Information No. 94-33379

ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

5

HER MAJESTY THE QUEEN

against

10

MR. GAS LIMITED

****

R E A S O N S   O N   S E N T E N C I N G

15

GIVEN ORALLY BY THE HONOURABLE JUDGE D.W. DEMPSEY
on January 26, 1996, at OTTAWA, Ontario

****

20

CHARGE(S): s. 61(1)(a), Competition Act - (9 counts)

****

25

APPEARANCES:

30

G. Assad, Esq. — Counsel for the Federal Crown

R. Wakefield, Esq. — Counsel for the accused

****

ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

TABLE OF CONTENTS

EXHIBITS FILED ON SENTENCING

EXHIBIT NUMBER ONE

Correspondence from chartered accountants firm; Financial Statements of Net Income or Loss for the periods from 1992 to and including July 31, 1995

EXHIBIT NUMBER TWO

Correspondence from Mr. Gas to Investigation and Research, Department of Consumer and Corporate Affairs, dated August 11, 1992

****

Transcript Ordered: January 26, 1996

Transcript Completed: February 4, 1996

Counsel Notified: February 15, 1996

CST 01 90

Friday,
January 26, 1996

5

REASONS ON SENTENCING

DEMPSEY, P.D.J. (Orally):

10 This matter has been set to this date for sentence in regards to the charge presently before this Court. Mr. Gas Limited was originally charged with nine offences under
15 the Competition Act. It was charged, firstly and globally, that during the period from June 1, 1988 to June 20, 1993, that being a person engaged in the business of supplying a
20 product, to wit, retail gasoline, that it did unlawfully by agreement, threat, promise or any like means attempt to influence upward or discourage the reduction of price at which other independent gasoline retailers supplied
25 or offered to supply the said product, contrary to section 61(1)(a) of the Act, and did thereby commit an indictable offence contrary to section 61(9) thereof.

30

It was also charged with eight other offences under section 61(1)(a) and 61(9) of the Act, in which charges it was alleged that it did on certain dates during the years 1992 and 1993, directly or indirectly by threat or any like means, attempt to influence upward or discourage the reduction of the price at which certain of its competitors engaged in the supply of retail gasoline.

At the commencement of trial it was agreed, in order to expedite the proceeding, that an Agreed Statement of Facts would be filed in which the actions of the accused as they relate to the alleged offences were set out. Following the conclusion of the receipt of evidence and following argument at trial, the accused was found not guilty of all but one of the said nine counts.

A finding of guilt was made as to count number 6 in the information, being a count that alleged that the accused did on a particular date, being on September 3, 1992, directly or

indirectly by a threat or a like means, attempted to influence upward or discourage the reduction of the price which one of its competitors supplied or offered to supply retail gasoline. That finding of guilt was based on the admitted evidence contained in the Agreed Statement of Facts, where it was agreed that two employees of the accused corporation met with the president of one of its competitors. At that meeting, the representatives of Mr. Gas made inquiries as to why the competitor was not conceding the 0.2 cent per litre advantage to the accused self-service station as dictated by industry norms. During that meeting, one of the employees indicated that the accused would continue to follow their pricing policy of maintaining 0.2 cents per litre advantage against full-service outlets.

On the basis of that evidence, this Court found that that comment amounted to a veiled warning that the competitor was facing a price war if it did not change its pricing policy;

5
10
15
20
25
30

and concluded that that comment amounted to the communication of an intention, in advance, to take some adverse future action and amounted to a threat under section 61(1) of the Act.

In its submissions to this Court, the defence suggested that this is a situation where this Court could properly not impose any penalty, or, at the most, impose a very modest financial penalty. It points, firstly, to the penalty section, being section 61(9) of the Act, which provides:

> "Every person who contravenes subsection (1) or (6) is guilty of an indictable offence and liable, on conviction, to a fine in the discretion of the Court or to imprisonment for a term not exceeding five years or both."

Unlike other sections of the Competition Act which provide for substantial and in some cases minimum fines, section 61(9) grants a discretion to a sentencing court as to whether to impose a financial penalty or not.

The defence emphasizes as well that this was not and is not a prosecution under section 45 of the Act for alleged price fixing which normally calls for and carries severe penalties. This Court is as well reminded that the matter before it was considered by both the Crown as well as the defence to be a test case, to obtain an interpretation of the wording of section 61(1)(a), and in particular the phrase "or any like means" as contained therein.

