
CANADA / JUDGMENT

R. v. Licon Construction Ltd.

2019 BCSC 1723

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1723 R. v. Licon Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Licon Construction Ltd.,

2019 BCSC 1723

Date: 20191009

Docket: 27336

Registry: Vancouver

Between:

Regina

v.

Licon Construction Ltd.

Corrected Judgment: The text of the judgment was corrected at paragraphs 72 and 75 on November 19, 2019.

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Counsel for the Crown:

W. R. LeBlanc

Representative for the Appellant Company, appearing in person:

Samuel Yau

Place and Date of Hearing:

Vancouver, B.C.

April 27, May 16, June 6 &

July 11, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 9, 2019

Introduction

[1] This is an appeal by Licon Construction Ltd. from fines totalling \$43,000 that were imposed on it by a judicial justice on August 26, 2016, following its guilty pleas to ten offences against the City of Vancouver's tree protection and building by-laws. Licon argues that the fines were excessive in light of the actual extent of its wrongdoing.

Circumstances of the Offences

- [2] The prosecution that led to these fines arose from the construction of a new house on Fremlin Street. Licon was the general contractor. Samuel Yau, who represented Licon at the sentencing hearing and on this appeal, owns the company with his wife.
- [3] As part of the approval process for the construction of this house, Licon and its then-owner provided a letter of assurance to the City about the measures that would be taken to protect the trees on the property during the construction process. The letter was also signed by the project's arborist. It provided for supervision by the arborist of construction in the "critical root zones" of certain designated trees.
- [4] The development permit that was issued by the City in January 2015 allowed the removal of one tree from the property with the consent of a neighbour, but required that seven other trees be retained and protected. Pursuant to the permit, an arborist had to be present during any construction work near those trees and protective barriers had to be put up around them.
- [5] An excavation near the trees to install a gas line was properly supervised by the arborist in August of that year.
- [6] In October the property was purchased by Zhi Huang and Qui Fan Li. There was some suggestion by the prosecutor that Mr. Huang was the sole previous owner, but this was not clarified.
- [7] The permit was amended that month to allow a retaining wall near some of the trees to be repaired.

- [8] The arborist, who went to the site on November 12, found forms for a new retaining wall, instead of the repairs to the existing wall that had been authorized. More significantly, the protection barriers for two of the trees had been removed and an excavation had been carried out within those protective zones. There was damage to the roots of both trees. In the case of the first tree, the damage was so severe that it was unlikely to survive and was at risk of becoming unstable. The arborist thought that the second tree might be saved by pruning, but that it also might not survive. In addition, removal of the first tree might have put the second at further risk because they were so close together.
- [9] A report by another arborist in January of 2016 described the first tree as being at risk of "failure", which I took to mean at risk of actually falling over.
- [10] In February 2016, Licon and the owners entered into an agreement with the neighbour for the damaged trees to be removed. The agreement acknowledged that excavation had taken place within the protection zones without the supervision of the arborist and that the barriers had been removed.
- [11] The City's inspector who went to the site later that month and found that the barriers for the other five trees that were to be retained had been removed. There were partial remnants of the barriers around the two damaged trees. The inspector noted large cuts to the roots of those trees and that the wooden forms for the new retaining wall were within two feet of them. Photos taken of the scene show debris, garbage, construction material and a portable toilet within the protection areas. The inspector was so concerned about risk to workers from the most severely damaged tree falling over that he issued a stop work order for the site.
- [12] The inspector then contacted Mr. Yau of Licon and requested that he obtain a further arborist report, seek a permit for the removal of the damaged trees and return the barriers to their previous locations. (The resulting arborist report confirmed the extent of damage to these trees and the predictions about their survival that I described previously.) Mr. Yau was also requested to seek a revision of the permit for the new retaining wall that had been started, which would lead to a further inspection and a removal of the stop work order.
- [13] At the end of February the inspector interviewed Mr. Yau and James Liu, a Licon employee; a representative of Shin-Yi Construction, the excavation contractor; and the owner's son. In March he spoke to Yan Huang, the landscaper.
- [14] Mr. Yau admitted that the work had gone on without the arborist, who was only called in after the fact, and that he had delayed applying for a further permit to allow him time to work out the agreement with the neighbour. Mr. Liu said that the barriers had been removed for a number of days in November by the landscaper, on instructions from Licon. The representative of the excavating contractor said that construction work had gone on without the barriers and that they had been digging for the retaining wall for Licon. The owner's son said that he only came by the property once in a while, and that he relied on Mr. Yau. After initially denying that he had cut any tree roots, the landscaper admitted that he had cut

