# COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Environment, Conservation and Parks) v. Henry of Pelham Inc., 2018 ONCA 999
DATE: 20181207
DOCKET: C64852



Watt, Huscroft and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen
(Ministry of the Environment, Conservation and Parks)

Appellant

and

Henry of Pelham Inc.

Respondent

Jessica Rosenberg and Nicholas Adamson, for the appellant

Albert Engel, for the respondent

Megan Savard and James Foy, for the intervener the Criminal Lawyers' Association

Heard: August 21, 2018

On appeal from the sentence imposed by Justice Joseph Nadel of the Ontario Court of Justice on October 24, 2017.

**Huscroft J.A.:**

**OVERVIEW**

[1] The respondent corporation pleaded guilty to "discharging or causing or permitting the discharge of a material into a watercourse or in any waters or on

any shore or bank thereof or into or in any place, which said discharge may impair the quality of the water or any waters", contrary to s. 30(1) of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40 (OWRA). The OWRA establishes a minimum fine of $25,000 for this offence. However, the trial justice fined the respondent a mere $600, invoking s. 59(2) of the *Provincial Offences Act,* R.S.O. 1990, c. P.33 (POA), to relieve the respondent from the minimum fine the OWRA required. The appeal judge increased the respondent's fine to $5,000 – a substantial increase, yet still a fraction of the minimum fine required by the OWRA.

[2] The Crown appeals from this decision with leave of this court. A second appeal of a sentence is unusual, but this case has implications that extend well beyond the OWRA and the respondent's offence. This is so because s. 59(2) of the POA applies to a wide range of public welfare legislation that prescribes minimum fines.

[3] I have concluded that the appeal judge erred in exercising his discretion under s. 59(2) in a manner that undermines the purpose of the OWRA. As I will explain, the discretionary power set out in s. 59(2) must be applied with appropriate restraint, lest it undermine provincial legislative policy governing public welfare offences – a policy that emphasizes deterrence.

[4] I would allow the appeal and vary the sentence imposed by the appeal judge by imposing the minimum fine of $25,000 set out in the OWRA.

**BACKGROUND**

[5] The parties filed an agreed statement of facts, dated February 24, 2017, which I summarize below.

[6] A St. Catharines resident, Mr. Ed Skala, called the Ministry of the Environment and Climate Change Pollution Hotline on November 7, 2014, reporting that one of the two ponds on his property had turned black. An aeration system he installed several years earlier had not been operational for approximately one year. A tributary of Richardson Creek, which connects to the pond, runs through a vineyard owned by the respondent winery.

[7] On November 8, 2014, Ministry officers investigated and observed a black pond with a faint organic odour. The incoming water from the creek did not appear to have the blackish colour. On November 10, Ministry officers met with an officer/director of the respondent corporation, who indicated that the respondent had spread a mixture of cattle manure and grape pomace on the land for approximately two weeks, and that it had not been incorporated into the soil because of wet weather conditions. He speculated that the manure/pomace may have entered the creek through a tile drain.

[8] That same day, the respondent retained AMEC Environmental to assess the situation and prepare an action plan at the request of the Ministry. The plan was submitted to the Ministry the following day. In addition, the respondent

purchased a new pump for Mr. Skala's aerators and arranged for vacuum trucks to clean black organic matter from the entrance to the pond.

[9] The observation of odour at the Skala pond on November 8, 2014 met the definition of "deemed impairment" under s. 1(3)(c) of the OWRA, which provides as follows:

> 1(3) For the purposes of this Act, the quality of water shall be deemed to be impaired by the discharge of material if the material or a derivative of the material enters or may enter the water, directly or indirectly, and,
>
> …
>
> (c) the material or derivative causes or may cause a degradation in the appearance, taste or odour of the water….

[10] This supports the charge that, on November 8, 2014, the respondent breached s. 30(1) of the OWRA, which provides as follows:

> 30(1) Every person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters is guilty of an offence.