The defence as well points to the fact that the accused, throughout the investigation and the inquiry which followed, cooperated fully with the Department. Reference is made as well by the defence to the fact that the two employees involved in this one instance have been let go, as they were acting contrary to the policy of the company against such actions.

The defence as well alludes to the financial costs borne by it as a result of this

5 10 15 20 25 30

investigation and inquiry and the defence of the charges before this Court. It as well submits that the corporation and its employees and officers have suffered more than financial costs, and in fact, suffered emotional and psychological costs and injuries as a result of the nature of the inquiry initiated by the Director of the Bureau of Competition Policy. It is, of course, of note that this is solely a submission made by counsel for the accused and there is, of course, no direct evidence before this Court on that issue.

As well, the defence points to the fact that Dr. Lermer, who gave evidence at trial, confirmed that the industry standard was that full-service locations were pricing their product 0.2 cents per litre above the cost of self-service outlets and, most importantly, that there was no suggestion of any impropriety in that practice.

The defence as well submits, and I find correctly submits, that there is a complete

5
10
15
20
25
30

lack of evidence that it in any way benefitted financially from the actions of its two employees. There is as well no direct evidence before this Court showing a discernible impact on either the competitor nor the market as a result of the actions of the accused's employees.

The Crown in its submissions asked this Court to steer its attention away from the incident itself and to focus on the product which is affected by the incident in question. The Crown argues that it is the product rather than the threat which is important and which should lead this Court to conclude that the accused's actions render this a very serious offence. The Crown correctly submits, in my opinion, that gasoline can no longer be considered as a luxury item in our society, the purchase of which can be deferred or cancelled completely. It is a product which, at least at this time, in the main, provides for no alternative. Gasoline is a product whose price has an enormous effect on all

individuals in society. The effect of an increase in price of this product is felt either directly at the gas pump or indirectly through increased prices for goods or services resulting from increased transportation costs.

The Crown has provided this Court with a series of authorities to support its position that this Court impose a substantial penalty in this case. It refers the Court, firstly, to the decision of Mr. Justice Kennedy in the case of R. v. Shell Canada Products Limited rendered on March 14, 1989, in Winnipeg. Mr. Justice Kennedy, in his decision, refers to the importance a sentencing court in this type of case must put on the issue of deterrence and the need to reflect the principal function of sentence, that being the protection of the public.

His Lordship, at page 2 of the decision, indicates that there are many factors which a court must look at in determining what would

be a fit and proper sentence. He refers to the fact that the court must look to determine if in fact the incident was an isolated one and whether or not it was the result of distinct corporate policy and whether that corporate policy was of long-standing duration. It must as well consider whether the threats used were meant to influence the price and whether those threats were overt and actually carried out. As well, His Lordship suggests that a sentencing court must consider the magnitude of the corporation and its earning capacity. It must as well consider whether there was a loss to the public as a result of the actions of the offender and whether those actions were deliberate and flagrant.

The Court is reminded as well, from the decision in Shell Canada Products Limited, that any penalty imposed cannot simply amount to a licence or be considered to be so minimal as to amount to an incidental business expense required to be paid in order to carry on its

illegal activity. The court as well, in the authorities referred to by the Crown, has been directed to the decision of the Manitoba Court of Appeal in the same case, R. v. Shell Products Limited, in which the penalty that was imposed at trial was in fact doubled from one hundred thousand dollars ($100,000).

In addition, the Court has been directed to a decision of my brother Judge MacPhee, rendered on May 30, 1991, in the case of R. v. Perry Fuels Inc. In that decision, an apparent joint position was placed before the court in terms of disposition. The apparent joint position was for the payment of a fine in the amount of forty thousand dollars ($40,000) and was imposed by the Court, apparently in light of the joint submission made. Perry Fuels, as noted from the documentation provided to this Court, appears to be a company having some connection, or in fact perhaps even being owned by, and being a division of Ultramar Canada.

As well, the Court has been directed to the decision of the Ontario District Court in the case of R. v. Sunoco Inc., a decision of Judge P. Drouin rendered on August 18, 1986. The Court has had an opportunity of considering the evidence in that case in which a fine of two hundred thousand dollars ($200,000) was apparently imposed.

