Canada v. Cool Spring Dairy Farms Ltd., 1999 ABQB 247

Date: 19990329
Action No. 9803-0227-S3

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

COOL SPRING DAIRY FARMS LTD.
and HANS MULLINK

Appellants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE D. A. SULYMA

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[1] This is an appeal from the sentence of The Honourable Provincial Court Judge McIntosh. The Defendants were charged with contravening approvals and enforcement orders issued pursuant to the provisions of the ***Environmental Protection and Enhancement Act***, R.S.A. 1980, c. E-13.3 ("the Act"). There were 13 counts alleged against the Defendants. After trial, conviction was entered on five of those counts, being one count of contravening an enforcement order, contrary to s. 213(g) of the ***Act*** and four counts of contravening provisions of an approval, contrary to s. 213(e) of the ***Act.***

[2] The Defendants are before the Court as they are alfalfa producers. Cool Springs Dairy Farms Ltd. is in the business of processing alfalfa and owns and operates a cubing plant and forage drying facility located on Hans Mullink's ("Mr. Mullink") farm. The operation of the facility entails a degree of noise and results in the release of dust. The convictions relate to emissions of dust that were beyond levels prescribed in the ***Act*** and Regulations thereunder and

further set out in approvals and orders. The running of the machinery also resulted in noise, which in turn affected Mr. Mullink's neighbours. As a result, an order was issued prohibiting the Defendants from operating the equipment and thereby making noise during certain hours. The convictions are based on occasions when the facility was operated outside of those time restrictions.

[3] Mr. Mullink acted on his own behalf and on behalf of the corporate Defendant at the trial of the charges. After conviction, the learned trial judge felt that a full sentencing hearing was advisable prior to his passing sentence and Mr. Mullink continued to act on his behalf and that of the corporation at that hearing.

[4] At the conclusion of the sentencing hearing, Judge McIntosh sentenced the Appellants to fines totalling $50,000.00 between them and made an order pursuant to s. 220 of the ***Act*** requiring the facility to stop work. He further ordered, pursuant to s. 220 of the Act, that the Appellants pay security of a further $50,000.00, and if such was not paid, that it would be deemed to be a decision by the Appellants to cease operations. Further, that the Appellants provide a report by a certain time, or that security would be forfeited.

[5] The Appellants submit that the trial judge imposed a sentence which was excessive, given all of the circumstances. There was a further submission that he erred in law or jurisdiction by imposing certain of the conditions in the s. 220(1) order. In that respect, during argument, the Crown indicated it had no objection to removing paragraph 7 from that order. This provision deemed the failure to post the $50,000.00 security as a decision by the Appellants to cease their business.

[6] Paragraph 7 is struck consequent to this appeal.

[7] The Supreme Court of Canada has defined the function of an appellate court hearing an appeal from sentence. In ***R. v. C.A.M.*** (1996) 105 C.C.C. (3d) 227 the Court held that appellate courts should not intervene in the discretionary exercise of a trial judge in imposing sentence unless the sentence imposed:

> (a) fails to consider a relevant factor;
>
> (b) overemphasizes a relevant factor; or
>
> (c) is demonstrably unfit.

This standard of review was strongly affirmed most recently in ***R. v. Mcdonnell*** (unreported 24 April 1997, S.C.C. No. 24817) in which Mr. Justice Sopinka, for the majority, held at p. 11:

> *M.(C.A.)* set out that, in the absence of an error in principle, failure to consider a relevant factor, or overemphasis of the appropriate factors, a sentence should be overturned only if it is demonstrably unfit.

And further at p. 27:

> The rationale for deference with respect to the length of sentence, clearly stated in both *Shropshire* and *M.(C.A.)* applies equally to the decision to order concurrent or consecutive sentences. In both setting duration and the type of sentence, the sentencing judge exercises his or her discretion based on his or her firsthand knowledge of the case; it is not for an appellate court to intervene absent error in principle, unless the sentencing judge ignored factors or imposed a sentence which, considered in its entirety, is demonstrably unfit.

The factors which may be considered in sentencing for offences under environmental statutes were given extensive consideration and outlined in the Reasons for Judgment of Provincial Court Judge Fradsham in ***R. v. VanWaters and Rogers Ltd.*** [1998] A.J. No. 642. They are as follows:

1. Protection of the public;
2. Retribution or punishment;
3. Rehabilitation and reform;
4. Deterrence;
5. Extent of potential and actual damage;
    (a) harm to the common good
    (b) consequences for those in the vicinity
    (c) costs borne by the public
6. Intent;
7. Savings or gain derived by the office;

8. Is this a “worst case”?

    (a) surreptitiousness

    (b) deliberateness

    (c) recklessness

    (d) attitude

    (e) disregard for instruction

9. Size and wealth of the corporation;

10. Contrition or remorse;

11. Guilty plea;

12. Cooperation and expenditures;

13. Laxity of government agencies;

14. Prior convictions;

15. Ease or difficulty of preventing pollution.

[8] The parties agreed further that sentencing is an individualized process which must consider the circumstances of the individual offender and the particular offence, that the moral turpitude of environmental offences is less than of some other crimes, that fines should not be harsh, but must amount to more than a license fee, and that if the Crown alleges aggravating factors, these must be proven on the usual criminal standard.

[9] With these principles in mind, I turn to consider the issue of whether it has been shown that the learned trial judge failed to consider a relevant factor, overemphasized a relevant factor, or that the sentence is demonstrably unfit.

