Court Overturns Jail Sentence for Corporate Director - R v Collingwood Prime Realty Holdings Corp et al

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May 25, 2020

In a decision released on May 12, 2020, Justice D.E. Harris of the Ontario Superior Court of Justice ("the Court") allowed an appeal from a sentence in *R v Collingwood Prime Realty Holding Corp et al* ("*Collingwood Prime*").[1] The Court held that the 45-day intermittent jail sentence and the $420,000 fine previously imposed were inappropriate given the level of moral blameworthiness and the lack of actual harm caused by Mr. El-Hinn and his company, Collingwood Prime Realty Holdings Corp. ("Collingwood Prime") (together, "the appellants").

BACKGROUND

In *Collingwood Prime*, the appellants pleaded guilty to 11 counts of violating the *Canadian Environmental Protection Act, 1999* ("CEPA").[2] The convictions related to the use and storage of transformers and capacitors that contained liquids with significant concentrations of polychlorinated biphenyls ("PCBs"). The first 10 counts were for using and failing to properly dispose of PCB-containing transformers and capacitors. Count 11 was for the failure to comply with an environmental protection compliance order ("EPCO") issued by Environment and Climate Change Canada that required the removal of the transformers and capacitors from the appellants' property.

In August 2018, Justice of the Peace M. Duggal ordered Mr. El-Hinn, the sole corporate director of Collingwood Prime, to pay a fine of $220,000 and to complete a 45-day intermittent jail term. Justice of the Peace Duggal also ordered Collingwood Prime to pay a $200,000 fine. The appellants appealed the sentence, arguing that the sentencing justice:

- misconstrued the sentencing principles applicable to the regulatory context
- made an error in principle by considering the aggravating factors set out in CEPA, s. 287.1(2) in determining whether imprisonment should be part of the sentence

[1] 2020 ONSC 2953 [*Collingwood Prime*].
[2] SC 1999, c 33.

- erred in assessing the aggravating factors, and
- erroneously relied on the Ontario Court of Justice's decision in *R v Sinclair*[3] in determining the appropriate sentence.

On appeal, Justice D.E. Harris vacated Mr. El-Hinn's jail sentence and ordered reduced fines of $170,000 for Mr. El-Hinn and $150,000 for Collingwood Prime.

HIGHLIGHTS

Erroneous Reliance on *R v Sinclair*

- The Court agreed with the appellants that the sentencing justice erred in relying on *R v Sinclair* to determine the appropriate sentence. In *R v Sinclair*, Mr. Sinclair, like the appellants, failed to remove PCBs from his property despite repeated orders. Unlike the appellants, however, Mr. Sinclair began to build on the site, knowingly causing PCB-contaminated water to drain into the Bay of Quinte. Mr. Sinclair and his company were fined $659,000 and Mr. Sinclair was sentenced to a four-month jail term. On appeal, the fine was reduced, but Mr. Sinclair's jail term was upheld.
- The Court held that in relying on *R v Sinclair*, the sentencing justice fixed the "appellants' moral culpability at too high a level".[4] While there were factual similarities between the appellants' case and *R v Sinclair*, the comparison between the two cases was an error in principle. The Court found that:
  - Mr. Sinclair's state of mind was "much more blameworthy" than was Mr. El-Hinn's
  - Mr. Sinclair intentionally took steps to dig trenches that drained into wetlands and marshes knowing that PCB-contaminated sediments would enter the Bay of Quinte
  - Mr. Sinclair's motivation for his actions was to increase profits or to decrease costs
  - Mr. Sinclair ignored warnings and disregarded orders issued by the Ministry of the Environment (as it then was) and the Court, and
  - Mr. Sinclair's conduct was found to be "deliberate, flagrant and calculated and continued over a lengthy period of time".[5]

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3 [2009] OJ No 5318 (Ont CJ).
4 *Collingwood Prime*, *supra* note 1 at para 21.
5 *Ibid* at para 49, citing *R v Sinclair*, *supra* note 3 at para 134.

- The appellants' culpability was of a lower degree: passive negligence. The Court stated that this is a "fundamental distinction" from *R v Sinclair*.[6] The appellants were not attempting to make a profit at the expense of the environment. Nor did Mr. El-Hinn exhibit the "reprehensible attitude and lack of remorse" that Mr. Sinclair did.[7]

- In concluding that the sentencing justice's reliance on *R v Sinclair* was erroneous, the Court noted that the sentencing justice excluded five other cases from consideration on the basis that they were distinguishable. Notably, these five cases all featured *actual* harm, whereas in the appellants' case there was only a *risk of potential* harm. The Court concluded that actual harm occurred in *R v Sinclair* and therefore, *R v Sinclair* was distinguishable as well.[8]

- The sentencing justice's discussion of and reliance on *R v Sinclair* was a central component of the reasons leading to the sentences imposed and was not just a factor leading to an unfair sentence. Rather, the Court found that the sentencing justice's reliance was an error in principle resulting in an erroneously more severe sentence for Mr. El-Hinn.[9]

Application of Sentencing Principles

- The Court dismissed the appellants' arguments about the sentencing justice's application of sentencing principles and aggravating factors. In doing so, the Court affirmed prior case law about sentencing in the regulatory context.

