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## Canadian Constitution Foundation

### Reasons for Sentence

Justice P. D. Tetley

Ontario Court of Justice, November 25, 2011

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ONTARIO COURT OF JUSTICE  
IN THE MATTER OF an appeal under clause 116(2) (a) of the Provincial Offences Act, R.S.O. 1990, c. P.33, as amended;

#### **BETWEEN:**

HER MAJESTY THE QUEEN  
Appellant

— AND —

MICHAEL SCHMIDT  
Respondent

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Before Justice P. D. Tetley  
Reasons for Sentence released on November 25, 2011

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Alan E. Ryan and Demetrius Kappos, Ministry of Natural Resources for the Appellant  
Karen Selick, Canadian Constitution Foundation for the Respondent

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#### **TETLEY J.:**

### **1) Background**

[1] These are the reasons for sentence in the matter of Regina v. Michael Schmidt.

#### **History of the Proceedings**

[2] On January 22, 2010 the respondent Michael Schmidt was found not guilty of nineteen charges relating to the production and distribution of raw milk and raw milk products under the Ontario Provincial Offences Act, R.S.O. 1990, c. P.33 (hereinafter P.O.A.). Seventeen of the charges were laid by the Ministry of Natural Resources (M.N.R.) with these charges alleging infringement of either s. 18 (1) or 18 (2) of the Health Protection and Promotion Act, R.S.O. 1990, c.H.7 (hereinafter H.P.P.A.) In general terms, these sections prohibit the sale, offer for sale or distribution of unpasteurized milk, cream or milk products, including cheese.

[3] In addition to the charges under the H.P.P.A., two offences alleging violation of the Milk Act, R.S.O. 1990, c.M.12 (hereinafter Milk Act) were prosecuted. The Milk Act charges included operating a plant in which milk, cream or milk products were processed without a licence, contrary to s. 15 (1) of the Milk Act and carrying on a business as a distributor of fluid milk products without a licence contrary to s. 15 (2) of the Act.

[4] Following a six day trial the respondent was acquitted of all nineteen of the offences with which he had been charged. The Crown appealed that decision and on September 28, 2011, following a full day hearing on April 14, 2011, acquittals on twelve counts under the H.P.P.A. and the s. 15 (1) Milk Act charge were overturned and guilty findings substituted.

## The Sentencing Position of the Crown

[5] On behalf of the Ministry of Natural Resources, Mr. Ryan submits a fine of \$1000 per count ought to be imposed for each of the ten H.P.P.A. infractions. The remaining two H.P.P.A. counts relate to the distribution of a small quantity of cheese to the officer before she became a cow-share member (August 22, 2006 and October 17, 2006) and a \$200 fine is submitted as being appropriate for those counts. The majority of the H.P.P.A. infractions are noted to involve the sale of milk and cheese on five separate dates to the undercover officer as well as to other cow-share members who were present when these transactions occurred. A fine of \$5000 is sought for the offence of operating a milk plant without a licence during the fourteen week period of the Ministry's investigation.

## The Sentencing Position of the Respondent

[6] On behalf of the respondent, Ms. Selick submits a notional penalty is warranted based on consideration of a number of cited factors including the following:

- An assertion that the respondent's "cow-share" program and the resulting prosecution constitute a "test case" involving the interpretation and constitutionality of both the Milk Act and certain provisions of the H.P.P.A. warranting the imposition of a lenient penalty;
- The absence of malice, recklessness or greed as motivating considerations for the respondent's participation in these offences;
- The respondent's previous good character and his many and varied voluntary contributions to the community, organic and biodynamic farming issues and agriculture in general.

## Legal Considerations

### A. Applicable Statutory Provisions

[7] The penalty provisions relevant to this sentencing judgment are referenced in s. 101 (1) of the H.P.P.A., s. 21 of the Milk Act and s. 72 (1) – (4) of the P.O.A.

#### Health Protection and Promotion Act – Penalty

101. (1) Every person who is guilty of an offence under this Act is liable on conviction to a fine of not more than \$5,000 for every day or part of a day on which the offence occurs or continues.

#### Milk Act - Offences

21. Every person who contravenes this Act or the regulations, or any plan or any order or direction of the Commission, the Director or any marketing board, or any agreement or award or renegotiated agreement or award declared to be in force by the Commission, or any by-law under this Act, is guilty of an offence and on conviction is liable for a first offence to a fine of not more than \$2,000 for each day that the offence continues and for a subsequent offence to a fine of not more than \$10,000 for each day that the offence continues.

