R. v. Sunoco Inc.

Her Majesty The Queen v. Sunoco, Inc.

Citation: 1986 CarswellOnt 882,

12 C.P.R. (3d) 79

Court: Ontario District Court

Judge: German D.C.J.

Judgment: August 18, 1986

Year: 1986

Counsel: *J. LEISING, Esq.*, for the Crown.

***N. NEWBOULD, Esq.* & *J.L. FINNIGAN, Esq.*, for the Accused.**

Subject:

Property

Corporate and Commercial

Trade and Commerce

--- Combines and competition legislation

-- Competition offences

-- Price maintenance

-- Principles of sentencing

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German, D.C.J.

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Reasons for Sentence

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THE COURT: This is the sentencing of Sunoco Oil Inc. Before proceeding, I would like to thank counsel for their very able assistance in this case, and all the parties for their patience. I propose now to proceed on the sentencing, unless either counsel wish to make any further submissions at this point.

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Mr. NEWBOULD: I have no further submissions.

3

Mr. LEISING: Yes, no, thank you.

4

THE COURT: All right.

5

On June the 24th, 1986, I found Sunoco guilty on Count 1 of the indictment and not guilty on the other Counts. The offence which I found the company to have been committed was the agreement which Sunoco imposed on the Singh station that they would compete with what Sunoco said was their similar and like competition and the dealer was forbidden to initiate downward pricing and was not to compete with prices charged by the station across the road or with any other station other than those specified.

6

The dealer was given a price allowance and this price allowance was frozen to discipline the dealer when the oral agreement was broken by Mr. Singh ordering prices to drop below that

of the similar and like competition.

7

To put it succinctly, the agreement, though oral, was that the dealer would receive an allowance so long as he priced as he was directed, but when he did not, the company disciplined him by freezing his allowance.

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In my view, this was similar to the method used in other cases, such as Levi Strauss, **where the supply of product was used to enforce compliance.**

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Shortly afterwards, the two parties agreed to go their separate ways.

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Mr. Martell gave evidence on the sentencing that since the conviction, Sunoco have changed their method of carrying on business by removing the temporary voluntary allowance and switching to a rack pricing system whereby product is sold to the dealer at a competitive price and he is free to set his selling price. I accept Mr. Martel's evidence and am satisfied that these changes have been made *bona fide*.

11

In turning to the sentence that would be appropriate, both counsel have submitted that it should be a fine, but they have, perhaps not surprisingly, differed in the amount that the fine should be. The Crown is asking for a fine of $250,000.00, and the defence is asking for a fine of $30,000.00.

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I believe there are several principles of sentencing to be considered by me. Rehabilitation of the offender and deterrence to the offender from committing further offences; general deterrence to others and protection of the public and to show the public's displeasure of the conduct.

13

Mr. Justice Arnup in *Regina v. Browning Arms* stated at page 303 that:

> **There can be no doubt that the principle which underlies s. 38 of the Combines Investigation Act is ... 'designed to protect the interest of the public in free competition'.**
>
> **Section 38 is particularly applicable to the protection of competition at the retail level, a level at which the consumer is especially concerned.**
>
> **Where a corporation is convicted under s. 38, the first consideration in determining an appropriate sentence is the same as with any other criminal offence -- protection of the**

> **public interest. The offence is not a trivial one. It is indictable. The section's role in the protection of free competition has commercial importance, and breach of it has important economic implications and consequences.**
>
> **The aspect of deterrence to others who might be tempted to commit similar offences is clearly an important factor to be taken into account. The penalty imposed must not be so small as to be regarded by the accused or by other corporations as a licence fee for carrying on business in a manner contrary to law.**
>
> **The aspect of deterrence to the convicted corporation is also of importance, although not of as great importance as that of deterrence to others, because a convicted corporation is less likely to commit the identical offence again, ...**
>
> **The size of the convicted corporation, the scale of its operations, the range of products sold by it and of products affected by the illegal practice are all questions to be taken into account. The nature of the market itself, in the particular commodities which are the subject of the charge, is also a matter of consideration. Does the accused company sell a wide range of products, or only a few? Does it have many competitors with respect to those products, or only a few? Are its products sold by thousands of dealers, or only by carefully selected 'franchise holders'?**
>
> **We must also give consideration to sentences which have been imposed in the past, some of which have been imposed in cases which went to the Court of Appeal, ...**

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To consider the amount of the fine, it is necessary to look at the profits of the company. Thomas Riley testified for Sunoco and I accept his evidence that the financial statements which were tendered on the sentencing are accurate and I have relied on them.

