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Pétroles Global: Calculating Fines Imposed on Corporations

When an organization – including a corporation, a company or a partnership – is found guilty of a criminal offence, section 718.21 of the *Criminal Code* requires a court to take a number of factors into consideration when determining the fine, including:

- any profits realized as a result of the offence;
- the economic viability of the organization and continued employment of the employees;
- any restitution made by the organization to the victims; and
- measures taken by the organization to prevent repeat offences.

Rarely have these factors (since their coming into force in 2004) been the subject of such detailed analysis as in *R. v. Pétroles Global Inc.*, 2015 QCCS 1618, a recent decision of the Superior Court of Québec. In its ruling, the Court rejected purely arithmetical calculations in favour of a multifactorial approach, and fined the company $1 million, even though the offence had been committed without the knowledge of senior management and the board of directors.

Background

In 2008, Pétroles Global, a retail gasoline operator, was charged with conspiracy to fix gasoline prices, contrary to section 45 of the *Competition Act*. As part of its defence, the company argued that the offence had been committed without the knowledge of its senior officers and, therefore, did not give rise to criminal liability on its part. Nevertheless, in 2012, the accused corporation was tried by the Court of Québec (see our previous publication on this decision) and was found guilty by the Québec Superior Court in 2013 (leave to appeal to the Québec Court of Appeal granted).

When Pétroles Global once again appeared before the Superior Court for sentencing, it stressed that none of its shareholders or senior officers had taken part in the offence, which afforded the company $645,000 in illicit gains. The Crown called for a fine ranging from $2.2 million to $2.6 million.

In the end, the Court imposed a $1 million fine on the company, *i.e.*, 10% of the maximum sentence available at the time the offence occurred. Note that the maximum sentence has since been increased to $25 million.

Sentencing Factors Specific to Organizations

In its reasons, the Court stated that in addition to general principles of sentence determination, such as general deterrence and the gravity of the offence, factors specific to organizations must also be weighed. The Court grouped organization-specific factors into three categories:

- **Moral turpitude:** This category includes (i) the amount of gains realized as a result of the offence; (ii) the degree of complexity required to commit the offence, having regard

to the nature, duration and territorial scope of the offence, for example; and (iii) whether the organization attempted to conceal its assets to show that it was unable to pay a fine or make restitution of the illicit gains. In the case at bar, the Court held that "just because the board of directors did not authorize or was unaware of the offence does not mean that criminal liability is lessened for the purposes of determining the sentence [translation]."

- **Public interest:** It is in this category that the economic viability of the organization is taken into account. Noting that there is "no socio-economic or general political advantage to bringing about the bankruptcy of Global", the Court adjusted the payment terms of the fine accordingly. Investigation and prosecution costs incurred by public authorities, as well as penalties already imposed on the organization and its agents, were also taken into account under this heading.
- **Rehabilitation, re-adaptation and repeat offences:** This category takes into consideration (i) previous convictions and sentences imposed for similar previous conduct; (ii) penalties imposed by the organization on representatives for their role in the commission of the offence; (iii) all forms of restitution or indemnity already paid by the organization to the victims of the offence, including any sums paid within the context of a class action; and (iv) measures adopted to prevent repeat offences.

In applying these principles, however, the Court refrained from turning to precedents, in which sentences stemmed from joint sentencing recommendations; it deemed such precedents to be of "little use".

Rejection of a Purely Economic Analysis

The Court noted that, from a purely economic standpoint, the amount of the fine should – if it is to have any real deterrent effect – exceed the benefits expected to be gained from the offence. "In the view of economists," said the Court, "a fine providing optimal deterrence must be a fine that [is] equal to the expected gain multiplied by the probability of detection [translation]."

The Court, however, refused to apply the "principle of a fine that is economically optimal". According to the Court, under a purely economic or arithmetical approach, the sentence could not be tailored to the particular situation of the accused organization; nor would it take account of the "cascading economic consequences" resulting from economic crimes. The calculation of the fine would therefore have to take into account deadweight loss – that is, the loss of economic efficiency that follows an inefficient distribution of resources – an approach recommended in 2012 by the Federal Court in *Canada v. Maxzone Auto Parts (Canada)* (see our bulletin on this judgment).

Commentary

In the current context where investigations and criminal prosecutions targeting companies are on the rise, the Superior Court casts a welcome light on sentencing guidelines applicable to organizations. This clarification is a reminder that fines should not generally jeopardize the economic viability of an organization, although the Court does not expressly rule out the possibility of doing so – for example, in cases in which an organization has little or no socio-economic value (on this subject see the Ontario Court of Appeal ruling in *R. v. Metron Construction Corporation*, at paras. 103-110).

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