"some" roots when performing his tasks, which he had been hired to perform by Licon.

[15] The damaged trees were ultimately removed. As of the sentencing hearing, the replacement trees provided for in the agreement with the neighbours had not been planted yet. Mr. Yau explained that it was not the appropriate season in which to do so.

Sentencing Proceedings

[16] On August 23, 2016 Licon entered guilty pleas to:

- Seven counts of carrying out demolition, excavation, or construction on a site without protection barriers in place (section 7.6 and 11.6(a) of By-law 9958) - one for each of the trees that were to have been preserved;
- Two counts of allowing trees to become hazardous (section 8.2(c) and 11.6(a) of By-law 9958) - one for each of the damaged trees; and
- One count of failing to comply with the conditions of a development permit (section 6.7 of By-law 3575).

[17] The excavation contractor, the landscaper and the owners of the property also entered guilty pleas to various charges against them at the same hearing.

[18] During the process of entering the pleas, Mr. Yau advised the judicial justice that he had represented all of the parties during an attempt to negotiate a settlement with the City, based on the fact that most of the trees had not been damaged, but that "they don't want to negotiate with me". He said that because "we don't want to waste the time" the participants were all pleading guilty. He expressed some confusion about Licon being charged with allowing one of the trees to become hazardous when it had already been cut down, but when the prosecutor asked him if he wanted to set that count for trial he said, "I just wanted to save time for the court."

[19] In addition to the circumstances of the offences that I have summarized, the prosecutor referred to a previous incident in May of 2015, in which Mr. Yau and Mr. Liu had been involved in the unauthorized removal of barriers and a tree from a site on West 49th Avenue. The inspector in that case had sought compliance with a revised arborist report, as well as revisions to the building plans and a permit for removing the tree, instead of referring their actions for a prosecution.

[20] The prosecutor set her sentencing submissions within the context of what she described as "a virtual tsunami" of by-law charges related to tree removal in Vancouver. She related this to the significant ongoing increase in residential property values and the inconvenience that preservation of trees as required by the by-laws created for owners who were seeking to redevelop their properties to maximize profit. She cited a media report about the recent marked increase in stop work orders resulting from owners "pushing boundaries on what's allowed in order to speed the process and get what they want."