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Firstly, the fine must not be so large that it is impossible for the company to pay, but yet it must not be so small relative to the offender that it can be considered by the offender to be a licence fee or merely a cost of doing business. While I am sure the company has commenced its rehabilitation, I am of the view the fine must be sufficiently large that it will not be forgotten.

16

In considering the effect of deterrence to others who might be like-minded to commit similar offences, the fine must be of a sufficient size that it will be a true deterrent. While I appreciate counsels list of fines levied in other cases, it is misleading by itself, because the fine must bear some relationship to the facts of the case and the offender and the bare list is not of great use. The size of the fine must be demonstrated to all manufacturers that the Courts will not look lightly at the offence. It must not be trivial.

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To consider the principle of protection of the public, Canadians through Parliament have clearly shown that they wish there to be competition in the market place. Gasoline is a product

that is used by most Canadians directly and indirectly by all Canadians.

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While the company was charged and convicted of its dealings with one dealer, the company's own evidence was that they were following a practice which had been in existence for 30 years, and the agreement was not an isolated instance, although, there was evidence that this was the first time the temporary voluntary allowance had been frozen.

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Of course, the amount of the net earnings of the company is not the only relative item when it comes to imposing the fine. The seriousness of the offence is always an element that must be taken into consideration, and the question of parity must always be considered.

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In this case, the agreement entered into with the dealer was not an isolated instance. The evidence was that all dealers were required to match their similar and like competition which -- and this, to me, is the most serious breach of the Statute -- was chosen by Sunoco. There are a number of dealers across Canada, particularly in Ontario and Quebec, and their sales are directly to the public.

21

I would refer again to the decision of Mr. Justice Arnup in *Browning Arms* previously quoted as to the serious nature of the charge under this Section. As I said, I do not believe it is appropriate to look at a list of earlier fines without looking at all the facts of the case. What fine has been levied in other instances is only one of the items to be taken into account.

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The fine levied against *Petrofina* by my brother Judge Loukidelis must be considered on the facts of that case at that time and where the company had pleaded guilty.

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In this case, I believe Mr. Newbould's submission of a fine of $30,000.00 would be considered a licence fee or a cost of doing business with the company of the size of Sunoco and would not be a deterrent to any other manufacturers who might be tempted to commit an offence. It would not take into account the size of the corporation's profits and the size and the importance of the company's business to Canadians.

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I had concern about the amount of the fine imposed by my brother Judge Trotter in *Imperial Oil* which was a relatively recent case and where the conduct of the defence witnesses went against them, but in that case, His Honour specifically stated that it was an isolated instance. Further, of course, in the circumstances of that case, the Crown's submissions were that a fine

of $75,000.00 was the appropriate penalty, where in this case, the Crown, and an experienced Crown, has submitted that a fine of $250,000.00 is the appropriate penalty.

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In all the circumstances of this case, the submission by Crown counsel of a fine of $250,000.00 would be appropriate, except that it does not take into consideration the conduct of the company during and after the trial. I was satisfied that the defence witnesses did not lie and there was no attempt to falsify documents. In addition, the conduct of the company since the trial is to be commended and they are entitled to have their sentence mitigated.

26

In all of the circumstances of this case and to cover what I consider the most important principle of sentencing that is deterrence to others, I impose a fine of $200,000.00.

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In dealing with the order for prohibition, I believe Sunoco has learned its lesson and it is not necessary to impose an order of prohibition in this case. I am satisfied that the imposition of the fine together with the trial itself, which could not have been a pleasant experience, will be sufficient without the necessity of a prohibition order.

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Would the company like time to pay the fine?

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MR. NEWBOULD: Yes, Your Honour. If that's satisfactory. Perhaps in 30 days.

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MR. LEISING: I have no objection.

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THE COURT: All right. 30 days to pay.
