COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Metron Construction Corporation, 2013 ONCA 541
DATE: 20130904
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Rosenberg, Watt and Pepall JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Metron Construction Corporation

Respondent

Joan Barrett and Avene Derwa, for the appellant

Jay Naster, for the respondent

Heard: April 23, 2013

On appeal from the sentence imposed on July 13, 2012 of Justice Robert G. Bigelow of the Ontario Court of Justice, with reasons reported at 2012 ONCJ 506, [2012] O.J. No. 3649.

Pepall J.A.:

A. INTRODUCTION

[1] On Christmas Eve, 2009, three workers and a site supervisor employed by the respondent, Metron Construction Corporation, plunged to their deaths. Together with two others, they had boarded a swing stage that collapsed as it descended from the exterior of the fourteenth floor of a high-rise construction

site. The respondent pleaded guilty to one count of criminal negligence causing death and was sentenced to a fine of $200,000. The Crown seeks leave to appeal this sentence on the grounds that it is manifestly unfit.

[2] This appeal addresses amendments made to the *Criminal Code* in 2004 and, in particular, the factors that must be considered when sentencing an organization, which in this case is a corporation.

B. FACTS

[3] The respondent is an Ontario company which carries on business in the construction industry. At the time of the accident, in addition to the site at which the incident underlying this appeal took place, it was working on three small to medium size construction projects in southern Ontario. Joel Swartz is the President and sole director of the respondent.

[4] In September of 2009, the respondent entered into an agreement to restore concrete balconies on two high-rise buildings located on Kipling Avenue in the City of Toronto. The respondent retained a project manager who, on behalf of the respondent, hired Fayzullo Fazilov as site supervisor.

[5] The project was to be completed by November 30, 2009. Delays arose prior to its commencement and, in December, the appellant was offered a $50,000 bonus if the project were to be completed by the end of December, 2009.

[6] Prior to the commencement of the project and during the course of the work on the project, representatives of the respondent had taken various safety precautions. These included: arranging for the project manager and the site supervisor to take swing stage instructors' and operations courses; weekly job site inspections by the project manager; and periodic meetings with the workers to review safety requirements including the use of swing stages. The respondent also instructed that a copy of the safety manual be given to each worker.

[7] The respondent had to acquire swing stages to effect the repairs to the balconies. At the commencement of the project, the respondent leased a number of swing stages from a Toronto area supplier, however, by late October, 2009, more were necessary. As the Toronto-area supplier was out of stock, the respondent leased two swing stages from an Ottawa-based supplier.

[8] These two swing stages were delivered to the site on or about October 27, 2009. Each swing stage was 40 feet long and consisted of four ten-foot long modules held together by plates and bolts. Although they appeared to be new, neither had any markings, serial numbers, identifiers, or labels describing maximum capacity, as required by both occupational health and safety legislation and industry practice. The two swing stages arrived without any manual, instructions, design drawings, or other product information. There was no report in writing by a professional engineer stating that the swing stage had been erected in accordance with design drawings, as required by O. Reg. 213/91, s.

139(5) enacted under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O. 1 ("*OHSA*").

[9] The two swing stages were assembled and installed by the respondent's workers under the supervision of Fazilov and the project manager whom the respondent believed had obtained training in respect of the safe set up of swing stages.

[10] The normal and usual practice on the project site was for only two workers to be on a swing stage at any one time.

[11] At 4:30 p.m. on December 24, 2009, close to the end of the working day, five workers plus Fazilov boarded one of the swing stages to travel from the 14th floor of one of the high-rise buildings to the ground. There were only two lifelines. These are harnesses with a lanyard attached that serve as fall protection equipment. With the combined weight of the workers and the equipment, the swing stage collapsed. Three workers and Fazilov, none of whom was secured by a lifeline, fell to their deaths. They ranged in age from 24 to 40. One worker, who was attached to one of the two lifelines, survived uninjured. Another worker who was not secured properly by a lifeline, was seriously injured.

[12] A post-mortem examination determined that the cause of death was multiple injuries suffered from a fall of great height.

[13] Toxicological analysis determined that three of the four deceased, including the site supervisor Fazilov, had marijuana in their systems at a level consistent with having recently ingested the drug.

[14] Subsequent forensic examination of the swing stage revealed that a significant cause of the collapse was its defective design and inability to withstand the combined weight of the six men and their equipment. Moreover, had six lifelines been available, and had each of the workers been attached to a lifeline as required by both s. 141 of O. Reg. 213/91 and industry standards, the men would have survived. To the respondent's knowledge, at any given time all workers on a swing stage were hooked up to lifelines. The respondent did not know why, on December 24th, 2009, there was a departure from this practice.

[15] It was agreed by the parties that Fazilov had failed to take reasonable steps to prevent bodily harm and death by: (1) directing and or permitting six workers to work on the swing stage when he knew or should have known that it was unsafe to do so; (2) directing and/or permitting six workers to board the swing stage knowing that only two lifelines were available; and (3) permitting persons under the influence of a drug to work on the project.