- [21] Given how valuable redeveloped properties are, the prosecutor emphasized that fines imposed for damaging or removing trees must amount to more than the cost of doing business for those involved in the redevelopment, in order to act as a deterrent. To illustrate the risks being created by this conduct, she cited a summary of the environmental, social and economic benefits of trees to the community and noted that the City's tree canopy, half of which is on private property, had shrunk to a small portion of its former size.
- [22] The prosecutor submitted that fines of \$6000 per count should be imposed against Licon for the offences of failing to maintain the barriers. She sought higher fines against the company for these counts than for the other parties who had been charged with them "because of the history", which I took to mean Mr. Yau and Mr. Liu having been implicated in previous improper dealings with trees on the West 49th property.
- [23] She submitted that Licon should receive fines of \$8000 per count for the offences of permitting the trees to become hazardous and \$5000 for the count of failing to comply with the development permit. These fines were the same amounts as she sought against the other parties who had been charged with those two offences.
- [24] In addition to her submissions about the need for deterrence, the prosecutor cited decisions of other judicial justices who had imposed substantial fines for similar offences. This included fines of \$3-4000 per count just for removing barriers, and of \$8-10,000 per count for actually removing trees without a permit. She simply referred to the outcomes of these cases, rather than providing the judicial justice with transcripts of the reasons for judgment.
- [25] Summarizing her position, she said:
- "These are big fines. They are in keeping, however, with previous fines imposed and in keeping with what is required, we hope, to deter these parties who continue, and the public, to breach the by-laws".
- [26] Both Mr. Yau and Mr. Liu spoke on behalf of Licon.
- [27] Mr. Yau denied any wrongdoing in the previous case involving the West 49th property, describing the situation as a mistake by the arborist and the "Landscaping Department", which he said was why no fine was imposed on Licon.
- [28] In the present case, he said that he had received a "licence" to fix the retaining wall and had had rebuilt it "on top". I understood him to be saying that Licon's actions amount to repairing the wall, as the City had authorized.
- [29] As to the circumstances under which the trees were damaged, he explained that Mr. Liu, who had just graduated in engineering, lacked the experience to know that the arborist had to be called before the barriers could be removed and work on the retaining wall was carried out. In response to questioning by the judicial justice, Mr. Yau said that he had reminded Mr. Liu about the proper procedure and had told him to request the arborist to be present, but that Mr. Liu had forgotten.

- [30] He also claimed that after the damage to the trees the other barriers "were immediately put back for protection", although, as the prosecutor pointed out in reply, this was contrary to the observations of the inspector about the absence of those barriers when he attended.
- [31] Mr. Liu confirmed that he had been instructed by Mr. Yau to carry out the landscaping on the property, but said that was not aware that the removal of the barriers would endanger the trees, or would be contrary to the development permit. He could not remember whether or not Mr. Yau had told him about these things. He stressed that "it had never been our intention to cut or damage a tree."
- [32] Mr. Yau made the general concession with respect to Mr. Liu's actions: "I know our company make mistake as long as he's hired by me, or I tell him [a]nyway, a mistake is a mistake." He reiterated that he just wanted to save the court's time, "because we're guilty".
- [33] The judicial justice then engaged in an extended dialogue with Mr. Yau in which he castigated him for placing the owners and Mr. Liu in a difficult situation through his negligence.
- [34] Other than asking him how long he had been in business, the judicial justice did not make any inquiries about the financial position of the company or the payment it had received for this project, on the issue of its ability to pay a fine.

Reasons for Sentence

- [35] The judicial justice reserved judgment until August 26.
- [36] He began the analysis portion of his reasons with some general remarks about the nature of regulatory offences, with their standards of strict and absolute liability, and their goal of encouraging (and where necessary, enforcing) socially beneficial individual and corporate conduct. Focusing on the type of offences before him, he echoed the prosecutor's concerns about the harm caused by the reduction of Vancouver's tree canopy and the ongoing risks posed to it by owners who seek to reduce the number of trees on their property during the course of redevelopment.
- [37] He then turned to the relative degrees of liability of the participants in this case:
- [13] The challenge of sentencing an accused for strict liability offences exacerbates when multiple parties are held culpable either primarily or vicariously. First question that the sentencing Court ought to grapple with: who's liable for what and to what degree? Respectfully, the owners of the property could not be held to have the primary liability as they had signed a contract with a general contractor requiring them to rebuild their home in a proper lawful manner. One could argue that the property owners are always liable for the actions or omissions of the "staff" working on their property. In situations where owners have taken necessary steps to enforce a contract, the liability for the work entrusted to others must be apportioned accordingly. In the case at bar, the primary liability therefore lays at the feet of the general contractor Licon, the excavating contractor ., and, to some

limited degree [the landscaper] as they had a very specific and limited task to perform. The owners are vicariously liable with rather limited consequences.

[38] The judicial justice found himself unable to "instrumentally apply the quanta" (that is, rely on the amounts of the fines) contained in the comparable cases that had been referred to by the prosecutor. He said that because she had not provided him with the actual reasons for judgment in those cases, he did not know the rationale of the sentences that had been imposed and could not determine their precedential value.