**THE LEGISLATION**

[11] There are two relevant sentencing provisions for the purposes of this appeal. Section 109 of the OWRA establishes a minimum and maximum fine for a breach of s. 30(1) by a corporation on a first conviction:

> 109(1) Subsections (2) and (3) apply to the following offences:
>
> 1. An offence under subsection 30(1).

…

> (2) Every corporation convicted of an offence described in subsection (1) is liable, for each day or part of a day on which the offence occurs or continues, to a fine of,
>
> > (a) not less than $25,000 and not more than $6,000,000 on a first conviction….



[12] The POA contemplates the establishment of minimum penalties in provincial legislation such as the OWRA, while s. 59(2) empowers trial judges to provide discretionary relief from such penalties in limited circumstances:

> 59(2) Although the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.

## THE DECISIONS BELOW

### *The decision at trial*

[13] The Crown asked the trial justice to impose the statutory minimum fine of $25,000, set out under s. 109(2)(a) of the OWRA. The respondent sought a reduced fine of $300-$2,500, inviting the trial justice to exercise her discretion under s. 59(2) of the POA.

[14] The trial justice noted the Crown's option to lay charges under either Part I (by certificate of offence) or Part III of the POA (by information), and suggested that the Crown had laid the charge under Part III because the 30-day time limit

for proceedings under Part I had been exceeded. Given the agreed facts, the absence of any testing of the discharge, the immediate remediation efforts by the respondent, and the fact that this was the first time the respondent had been charged with an offence by the Ministry of the Environment, the trial justice agreed with the defence submission that it would have been appropriate for the respondent to have been charged under Part I, which entailed a lower fine.



[15] The trial justice went on to find that there were exceptional circumstances in this case, not because of monetary implications or financial burdens on the respondent but because of the nature of the offence and the respondent's immediate actions in light of the offence. As a result, the $25,000 minimum penalty requested by the Crown "should not automatically [be] accepted as appropriate". She stated:

> The penalty to be imposed, like the facts, should be distinct to each and every case before the Court and take into account individual facts and circumstances in addition to the principles of specific and general deterrence.

[16] The trial justice then outlined the circumstances of the case, highlighting ostensible shortcomings of the Crown's case against the respondent:

- the Ministry of Environment investigator did not observe black water flowing into the creek;
- the aeration system in the pond had not been operating for about one year;

- after calling the Ministry of the Environment, the owner of the pond declined to make any further statements;
- no samples were taken and no analysis was completed; and
- there was no information as to any environmental impact of the said discharge.



[17] The trial justice noted that as soon as the respondent became aware of the situation, it retained an environmental firm to assess the situation and prepare an action plan, purchased a new pump for the pond, and arranged for the black organic matter in the pond to be cleaned. The cost of remediation was $12,000. The trial justice found that these actions, along with the fact that this was the first time the respondent had been charged under the OWRA, were "clearly indicative of both a good neighbour and of a good corporate citizen" and that the circumstances of the case "[fit] into the descriptor of exceptional circumstances for purposes of sentencing."

[18] The trial justice concluded that this finding, along with her finding that it would have been appropriate for charges to have been laid under Part I rather than Part III, warranted a fine lower than the statutory minimum, which she said would satisfy both general and specific deterrence and was in the interests of justice. She noted that, had the respondent been charged with two counts of violating the OWRA pursuant to Part I of the POA, the fine set for each offence

would have been $300. Given the respondent's reaction to the situation, it was not unreasonable to believe that it would have accepted responsibility and paid these fines. Accordingly, the trial justice imposed a fine of $600 plus costs.