[16] As a result of the acts and omissions of Fazilov, a "senior officer" within the meaning of s. 2 of the *Criminal Code*, the respondent pled guilty to criminal negligence causing death pursuant to s. 22.1(b), s. 217.1, and s. 219 of the

Code. I will address these provisions in greater detail subsequently in these reasons.

The Workers

[17] All of the workers were originally from central east Europe.

[18] Aleksey Blumberg had been in Canada since 2005. When he died, he was 33 years old, had just been married for three months and was planning to start a family. His wife filed a victim impact statement.

[19] Aleksandrs Bondarevs had been a permanent resident in Canada since 2002. He lived with his parents, had a girlfriend and planned to return to school. He was 24 years old when he died.

[20] Vladimir Korostin had been in Canada since 2007. He had two daughters who were age 6 and 14 at the time of the accident. He was 40 when he died. He and his former wife of 15 years had been divorced but were in the process of reconciling. They were to spend that Christmas together as a family. His former wife filed a victim impact statement.

[21] Fayzullo Fazilov had been in Canada since 2007. His family, consisting of his wife, his 2 and 7 year old children, elderly parents and four sisters, resided in Uzbekistan. He was 31 years old when he died.

[22] Dilshod Marupov is from Uzbekistan. At the time of the accident, he was on an expired student visa and did not have a work permit. He was a friend and

roommate of Fazilov who had invited him to work on the project. He had only been at the site for two days. At the time of the sentencing hearing, he was continuing to recover from his injuries.

[23] The workers and their families were of limited financial means. None had life insurance. The respondent did not pay any restitution but the workers' families did receive settlements from the Workplace Safety and Insurance Board ("WSIB").

***OHSA* Plea**

[24] Swartz pled guilty to four counts under the *OHSA*:

> 1. Failing to take all reasonable care to ensure, as a director of Metron, that the corporation complied with s. 26.2(1) of O. Reg. 213/91, as amended, contrary to s. 32(a) of the *OHSA*, as amended, by failing to ensure that all workers who could not read English received adequate written instructions on the use of fall protection systems in their native languages.
>
> 2. Failing to take all reasonable care to ensure, as a director of Metron, that the corporation complied with s. 26.2(3) of O. Reg. 213/91, as amended, contrary to s. 32(a) of the *OHSA*, as amended, by failing to ensure that the training and instruction record to be maintained by the fall protection system instructor included the worker's name and the dates on which training and instruction took place.
>
> 3. Failing to take all reasonable care to ensure, as a director of Metron, that the corporation complied with s. 93 of O. Reg. 213/91, as amended, contrary to s. 32(a) of the *OHSA*, as amended, by

> failing to ensure that the swing stage that collapsed was not used while it was defective or hazardous.
>
> 4. Failing to take all reasonable care to ensure, as a director of Metron, that the corporation complied with s. 134 of O. Reg. 213/91, as amended, contrary to s. 32(a) of the *OHSA*, as amended by failing to ensure that the scaffold platform used by the workers on December 24, 2009 was not loaded in excess of the load that the platform was designed and constructed to bear.

[25] A joint submission was accepted by the sentencing judge. Swartz was sentenced to pay a fine of $22,500 per count for a total of $90,000. The maximum penalty for individuals, including a director, under *OHSA* is $25,000: see *OHSA*, s. 66(1). Swartz was also required to pay a statutorily required 25% Victim Fine Surcharge: O. Reg. 161/00, s. 1. All criminal charges against Swartz were withdrawn by the Crown.

C. APPLICABLE *CODE* PROVISIONS

[26] As mentioned, the respondent pled guilty to criminal negligence pursuant to s. 22.1(b), s. 217.1, and s. 219 of the *Code*. Section 219 was the existing criminal negligence provision and the other two sections were enacted by Parliament in 2004. These three sections provide as follows.

> 22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if
>
> ...

> (*b*) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs – or the senior officers, collectively, depart – markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.
>
> …
>
> 217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> …
>
> 219. (1) Every one is criminally negligent who
>
> (*a*) in doing anything, or
>
> (*b*) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> (2) For the purposes of this section, "duty" means a duty imposed by law.

[27] "Organization" is defined in s. 2 of the Code as including a company and a body corporate. A "senior officer" is defined as:

> a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the

> organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer;

[28] A "representative", in respect of an organization, means:

> a director, partner, employee, member, agent or contractor of the organization;

[29] Fazilov fell within the definitions of representative and senior officer.

[30] In addition to the general principles of sentencing found in sections 718 to 718.2, the recently enacted s. 718.21 is applicable. It states:

> 718.21 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.

[31] It was within this statutory framework that the sentencing hearing proceeded.

D. SENTENCING HEARING

(1) Crown Submissions

[32] Before the sentencing judge, the Crown sought a fine of $1 million.

[33] The Crown identified the mitigating factors as consisting of the respondent's guilty plea, the absence of any criminal record or previous *OHSA* convictions and a history of Ministry of Labour compliance.

