
COMPANY FINED \$750,000 FOR CRIMINAL NEGLIGENCE CAUSING DEATH

*By Barry W. Kwasniewski**

A. INTRODUCTION

On Christmas Eve in 2009, four workers of Metron Construction Corporation (“Metron”) died when their swing stage,¹ which carried more weight than it was designed to hold, fell from the fourteenth floor of a construction site. Criminal charges pursuant to the *Criminal Code* of Canada (the “Code”) were brought against Metron and its sole director and president, Joel Swartz. The criminal charges were later withdrawn against Mr. Swartz, who was required to pay a \$90,000 fine under the Ontario *Occupational Health and Safety Act*² (the “OHSA”). Metron entered a guilty plea to a count of criminal negligence causing death. The sentencing hearing took place before the Ontario Court of Justice on June 15th and 28th, 2012, and the judgment was released on July 13, 2012. Metron was sentenced to pay a \$200,000 fine. The Crown appealed this sentence to the Court of Appeal asserting that the fine was “manifestly unfit”. The Court of Appeal judgment was released on September 4, 2013, resulting in an increased fine of \$750,000. This *Charity Law Bulletin* discusses both the Ontario Court of Justice³ and Court of Appeal⁴ decisions. While the facts and the decision are specific to this case, the laws regarding worker safety apply to charities and not-for-profits, which are under legal obligations to protect the safety of their workers.

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¹ A swing stage is a platform that can be used to repair balconies. Metron’s swing stage was 40 feet long and had four 10-foot long modules held together by plates and bolts.

² *Occupational Health and Safety Act*, RSO 1990, c O.1.

³ The Court of Justice decision is *R v Metron Construction Corp.*, 2012 ONCJ 506, [2012] OJ No 3649.

⁴ The Court of Appeal decision is *R v Metron Construction Corp.*, 2013 ONCA 541, [2013] OJ No 3900.

B. THE FACTS AND GUILTY PLEA

In September 2009, Metron hired Fayzullo Fazilov as the site supervisor for a project to restore concrete balconies in Toronto. Metron leased two swing stages for the project, but neither of them had serial numbers or labels about maximum capacity, nor did they arrive with any manual instructions, product information and design drawings prepared by an engineer, as are required by s. 139(5) of the OHS Regulations for construction projects. The common industry practice is to have two workers on one swing stage, but on Christmas Eve, five workers and Mr. Fazilov boarded one swing stage with two harnesses. The swing stage was unable to support the weight and it fell. Four of the men, including Mr. Fazilov, were not supported by harnesses and they died. In addition, three of the four deceased, including the supervisor Mr. Fazilov, were under the influence of marijuana at the time of the accident. It was revealed that the cause of the accident was the swing stage's "defective design and inability to withstand the combined weight of the six men."⁵ However, the workers would have survived the accident had they been given the required harnesses. Metron admitted that Mr. Fazilov should not have allowed six workers on one swing stage without harnesses and while under the influence of marijuana. Metron pleaded guilty to one count of criminal negligence causing death under *Code* sections 22.1(b), 217.1, and 219.

Code section 22.1(b), enacted in 2004 after the Westray mining disaster in Nova Scotia, provides that for the purposes of proving an offence which requires "negligence", an organization is party to an offence if a senior officer departs from the expected standard of care. Metron conceded that Mr. Fazilov was "senior officer", as defined in s. 2 of the *Code*. Section 217.1, also enacted in 2004, provides that someone who directs the work of another person is under a legal duty to take "reasonable steps to prevent bodily harm to that person, or another person." The offence of criminal negligence is set out at s. 219(1) of the *Code*, as follows: "Every one is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons." Therefore, in light of these *Code* provisions, Metron was found criminally negligent for the deaths of the workers.

C. THE SENTENCE

In criminal sentencing, courts must apply the general principles of denunciation, deterrence, rehabilitation and proportionality. In addition, at the sentencing hearing the Ontario Court of Justice also applied recently

⁵ *R v Metron Construction Corp.*, 2013 ONCA 541, [2013] OJ No 3900 at para 14.

enacted *Code* section 718.21 which listed the factors that a court should use when imposing sentences on an organization. Section 718.21 provides:

A court that imposes a sentence on an organization shall also take into consideration the following factors:

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to public authorities of the investigation and prosecution of the offence;
- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- (g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

At the sentencing hearing, the court noted that there was only one other case where a corporation was sentenced for criminal negligence causing death. That was a decision from the Province of Quebec where a corporation was fined \$100,000.⁶ Therefore, the court assessed Metron's case by primarily relying upon *OHS*A jurisprudence. While recognizing that there was no maximum *Code* fine, examining the factors from section 718.21, the court arrived at Metron's \$200,000 sentence by taking into account the range of fines from several *OHS*A cases.

