the British Columbia Court of Appeal looked at the very same issue as in the *OHL Construction* case in an unreported case called *John Laing & Son (Canada) Limited v. United States Fidelity & Guaranty Co.* [*John Laing*]. In that case, the court reached the conclusion that the penal sum of the performance bond limited the payment to be made to the obligee under the bond by reason of the defaults of the principal. However, the penal sum did not have any relation to payments that the surety might have to make to the obligee by reason of its own breach of the bond.

The *John Laing* decision is therefore directly on point and supports the proposition that the penal sum is not a limit of the surety's liability for breach of the bond. One could say that for the last 45 years, we have been overlooking the fact the Emperor has not been wearing any clothes the whole time.

CASE SUMMARY

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DETERRENCE AND DENUNCIATION: COURT OF APPEAL SENDS STRONG MESSAGE ON WORKERS' SAFETY

R. v. Metron Construction Corp.

On Christmas Eve, 2009, four people died at a Toronto high-rise when a swing stage at the 14th floor collapsed and plummeted to the ground. Metron, the contractor undertaking the restoration of exterior balconies, pled guilty to a charge of criminal negligence causing death and was fined $200,000. The Ontario Court of Appeal overturned the fine, finding that such a small monetary value was manifestly unfit for the crime. The Appeals Court substituted a $750,000 fine instead.

Metron had contracted to restore concrete balconies on two high-rise buildings in Toronto in September 2009.The work was scheduled to be completed on November 30, 2009, but quickly fell behind schedule.

Work on site was done by way of 40-foot-long swing stages, which consisted of four ten-foot-long modules held together by plates and bolts.

Metron took numerous safety precautions on site and had its project manager and site supervisor both take swing stage instructor and operations courses. The project manager inspected the job site weekly and held periodic meetings with workers to review swing stage safety requirements. All workers on site received an English copy of the swing stage safety manual.

Notwithstanding these safety precautions, some of the swing stages contained no markings, serial numbers, identifiers, or labels describing max capacity, as required by occupational health and safety legislation and good industry practice. Moreover, there was next to no product information, design drawings, or assembly instructions. Finally, there was no professional engineer's report on site, attesting that the swing stage had been erected in accordance with design drawings, which is required by the relevant regulations.

It was typical practice on site for two workers to operate on a stage at any one time; however, on the night of the accident, six men, including the site supervisor, boarded the swing stage. Only two of the men were tied off with safety lines because there were only two lifelines. The swing stage collapsed under the men's combined weight, and four of the six men tragically died.

Subsequent toxicology reports found that three of the four deceased, including the supervisor, had ingested marijuana shortly before the accident.

Metron and the Crown reached an agreed statement of facts that noted that Metron's site supervisor had failed to take reasonable steps to prevent bodily harm and death. Specifically, the supervisor either directed or permitted six workers to board the swing stage when he knew or ought to have known that it was not safe to do so and when he knew or ought to have known that only two

lifelines were available. The supervisor also permitted intoxicated persons to work on site.

Under s. 2 of the *Criminal Code*, a supervisor is a "senior officer" of a corporation, and therefore, his actions in this case were imputed to Metron as a corporate entity. Consequently, Metron pled guilty to violations of s. 217.1 and s. 219, criminal negligence causing death, under the *Code.*

Metron's CEO also pled guilty personally to four counts under the *Occupational Health and Safety Act* [*OHSA*] and received a fine of $22,500 per count for a total of $90,000 plus the mandatory 25 per cent victim surcharge fine.

Corporations and the *Criminal Code*

Sections 22.1(b) and 217.1 of the *Code* were introduced in 2004.

Section 22.1 states that

> *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.*

Section 217.1 provides that

> *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.*

Section 2 of the *Code* provides a definition for "organization", capturing corporations as well as "senior officer" that is defined as follows:

> *Senior Officer means 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.*

The court found that a construction site supervisor fell within the definition of senior officer and representative of a contractor.

The *Code* also contains guidelines for the imposition of sentences on organizations and sets out ten factors for consideration at s. 718.21.