[34] As an aggravating factor, the Crown submitted that the accident was totally preventable. The swing stage arrived without stickers indicating a load capacity and was assembled without instructions. Furthermore, had the supervisors

ensured that the workers wore the required fall protection equipment, they would have survived notwithstanding the defects in the swing stage.

[35] In the face of limited jurisprudence resulting from the amendments, the Crown provided the sentencing judge with sentencing case law under the *OHSA* and asked the court to consider the *OHSA* fines as a starting point. Unlike the *Code*, the *OHSA* has a maximum penalty of $500,000 for corporations.

[36] The Crown submitted that the respondent was now a shell corporation and dormant but contended that it had reinvented itself, operated the same company under a different name, and was financially solvent. The Crown invited the court to examine the website materials of a company called Formstructures, of which Swartz was the owner, and which identified projects and advertisements identical to those found on the respondent's website. Crown counsel submitted that Formstructures was a reincarnation of the respondent and was, in essence, benefitting from the respondent's goodwill on high end and lucrative projects.

[37] Crown counsel also invited the court to take the company's ability to pay into consideration. In her submission, other than the loss of income from the completion of the high-rise project, there was no permanent loss of income. Rather, the public was the one who paid through the provision of emergency response personnel, the health care treatment provided to Marupov and WSIB

payments. Crown counsel noted that there may be future funds payable to the respondent arising from insurance and other available remedies.

[38] In requesting a substantial fine, Crown counsel asked the court to consider the overriding principle of general deterrence.

(2) Defence Submissions

[39] Before the sentencing judge, the defence submitted that the respondent had demonstrated remorse and by pleading guilty, had spared everyone the emotional toll and financial cost of a trial. The guilty plea was a significant mitigating factor.

[40] The defence acknowledged that the tragic consequences were a factor to be considered and that Fazilov's lapse in judgment in permitting six to board the swing stage with only two lifelines was the respondent's responsibility. That said, regard must be had to the particular circumstances of the offence and the offender, the absence of any systemic course of conduct by the respondent, and the absence of any history of offences or violations.

[41] The defence accepted that the single most important sentencing principle governing the sentencing judge's decision was general deterrence. There was no evidence of any of the factors in s. 718.21(a) or (b) of the *Code*. The defence also referenced the impact on the offender, the proposed regulatory penalty to be imposed on Swartz, restitution, and the respondent's stated intention not to use

swing stages in the future. While the court may properly consider whether an 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 pursuant to s. 718.2(1)(c), the defence argued that there was no such evidence. The website materials fell short of proving beyond a reasonable doubt that there was any effort to conceal or convert assets. Moreover, there was no basis to pierce the corporate veil. There was no evidence that assets or projects belonging to, or undertaken by, the respondent were transferred to Formstructures.

[42] The defence filed correspondence dated May 31, 2012 from Rich Rostein LLP Chartered Accountants, purporting to calculate the respondent's economic loss and including unaudited financial statements for the respondent for the years ending September 30, 2008 through to September 30, 2011. A different accounting firm prepared the financial statements for the respondent in each of those years. The unaudited financial statements for the period May 2, 2008 to September 30, 2008 were prepared by Goldfarb Schulman Patel & Co. LLP ("GSP"). These financial statements were qualified with GSP writing that they expressed no assurance on the financial statements and readers were cautioned that the statements may not be appropriate for their purposes. Similarly, the following year, Price Waterhouse Coopers LLP made the same qualifications. It would also appear that the full financial statement was not filed by the respondent at the sentencing hearing. Aneal R. Thansingh prepared the

unaudited financial statements as at September 30, 2010. He expressed no audit opinion. The unaudited statements suggest that as at September 30, 2011, the respondent only had accounts and loans receivable and by definition was insolvent. That said, the respondent showed sales of $3,249,961 and management fees of $330,000 in the year ending September 30, 2010. The note to this unaudited statement states that the respondent was incorporated May 2, 2008. In 2011, sales were stated to be down to $11,703.

[43] The defence advised the sentencing judge that Swartz was unable to get bonding. That said, counsel also advised the court that there were sufficient funds available through insurance to handle all legitimate claims.

[44] After reviewing the limited jurisprudence under the *Code* and the *OHSA* cases, the defence submitted that the $1 million fine sought by the Crown was unprecedented, harsh and excessive.

[45] In the submission of the defence, $100,000 would be an appropriate fine.

E. SENTENCING DECISION

[46] The sentencing judge commenced his analysis by observing that there existed only one decision, a decision of the Court of Quebec, in which a corporation had been sentenced for criminal negligence causing death. He then proceeded to analyse the significant body of case law on sentencing for breaches of occupational health and safety legislation that had resulted in

serious injury or death to workers. He concluded that because these cases emphasize deterrence and denunciation, the same principles reflected in the sentencing provisions in the *Code*, the *OHSA* jurisprudence could be instructive so long as one took into account the absence of a maximum fine in the *Code*, the need to consider additional factors including those set out in s.718.21, and that the prosecutor had to establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender. Those cases revealed a range of fines between $115,000 and $425,000 for cases involving fatalities.