[39] Instead, he said that he would arrive at the sentences by applying the relevant general principles, including consideration of "the nature of the offence, compliance history, previous convictions or history, financial circumstances of the accused, damage to the society and generally the cooperative attitude of the parties; how they conducted themselves whether during the proceedings or outside when dealing with the City personnel", and the sentencing provisions of the Criminal Code, as explained in decisions such as *R. v. First Pro Shopping Centres Inc.*, [2006] B.C.J. No. 1235 (Prov.Ct.).

[40] His further specific sentencing remarks dealing with Licon were quite brief:

So then this brings us to Licon Construction. In my respectful view Licon has primary liability as they were interested with the overall management and work on the site for which they were remunerated. One of the primary tasks of any general contractor is to ensure they perform their required tasks diligently and ensure an owner's protection from any liability. They have some history with the City. No submissions were made by them on their financial conditions. On each of the Counts 18, 19, 20, 21, 22, 23 and 24, the fine is \$4,000 on each count. For Counts 43, 44 and 45 the fine is \$5,000 on each count for the total of \$42,000

[41] The count referred to as 43 was actually 49 (failing to comply with the development permit) and the total of these fines, as I said at the outset, was actually \$43,000.

[42] On the issue of payment, there was an exchange between the judicial justice and Mr. Liu, who was appearing on behalf of Licon on that day:

Now, I will give each one of you reasonable time to pay. So we will start with Licon. How long Licon would require? It is a pretty heavy fine, \$42,000. How long will it take them?

JAMES LIU: Your Worship, before -- before the payment schedule can I put some words on this?

THE COURT: Of course.

JAMES LIU: So actually I'd like to start with the counts.

MS. GERBER: Your Worship, Mr. Liu should understand that you have - he has given his judgment. He is not going to change his mind --

THE COURT: Yeah.

MS GERBER: -- on the fines. He's asking now how much time does Licon need to pay?

THE COURT: The opportunity was available to everyone on the day we met, 23rd, to make submissions on sentence. I heard everything everybody said and Ms. Gerber said.

JAMES LIU: Understood.

THE COURT: And then I came down with this sentence.

JAMES LIU: Okay. In this case I was not authorized to answer the question for this payment.

THE COURT: Well, I will give him one year to pay, all right? So for Licon to be paid on or before 26th of August, 2017.

- [43] As requested by the prosecutor, the judicial justice also made an order pursuant to s.333 (c) of the Vancouver Charter requiring Licon to comply with the tree protection by-law for one year.
- [44] Because parity of sentence among the various participants is one of the issues raised by Licon on appeal, it is also useful to summarize the counts to which the other participants entered guilty pleas, the sentences that they received and the comments that the judicial justice made about the extent of their responsibility.
- [45] The owners had entered pleas to the same counts as Licon, plus an additional count of failing to ensure that work on their property was carried out in accordance with the by-law. The judicial justice had the initial view that their primary liability was only with respect to that additional count and the one for failing to comply with the development permit, with the remaining counts being subject to the rule against multiple convictions. However it appears that following further exchanges with the prosecutor, which have not been transcribed, sentences were imposed on the owners on all of the counts to which they had entered pleas.
- [46] Mr. Huang was fined \$3000 on that additional count, \$2000 for each count of allowing work to be performed with the tree barriers removed, \$3,900 for each count of allowing a tree to become hazardous and \$200 for failing to comply with the development permit. The total fines for him were \$25,000. When granting Mr. Huang time to pay the fines, the judicial justice mistakenly described the total as \$12,500.
- [47] Ms. Li, who was sentenced on a later date, was fined \$250 on each count, for a total of \$2,750. The judicial justice described her as having "very little if any knowledge of construction processes and the associated vagaries."
- [48] The excavation contractor had entered guilty pleas to all of the same counts as Licon, except for failing to comply with the development permit. It entered a plea to an additional count of carrying on a business without a licence. The judicial justice described the company as having "a somewhat limited role" and "primary liability in some [counts] but mainly are vicariously liable." Significantly in his view, it had "no history with the City". The company received fines of \$2500 on each count of allowing work to be performed with the tree barriers removed, \$4000 on each of the two counts of permitting a tree to become

hazardous, and \$500 for not having a business licence, for total fines of \$26,000 (the judicial justice mistakenly described the total as \$25,500).

