

1. Did the judge err in using the sentencing range found in *OHS*A 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 *OHS*A 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 J.J.A.
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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

endurance. In addition, the instrument of service must originate from the architect and be an exercise of skill and judgment that cannot be a purely mechanical exercise. As mentioned in *CCH Canadian Ltd. v. Law Society of Upper Canada*, the exercise of skill requires “the use of one’s knowledge, developed aptitude or practised ability in producing the work”, and the exercise of judgment requires “the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work”. The aesthetic merit of an architect’s instrument of service does not factor into an architect’s exercise of skill and judgment.

Ownership of Copyright

An architect who authors an instrument of service is the first owner of the copyright, subject to several exceptions outlined in the *Copyright Act*. According to the English court in *Meikle v. Maufe*, “the architect owns the copyright in the plans and also in the design embodied in the owner’s building. The building owner may not therefore reproduce the plans or repeat the design in a new building without the architect’s express or implied consent”. However, if the architect is employed under a contract of service or apprenticeship, then the copyright of the work produced during employment belongs to the employer as the first owner, provided there is no agreement to the contrary.

Standard Form Contracts

To manage the expectations between an architect and an employer/client as to the ownership of copyright, architects are well advised to execute standard form contracts. The Ontario Association of Architects provides the *Standard Form of Contract for Architect’s Services* wherein copyright for the architect’s instruments of service belongs to the architect and remains their property regardless of whether the project for which they are made is executed or not, and whether the architect has been paid for their services or not. However, as a condition precedent to the client’s right to use the architect’s instruments of service, the architect must be paid for all the fees and expenses owed to them in full.

Under the *Standard Form of Contract for Architect’s Services*, the client may be allowed

to retain copies of the architect’s instruments of service for information and reference for the project at hand. The copies of the architect’s instruments of service themselves may only be used by the client, for the purposes intended, and for a one-time use, on the same site, and for the same project. The architect’s instruments of service may be used for renovations, additions, or alterations to the project; however, alteration of the architect’s instruments of service by the client or any other person is prohibited unless a written licence is obtained from the architect. In addition, the architect’s instruments of service may not be offered for sale or transfer unless the express written consent of the architect is obtained.

Term of Copyright

Copyright protects an architect’s instruments of service for a term of the architect’s life, the remainder of the calendar year in which the architect dies, and a period of 50 years following the end of that calendar year. The architect, however, may assign the right or grant an interest in the right by licence. Given that the architect is the first owner of the copyright, assignments and grants of copyright (other than by will) automatically revert to the architect’s estate 25 years after their death. Where an employer is the first owner of the copyright, this rule does not apply.

Change of Architect

Under the Ontario *Architects Act* regulations, it is a prescribed standard of practice for an architect to refrain from soliciting or accepting any work in respect of a building project, knowing or having reason to believe that another architect has been engaged on the same project for the same purpose by the same client. However, this prescribed standard of practice does not prevent an architect from undertaking the work after (a) the client has given written notice to the architect that the engagement or employment of the other architect has been terminated and (b) the architect has given written notice by registered mail to the other architect that they have been engaged or employed by the same client for the same purpose. This raises the question of whether the newly retained architect may use the previous architect’s instruments of service.

The newly retained architect may only use the previous architect's instruments of service if the previous architect has provided their consent or agreement. If the client does not provide assurance that the previous architect has been paid for their services, or agrees that there is a dispute over the fees, then the newly retained architect must advise the client that the instruments of service relative to the dispute cannot be used until the dispute is resolved.

Remedies for Infringement of Copyright

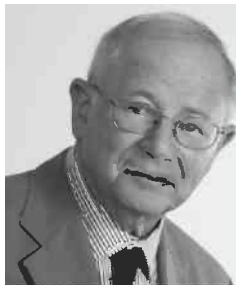
Because copyright is the sole right to produce or reproduce a work or any substantial part thereof, it is an infringement of copyright for any person to take such action without the architect's consent. Where copyright has been infringed, the architect is entitled to all remedies by way of injunction, damages, accounts, and delivery up. However, if the infringing party was not aware and had no reasonable ground for suspecting that copyright subsisted in the work, then the architect is only entitled to an injunction as a remedy. If the construction of a structure that infringes an architect's copyright has commenced, the architect is not entitled to obtain an injunction to stop construction nor order the structure's demolition.

When assessing damages for copyright infringement, they are to be dealt with broadly "as a matter of common sense". Factors that are taken into consideration include

- (a) the profit gained from the infringing party,
- (b) the architect's loss of public and professional recognition from the infringement, and
- (c) the fee the architect would have received for a licence to use the copyright, as in *Bemben and Kuzych Architects v. Greenhaven-Carnagy Developments Ltd.*

The remedies available to an architect in the face of copyright infringement, paired with the value of an architect's work on any given construction project, serve to clearly demonstrate that the importance of copyright in an architect's work cannot be understated.

CASE SUMMARY



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CONTRACT PERFORMANCE FRUSTRATED BY ACTIONS OF OUTSIDER

Advanced Precast Inc. v. Brown Daniels Associates Inc.

A contract is, in legal terms, "frustrated" when its full performance is made impossible. The following summary illustrates what happens when a contract between two parties—Advanced Precast Inc. and Brown Daniels Associates Inc. in this case—is frustrated by the actions of somebody who is not a party to the contract.

On September 28, 2010, a company called 777 Bay Street Inc. (777), the owner, and Brown Daniels Associates Inc. (BDA), the general contractor, signed a contract using the CCDC-2 2008 form to effect repairs to the owner's building. BDA then entered into a subcontract in the amount of \$43,000 plus tax with Advanced Precast Inc. (API) for the precast concrete portion of the main contract. API, in turn, lined up several subtrades to perform the work.

In January 2011, when one of API's subcontractors arrived on the site with its workers and heavy machinery, it encountered several problems.

The first problem was that BDA was concerned that the equipment would be too heavy for the location in which it had to be placed to carry out the work. The second problem they discovered was that the existing fasteners used to attach the precast concrete panels to the building were different from those shown in the drawings and specifications. It became clear that the existing precast concrete panels could not be removed without major damage to the panels.