***The decision on appeal***

[19] The appeal judge accepted that the absence of a prior conviction under the OWRA is not a mitigating factor, but stated that it was not irrelevant to whether the circumstances in this case were exceptional. In addition, the appeal judge concluded that the trial justice erred in second-guessing the Crown's prosecutorial discretion in prosecuting under Part III rather than Part I, and that this informed her decision to impose a $600 fine. However, the appeal judge went on to conclude that there were exceptional circumstances that could properly found relief from the minimum fine prescribed by the OWRA.

[20] The appeal judge considered that exceptional circumstances and the interests of justice are "somewhat tautological" concepts, and concluded that a fine is not "in the interests of justice" when it is "unfair". Although he identified two aggravating factors – the impairment of water quality and the concerted action the respondent took in risking the release of fertilizer into the water stream over a two-week period – the appeal judge concluded that imposing a $25,000 fine in the circumstances of this case would be seen as "patently unfair", and in his view was unfair. He described the offence as "a very modest incident" and asserted that it was not obvious that the Crown could have proved the charge in any

event: “In my view, on the facts that I have before me, if push came to shove, it is a case that the Crown might not have been able to prove but for Henry of Pelham’s guilty plea.”

[21] In particular, the appeal judge referred to the refusal of the pond owner to cooperate with the Ministry; the inability to prove the cause of the blackness of the pond “with any certainty”; and the “mere supposition” that run-off from the respondent’s vineyard entered the pond. He stated: “The facts were so minimal, that in my view it could be seen to be an exceptional circumstance.” Although the pond gave off an organic smell, the appeal judge noted that there is always faint organic smell in a forest in the fall.

[22] In summary, the appeal judge stated that the Crown was seeking “a significant sentence for an offence of very modest proportion”, an offence that “it might never have been able to prove on a contest but for the guilty plea of the defendant.” The appeal judge considered that the guilty plea on the facts admitted was a “substantially mitigating circumstance”, and in all of the circumstances concluded that the fine should be increased from $600 to $5,000, rather than to the $25,000 minimum prescribed by the OWRA.

## THE POSITIONS OF THE PARTIES

### *The appellant*

[23] The Crown argues that s. 59(2) must be read in the context of the statutes to which it applies and must be applied in a manner consistent with the objectives of those statutes. The overarching objective of public welfare legislation, as the Supreme Court of Canada held in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, is the protection of the public. As this court held in *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.), deterrence is the paramount factor in sentencing under public welfare statutes. The Crown argues that s. 59(2) must not be interpreted in a manner that undermines this purpose.

[24] Thus, the Crown submits that the requirement of exceptional circumstances demonstrates the intention that the discretion in s. 59(2) is intended to be exercised sparingly – “rarely”, “in the clearest of cases”, and “in extraordinary contexts”. If the court is satisfied that exceptional circumstances exist, it must then engage in a balancing exercise, balancing “any injustice that imposing the minimum fine would cause for the defendant, against the Legislature’s determination that the societal interests which the public welfare statute is designed to protect require the imposition of a minimum fine.” The court may impose a sentence below the minimum if the balance tips in favour of the defendant.

***The respondent***

[25] The respondent describes s. 59(2) as a “safety valve” that has prevented minimum fines from being challenged under s. 12 of the *Canadian Charter of Rights and Freedoms* on the basis that they constitute cruel and unusual punishment. The respondent adopts the appeal judge’s interpretation that “not in the interests of justice” means “unfair”, an interpretation that it says accords with the grammatical and ordinary sense of the words. The respondent argues that s. 59(2) should permit relief from minimum fines whenever exceptional circumstances exist, not just when the offender’s ability to pay is at issue.

[26] The respondent submits, further, that the POA and the OWRA do not have the same purposes and should not be considered together. The POA is concerned with the efficient prosecution of provincial offences, while the OWRA is concerned with the conservation, protection, and management of Ontario’s waters. Section 59(2) of the POA should be interpreted liberally, so as to broaden rather than narrow the range of exceptional circumstances, in accordance with the grammatical and ordinary sense of the word “otherwise”, which expands the interests of justice beyond simply avoiding minimum fines that would be unduly oppressive.

