SUPREME COURT OF YUKON

Citation: *R v CMC Metals Ltd.*
2025 YKSC 25

Date: 20250321
S.C. No. 24-AP004
Registry: Whitehorse

BETWEEN

REX

Appellant

AND

CMC METALS LTD.

Respondent

Before Justice K. Wenckebach

Counsel for the Crown — David A. McWhinnie and Andrew Nyanhete, Articled Student

Appearing as Agent for the Respondent — Kevin Brewer (by telephone)

This decision was delivered in the form of Oral Reasons on March 21, 2025. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): This is an appeal of a sentencing decision in which a judge in the Territorial Court of Yukon imposed $12,000 fine against the respondent, CMC Metals Ltd (“CMC Metals”). CMC Metals, which is a mining company, had pleaded guilty to engaging in a Class 2 exploration program not in accordance with the notification given to the Chief, contrary to s. 132(2) of the *Quartz Mining Act*, SY 2003,

c 14 (the "*QMA*"). The activities that were in violation of the *QMA* were building access roads and trenching. The fine was ordered based on a joint recommendation from the Crown and the respondent. The Court also waived the fine surcharge. At the time, the parties and the Court believed the maximum fine was $20,000. However, the maximum fine under s. 132(2) is actually $5,000.

[2] There is no question that the sentence must be set aside. However, the Crown and the representative for CMC Metals, Kevin Brewer, disagree on the amount of the fine to be paid. The Crown seeks that I impose a $4,800 fine, while Mr. Brewer seeks that I impose a fine of $1.

[3] Before addressing the substance of the appeal, I would like to address a preliminary issue. In his written materials in the appeal, Mr. Brewer stated that he felt coerced in agreeing to the statement of facts at trial. This can be a concern because the plea bargaining process must be fair. A guilty plea will, therefore, only be valid if it is voluntary, unequivocal, and informed (*R v Wong*, 2018 SCC 25 at para. 43).

[4] In this case, I am satisfied that the guilty plea was voluntary, unequivocal, and informed. At trial, the judge asked Mr. Brewer to confirm that he was entering the guilty plea of his own free will, which he did. The judge also explained to him the impact of entering a guilty plea, which Mr. Brewer stated he understood. Moreover, in his submissions on appeal, Mr. Brewer explains he felt coerced into entering the guilty plea because he did not have the money to hire counsel, and he was concerned about cross-examining officials who would in the future have authority over his mining projects. It is unfortunate that Mr. Brewer did not feel he could take the matter to trial as he wanted to, but that does not amount to coercion. The guilty plea was therefore valid.

[5] The issues, then, are threefold:

1. Does the Court have the authority to remit the question of the sentence to the trial court or must the Court sitting on appeal decide the appropriate sentence?
2. How should the joint submission be treated?
3. What is the appropriate sentence in this case?

[6] So, I turn to the first question.

[7] Both the Crown and Mr. Brewer submit that on a summary conviction appeal, the Court does not have the jurisdiction to remit sentencing to the trial court. I also conclude that I cannot send the matter back to the trial court. Appeals of regulatory offences are governed by the *Summary Convictions Act*, RSY 2002, c. 210 (the "*SCA*"). The *SCA* does not set out a process for appeals but imports the pertinent *Criminal Code*, RSC 1985, c C-46 (the "*Code*") appeal provisions. The pertinent provisions for our purposes are ss. 813, 822, and 687, which is incorporated by reference by s. 822.

[8] Section 813 provides that the Crown may appeal a sentencing decision. Section 687 states that a court hearing an appeal of a sentencing decision may vary the sentence or dismiss the appeal.

[9] In *R v Montesano*, 2019 ONCA 194, the Court of Appeal for Ontario considered whether s. 687 provides a summary conviction appeal court the jurisdiction to remit a sentencing determination to the trial court. It concluded that such authority could only be granted if it was explicitly provided by the legislation. Because s. 687 does not provide explicit authority to the court to remit a sentencing matter to a trial court, a court sitting on appeal may only vary the sentence or dismiss the appeal (at paras. 21-22).

[10] I find the Court of Appeal for Ontario's decision persuasive and adopt its reasoning.