There has as well been provided to this Court, at tab 6 of the Crown's argument, a copy of correspondence, dated August 11, 1992, from the general manager of Mr. Gas Limited to the director of Investigation and Research of the Department of Consumer and Corporate Affairs. In that letter, the author sets out the position of Mr. Gas, in terms of the Competition Act, and confirms that Mr. Gas has voluntarily and of its own initiative implemented a program to ensure compliance with the Act by all of its independent operators. The Crown, in its submissions to this Court, refers to this correspondence and, in fairness, as a result of that, unless there

5

10

15

20

25

30

are objections from counsel, I propose to file a copy of that as Exhibit Two on sentence. Mr. Wakefield?

MR. WAKEFIELD: There's no difficulty with that, Your Honour.

THE COURT: Mr. Assad, any objection?

MR. ASSAD: No objections, Your Honour.

THE COURT: Thank you. It is the opinion of this Court that that correspondence, as it has been referred to by counsel in the submissions, should be properly and formally before this Court as an exhibit. It is correspondence setting out the position of the corporation and, obviously, it is evidence of its intention as of the date thereof. The Crown in its submissions, of course, points to the fact that the correspondence is dated August 11, 1992, and the offence date of the charge before this Court, of course, falls very soon thereafter.

The Court is very mindful that normally, the offence before this Court would call for a substantial penalty to properly deal with the

issue of deterrence and to discourage any attempts to lessen competition in the market-place. However, having said that, this Court must also consider those factors which go to the mitigation of sentence. Although this Court must be mindful of the nature of the product that was being dealt with in this case, that being retail gasoline, and the importance of that product to society at large, this Court, as any sentencing court, must properly consider both the aggravating as well as the mitigating factors before it.

Clearly, as indicated, the most serious aggravating factor is the product itself that is being dealt with. As well, however, the Court must consider, as indicated, the nature of the offence itself. The offence took place on one occasion and occurred as a result of two employees apparently contravening the then stated policy of the accused. As well, there appears to be no direct evidence before this Court that the competitor nor the market was affected by the threat. In addition, it

is not argued that the accused did not in any way act but in full cooperation with the authorities throughout.

As well, as in any sentencing situation, this Court must reflect the financial means of the accused and its ability to pay a financial penalty. There has been filed with the Court a combined schedule of net income or loss for the periods from 1992 to and including July 31, 1995. It would appear from the statement filed for the period ending July 31, 1994, that the corporation suffered an operating loss slightly in excess of twenty-nine thousand dollars ($29,000) before tax. As well, for the period ending July 31, 1995, the corporation, prior to the consideration of the gain or loss on disposal of assets, suffered an operating loss of one hundred and sixty-two thousand five hundred and eighty-eight dollars ($162,588).

The Crown, of course, points to the fact that these financial statements do not reflect

totally the capacity of the corporation to pay a fine. He refers the Court to the issue of retained earnings and the assets of the accused. Counsel for the accused has provided me with oral representations as to the retained earnings of the corporation and indicates that, although the retained earnings for the year 1995 were approximately 1.4 million dollars, that there was in fact no money, should those retained earnings have to be capitalized or paid. Counsel for the accused indicates that this corporation, like the industry itself, is facing a bleak financial picture given the nature of the market at this time, a market which, he suggests, is not going to improve in the near future.

The Court, then, in arriving at what it considers to be a fit and proper disposition in this case, must factor all of the evidence it has heard and the submissions that it has received. After doing so, it is the position of this Court that this is not a case where no

penalty can be imposed. It is obvious that, although there are many mitigating factors in this case, the over-riding concern still remains to be deterrence.

In the circumstances of this case, after considering the evidence and the submissions made, I am satisfied that a monetary disposition is a proper one, the amount of which must reflect the offence as well as the offender. The amount of the fine being levied in this case is the sum of fifty thousand dollars ($50,000). Does the accused require time to pay?

MR. WAKEFIELD: Yes, Your Honour. If you could allow a period of one year initially, and if it can't be done within that period of time a court application could be made.

THE COURT: The corporation will be allowed a period of one year to pay. Thank you.

The Honourable Judge D.W. Dempsey
Ontario Court (Provincial Division)

THIS IS TO CERTIFY that the foregoing is a true and accurate transcription from the record made by sound recording apparatus, to the best of my skill and ability.

Irene Czapla
Certified Court Reporter