#### Provincial Offences Act – Probation Order

72. (1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may, having regard to the age, character and background of the defendant, the nature of the offence and the circumstances surrounding its commission,

- (a) suspend the passing of sentence and direct that the defendant comply with the conditions prescribed in a probation order;
- (b) in addition to fining the defendant or sentencing the defendant to imprisonment, whether in default of payment of a fine or otherwise, direct that the defendant comply with the conditions prescribed in a probation order; or
- (c) where it imposes a sentence of imprisonment on the defendant, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the defendant, at all times when he or she is not in confinement pursuant to such order, comply with the conditions prescribed in a probation order.

#### Statutory conditions of order

- (2) A probation order shall be deemed to contain the conditions that,
  - (a) the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;
  - (b) the defendant appear before the court as and when required; and
  - (c) the defendant notify the court of any change in the defendant's address.

#### Conditions imposed by court

- (3) In addition to the conditions set out in subsection (2), the court may prescribe as a condition in a probation order,
  - (a) that the defendant satisfy any compensation or restitution that is required or authorized by an Act;
  - (b) with the consent of the defendant and where the conviction is of an offence that is punishable by imprisonment, that the defendant perform a community service as set out in the order;

(c) where the conviction is of an offence punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence as the court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant; or

(d) where considered necessary for the purpose of implementing the conditions of the probation order, that the defendant report to a responsible person designated by the court and, in addition, where the circumstances warrant it, that the defendant be under the supervision of the person to whom he or she is required to report.

#### Form of order

(4) A probation order shall be in the prescribed form and the court shall specify therein the period for which it is to remain in force, which shall not be for more than two years from the date when the order takes effect

## **B. Relevant Case Law**

[8] I accept the Crown's submission that the Ontario Court of Appeal has directed that the primary sentencing consideration in public welfare offences is deterrence of both the specific and general variety. See: *R. v. Cotton Felts Ltd*, 1982, 2 C.C.C. (3d) 287 O.C.A.; *R. v. Bata Industries Ltd.*, (1992), 7 C.E.L.R. (N.S.) 245 (O.J.C.) It is clear that the protection of the public and the imposition of a penalty substantial enough to deter both the offender and other like minded individuals is called for in circumstances involving offences of this kind.

## **C. Determination of the Quantum of the Fine to be Imposed**

[9] In *Regina v. Cotton Felts*, the Ontario Court of Appeal canvassed a number of factors that the sentencing judge must consider in determining the appropriate penalty to be imposed in circumstances involving a breach of a regulatory restriction involving a public welfare statute(s). Justice Blair enumerated these considerations as including the following:

- The size of the offending company;
- The scope of the economic activity in issue;
- The extent of the actual or potential harm;
- The applicable statutorily enacted sanctions or penalty provisions;
- The prevailing consideration that a fine... "must be substantial enough to warn others that the offence will not be tolerated..." without the fine "being harsh" or alternatively lenient to the point it may be seen... "to be a mere licence fee for illegal activity."

## **D. Other Sentencing Considerations**

### **i) The Respondent's Related Record**

[10] The respondent's dated but related record is a factor that must be considered in determining the quantum of the financial penalty to be imposed in this matter and the content of any other ancillary orders that may be warranted. The details of the respondent's 1994 P.O.A. convictions are as follows:

	<b>Description</b>	<b>Statutory Provision</b>	<b>Sentence</b>
1	Operate plant without licence	Milk Act, s. 15(1)	Probation for 2 years
2	Offer/sell/distribute raw milk	HPPA, s. 18	\$500.
3	Hinder or obstruct an inspector on 11 March, 1994	HPPA, s. 42(1)	\$500.
4	Hinder or obstruct an inspector on 18 August, 1994	HPPA s. 100(1)	\$1,000.
5	Fail to obey written order on 18 March, 1994	HPPA s. 100(1)	\$500.
6	Fail to obey written order on 18 August, 1994	HPPA s. 100(1).	\$1,000.
7	Carry on business as distributor without a licence	Milk Act, s. 15(2)	Probation for 2 years

### **ii) The "Kienapple" Principle**

[11] I accept Ms. Selick's submission that the H.P.P.A. offences relating to five of the transactions between the respondent and the undercover officer describe the same prohibited act. I accept that the act of "selling" unpasteurized milk or cheese in these transactions also encompasses the prohibited act of "distributing".

[12] As indicated by the Supreme Court of Canada in *Kienapple v. R.*, [1975] 1 S.C.R. 729, at page 745, no one should be subject to double or multiple convictions for the same offence, or punished twice for a singular offending act. Accordingly, the charges relating to the distribution of both milk and cheese on October 20, 2006 and October 27, 2006 shall be noted stayed together with the milk distribution charge arising from the investigation on November 7, 2006. This results in seven H.P.P.A. counts and the singular Milk Act count to be considered for sentencing purposes.

