ON Appeals Court More Than Triples Fine in Christmas Eve Scaffolding Case

When cases involving safety violations are appealed, it's usually over whether the prosecution proved that the defendant committed the offence or the defendant successfully proved due diligence. But other issues can lead to an appeal, including the amount of any fine imposed on a convicted company or individual. For example, the defence may argue that the fine was too high, while the prosecution argues it was too low. In fact, that's the argument the Crown made after the trial court imposed a $200,000 fine on the employer involved in the notorious Christmas Eve scaffolding case. The Ontario Court of Appeal recently agreed with the government and more than tripled the fine. Here's a look at the Court's reasoning.

THE CASE

What Happened: On Dec. 24, 2009, workers were on scaffolding repairing balconies at an apartment building when the scaffolding collapsed. One worker was seriously injured; four others died. On June 15, 2012, Metron Construction, their employer, pleaded guilty to one charge of criminal negligence causing death under the *Criminal Code* (Code) as amended by Bill C-45. Joel Swartz, its president, pleaded guilty to four OHS violations*, each of which* alleged that he failed, as a company director, to ensure that Metron complied with the *OHS law* and regulations. The court fined Metron $200,000 and

Swartz $90,000 [*R. v. Swartz*, [2012] ONCJ 505 (CanLII), July 13, 2012; *R. v. Metron Construction Corp.*, [2012] ONCJ 506 (CanLII), July 13, 2012]. The government and defence agreed on Swartz's fine. But the government, which had asked for a $1 million fine for Metron, appealed its fine as too low, arguing that the fine ignored the 'moral blameworthiness' of a criminal negligence conviction and the gravity of the offence.

What the Court Decided: The Ontario Court of Appeal increased Metron's fine to $750,000.

The Court's Reasoning: The Court first explained that the lower court placed too much emphasis on what Metron could afford to pay as a prerequisite to the imposition of the fine. Although the company's economic viability was one of the factors to be considered, it wasn't the most important one and shouldn't prevent the imposition of a fine. Because Metron pleaded guilty to criminal negligence, the Court was required to considered the 10 factors spelled out in Sec. 718.21 when sentencing it. Based on these factors and the circumstances of the offence, the Court concluded that the $200,000 fine was 'manifestly unfit.' Such a fine didn't deliver a message on the importance of worker safety. In fact, some might find it simply a cost of doing business. Metron was convicted of a criminal offence more serious than those under the *OHS Act*, which should be reflected in its fine. So the Court concluded that a $750,000 fine was a 'fit fine in the circumstances' [*R. v. Metron Construction Corp.*, [2013] ONCA 541 (CanLII), Sept. 4, 2013].

ANALYSIS

Anyone familiar with the fines imposed in Ontario for serious workplace safety offences knows that a $200,000 fine is fairly typical for such an offence. (Just look at the Ontario section of the Month in Review for any given month.) But Bill C-45 specifically amended the Code to treat safety incidents involving particularly egregious conduct more seriously than

violations of the OHS laws and regulations. So a fine for a criminal negligence conviction related to a safety incident should be a stiffer penalty than one imposed under the OHS laws. Otherwise, the threat of a criminal prosecution for neglecting worker safety wouldn't serve as much of a deterrent. (For more on sentencing for criminal negligence convictions, see 'The Other Side of C-45: Sentencing a Company for a Safety Violation that Constitutes Criminal Negligence,' March 2007, p. 1.)