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EXPECT THE BEST

The Continuing Saga of Metron Construction

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In our February 2012 Employment Update we highlighted the case of *R v. Metron Construction Corporation* as one to watch for the severity of the penalty imposed under the Bill C-45 amendments to the *Criminal Code*. There have now been some recent developments in this case.

In June 2012, Metron plead guilty to criminal negligence causing death under the *Criminal Code*. The Reasons for Judgment with respect to sentencing were released on July 13, 2012. In total, Metron, and its President, Joel Swartz, were fined over $300,000, when the criminal sanctions are combined with the regulatory penalty already imposed on Mr. Swartz.

The Reasons for Judgment and resulting fines have been the basis for much debate. Some argue that the penalty was harsh, while others suggest it was far too lenient and that jail time or a significantly higher fine should have been imposed. This debate is destined to continue for some time because on August 13, 2012 the Crown filed a Notice of Application for Leave to Appeal and Notice of Appeal. In this article, we consider the impact of the Reasons for Judgment and the potential consequences of the appeal.

Background

On Christmas Eve 2009, four workers fell 14 stories to their deaths, when their swing stage collapsed. None of the workers were secured with the proper fall protection. One of the deceased was Metron's Site Supervisor on the project. A fifth worker also fell but survived, suffering serious injuries. A sixth worker was properly attached to a safety line which prevented him from falling.

Following an investigation, charges were laid against Metron and Mr. Swartz. Metron entered a guilty plea to a count of criminal negligence causing death and the parties agreed to specific facts to support such a finding. Specifically, the parties agreed that the Site Supervisor met the definition of a senior officer of Metron and that through his acts and omissions Metron had failed to take reasonable steps to prevent bodily harm or death by:

a) directing or permitting six workers on the swing stage when it was known or should have been known it was unsafe to do so;

b) directing or permitting six workers to be aboard the swing stage knowing that only two lifelines were available; and

c) permitting persons under the influence of drugs to work on the project.

Metron pleaded guilty to criminal negligence pursuant to sections 22.1(b), 217.1 and 219 of the *Criminal Code*.

Lower Court Decision

In considering the appropriate sentence for Metron, Justice R. Bigelow noted that there was little case law upon which to rely as a guide. As previously noted, prosecutions under the Bill C-45 amendments made in 2004 have been extremely rare. Justice Bigelow therefore looked mainly to the general principles of sentencing, both under the *Criminal Code* and under Ontario's *Occupational Health and Safety Act*, to determine the appropriate penalty.

In terms of mitigating factors, Justice Bigelow specifically noted:

a) Metron had no prior record for violations of either criminal or regulatory legislation;

b) Metron was likely unaware that its security system had been neutralized at the time of the accident;

c) After the accident Metron expended significant funds on occupational health and safety improvements;

d) Metron was a family run corporation employing up to 100 individuals and was already in a precarious financial position;

e) There was no advantage to Metron as a result of the offence;

f) The Crown did not establish any attempt by Metron to hide or convert assets in order to reduce any fine that might be imposed or to avoid payment of restitution;

g) Metron had entered a guilty plea thereby substantially reducing the costs of a public prosecution;

h) Metron's President had already entered a guilty plea to violations of the Regulations of the *Occupational Health and Safety Act*, and a substantial fine totalling over $100,000 had been imposed; and

i) Neither Metron nor its President had previously been convicted of similar offences or sanctioned under the *Occupational Health and Safety Act*.

Justice Bigelow imposed a fine of $200,000 plus a victim surcharge of $30,000. Justice Bigelow determined that this amount, combined with the fine imposed on Mr. Swartz, was three times the net earnings of the business in its last profitable year and would send a clear message about the importance of ensuring worker safety.

Appeal

In its Notice of Appeal, the Crown states that the sentence imposed by Justice Bigelow is manifestly unfit. The Crown states that Justice Bigelow erred in the assessment of the appropriate sentencing range and that the penalty imposed did not sufficiently reflect the high degree of culpability for a criminal conviction.

Lessons for Corporations and Officers

We are a long way from knowing whether the Court of Appeal will agree with the Crown's appeal arguments. In the interim, the debate regarding Metron's sentence and the efficacy of the Bill C-45 amendments more generally will continue. As this debate goes on, and while we await an ultimate determination on appeal, there are some points to take from the Metron case so far.

Most importantly, corporations should be aware that they can be held criminally responsible for the actions of mid-level managers such Metron's Site Supervisor. In fact, the Crown need not prove that the "senior officer" referred to in the applicable *Criminal Code* provisions is a directing mind of the corporation. Remember, the conduct that formed the basis of Metron's criminal liability was solely that of its Site Supervisor. Corporations must therefore be cognizant that the actions of just one site supervisor can negate all the positive steps taken by a corporation with respect to health and safety, and can result in criminal liability.

It follows that the importance of selecting qualified managers and supervisors cannot be overstated. Proper training of these designated individuals is essential to protecting the health and safety of workers, and to protecting organizations from liability.

The fines imposed on Mr. Swartz were the largest ever against an individual convicted under Ontario's *Occupational Health and Safety Act*. Similarly, the fine imposed on Metron was the largest ever for a criminal

negligence conviction based on health and safety violations. Although some workplace safety advocates remain dissatisfied with these penalties, it is possible that we are starting to see a shift towards heftier penalties for health and safety violators. Certainly, there seems to be a movement on the part of the Crown towards higher penalties, considering the $1,000,000 fine that was sought for the *Criminal Code* violation, and the appeal that has since been filed.

Corporations, and their directors, must be vigilant with respect to their health and safety obligations. Such vigilance is required to protect those whom they employ, which is the most important consideration by far, but also to avoid facing penalties that may now have a very significant impact on their bottom line. ■