- [49] Like the excavation contractor, the landscaper had entered guilty pleas to all of the same counts as Licon, except for failing to comply with the development permit, plus a count of carrying on a business without a licence. He received fines of \$1000 on each of the counts of allowing work to be performed with the tree barriers removed, \$2500 on each of the counts of allowing a tree to become hazardous, and \$500 on the count of carrying on business without a licence, for a total of \$12,500.
- [50] The judicial justice described having the impression that the landscaper was "almost clueless in matters of business" and that: "[i]n the scheme of things herein he is likely somewhat of a lesser actor", who was likely only carrying out the instructions of Licon or the excavation contractor. The judicial justice also found that the landscaper was unlikely to have obtained the financial benefits that Licon and the excavation contractor "may have reaped by cutting corners and disregarding tree protection barriers or rules".
- [51] In response to the landscaper's request to be able to perform community service work "to offset the charges" (which I took to mean in lieu of the fines that had been imposed), the judicial justice made some further general comments that potentially shed further light on his reasoning process and the weight he attached to particular sentencing objectives:
- [75] One of the reasons that you see higher penalties is because of the principle of general deterrence. As you were saying, you are honest; I believe you; I have no reason not to believe you. Two trees were cut. There was a tree protection that was compromised for many other trees. And there is a heated-up construction boom in the housing industry in Vancouver; we know that. There are contractors that community need to get the clear message from the court. That is why you see higher penalties, but the penalties are not as high as in the previous cases that [the prosecutor] talked about.
- [76] The likelihood is in this case that both parties will appeal this case. {The prosecutor} will likely appeal for a too-low fine and you folks will appeal for a too-high fine, which I sincerely hope will happen that all of you will appeal and we will get some kind of a clear direction where the Supreme Court wishes to go.
- [77] The alarming fact is just that our tree canopy is reducing, rendering ecological health of our urban environment in a serious jeopardy. We live here, we raise our children and grandchildren here. Public has a right to clean air, structurally sound, and aesthetically pleasant urban landscape.

Arguments on Appeal and Fresh Evidence

[52] The hearing of the appeal proceeded over four days. Mr. Yau, apparently following my suggestion on the first hearing date that he seek legal assistance, ultimately produced detailed written submissions. He also sought to rely on some material that had not been presented to the judicial justice at the sentencing. This required him to make an application to adduce fresh evidence on appeal.

[53] One of the items that Mr. Yau sought to rely on was a resignation letter from Mr. Liu, dated December, 20, 2016. In the letter Mr. Liu made some potentially relevant comments:

I am sorry to make the company suffer from the [C]ity tree fine on the project of 6710 Fremlin Street, Vancouver. I have to confess that you did mention that we should not cut the tree branch and touch the two trees in the front yard. However, Ms. Huang ordered the Landscaper to cut the tree branch and the Excavator to dig the tree roots, because she did not like that ugly tree and she wanted to build the concrete retaining wall as small as possible. After she did that, she told me that she would take full responsibility of all the legal fee or fine. However, she did not mention any more after work or in the court. I may be too young and green to handle such a matter, so I did not know how to stop her from damaging the trees at that moment. I am too naïve to trust her that she will do something to protect our company. I feel guilty and ashamed of what happened, and the stress has kept me up for many nights. After this incident, I am always scared of making more mistakes and troubling the company, so I feel that I am unsuited and no longer want to continue working in construction.

[54] Mr. Yau also sought to rely on a package of material that included: the corporate documents of Licon, showing himself and his wife as its officers; his contract with the owner's son, showing Licon's fee and the scope of work; plans and photos from the site; and a property assessment.