[11] As I do not have the jurisdiction to remit the matter to the Territorial Court, I will consider what the appropriate sentence should be in this case.

[12] So I turn to the second question — that is, how should the joint submission be treated?

[13] The Crown submits that Mr. Brewer seeks to undo the plea bargain he and the Crown struck at the trial level. He argues that, while plea agreements are not binding in the way, for instance, that contracts are, there would be some unfairness in permitting Mr. Brewer to renege from the plea agreement when the Crown in good faith changed their position at trial, including by dropping counts in exchange for the joint submission.

[14] In most circumstances, it would not be fair for either the Crown or the defence to change their position in an appeal after presenting a joint submission at the trial level. However, this situation is not normal. The fine the parties agreed to cannot be imposed. The agreement the Crown and Mr. Brewer reached — at least with regard to the amount of the fine — is no longer applicable. Thus, it is open to Mr. Brewer to seek a different fine than that which the Crown seeks.

[15] This does not mean, however, that the parties' whole agreement will be disregarded. At the trial level, the parties filed an agreed statement of facts. I will use those facts in determining the appropriate sentence. Mr. Brewer referred to other evidence in his written and oral submissions. It was not provided by way of sworn evidence, however. Moreover, this is not a new hearing under ss. 822(4) and (6) of the

Code. I will therefore only consider the evidence that is contained in the agreed statement of facts.

[16] The third question is: What is the appropriate sentence in this case?

[17] The factors used to determine a sentence for environmental offences include:

> 1) the criminality of the conduct/culpability of the offender;
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> 2) the nature of the environmental damage/harm;
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> 3) the extent of attempts to comply;
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> 4) remorse/the acceptance of responsibility;
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> 5) the size of the corporate offender;
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> 6) benefits realized by the offence;
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> 7) the offender's prior record and past involvement with the authorities; and
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> 8) deterrence.
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> (*R v Beets*, 2018 YKSC 21 at para. 75)

[18] Mr. Brewer also seeks that I take an additional factor into account. Mr. Brewer states that he does not believe the charges should ever have been brought against him. Once it came to his attention that he was not complying with the *QMA*, he took the necessary steps to remediate the area. For public policy reasons, he believes that he and the Government of Yukon should have resolved the issues without going to court.

[19] I cannot, however, take these submissions into account in determining a sentence. The Crown has what is called "prosecutorial discretion". This means that the Crown must have the ability to bring, manage, and terminate prosecutions independent of other interests. The Crown must be free of political pressures from government in

making its prosecutorial decisions; otherwise, one of the risks is that the law will not be applied equally to all (*Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 29-30).

[20] Furthermore, the courts cannot interfere with prosecutorial discretion. Absent narrow exceptions, the Court does not have the authority to intervene in the parties' decision-making process. It may only supervise their conduct when they are appearing in court. For instance, it would not be proper for me to prevent Mr. Brewer from defending the appeal. It would also not be proper for me to weigh in on the Crown's decision to proceed with the prosecution or appeal (at para. 32).

[21] Additionally, if I were to do so, it would affect the Court's independence. In reviewing the Crown's decisions, I would be stepping into the shoes of a supervisory Crown becoming, essentially, a part of the litigation rather than separate from it. Except in exceptional circumstances, it is not the role of the Court to examine the decisions the Crown has made in the exercise of their prosecutorial discretion (at para. 31).

[22] I have heard Mr. Brewer's complaints that the Crown should have worked cooperatively with him rather than prosecuting. I cannot, however, make any conclusions about the Crown's decision to prosecute nor can it be a factor in my decision about the amount of the fine to impose.

[23] I now turn to the factors for determining an appropriate sentence.

[24] When addressing these factors, the Court looks at whether they are aggravating, meaning that they tend to increase the seriousness of the offence, or mitigating, which means they tend to lessen the seriousness of the offence. Sometimes, as well, a factor can be neutral, thus not having any effect on the seriousness of the offence.

[25] With regard to culpability and intent, Mr. Brewer did not intentionally violate his permit but did so because he misunderstood the law. At all times, he was acting in good faith.