[13] I have included the summary of the offences referenced in this sentencing judgment as detailed in chart form at page four of Ms. Selick's sentencing brief.

	Description	Statutory Provision	Date of Offence per Information	Location
1	Operate a plant without a licence	Milk Act s.15	Between 18 August, 2006 and 21 November , 2006	Farm
2	Distribute cheese to Atherton	HPPA s. 18(2)	22 August, 2006	Blue bus
3	Distribute cheese to Atherton	HPPA s. 18(2)	17 October, 2006	Blue bus
4	Sell cheese to Atherton	HPPA s. 18(2)	20 October, 2006	Farm
5	Distribute milk product to Atherton	HPPA s. 18(2)	20 October, 2006	Farm
6	Sell milk/cream to Atherton	HPPA s. 18(1)	20 October, 2006	Farm
7	Distribute milk/cream to Atherton	HPPA s. 18(2)	20 October, 2006	Farm
8	Sell cheese to Atherton	HPPA s. 18(2)	27 October, 2006	Farm
9	Distribute cheese to Atherton	HPPA s. 18(2)	27 October, 2006	Farm
10	Sell milk/cream to Atherton	HPPA s. 18(1)	27 October, 2006	Farm
11	Distribute milk/cream to Atherton	HPPA s. 18(1)	27 October, 2006	Farm
12	Sell milk/cream to Atherton	HPPA s. 18(1)	7 November, 2006	Blue bus
13	Distribute milk/cream to Atherton	HPPA s. 18(1)	7 November, 2006	Blue bus

### iii) "Test Case" Exemption"

[14] I am not persuaded that moderation of the otherwise appropriate monetary penalty is warranted here on the basis that this case has been brought forward as a test case to determine or clarify a principle of law or fact. This is not a circumstance warranting a stay of proceedings or relief from the imposition of an otherwise appropriate fine or sanction such as *Regina v. Dwyer* 1999 CanLII 1535 (O.C.A.) or *McNaughton v. The Queen* [1976] Q.J. No. 187; *R. v. Turmel* [1995] O.J. No. 1302; *R. v. Stewart (No.2)* Ontario High Court of Justice 45 O.R. 185.

[15] This submission might have greater currency but for the respondent's previous violation of the same legislation in 1994.

[16] The fact the constitutional validity of the applicable legislation was not challenged at that time does not create a circumstance that amounts to this case being brought forward, for the purpose of determining a point of law. The respondent's "cow-share" arrangement was in place for many years before prosecution was instituted. The challenge to the constitutionality of certain aspects of the H.P.P.A. and the Milk Act was in response to that prosecution with many other issues being raised in defence of these charges. Accordingly, I am unable to conclude that these circumstances meet the criteria referenced in the cited cases for a "test case" exemption from the usual sentencing criteria and process in the absence of cooperation by the respondent in defining the legal issue involved in this prosecution in a more direct manner.

### iv) Motive and Good Character

[17] I accept Ms. Selick's submission that the respondent's motivation in championing the cause in support of a less restrictive legislative regime governing the distribution of raw milk products is not motivated by malice, recklessness or greed, and that the respondent is an otherwise a contributing member of society and a person of good character. However, these factors are of diminished significance in the determination of penalty with respect to the regulatory offences in issue.

[18] Similarly, in view of the medical evidence presented at the respondent's trial regarding the potential health risks associated with human consumption of raw milk, an-ecdotal evidence of varied health benefits attributed to raw milk by its consumers and/or conversely the absence of any definitive proof of any negative health consequences directly attributed to the consumption of the milk produced at Glencolton Farms are not relevant sentencing considerations influencing the determination of penalty in this matter.

### vi) Mistake of Law

[19] I accept Ms. Selick's submission that the fact the respondent believed he was complying with the applicable legislation is a factor to be considered in determining the appropriate sentence in this case. (See: *R. v. Scheper* [1986] Q.J. No. 1806, at para. 11; *R. v. Potter* [1978] 39 C.C.C. (2d) 538.)

[20] More importantly, the extended period of time where regulatory enforcement procedures were not instituted may reasonably be concluded to have contributed to this mistaken belief. This is a significant sentencing consideration in my view. While I am not prepared to accept the assertion this matter should be viewed as a test case I conclude a factual basis existed for the respondent to believe his "cow-share" programme was compliant with the applicable legislative restrictions governing the distribution of raw milk and raw milk products in Ontario. The rationale for this conclusion is detailed in the appeal judgment (pp. 35-38) and accordingly will not be repeated here.

#### **vii) The Offender's Means**

[21] Obviously, the court must be satisfied the offender has the ability or means to pay a fine. This must be established on the basis of proof beyond a reasonable doubt. The fine must be able to be paid within a reasonable period of time.