[55] I ruled that the letter from Mr. Liu met the test to be admitted as fresh evidence. I deferred my ruling on the remaining material until I could determine its actual relevance in light of Mr. Yau's arguments.

[56] Mr. Liu's letter was relied on as support for Mr. Yau's submissions that the co-owner Ms. Li (described as Ms. Huang in the letter) was the person who had directed the excavation of the tree roots, and that she had deliberately done so when Mr. Yau was not on the site, to take advantage of Mr. Liu's inexperience.

[57] He made the further point that Licon's fee was \$70,000, and that the tree-cutting issue caused the project to be extended for an additional eight months, leading to "the depletion of the funds that were received for this project", by which I took him to mean Licon's profit.

- [58] I will admit the contract as fresh evidence showing the nature of the services that were to be provided by Licon (which was designated as the "construction manager" and agreed as its "scope of work" to "provide a residence" on the property) and the \$70,000 management fee. These matters are relevant to the sentencing issues of Licon's role within the project, its anticipated profit and its ability to pay a fine.
- [59] I will also admit the corporate documents, since the closely-held nature of the company and its limited corporate structure tend to support Mr. Yau's characterization of it as a "small family-run company". This is also a relevant consideration when determining the appropriate fines.
- [60] There were additional new facts alleged in Licon's submissions that I cannot give effect to however.
- [61] Mr. Yau claims that the landscaper and the owner's son were the ones who had agreed to a new retaining wall, which would still have adequately protected the trees, and that Mr. Yau simply implemented their agreement. The additional evidence cited in support - the site plan and its revised version - does not support this contention, so even if it were to be admitted it could not have the desired effect.
- [62] The same is true for the claim that the owner's son dealt directly with the landscaper, who then subcontracted with the excavation contractor for what proved to be the fateful excavation around the trees. Neither the excerpts from the sentencing hearing that Licon relies on, nor the "Construction Estimate/Agreement" for concrete forming and landscaping (which is on Licon's letterhead) support it, so I would not admit them either. As I have already summarized, the admissions obtained by the building inspector were that both the excavation contractor and the landscaper carried out these tasks for Licon. Those admissions were not contradicted by Licon during the sentencing.
- [63] For the Crown, Mr. LeBlanc emphasizes the deferential standard that is to be applied in sentence appeals. Absent a clearly excessive or inappropriate sentence, or an error in principle that led to the imposition of an unfit sentence, an appellate court should not interfere.
- [64] He argues that in this case the judicial justice validly emphasized deterrence in light of the harmfulness of this type of offence to the natural environment of Vancouver, and correctly assigned Licon a level of moral culpability that was in keeping with its role in the project. In that regard, the judicial justice properly took into account Licon's previous history of tree violations.
- [65] He points out that the consequence of Licon's negligence was the loss of two healthy trees that had been designated for retention. Licon is not unsophisticated in these matters and was engaged in the activity that led to this harm in order to gain a profit, which attracts particular concerns in a regulatory context. Reflecting these concerns, the judicial justice imposed sentences that were in the middle of the permissible range under the bylaw (\$500 -

\$10,000) and in keeping with the similar cases that had been referred to by the prosecutor. In the Crown's submission, it cannot be said that he erred in concluding that fines in those amounts were appropriate and necessary to meet the applicable goals of sentencing in this case.