[47] The sentencing judge noted that the general principles of sentencing in ss. 718 to 718.2 of the *Code*, which include denunciation, deterrence, rehabilitation and proportionality, apply to organizations, but that the 2004 amendments added additional factors to be considered in sentencing an organization, as set out in the new s. 718.21. He then analyzed these new factors as they applied to this case.

[48] He found that there was no advantage realized by the respondent as a result of the offence. Furthermore, there was no evidence of planning. The Crown also fell well short of establishing beyond a reasonable doubt that the respondent had attempted to hide or convert assets so as to avoid a fine. The sentencing judge was of the view that he was required to take the respondent's ability to pay into account. He concluded that the respondent's financial situation

was precarious but nonetheless, it intended to continue the business and felt it could pay a fine of $100,000 in the reasonably near future. By entering a guilty plea, the respondent had reduced the cost to the public of a prosecution. Neither the respondent nor Swartz had been convicted of similar offences or sanctioned in the past. Swartz had pled guilty to violations of the *OHSA* arising from this accident and had already attracted fines amounting to $90,000.

[49] The sentencing judge concluded that the penalty recommended by the Crown would likely drive the respondent into bankruptcy. He was satisfied that a fine of $200,000 plus a Victim Fine Surcharge of 15% or $30,000 was appropriate. He observed that this was three times the net earnings of the business in its last profitable year and should send a "clear message" of the importance of worker safety to all businesses.

F. GROUNDS OF APPEAL

[50] The Crown submits that the sentencing judge erred in using the sentencing range developed under provincial health and safety legislation to determine the sentence without regard to the higher level of culpability inherent in criminal offences and the particular gravity of the offence of criminal negligence.

[51] The Crown also argues that the sentencing judge erred by determining the amount of the fine based on the respondent's ability to pay. As such, he misapplied s. 734(2) and s. 718.21(d) of the *Code*.

[52] The Crown takes the position that a fine of $200,000 is manifestly unfit in the circumstances of this case.

G. ANALYSIS

[53] I will commence my analysis with a brief examination of the history of the amendments to the *Code* and the limited case law, followed by a discussion of each of the issues raised by the appellant. This last discussion will be prefaced by a brief outline on the applicable standard of review.

History

[54] In 1992, 26 miners were killed at the Westray coal mine in Nova Scotia after methane gas ignited. A public inquiry into the explosion was established with Justice K. Peter Richard serving as its Commissioner. In his report entitled "The Westray Story: a Predictable Path to Disaster", (November 1997 Province of Nova Scotia), Commissioner Richard concluded, at pp. vii-ix, that the loss of the miners was not the result of an isolated error but showed instead an operating philosophy that consistently prioritized economic expediency over concerns for workers' safety. At p. ix, he described the Westray explosion as "a story of incompetence, of mismanagement, of bureaucratic bungling, of deceit, of ruthlessness, of cover-up, of apathy, of expediency, and of cynical indifference." He placed responsibility, in part, on the owner/operator of the mine, Curragh Resources Inc.

[55] Ultimately a prosecution of two managers of the mine was abandoned.

[56] Bill C-45, *An Act to amend the Criminal Code (Criminal Liability of Organizations)*, 2nd Sess., 37th Parl., 2003 (assented to 7 November 2003), S.C. 2003, c.21, flowed from the incidents described in the Report.

[57] Prior to the enactment of Bill C-45, corporate criminal liability was established through the actions or omissions and the state of mind of a directing mind of the corporation. A directing mind could cause the corporation to be criminally liable for his or her acts or omissions. At common law, a directing mind was defined as a person with:

> authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision making power in a relevant sphere of corporate activity: *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497 at 521.

[58] This was known as the identification doctrine: *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662.

[59] Some authors suggested that this model failed to respond to the reality of the modern corporation where much of the policy-making is delegated throughout the corporation and responsibility is diffuse: see for example, James Gobert, "Corporate Criminality: Four Models of Fault" (1994), 14 Legal Studies 393 at pp. 395-6.

[60] The amendments embodied in Bill C-45 were intended to ameliorate this difficulty. The definition of "senior officer" in s. 2 of the *Code* served to broaden the scope of those whose conduct could establish the criminal liability of the organization.

[61] In his article entitled "Extending Corporate Criminal Liability?: Some Thoughts on Bill C-45", (2004) 30 Man. L. J. 253, at pp. 253-4, Professor Darcy L. MacPherson summarized the changes effected by Bill C-45:

> (a) the replacement of the identification doctrine with a broader regime of criminal liability;
>
> (b) the expansion of the principles underlying the attribution of criminal responsibility for fault-based crimes:
>
> > (i) for crimes requiring *mens rea*, when a senior officer knows an offence is being or is about to be committed by corporate agents and fails to exercise due diligence to prevent it; and
> >
> > (ii) for crimes of negligence, the legislation allows for an aggregation of fault of senior officers;
>
> (c) the loosening of the availability of potential defences; and
>
> (d) the inclusion of both increased fines and sentencing guidelines particular to organizations.

