIRD & BERLIS LLP
Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 F 416.863.1515
www.airdberlis.com

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