

THE COURT OF APPEAL PUTS AN END TO 'JAIL ON THE COUCH' SENTENCES FOR BID-RIGGING

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Let it be known, the message sent by the Court of Appeal (the “**Court**”) in the cases of Pasquale Fedele, Jacques Lavoie and Patrick Alain could not be any clearer. Bid rigging and fraud in order to obtain public contracts will result in mandatory prison sentences when the contract is of high value.

Sentences

In its decision *R v Fedele*,^[1] the Court reversed the trial judge’s decision to impose conditional sentences on the three accused, substituting them with firm prison sentences. The Court even increased Fedele’s sentence from 2 years less a day served in the community to three years of imprisonment, while Lavoie (2 years less a day) and Alain (18 months) will serve their sentences in prison. The Court would also have increased Lavoie’s sentence to 30 months of imprisonment but deferred to the Crown’s suggestion of 2 years less a day.

Facts

The criminal charges of fraud against Fedele, Lavoie and Alain stem from an investigation into their roles at a construction company called CIV-BEC. Between 2008 and 2010, they created a bid rigging system that helped them obtain public construction contracts at artificially inflated prices from a number of municipalities in the Saint-Jean-sur-Richelieu region. The accused were found guilty with respect to six contracts, together worth over 15 million dollars.^[2] The Crown appealed the sentences handed out by the trial judge, arguing that they were too lenient given the gravity of the crimes committed.

Principles established by the Court

The Court, in granting the appeal, states from the outset that despite the high degree of deference that must be awarded to first instance sentencing decisions, the sentences in this case were manifestly inappropriate because they clearly did not respect the principles of deterrence and denunciation.^[3]

According to the Court, the very serious consequences, both social and financial, of an organized collusion system in the attribution of public construction contracts, require the imposition of sentences that demonstrate that such systems will not be trivialized nor tolerated by the courts.

Objective gravity

In 2004, the legislator increased the maximum sentence for fraud from 10 to 14 years of imprisonment, indicating the objective gravity of this type of offence. It should be noted that the offence of bid rigging in section 47 of the Competition Act was similarly modified in 2009, as the maximum sentence increased from 5 to 14 years of imprisonment. Regarding the objective gravity of fraud, the Court considered the fact that the offences were aimed at public funds; therefore, taxpayers were the true victims. Further, crimes of fraud in bidding processes are particularly preoccupying in Quebec, where they seem to have been highly trivialized by many construction contractors.^[4] Finally, the bid rigging in this case holds additional objective gravity because if this type of criminality is not constrained, it has a high risk of negatively affecting the public's confidence in public institutions and may thereby “undermine the very foundations of the rule of law” [our translation].^[5]

On this point, the Court concludes that bid rigging in the granting of public contracts is of an additional objective gravity that must be reflected in the sentencing process, even in the absence of the aggravating factor of any breach of trust.

Subjective gravity

Secondly, the Court examines the subjective gravity of the offences, which must be appreciated according to the moral blameworthiness of the accused. The Court finds that the trial judge also minimized the subjective gravity of the accuseds' crimes. The Court finds that the schemes deployed were sophisticated, that they spanned extended periods, that the accused knew that they were taking important risks while having much to gain, and that such schemes are difficult to detect.

Finally, the Court studies the applicable jurisprudence and doctrine. It concludes that in cases of major fraud (over \$500 000), sentences of 3 to 5 years of imprisonment have generally been imposed. It also specifies that a conditional sentence is more lenient than imprisonment, and that it will not be justified in cases where the objectives of deterrence and denunciation must take the upper hand given the gravity of the offences at hand, which involve bid rigging for public contracts. Lavoie could have received a sentence to be served in the community were it not for the existence of a risk of re-offending, his minimization of his involvement and his trivialization of his illegal behaviour.

Summary

As such, the Court concludes that the offence of fraud in public bidding processes holds important objective and subjective gravity, and that both were minimized by the trial judge. It therefore intervenes to correct this error of principle and to adjust the sentences in consequence. Notably, it takes the firm stance that in cases of major fraud, a sentence of imprisonment is generally warranted, because a conditional sentence does not fulfill

the objectives of deterrence and denunciation. Incarceration can be appropriate even in cases where the accused has no criminal record, has a good reputation, partly reimbursed the victims, shows remorse, and is not likely to re-offend.^[6] The Court does however temper this stance by specifying that there remain cases in which a conditional sentence remains justifiable, particularly in cases where the fraud involves lesser amounts.

Commentary

The important objective gravity that the Court attributes to offences of fraud in public bidding processes is part of a similar legislative tendency. Modifications to the Criminal Code in 2004 and to the Competition Act in that 2009 increased the maximum prison sentence to 14 years clearly indicate that the legislator considers fraud, bid rigging, price fixing, market allocation, and limiting production to be serious and reprehensible crimes (section 45 of the Competition Act criminalizes conspiracies, agreements or arrangements between competitors, while section 47 criminalizes bid rigging).

Finally, it is interesting to note that the Fedele decision is part of a tendency that goes beyond just Quebec. Six years ago, in 2012, chief justice Crampton of the Federal Court wrote that offences to sections 45 and 46 of the Competition Act are such that their denunciation can only be achieved by sentences that communicate society's reprehension towards these crimes.^[7] According to him, hard core cartels such as agreements for price and bid rigging are similar to fraud and theft because they represent no less than an attack on our free market economy. He added that such agreements have a greater negative effect than theft or fraud, and that they must be dealt with as severely as, if not more severely as those offences. He concluded, as the Court of Appeal did in Fedele, that when the amounts in question are in the tens of millions of dollars, these illegal agreements should be treated as major fraud.

Justice Crampton stated that significant sentences of imprisonment would not only be justified, but even required to reach the objectives of exemplarity and dissuasion for this type of crime, which has wrongly considered by some to be quite trivial.

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[1] 2018 QCCA 1901.

[2] *Ibid* at para 48.

[3] *Ibid* at para 35.

[4] *Supra* note 1 at para 41.

[5] *Supra* note 1 at para 43.

[6] *Supra* note 1 at para 70, citing *R v Coffin*, 2006 QCCA at para 51.

[7] *Canada v Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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