[62] It is the last of these changes that is the focus of this appeal and more particularly, the application of the sentencing factors found in s. 718.21.

[63] In addition to the changes reflected in s. 718.21, ss. 732.1(3.1) and (3.2) of the *Code* now provide for optional and far-reaching probation conditions that can

be imposed on organizations. The sentencing judge did not consider the probation provisions, and the parties made no submissions in respect of them. Accordingly, I do not propose to say anything further about them.

Transpavé Decision

[64] Even though the Bill C-45 amendments have been in place for nearly a decade, the jurisprudence involving a workplace death conviction under the new *Code* provisions is limited.

[65] *R. c. Transpavé Inc*., 2008 J.Q. No. 1857 (Cour du Québec), involved a corporate manufacturer of concrete slabs who pled guilty to criminal negligence causing death contrary to s. 219 of the *Code*. A young employee had been killed as a result of malfunctioning equipment and inadequate training. The company did not know the equipment could malfunction as it did.

[66] The judge accepted a joint submission for a fine of $100,000. He determined that the offender was not an insensitive corporation but a family-owned business of 100 employees. It had no previous occupational health and safety convictions, had demonstrated significant remorse and attention to the needs of the other employees and the victim's family after the incident, and had spent more than $750,000 on improving safety measures.

[67] The improvements guaranteed that such an accident would not reoccur, and the $100,000 fine would allow for the survival of the corporation and the continuation of 100 jobs.

Issues

[68] There are three issues to be considered on this appeal.

> (i) Did the sentencing judge err in using the sentencing range found in the *OHSA* jurisprudence to determine the appropriate range of sentence for criminal negligence causing death?
>
> (ii) Did the sentencing judge err in his application of s. 734(2) and s. 718.21(d) of the *Code*, and in limiting the respondent's fine to an amount it could afford to pay?
>
> (iii) Was the sentence manifestly unfit?

Standard of Review

[69] At the outset, it must be emphasized that Parliament has given judges a discretion to determine a fit and proper sentence. The standard of review is one of deference. As stated so eloquently by Chief Justice Lamer in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 91:

> "[i] in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both *Shropshire* and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing

> submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

[70] Absent an error in principle, failure to consider a relevant factor, or an overemphasis of appropriate factors, this court should interfere only if the sentence is demonstrably unfit: *M. (C.A.)*, at para. 90.

(1) Use of *OHSA* Sentencing Range

(a) Positions of the Parties

[71] The Crown submits that the sentencing judge erred in relying on the sentencing range developed under the *OHSA* regulatory regime to determine the sentence in this case for criminal negligence causing death. The latter attracts a higher degree of moral blameworthiness. The relative seriousness of criminal negligence causing death and *OHSA* offences is evident from the available maximum punishment and Parliament's intention to provide an additional level of

deterrence with the enactment of Bill C-45. The Crown's complaint is not that the sentencing judge considered the *OHSA* jurisprudence; rather that he erred by relying on that jurisprudence to inform his decision on an appropriate penalty. In relying on the *OHSA* sentencing range, the sentencing judge failed to properly consider the principle of proportionality found in s. 718.1 of the *Code*, which calls for a sentence to be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[72] Furthermore, the respondent should not be able to distance itself from culpability due to Fazilov's position as site supervisor.

[73] The respondent answers by submitting that the Crown invited the sentencing judge to consider *OHSA* jurisprudence and it is inappropriate and unfair to now challenge the sentencing judge's reliance on these decisions. The respondent submits that the sentencing judge did have regard to the higher culpability attaching to criminal offences, recognizing that the *Code* does not provide for a maximum fine, and considered the principles of sentencing found in s. 718 to 718.2 of the *Code*.

[74] The respondent argues that as a result of Bill C-45, a much broader range of conduct is now subject to corporate criminal liability and there is a need for broad discretion. The respondent's liability was predicated on the site

supervisor's acts and conduct as described in the agreed statement of facts and that the sentencing judge found no evidence of planning or complexity.

(b) Discussion

[75] As noted by Cory J. in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at para. 219, there is a distinction between regulatory and criminal offences.

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

> It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

[76] As is clear from the foregoing, the concepts of fault and ensuing blameworthiness are distinguishing features between offences under the *Code* and those under regulatory regimes.

[77] The regulatory legislation relevant to this appeal is the *OHSA*. This statute is designed to establish and enforce standards of health and safety in the workplace.

[78] As stated by this court in *R. v. Cotton Felts Ltd.* (1983), 2 C.C.C. (3d) 287, at p. 294, to a large extent, the enforcement of the *OHSA* is achieved by fines imposed on offending corporations:

> The amount of the fine will be determined by a complex of considerations, including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence.

The maximum fine for an organization under the *OHSA* is $500,000 and for an individual, $25,000.