[26] For the next factor, which is the extent of damage caused by the offender's actions, the agreed statement of facts indicates there was no evidence that the work resulted in significant or unforeseen environmental impacts beyond the direct impact of the work itself. This is not a mitigating factor but simply a neutral factor (*Beets* at para. 84).

[27] The third factor is Mr. Brewer's attempts to comply. The Crown submits that Mr. Brewer made, at best, minimal efforts to determine whether CMC Metals was permitted to conduct the work.

[28] Mr. Brewer, on the other hand, submits that he was led into his error by mining officials. He received incomplete information from them. Because of this incomplete information, he believed the activities CMC Metals undertook were within its permit. He referred to this as "officially induced error". As the Crown pointed out, officially induced error is a term used to describe a complete defence to a charge. I will not therefore use this term. I will, however, consider his submissions that mining officials led him to believe CMC Metals could take the actions it did.

[29] The agreed statement of facts includes emails between Mr. Brewer and mining officials. Mr. Brewer submits that, in his email, he asked about the permitting required to do the kind of work CMC Metals eventually did. The mining official told him, in response, about the process for applying for a certain kind of permit. Mr. Brewer submits that what

the mining official should have done instead was to tell him that he needed to amend his current permit.

[30] I conclude that mining officials did not misinform Mr. Brewer. In his email, Mr. Brewer stated, “[w]e are considering applying for a Class 2 permit for a property.” He then asked about the application process for getting a Class 2 permit. He did not specify which property he was referring to or that it was property to which a permit was already attached. In reply, the mining official stated, “I am unsure which property you are inquiring about...” She then went on to detail the requirements for getting a Class 2 permit. The official indicated that she did not have complete information and then answered the question that was posed to her.

[31] In my opinion, Mr. Brewer, although not meaning to, did not provide enough detail for the mining official to give him the information he was seeking. I conclude that the official did not lead Mr. Brewer astray with her response.

[32] Mr. Brewer has voluntarily taken part in a heavily regulated industry and has the obligation to inform himself of his rights and responsibilities when taking part in the industry. He should have done more to determine what he could and could not do. While I conclude Mr. Brewer’s attempts to comply were more than minimal, they were not adequate.

[33] Remorse is the next factor I will consider.

[34] Mr. Brewer showed remorse, reclaimed the work, and pleaded guilty. This is a mitigating factor.

[35] Regarding the size of the offender, the corporation is small and is not doing well financially.

[36] Additionally, it realized no benefits from the offence. In his submissions, Mr. Brewer explained the extent of the financial burden CMC Metals and he personally undertook to reclaim that work. Although this information is not in evidence, I can still conclude that this mistake cost CMC Metals rather than benefiting it.

[37] The corporation also has no prior record for environmental offences.

[38] Finally, I turn to the factors of denunciation and deterrence.

[39] Denunciation is about condemning the offender's actions. Deterrence is about dissuading the offender (called "specific deterrence") and others in the larger community (called "general deterrence") from committing similar offences. I will focus my analysis on deterrence.

[40] Mr. Brewer says that he does not need to be deterred from committing a similar offence again, and I accept that. However, general deterrence is just as important. The penalty imposed must be meaningful and not simply be seen as the price of doing business. Without being harsh, the penalties must be sufficiently substantial to warn others that such illegal activity will not be tolerated (*R v Johnson*, 2010 NWTTC 17 at para. 32, citing the 1985 Law Reform Commission of Canada study paper entitled *Sentencing in Environmental Cases* at pages 14 and 16). A fine of $1 would not act as any kind of general deterrence.

[41] Taking the different factors together, the circumstances of the offence and of the offender, put this offence at the lower spectrum of severity. In addition, however, I must also take into account that, although CMC Metals pleaded guilty to one count, the facts from one other count were included in the offence. The charge therefore included two

distinct unauthorized activities: establishing new access roads and trenching. This increases the gravity of the offence.

[42] I therefore order that Mr. Brewer pay a fine of $3,500. If the fine surcharge is at issue, I waive the requirement that Mr. Brewer pay it.

[DISCUSSIONS]

[43] It is not as large of a fine as $12,000, so I will give you six months to pay the fine.

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WENCKEBACH J.