- The Court confirmed that moral blameworthiness is a relevant factor to consider in determining the appropriate sentence for a regulatory offence.[10]

- The Court also confirmed that the aggravating factors set out in CEPA, s. 287.1(2) apply only to the determination of the fine amount, and not to imprisonment. In contrast, part of section 287.1 incorporates by reference the sentencing principles in sections 128.1 to 718.21 of the *Criminal Code*[11] and applies to all sentencing measures, including fines and jail time.[12]

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6 *Collingwood Prime*, *supra* note 1 at para 50.
7 *Ibid*.
8 *Ibid* at para 51.
9 *Ibid* at para 53.
10 *Ibid* at paras 25–27.
11 RSC 1985, c C-46.
12 *Collingwood Prime*, *supra* note 1 at para 30.

The Appropriate Sentence

- The Court confirmed the fundamental sentencing principles under CEPA include general deterrence, specific deterrence, denunciation of harm and the risk of harm, and the "polluter pays" principle as set out in CEPA, s. 287.[13] As held in prior cases, "a sentence should be the minimum necessary and be the least restrictive sanction required to satisfy the pertinent sentencing principles".[14]

- The Court concluded that a jail sentence was inappropriate for several reasons:

  - While the degree of fault was high and the appellants' lack of response to the EPCO was egregious, Mr. El-Hinn's conduct was negligent, "not full criminal *mens rea*."[15]

  - While there was real and substantial *potential* harm to the environment, no *actual* harm was caused by the appellants' actions. The Court confirmed that the "absence of actual harm is not a mitigating factor but is an important circumstance in properly characterizing the offence".[16]

  - During the current COVID-19 pandemic, the individual and collective cost of an intermittent jail sentence outweighs any benefit to the public interest.[17]

- The Court also reduced the fines imposed on the appellants to $170,000 for Mr. El-Hinn and $150,000 for Collingwood Prime. While the Court noted that fines of the general magnitude awarded by the sentencing justice were warranted because of the "steadfast refusal of the appellants to undertake the cleanup of PCBs over a period of years",[18] the Court reduced the fines for several reasons:

  - The appellants' moral culpability was lower than determined by the sentencing justice.[19]

  - The sentencing justice erred in imposing consecutive sentences for each count. There was a single act of malfeasance that should be viewed as one wrong resulting in concurrent sentences where possible for Counts 1 through 10. Count 11, the violation of the EPCO, however, should be consecutive to reinforce compliance with government orders.[20]

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13 *Ibid* at para 55.
14 *Ibid* at para 56, citing *Ontario (Labour) v New Mex Canada Inc*, 2019 ONCA 30 at paras 76–83.
15 *Collingwood Prime*, *supra* note 1 at para 58.
16 *Ibid* at para 62.
17 *Ibid* at para 72.
18 *Ibid* at para 74.
19 *Ibid* at para 75.
20 *Ibid* at para 79.

- The Court did note that having concurrent sentences raised the question of sufficiency of the fines because the maximum fine amounts applicable to Counts 2 through 10 under CEPA, s. 272.1 were $50,000 for a small revenue corporation and $25,000 for an individual first time offence. To resolve this, the Court ordered consecutive fines for Counts 1 and 11, and concurrent fines for Counts 2 through 10, based on the need to penalize for the single act of malfeasance.[21]

- The Court held that fines of approximately three times the cost of cleanup, or $330,000, were proportionate to the offences and the offenders, rather than four times the cost of cleanup as the sentencing justice issued.[22] The Court also waived the victim surcharge.

CONCLUSION

The Court in *Collingwood Prime* maintains the status quo for sentencing for regulatory offences and affirms prior case law. The turning point in this case was the sentencing justice's heavy reliance on a case that, while having some factual similarities, was distinguishable in terms of the offender's level of moral blameworthiness and the incidence of actual harm, both considered by the Court to be important factors in determining the appropriate sentence.

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Document #: 1734928

[21] *Ibid* at paras 81–82.
[22] *Ibid* at para 83.