***The intervener***

[27] The intervener argues that s. 59(2) should be interpreted as "a flexible safety valve" that permits trial judges to exercise discretion to reduce a fine in any case where imposing the minimum fine would be contrary to the interests of justice. The discretion need not be exercised sparingly or rarely: "The *only* question under s. 59(2) is whether the minimum fine is contrary to the interests of justice. If so, the circumstances will be exceptional" (emphasis in original).

[28] The intervener highlights the fact-specific nature of the decision that must be made and emphasizes the need for flexibility in the exercise of the discretion. The trial judge must consider not only the circumstances of the defendant, but also the nature of the conduct and whether punishing it advances or frustrates the public welfare goal of the particular statute. *A priori* rules limiting the application of s. 59(2) cannot safely be created.

[29] The intervener submits that proportionality should be the dominant principle of sentencing for regulatory as well as criminal offences. According to the CLA, deterrence is simply one goal among many that must be considered in imposing a proportionate sentence.

**DISCUSSION**

[30] As I noted at the outset, although this appeal arises in the context of a prosecution under the OWRA, that Act is only one of many public welfare

statutes that are subject the enforcement regime established by the POA. Accordingly, I briefly will review the POA before addressing the nature of public welfare legislation, and the OWRA in particular.

***The Provincial Offences Act***

[31] In 1979, the POA replaced the *Summary Convictions Act*, which had governed the prosecution of regulatory offences. It was designed to provide a new procedure for the prosecution of regulatory offences – a procedure that, as the purpose provision of the POA makes clear, reflects the distinction between provincial offences and criminal offences. A more complete history of the POA is set out in the final report of the Law Commission of Ontario, *Modernizing the Provincial Offences Act: A New Framework and Other Reforms* (2011), at pp. 22-24.

[32] The POA established a two-pronged approach to prosecuting regulatory offences. Minor offences can be prosecuted under Part I by means of a certificate of offence – essentially a ticket-based scheme that does not require judicial proceedings. The maximum fine for an offence prosecuted under Part I is $1,000. More serious offences can be prosecuted by laying an information under Part III. That section establishes a presumptive maximum fine of $5,000, but specifically contemplates that other legislation may establish a different fine regime, as the OWRA does.

***The nature of regulatory offences***

[33] As the Supreme Court noted in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at pp. 1302-1303, regulatory offences "are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application." After all, regulatory offences are not "true crimes" – "conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely": *R. v. Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154, at p. 218. Regulatory offences arise in the context of conduct that is otherwise lawful – indeed, conduct that may be encouraged and promoted for the good of society, but which nevertheless requires regulation in the public interest: see *Wholesale Travel*, at pp. 216-222, per Cory J. As the Supreme Court noted more recently, "regulatory legislation does not share the same purpose as the criminal law, and it would be a mistake to interpret it as though it did": *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300, at para. 34.

[34] It is not necessary to prove *mens rea* in order to prove the commission of regulatory offences, which involve strict liability. The Crown need prove only the commission of the prohibited act beyond a reasonable doubt. Liability follows unless the defendant can establish, on the balance of probabilities, a due diligence defence – that reasonable care was taken to avoid the commission of the prohibited act.

[35] Public welfare statutes regulate everything from driving to fishing, environmental protection and workplace health and safety. As noted above, the POA governs the penalties for committing regulatory offences unless the relevant statutes establish different penalties. This occurs in a variety of contexts. For example, the *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1, establishes a maximum fine of $100,000 for individuals (in addition to the possibility of imprisonment) and $1.5 million for corporations. The *Liquor Licence Act*, R.S.O. 1990, c. L.19, establishes a maximum fine of $100,000 for individuals and $250,000 for corporations, and doubles these figures for offences involving minors. The *Fish and Wildlife Conservation Act, 1997,* S.O. 1997, c. 41, does not distinguish between individuals and corporations, establishing a maximum fine of $25,000 for any person violating the Act and $100,000 for certain specified offences and offences committed for commercial purposes.