[79] The *Criminal Code* offence engaged in this appeal is criminal negligence causing death. It is one of the most serious offences in the *Code*. As stated by this court in *R. v. L. (J.)* (2006), 204 C.C.C. (3d) 324 at para. 14, the offence of criminal negligence causing death is “at the high end of a continuum of moral blameworthiness”. A conviction for such an offence requires a marked and

substantial departure from the conduct of a reasonably prudent person in the circumstances: *R. v. J. F.*, 2008 SCC 60, 3 S.C.R. 215, at para. 16 and *R. v. R. (M.)*, 2011 ONCA 190 (2012), 275 C.C.C. (3d) 45, at para. 28.

[80] The seriousness of the offence of criminal negligence causing death is reflected in the maximum punishment for such an offence – life imprisonment for an individual: s. 220(b). If an offender is an organization, the quantum of the fine is unlimited: s. 735(1)(a). This contrasts significantly with the *OHSA* provisions.

[81] The presence of 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: Minister of Justice, "Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights", Sessional Paper No. 8512-372-178 (2002).

[82] In the United Kingdom, the *Corporate Manslaughter and Corporate Homicide Act, 2007* (UK), c. 19 broadened the scope for criminal liability for certain organizations. The sentencing guidelines promulgated by the Sentencing Guidelines Council recognized the greater moral blameworthiness that attaches to a conviction for corporate manslaughter, as the offence is named in the United Kingdom, and that fines must not only deter but must also be punitive:

Sentencing Guidelines Council, *Corporate Manslaughter & Health and Safety Offences Causing Death, Definitive Guideline* (2010) ("UK Sentencing Guidelines"). Indeed, at s. 24, they provide:

> The offence of corporate manslaughter, because it requires a gross breach at the senior level, will ordinarily involve a level of seriousness significantly greater than a health and safety offence. The appropriate fine will seldom be less than £500,000 and may be measured in millions of pounds.

[83] While these guidelines are obviously inapplicable in Canada, they do provide a comparative approach to a comparable offence.

[84] Turning to the sentencing judge's treatment of the distinction between *OHSA* and *Criminal Code* offences, he properly identified the absence of a maximum fine in the *Code* for criminal negligence causing death, the need to consider additional factors, and that aggravating facts and any previous conviction had to be proven beyond a reasonable doubt. The sentencing judge also cannot be faulted for reviewing the *OHSA* case law – he was invited to do so by the Crown.

[85] He reviewed the principles of deterrence and denunciation found in the *OHSA* jurisprudence. At para. 21 of his decision, the sentencing judge stated:

> Those principles of deterrence and denunciation are also reflected in the sentencing provisions of the *Code*. Therefore, decisions dealing with penalties imposed for serious breaches of occupational health and safety legislation can be instructive when considering penalties

> for breaches of the *Code* so long as one takes into account that unlike under occupational health legislation, the *Code* does not provide for maximum fine, that the *Code* directs courts to consider additional factors including those set out in s. 718.21 and that the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[86] Although the sentencing judge describes the respondent's breaches as serious, his reasons are silent on the respondent's wanton and reckless disregard for the lives and safety of others and the higher degree of moral blameworthiness and gravity associated with the respondent's criminal conviction for criminal negligence causing death.

[87] Section 718.1 of the *Code* states that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". A range of sentences established under the *OHSA* regulatory regime does not reflect the gravity of the offence of criminal negligence causing death. The *OHSA* cases that attracted fines of between $115,000 and $450,000 and that were relied upon by the sentencing judge are of limited assistance.

[88] In this case, by pleading guilty, the respondent acknowledged that the actions of its representative, Fazilov, demonstrated a marked and substantial departure from the standard that could be expected of a reasonably prudent person. The consequence of that conduct was the death of four workers and the serious permanent injury of a fifth.

[89] In my view, while the sentencing judge was entitled to consider the range of sentences under the *OHSA*, reliance on the *OHSA* regulatory jurisprudence and the resulting imposition of a $200,000 fine (which itself was at the lower end of the *OHSA* range for fatality cases) reflect a failure to appreciate the higher degree of moral blameworthiness and gravity associated with the respondent's criminal conviction for criminal negligence causing death and the principle of proportionality found in s. 718.1 of the *Code*. This was in error.

[90] I agree with the appellant that a corporation should not be permitted to distance itself from culpability due to the corporate individual's rank on the corporate ladder or level of management responsibility.

(2) Ability to Pay

(a) Positions of the Parties

[91] The Crown next submits that in determining an appropriate fine, the sentencing judge misapplied ss. 734(2) and 718.21(d) of the *Code,* and restricted his determination of an appropriate fine based on the respondent's ability to pay. The Crown submits that the sentencing judge also erred in concluding that a fine that might bankrupt the respondent was not an available option.

[92] The respondent argues that there was no such error and that a consideration of the respondent's ability to pay a fine was appropriate due to s. 734(2), which requires a judge to be satisfied of an offender's ability to pay, or s.