⁶ *R c Transpavé* [2008] JQ No 1857.

On appeal, the Crown submitted that the fine was “manifestly unfit” arguing that the sentencing judge should not have used the ranges from *OHS*A cases since criminal offences, especially criminal negligence, involve a higher degree of culpability, and thus deserve a higher fine.

The Court of Appeal agreed that there was limited jurisprudence concerning a workplace death conviction under the new *Code* amendments. It then considered three issues in the appeal:

- 1) Whether the sentencing judge erred by relying upon the range of fines found in the *OHS*A jurisprudence to determine Metron’s sentence for criminal negligence causing death.
- 2) Whether the sentencing judge incorrectly applied section 734(2)⁷ and 718.21(d) of the *Code*, in addition to limiting the fine to an amount that Metron can afford.
- 3) Whether the \$200,000 fine was “manifestly unfit” for Metron’s case.

D. CONSIDERATION OF THE ISSUES

1. Using the sentencing range in *OHS*A jurisprudence

The Court of Appeal distinguished between regulatory offences and criminal offences, concluding that the regulatory and criminal offence concepts of fault and blameworthiness were quite different. The court noted that the *OHS*A was regulatory legislation, which imposed maximum fines of \$500,000 on organizations. On the other hand, Metron was being sentenced for criminal negligence causing death, which was a serious criminal offence without a maximum fine. Furthermore, the court affirmed that the *Code*’s corporate criminal liability for criminal negligence should not replace provincial legislation, like the *OHS*A, but instead should provide “additional deterrence for morally blameworthy conduct.”⁸ Section 718.1 of the *Code* expressed the concept that a sentence should reflect the gravity of an offence, and the *OHS*A sentences did not reflect the gravity of criminal negligence causing death. The court concluded that although the sentencing judge was allowed to consider the *OHS*A jurisprudence, the \$200,000 fine did not demonstrate the “moral blameworthiness and gravity” of criminal negligence causing death.

⁷ Section 734(2) states: “Except when the punishment for an offence includes a minimum fine or a fine is imposed in lieu of a forfeiture order, a court may fine an offender under this section only if the court is satisfied that the offender is able to pay the fine or discharge it under section 736”.

⁸ *Supra* note 5 at para 81.

2. Limiting the fine to an amount Metron could afford

The Court of Appeal analyzed the *Code* section 734(1), which authorized the court to fine a convicted person, and section 734(2), which permitted courts to fine a person only if that person was able to pay the fine. However, both sections did not apply to organizations, such as Metron. Therefore, the court ruled that under section 734 it was not necessary to consider an organization's ability to pay a fine. The court then examined the *Code* section 718.21 to determine whether this section considered an organization's ability to pay. It determined that a court must consider, as only one factor, the sentence's impact on the "economic viability of the organization"⁹ and on the organization's employees. However, the Court of Appeal ruled that the sentencing judge erred when he considered himself as precluded from imposing a fine that could result in the corporation's bankruptcy.

3. \$200,000 fine being manifestly unfit

The Court of Appeal agreed with the Crown that the \$200,000 fine was unfit, since the sentence should be proportionate to the seriousness of the offence and the organization's level of responsibility. The court required the sentence to demonstrate the "importance of worker safety,"¹⁰ not the "cost of doing business."¹¹ The court also considered that Metron's offence was more serious than *OHS*A offences, and a corporation should be responsible for its representatives' and supervisors' conduct. The court concluded that \$750,000 fine was a more suitable sentence for Metron, given the seriousness of the offence and the factors in section 718 of the *Code*. Therefore, Metron's sentence increased from \$200,000 to \$750,000 by the Court of Appeal.

E. CONCLUSION

R v Metron Construction Corp. was the first Ontario case that addressed a corporation's sentence for criminal negligence causing death. This case demonstrates the court's willingness to impose high fines on organizations in situations of serious misconduct leading to worker injury and death. While Metron is a for profit business, the laws apply equally to charities or not-for-profit organizations. Charities and not-for-profit organizations should have proper safety measures for their workers or volunteers, must abide by their province's occupational health and safety legislation, and should monitor the conduct of any representatives

⁹ *Ibid* at para 102.

¹⁰ *Ibid* at para 115.

¹¹ *Ibid*.

or supervisors who direct the work of others. These recommendations are particularly important for those organizations involved in programs or activities which entail a significant risk of injury. As well, charities and not-for-profits that carry out activities and programs in foreign countries that employ local employees may also be subject to criminal and occupational health and safety legislation applicable in those jurisdictions.



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