The Lower Court Decision

With Metron's guilty plea, the court had to determine the appropriate sentence. The Crown sought a penalty of $1 million, while Metron argued that $100,000 was the more appropriate fine. The guiding principle for a fine for criminal negligence is deterrence and denunciation.

The Crown identified several aggravating factors that, it argued, militated in favour of a steep $1 million penalty. Specifically, the Crown focused on the egregious nature of the accident in the face of clear warning signs and simple, available steps to prevent the incident. For example, the collapsed swing stage had stickers that indicated the maximum load, it was assembled without the use of instructions, and the supervisor failed to require the workers to wear mandatory fall protection that would surely have saved their lives.

Metron argued that its fine should be moderated, focusing on a number of mitigating factors. First, Metron argued that its guilty plea saved taxpayers the time, money, and emotional toll of a trial. Moreover, it argued, Metron had no prior criminal record or *OHSA* convictions and had a long history of compliance with the Ministry of Labour. In addition, Metron displayed no systemic course of unsafe conduct—this was a one-off unfortunate accident outside the norm of their typical operation.

Typically, a judge will look to precedent cases of similar facts to determine an appropriate sentence; however, in Canada, there was only one previous conviction of a corporation for criminal negligence causing death, in Quebec. Therefore, the sentencing judge turned to similar *OHSA* cases for guidance. Those cases emphasized deterrence and denunciation, the same principles found in the *Code*; however, *OHSA* violations carried a maximum penalty of $500,000, while the *Code* had no maximum penalty.

The fines imposed in the *OHSA* cases reviewed by the judge ranged in from $115,000 to $425,000. Ultimately, the judge set Metron's fine at $200,000, noting that a substantially higher fine would likely put Metron out of business.

The Appeal

The Crown raised three issues on appeal:

1. Did the judge err in using the sentencing range found in *OHSA* cases to determine the appropriate range of sentence for criminal negligence causing death?
2. Did the judge err in limiting Metron's fine to an amount it could afford to pay?
3. Was the sentence manifestly unfit?

On each issue, the Court of Appeal found in favour of the Crown.

Issue 1

The Appeal Court found that the judge was right to review *OHSA* cases but ultimately, the $200,000 did not reflect the higher degree of moral blameworthiness and gravity associated with a criminal conviction, as opposed to a regulatory violation. The penalty, according to the Court of Appeal, failed to reflect the principle of proportionality found in s. 718.1 of the *Code*. The Court of Appeal noted 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".

This is a clear message from the Court of Appeal that a corporation as a whole must be held responsible for the actions of its representatives and senior officers, no matter where in the organization they may be found.

Issue 2

As to whether ability to pay should factor into the determination of penalty with respect to a corporation, the Appeal Court found that the judge had wrongly imputed factors for consideration in penalizing convicted persons to convicted corporations. The Court of Appeal found that the *Code* was silent on the issue of ability to pay and that while the possibility of bankruptcy as a result of a fine was a consideration, it was not a determinative consideration.

Issue 3

Finally, the Court of Appeal determined that a $200,000 penalty was manifestly unfit for the crime. Four men died in what was ultimately a highly preventable accident. A fine of $200,000, the Appeal Court found, simply failed to convey the required message of the importance of worker safety. The lower court judge did not give enough emphasis to the principles of denunciation and deterrence. Fines must send a message to the public at large as well as punish the convicted. For that reason, the Court of Appeal substituted a much steeper $750,000 fine.

Ontario Court of Appeal
Rosenberg, Watt, Pepall JJ.A.
September 4, 2013

GUEST ARTICLE

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THE IMPORTANCE OF COPYRIGHT IN AN ARCHITECT'S WORKS

Overview

Architects are highly trained professionals responsible for the planning and design phase of the construction of a structure. As such, an architect's instruments of service, including plans, sketches, drawings, graphic representations, and specifications, are extremely valuable to any given construction project. Consequently, an architect is well served in maintaining copyright in their work—that is, the sole right to produce or reproduce their work or any substantial part thereof in any material form—for financial and other motives.

Copyright Protection

Copyright protects an architect's expressions in the form of their instruments of service, but not their ideas, procedures, nor methods of operation. To be protected by copyright, an instrument of service must be in some material form, capable of identification, and having a more or less permanent