718.21(d) of the *Code,* which requires consideration of the organization's economic viability. The respondent submits that unlike s. 734(1), s. 734(2) does not exclude corporations from its application. Moreover, it expressly applies to an offender who is defined in s. 2 of the *Code* as a "person who is being determined by a court to be guilty". In addition, s. 718.21(d) clearly mandates consideration of the respondent's economic circumstances. The respondent submits that, in any event, the sentencing judge did not treat ability to pay as determinative; he simply took it into account. This was evident from the fact that he imposed a fine in excess of what the respondent indicated it could pay and by referring to s. 734.3 of the *Code*.

(b) Discussion

Sections 734 and 735

[93] Dealing firstly with ss. 734(1) and (2) of the *Code*, these subsections state:

> (1) Subject to subsection (2), a court that convicts a person, *other than an organization*, of an offence may fine the offender by making an order under s. 734.1
>
> > (a) if the punishment for the offence does not include a minimum term of imprisonment, in addition to or in lieu of any other sanction that the court is authorized to impose; or
> >
> > (b) if the punishment for the offence includes a minimum term of imprisonment, in addition to any other sanction that the court is required or authorized to impose.

> (2) 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. [Emphasis added.]

[94] Section 734(1) therefore provides the court with the authority to fine a person who is convicted of an offence. An organization, which includes a corporation such as the respondent, is expressly excluded from the ambit of s. 734(1).

[95] Section 734(2) provides that the court "may fine an offender *under this section*" (emphasis added) only if satisfied of the offender's ability to pay. It is therefore clear from this language that s. 734(2) does not encompass an organization.

[96] At para. 30 of his reasons, the sentencing judge relied on s. 734(2) for the proposition that the *Code* required the court to consider the offender's ability to pay. In my view, this was an error.

[97] Section 735(1) of the *Code* governs fines imposed on organizations. It is silent on ability to pay. Section 735 (1) provides:

> (1) An organization that is convicted of an offence is liable, in lieu of any punishment for that offence, to be fined in an amount, except where otherwise provided by law,

> (a) that is in the discretion of the court, where the offence is an indictable offence; or
>
> (b) not exceeding one hundred thousand dollars, where the offence is a summary conviction offence.

[98] As such, an organization's ability to pay should not be treated as a prerequisite to the imposition of a fine.

[99] Lastly, a fine levied on a corporation must be distinguished from one imposed on an individual. In *R. v. Topp*, [2011] 3 S.C.R. 119, Fish J. described the legislative purpose of fines against individuals as being "to prevent offenders from being fined amounts that they are truly unable to pay, and to correspondingly reduce the number of offenders who are incarcerated in default of payment."[1] This legislative purpose is inapplicable to corporations.

Section 718.21

[100] Having determined that s. 734(2) is inapplicable, one must still ascertain whether ability to pay is a prerequisite under s. 718.21(d).

[101] In sentencing a corporation, a court must consider the general sentencing principles found in ss. 718, 718.1 and 718.2 as well as the specific sentencing principles applicable to an organization found in s. 718.21.

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[1] In 1994, when s. 734(2) was introduced, the then Minister of Justice explained that nearly a third of the people liable to incarceration in provincial jails were in that situation because they did not pay fines: House of Common Debates, Vol. 133, 1st Sess., 35th Parl., September 20, 1994, at p. 582.

[102] Subsection 718.21(d) requires the court to consider: “the impact that this sentence would have on the economic viability of the organization and the continued employment of its employees.” Subsection 718.21(d) is but one item in a list of factors to be considered by the court when sentencing an organization.

[103] Consideration of the impact on economic viability may encompass such matters as the importance of a corporation to a community or its value as a source of supply or as an industry participant. The second element of subsection (d) makes continued employment a factor to be considered. In the case of a corporation that is a significant employer, and whose viability is seriously threatened by the imposition of a fine, the quantum of the fine may be reasonably affected. In contrast, in the case of a corporation that carries on no or limited business and has no or few employees, the impact of a fine on the corporation’s economic viability may be of little consequence.

[104] If appropriate, the prospect of bankruptcy should not be precluded.

[105] The UK Sentencing Guidelines require the court to consider “whether a fine will have the effect of putting the defendant out of business” but go on to state that “in some bad cases this may be an acceptable consequence”. Consistent with this principle, in *R. v. Cotswold Geotechnical (Holdings) Ltd.*, [2011] EWCA Crim 1337, aff’g 2011 W.L. 2649504, the U.K. Court of Appeal upheld a fine of £385,000 for corporate manslaughter notwithstanding that the

fine would force the company into liquidation. The sentencing judge in *Cotswold*, in holding that the impact of the fine on the company's financial state could not be the determinative factor, had stated that:

> *[a] fine must be fixed at a level that marks the gravity of the offence and sends out a clear message*… that it is essential that health and safety guidance and good practice is strictly adhered to pursuant to the duty all employers have to take reasonable care to ensure the safety of their employees. [Emphasis added.]

[106] Pursuant to s. 178(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, an order of discharge does not release the bankrupt from any fine imposed by a court in respect of an offence.

[107] In sentencing the respondent in this case, the sentencing judge stated:

> I am of the view that imposing the penalty recommended by the Crown would likely result in the bankruptcy of the corporation and would *be in violation of the statutory requirements that I take into account the offender's ability to pay*. [Emphasis added.]