Discussion

- [66] Section 109(1) of the Offence Act, which governs by-law prosecutions, makes the appeal provisions of the Criminal Code applicable to appeals from sentences imposed in those prosecutions[1], including s. 687, which provides:
687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
- (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
 - (b) dismiss the appeal.
- [67] In the absence of an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor, or of a sentence that is otherwise demonstrably unfit, an appellate court should not interfere: *R. v. Lacasse* [2015] 3 S.C.R. 1089, at paras. 41-42, 52.
- [68] Before varying the sentence on the basis of an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor, the court must be satisfied that it actually had an impact on the sentence that was imposed: *Lacasse* at para. 44.
- [69] The inquiry into whether the sentence was demonstrably unfit must be focused on the principle of proportionality set out in s.718.1 of the Code - that the sentence must be proportional to the seriousness of the offence and the degree of responsibility of the offender. Both the individual sentence and its parity with similar offences and offenders must be reconciled in order to achieve a proportionate sentence: *Lacasse* at para. 53.
- [70] In the passage that I have quoted, the judicial justice correctly identified the most relevant factors to be considered when arriving at an appropriate sentence for a regulatory offence such as this one. In my opinion however, he went on to make several errors of principle that had a meaningful impact on the sentences that he imposed on Licon.

- [71] First of all, he did not resolve the factual dispute about whether the company's previous involvement with the City on a tree-cutting issue had involved any blameworthy conduct on the company's part. Mr. Yau denied that it had, and this denial put the onus on the Crown to prove that aggravating factor beyond a reasonable doubt: Criminal Code s. 724(3)(3). The prosecutor chose not to do so, which meant that the judicial justice was precluded from relying on that conduct.
- [72] Further, even if that previous conduct had been admitted, it could not have been used to aggravate the sentence, as the judicial justice clearly did here. While prior untried offences may be taken into account to the extent that they shed light on the character or background of an offender, they cannot be treated as aggravating circumstances or the subject of punishment in their own right: *R. v. Wertman*, 2009 BCSC 1177 at paras. 16 and 17.
- [73] I also think that the judicial justice erred in failing to make any inquiries of Mr. Yau about Licon's financial circumstances. Instead of merely noting that no submissions had been made by the company on this point, he should have sought the information from it himself, as part of his duty to assist a self-represented offender to present evidence that may assist their position on sentence. Had he done so, he would have known how much Licon was to be paid for this project and the scale of its business generally, and could have determined more accurately the level of fines that were actually needed to ensure that the penalty was more than its cost of doing business and achieve effective deterrence.
- [74] However, I am unable to find that the judicial justice erred in the manner in which he dealt with Mr. Liu's submissions about how the damage to the trees occurred. On the evidence before him, it was a proper situation in which to impose responsibility on Licon for failing to properly instruct and supervise an inexperienced employee.
- [75] On that point, although I have admitted it as fresh evidence and hearsay is admissible in sentencing proceedings (Criminal Code, s.723(5)), it is difficult to place much weight on Mr. Liu's letter, in which he claims that Mr. Yau instructed him not to cut the tree but that Ms. Li directed him otherwise. This claim runs directly contrary to what he advised the court at the sentencing - that his "supervisor" Mr. Yau told him that it was time to "start landscaping" and "move out the barriers" before they started. He does not explain why he gave the court what he knew to be false information at that point, but his willingness to do so must inevitably undermine the credibility of his more recent version of events. I also find it hard to accept that all of the participants would have described their respective roles to the inspector without ever even hinting that the damage had been deliberately done at Ms. Li's direction.
- [76] At the end of the day, I think the errors led the judicial justice to sentence Licon as an offender with a previous history of similar misconduct, and without regard for the scale on which it was operating or the financial rewards for its participation. I conclude that the amount of the fines should be moderated somewhat as a result, but without diluting to an excessive degree the valid concerns that the judicial justice expressed about the seriousness of damaging trees in the development process, and the resulting need to deter both these

participants and others who might be similarly inclined.

[77] In my opinion that can best be achieved by reducing the fines that were imposed on these counts by \$1000 each. This results in total fines of \$33,000, which I think accurately reflects the gravity of the offences and Licon's degree of responsibility for them. The sentence appeal is allowed to that extent.

[78] The judicial justice gave Licon one year to pay the original fines. The company will now have one year from the date of the release of this judgment to pay the new total.

"Schultes J."

[1] More generally, s. 133 makes the provisions of the Criminal Code relating to summary conviction offences applicable to these prosecutions where "express provision has not been made in this Act or only partial provision has been made "

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