[22] Interestingly, Ms. Selick references a previous sentencing judgment of mine, *R. v. DiGiuseppe* 2008 ONCJ 127, as authority for this proposition, a case where a \$2 million dollar fine was ultimately imposed. Considerations of quantum aside, the following cited principles are applicable here:

The Court must be satisfied the offender has the ability or means to pay a fine beyond a reasonable doubt: See *Gardiner* 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368. A fine should not be ordered, or a term of imprisonment imposed in default, unless there is "clear evidence" that means exist or will exist out of which a fine can be paid within a reasonable period of time after sentence has been imposed: *Hilton* (1982) 4 C.R. App.R. (s) 184; *R. v. Tracy* 1992 CanLII 801 (B.C.C.A.), (1982) 71 C.C.C. (3d) 329 (B.C.C.A.); *R. v. Natrall* (1972), 9 C.C.C. (2d) 390 (B.C.C.A.); *R. v. Raspar* (1978), 1 C.R. (3d) S-45 (Ont. C.A.); *R. v. Q.I.X. Computer Corp.* [1972] B.C.J. No. 1046 (B.C.C.A.).

[23] Having considered the respondent's testimony on the state of his personal resources and income, it is apparent that a recent change in circumstances (March 2011) has taken place in the respondent's residency and his relationship as a directing force at Glencolton Farms. According to the respondent, he has no income or possessions, other than that provided by the kindness of others.

[24] I accept, as accurate, the respondent's initial representation that "it is not a matter of affording" a fine that is in issue here but a matter of principle that is at stake from his perspective. I am satisfied, given time, that the respondent has the financial wherewithal readily available to him to satisfy a monetary penalty.

[25] Active involvement in the running of Glencolton Farms, until relatively recently, and the income that continues to be generated by that enterprise, provides confirmatory support that sufficient financial resources are available to the respondent. All that is required is that the respondent chooses to avail himself of that available resource as he has for most of the past decade.

#### **vii) Remorse**

[26] It is reasonably foreseeable that the respondent will continue to be an active, visible and vocal advocate and agent for reform of the laws governing the consumption of raw milk in Ontario. The fact he is an "unrepentant" believer in this cause is therefore hardly surprising. He has many supporters who embrace similar views. The absence of remorse is not an aggravating factor on sentence.

[27] The sentence here must be crafted to help ensure compliance with the law as it currently exists.

[28] In these circumstances the presence or absence of remorse is not a particularly significant sentencing consideration given the primary sentencing considerations of specific and general deterrence.

#### **Sentence**

[29] Following consideration of the oral and written submissions of counsel, the applicable statutory provisions, cited case law, referenced sentencing principles and on reflection of the evidence presented during the sentencing hearing, I conclude the following sentence is warranted:

1. A fine of \$200 on each of the two H.P.P.A. distribution charges dating from before the undercover operative became a cow-share member (August 27, October 17, 2006);
2. A fine of \$750 for each of the five remaining H.P.P.A. offences (3 x s. 18(1)) – October 20, 27, and November 7, 2006; (2 x s. 18(2)) – October 20 and October 27, 2006; and,
3. A fine of \$5,000, for the s 15 (1) Milk Act offence;

These fines total \$9,150.

[30] In determining the quantum of the fines to be imposed I have considered the circumstances of the offences and the respondent's financial resources. I have also considered the quantum of the penalties imposed in a similar prosecution involving the respondent in 1994 and the paramount sentencing considerations of specific and general

deterrence. I conclude these monetary sanctions represent a modest but not insignificant increase in the fines imposed following pleas of guilty, in a similar prosecution 17 years ago, sufficient to act as a deterrent to both the respondent and others. I am also satisfied, on the basis of the evidence adduced at this sentencing hearing, that given a reasonable period of time, the respondent has sufficient financial resources to pay these fines.

[31] I conclude the Milk Act provision in issue is not simply related to the quota milk distribution scheme in effect in Ontario. Section 2 (c) of the Milk Act clearly indicates that this Act is, in part, directed to maintaining control of the quality of milk in Ontario. This conclusion is confirmed by s. 18 (1) of the H.P.P.A., a section that provides milk is only to be sold pursuant to a Milk Act licence.

[32] Six months will be granted to pay the H.P.P.A. fines. The \$5000 fine levied in regard to the Milk Act offence is to be paid within the next year.

[33] In addition, a one year period of probation will be imposed concurrent on each of the H.P.P.A. offences and the Milk Act offence. Terms of the probation order shall be as follows:

1. The respondent shall not commit the same offence or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province in Canada that is punishable by imprisonment.
2. The Respondent shall appear before the court as and when re-quired.
3. The respondent shall notify the court of any change in the respondent's address.