[108] It is apparent from this passage that the sentencing judge considered himself precluded from imposing a fine that might result in the bankruptcy of the corporation. In my view, this was an error. The economic viability of a corporation is properly a factor to be considered but it is not determinative. Certainly it is not a condition precedent to the imposition of a fine nor does it necessarily dictate the quantum of the fine.

[109] The sentencing judge erred in concluding that imposition of a penalty that would likely result in bankruptcy would be in violation of the statutory requirements. While bankruptcy may be considered, it is not necessarily preclusive.

[110] The sentencing judge was correct in observing that the financial future of the respondent was impossible to predict with any degree of certainty given the outstanding litigation both by and against the respondent. To this, I would add that the heavily qualified and incomplete financial statements filed at the sentencing hearing constituted unreliable indicators of the respondent's financial prognosis. In this case, the respondent had only two permanent employees. The minimal financial information that was produced showed no ongoing payment of any compensation to employees. Corporate construction activity was evident in Formstructures, not in the respondent. Any public interest in the continued viability of the respondent was not manifest. The sentencing judge placed undue weight on the respondent's ability to pay.

(3) Manifestly Unfit Sentence

(a) Positions of the Parties

[111] The Crown submits that a fine of $200,000 fails to reflect the added degree of moral blameworthiness in a conviction for the offence of criminal negligence causing death. Indeed, such a fine falls at the lower end of the appropriate

sentencing range for *OHSA* violations involving fatalities. A $200,000 fine ignores the gravity and circumstances of the offence and the serious impact on the victims. Furthermore, the sentence failed to send any message of deterrence or denunciation to other corporations and undermined the intent and effectiveness of the Bill C-45 amendments.

[112] The respondent submits that the sentencing judge considered cases involving conduct that attracted higher fines. However, those cases involved more egregious conduct and larger corporations. In addition, the respondent submits that the sentence imposed was consistent with that rendered in *Transpavé*, which involved a substantially larger company and a $100,000 fine.

(b) Discussion

[113] In my view, quite apart from the errors identified above, the sentence of a fine of $200,000 was manifestly unfit.

[114] The sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Swartz, who pled guilty under the *OHSA*, received fines of $22,500, the upper maximum limit being $25,000. A fine of $200,000 was at the lower end of the *OHSA* cases involving fatalities. Here, the respondent was convicted of criminal negligence causing death. Six workers were involved, four of whom met their deaths. One worker was seriously and permanently injured. The victims were young and had families, some with young

children. The respondent had been operating with the faulty staging materials for more than two months.

[115] A sentence consisting of a fine of $200,000 fails to convey the need to deliver a message on the importance of worker safety. Indeed, some might treat such a fine as simply a cost of doing business. Workers employed by a corporation are entitled to expect higher standards of conduct than that exhibited by the respondent. Denunciation and deterrence should have received greater emphasis. They did not. The sentence was demonstrably unfit.

[116] In any event, the sentencing judge, in applying the *OHSA* range of fines and in treating ability to pay as a statutory prerequisite, made material errors in principle that affected the sentence imposed. In the circumstances, it falls to this court to impose a fit and just sentence.

[117] Dealing firstly with the factors to be considered under s.718.21, there was no evident advantage realized by the respondent as a result of the offence. The swing stage had been used for two months prior to the incident, however there was no evidence of planning or complicity. While the Crown did fail to prove evidence of concealment of assets beyond a reasonable doubt, the financial material describing the respondent's current circumstances is inadequate. There are no audited financial statements and the statements that have been produced from three separate accounting firms are incomplete and qualified. That being

said, it is reasonable to infer from the evidence filed that the respondent is not actively carrying on business. The respondent did plead guilty, thereby saving the time and cost associated with a trial and Swartz, himself, was fined $90,000 in respect of the *OHSA* convictions, in addition to a surcharge. The respondent had no prior record and had not been sanctioned in the past.

[118] The respondent was convicted of a very serious offence. It is a different and more serious offence than those found under the *OHSA*. As mentioned, the site supervisor's role should not serve to diminish the gravity of the offence. The intent of Bill C-45 is to trigger responsibility by the corporation for the conduct and supervision of its representative.

[119] The criminal negligence of Fazilov, for which the respondent is criminally liable, was extreme. Three times as many workers were on the swing stage when it collapsed than was usual practice. In addition, three times as many workers were on the swing stage than there were lifelines available, and even then only one of the lifelines was properly engaged.

[120] Having regard to the nature and gravity of the offence, the victims, the principles set forth in s. 718 and the specific factors described in 718.2(1), I am of the view that a fine $750,000 is a fit fine in the circumstances.

H. DISPOSITION

[121] Accordingly, I would grant leave to appeal sentence, allow the appeal, and sentence the respondent to pay a fine in the amount of $750,000.

Released: September 4, 2013 "MR"

"S.E. Pepall J.A."
"I agree M. Rosenberg J.A."
"I agree David Watt J.A."