R. v. Shell Canada Products Ltd.

Regina v. Shell Canada Products Ltd.

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Court: Manitoba Queen's Bench

Judge: Kennedy J.

Judgment: March 14, 1989

Year: 1989

Counsel: *D.G. Frayer*, for the Crown.

***H.L. Morphy, Q.C.*, and *K.E. Thomson*, for accused.**

Subject:

Property

Corporate and Commercial

Trade and Commerce

--- Combines and competition legislation

-- Competition offences

-- Price maintenance

-- Principles of sentencing

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Kennedy J.

(orally):

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May I once again thank counsel for their help, not only for their submissions but for the material they have provided. I have had an opportunity over the noon hour to review the authorities a little more closely.

2

The imposition of a penalty following a conviction must not only reflect the general principles of sentencing, which are deterrence to both the public and the individual, but it must also reflect a need for the protection of the public, as well as it must be related to the degree of deliberateness or open defiance of the law and the seriousness of the actions of the players, as these facts may be found in a particular case.

3

I have in my decision on the conviction said that a contravention of the Competition Act, R.S.C. 1970, c. C-23, is serious, and when it has to do with a commodity such as gasoline, affecting almost every citizen, it is even more so.

4

To that end, any penalty imposed must, in the circumstances, must reflect a loud denunciation to anyone defeating the purposes of the Act, which are not only aimed at ensuring a climate in which small and medium-size enterprises have an equitable opportunity to participate, but in order to provide the consumer with competitive prices and product choices.

5

In examining the facts then, it would be a different matter if a company attempted to maintain the price of some widget that few people might use and is not an essential product as opposed to maintaining a price of a more widely used and more essential product. Everything then, in respect to applying a penalty, must be taken in proportion having regard to the commodity involved and the scale of the operation of the company that has been charged.

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So, too, as the authorities suggest in relation to corporate violations of the Act, there are many factors which must be looked at, and I outline a few:

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One must ask:

> Whether the incident was of an isolated nature?
>
> Was it the result of distinct corporate policy?
>
> Was the corporate policy of any long-standing duration?
>
> Were there threats used to influence the price and were these threats overt and actually carried out?
>
> What was the magnitude of the corporation and its earning capacity?
>
> Was there a loss to the public?
>
> Were the actions of the offender deliberate and flagrant?

8

These are only a few of the criteria, if you will, that must be looked at in determining the sentence and which I have taken into account in respect to this matter.

9

In convicting Shell Canada Products, I do not shrink from my belief that the aggressive action of its representative, undoubtedly motivated by the economic interests of Shell, potentially damaged the Winnipeg market. A price war was obviated at least around the time of the incident and perhaps even later on had the car wash elected or been inclined to experiment again with lower prices in times of adverse weather conditions.

10

This belief, however, is tempered by the fact that the prices at the car wash were raised in large part because the experiment had not worked and the weather conditions had changed. So there are two factors which came to play in respect to the facts in this case; one being the influence of the Shell representatives and the other being the fact that the car wash intended to raise its prices in any event, because the weather had changed.

11

While the actions and the telephone calls were taken as threats, it is equally true that specific reprisals for the conduct of the car wash were not mentioned. I am, therefore, prepared to accept that the incident occurring reasonably soon after the change to rack pricing went into effect, were the results of

a vigilant and aggressive representative of Shell who went beyond allowable limits in response to the economic interests of Shell Canada Products Limited and not as a result of any deliberate flagrant policy on Shell Canada Products Limited.

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I accept that Shell's general policy was that independent dealers could set their own prices but its representatives had to act in such a way as to pay more than lip service to that policy.

13

I also consider a point neither counsel mentioned directly, and that is, in assessing a penalty, there was adverse publicity suffered by Shell as a result of the conviction and this particular trial, and a consumer-oriented public does not look kindly upon any competition lessening activities, which will undoubtedly be reflected in its sales.

14

In relating then the facts of this case to those referred to by counsel, there are significant differences, although the seriousness of the conduct remains. The fine imposed must signal to all corporations a repudiation of anti-competition behavior and must in the case of this accused be commensurate with its financial success.

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The company must realize through the fine imposed that it is not a licence -- and those words have been referred so in other decisions -- or is it an incidental expense to the business. Indeed, it must have the effect of ensuring that similar behavior is not to be repeated. A substantial fine will ensure that its many representatives and upper managers will not cross over, under the rubric of business counselling, the line separating acceptable business practice and prohibited conduct.

16

I have already indicated that I would not be imposing a prohibition order in any event as I do not find that the company had a prescribed course of conduct warranting such an order. I accept the reasoning in *R. v. Woolworth*, and because this is an isolated incident, unlikely to be repeated, such an order need not be made.

17

It is my view however, none the less, for the reasons stated that the fine must be salutary in nature having regard to the nature of the company, its size and the deterring effect on the conduct in future of itself and others.

18

I decline to apply any formula in the nature of a percentage of gross earnings in assessing a fine, but in the result, counsel, my decision has been that having regard to the various authorities that have been cited and, in particular, even noting the distinctions that exist in respect to the Imperial Oil and the

Sunoco decisions, the fine should be in the amount of $100,000.

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I would, of course, entertain a request from counsel for a moderate period of time within which to arrange payment.