[10] In my view, the sentence, both monetarily and by use of the s. 220 powers, can be said to be significant. The Record indicates that by far the major factor considered by the trial judge was his finding that Mr. Mullink throughout the proceedings refused to accept the authority of the Director and was bold in an obvious choice to flaunt the orders of the Director. Thus, deterrence was the primary factor behind the sentences imposed.

[11] In argument, the Crown noted that the Court found that the Defendant had in the past continued to offend in the face of authoritative orders and would do so in the future and accordingly it was appropriate for the Court to have made it non-economic for the Appellants to continue their operations in violations of the law. The Appellants' actions did show a past disrespect for the law and, statements of Mr. Mullink can also be said to indicate his attitude did not change during the course of the proceedings. Thus, specific and general deterrence were appropriate factors to weigh considerably.

[12] However, I conclude that there was an overemphasis by the trial judge on these factors. The sentencing record indicates that in so overemphasizing deterrence, the trial judge erred in failing to consider that the convictions were as a result of emissions of dust and improper operations resulting in noise on a few occasions. It cannot be said that the dust was or is toxic or was or is a dangerous chemical or material. The trial judge found that the only adverse effect of the noise was inconvenience, stress and worry to Mr. Mullink's neighbours. There were no adverse environmental effects proved to have resulted from the emissions or the noise. The business is a small, family owned operation, and the trial judge did not, in his sentencing reasons, refer to the fact that the Appellants had proved they made some expenditures during the course of the investigations and changes to improve the facility and attempt to comply with the approval and orders. Finally, aggravating factors put forth by the Crown were actually minor, and in one instance, where monitoring equipment was set up on a neighbouring property, involved attempts by the Appellants to deal with noise levels.

[13] It is also clear from the cases cited by the Appellants here that the learned trial judge markedly departed from the sentences customarily imposed for similar or greater offenders committing similar or greater breaches of environmental legislation. These cases involved, by and large, corporate Defendants, release of toxic material into the environment and extreme consequences to the public. In one of such cases the trial judge characterized the matter as "an ecological disaster". Although the penalties in question are not "at the maximum end of the spectrum" as is submitted by the Appellants, and, the trial judge did have evidence of the Appellant's worth and an opinion of their ability to pay fines, they are, again, significant and, in my view, clearly unreasonable, having regard to the facts and the other authorities.

[14] I allow the appeal with respect to the fine. The fine is reduced to $25,000.00 globally for both Appellants.

[15] Section 220(1) of the ***Act*** allows an apparently recent jurisdiction to the Court to require a bond posting or payment into Court to ensure compliance with a court order and to prohibit the offender from doing anything that may result in the continuation or repetition of the offence. At the sentencing hearing, Crown counsel pointed out to Judge McIntosh that the order sought here pursuant to s. 220 of the ***Act*** was "extreme", a "quantum leap" and would have "huge financial implications for the Appellants". The Appellants through counsel now submit that orders made pursuant to this section are rare and have only been granted in extreme cases such as in the cases I have already referred to. They further note that those cases did not go so far as to include a provision that would prohibit what were large and wealthy

convicted corporations dealing with hazardous chemicals from carrying on business. They submit that the effect of the order imposed by Judge McIntosh is to prevent this family from earning a livelihood.

[16] The Crown points out that beyond the alfalfa business, the Appellant, Mr. Mullink, is a farmer and his farming operations are not at all impeded by the s. 220 order. It further states that the effect of the order made by the learned trial judge was simply to make the Appellants operate their facility in compliance with the approval, and that they post a refundable performance bond. There was reference by the Crown to the fact that the Appellants had, prior to the charges, consented to matters that are now contained in the s. 220 order.

[17] Although it was the choice of the Appellants to be unrepresented at trial and at the sentence hearing, I must note that there was no submission made by them in response to the Crown's concession that what was being sought was extreme and could have enormous effect. In that regard it cannot be said that Judge McIntosh considered factors other than those that were submitted by the Crown and, again, specific and general deterrence would appear to have been paramount. He did not grant the Crown what had been asked for as a global monetary penalty. However, the circumstances of the Appellants did not warrant the "extreme" or "quantum leap" step beyond the penalty of requiring a further security of $50,000.00 and that portion of the s. 220 order is vacated. Further, I find that ordering the Appellants to stop their operations pending the deposit and further compliance was a demonstrably unfit measure. Thus, I vacate those portions of the s. 220 order.

[18] Condition No. 7 has already been vacated. With respect to the remaining conditions, those that will remain are only as follows:

1. Any reference in the Resolution of Appeal to the particulate emission limit of 0.40g/kg of effluent is hereby amended to read 0.60g/kg of effluent.

2. Section 2.3 of the Resolution of Appeal is amended to provide that the Appellants shall, within 30 days of the date of this judgment, provide a written report (the interim report), from the consultant to the Director addressing the following issue: "at what level of capacity can the plant operate to immediately achieve particulate emissions from any sources to the atmosphere not exceeding 0.60g/kg of effluent".

3. Thereafter, the Appellants shall immediately meet with the Director or his representatives to determine what arrangements will be made to run the plant to achieve the particulate emission limit of 60/g/kg. of effluent.

4. A failure to comply with these conditions will constitute a contempt of the Order of this Court and on such occurrence Cool Springs Dairy Farms Ltd. and Hans Mullink shall immediately cease operations and

thereafter be summonsed to appear before this Court to show cause why they ought not to be held in contempt of this Court.

DATED at Edmonton, Alberta this 29th day of March 1999.

J.C.Q.B.A.

APPEARANCES::

R. C. Secord
for the Appellants

P. Moreau
for the Respondent