[36] The OWRA establishes fines of up to $50,000 for individuals' first conviction and $100,000 for subsequent convictions; and up to $250,000 for corporations' first convictions and $500,000 for subsequent convictions. But it also sets out a higher range of penalties for more serious offences – from $5,000 to $4 million for individuals and from $25,000 to $6 million for corporations, a range that increases for second and subsequent convictions.

[37] The offence in this case is one of the more serious offences to which the higher range of penalties applies. The respondent's guilty plea put the $25,000 minimum fine in play.

***The nature of minimum fines***

[38] In *Cotton Felts*, this court set out an inclusive list of general considerations when it comes to sentencing on public welfare offences, but it emphasized that the need to enforce regulatory standards through deterrence is paramount. Minimum fines are a policy tool that is often used to accomplish this goal.

[39] Minimum fines apply without regard to the circumstances of individual offenders or the circumstances surrounding the commission of particular offences, and so necessarily risk overinclusion. They reflect a legislative judgment that nothing less than the minimum fine is sufficient to achieve deterrence in light of the nature of the offence committed.

[40] The Legislature established that all corporations that breach s. 30(1) of the OWRA are liable to a minimum fine of $25,000. Whether, or to what extent, the minimum fine succeeds in promoting deterrence is of no moment for the purposes of sentencing. It is the approach chosen by the Legislature and the court's responsibility is to apply that approach. The trial judge's sentencing discretion is limited to determining whether a fine above the minimum (and below the maximum) is warranted.

[41] The strictures of a minimum fine regime are to some extent mitigated by the exercise of prosecutorial discretion. Just as in the criminal law context a prosecutor may choose between pursuing a charge by summary conviction or indictment, in the regulatory context a prosecutor may choose between pursing a charge by means of the ticketing procedure under Part I or by laying an information under Part III of the POA, which gives rise to the possibility of larger and in some cases minimum fines. However, once the decision is made to prosecute under Part III, the applicable minimum fine must be imposed on conviction unless relief is warranted under s. 59(2).

***How should s. 59(2) be interpreted?***

[42] I set out s. 59(2) of the POA again for convenience:

> (2) Although the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.

[43] This court has exercised the discretion under s. 59(2) to reduce minimum fines in two cases, both of which arose in the context of the *Compulsory Automobile Insurance Act,* R.S.O. 1990, c. C.25. In *R. v. Ade-Ajayi*, 2011 ONCA 192, 97 C.C.L.I. (4th) 183, the Crown agreed to a reduced fine in the “particularly unusual” circumstances of the case, which involved an appellant who was unemployed, seeking disability support and living off student loans. In brief

reasons, this court described the reduced fine as being in the interests of justice without considering whether the minimum fine was unduly oppressive in the circumstances. In *R. v. A.E.*, 2016 ONCA 243, 348 O.A.C. 68, another case involving driving without compulsory insurance, this court reduced the minimum fine because of the appellant's mental illness and its effect on his ability to earn money to pay the fines. Again, this court described its decision to reduce the fines as being in the interests of justice. In neither case did this court provide interpretive guidance for s. 59(2).

[44] In my view, it is important to distinguish the authority to provide relief from a minimum fine from the duty to impose the minimum fine itself. Contrary to the intervener's assertion, minimum fines are not mere guidelines; they are statutory requirements that establish sentencing floors. The starting point is that trial judges are required to impose minimum fines established by the relevant legislation. Their authority to provide discretionary relief under s. 59(2) of the POA – to impose a lesser fine or even suspend a sentence – does not have the effect of rendering minimum fines conditional in their application. On the contrary, minimum fines must be imposed unless the defendant satisfies the court that exceptional circumstances exist that justify the exercise of the court's discretion to provide relief.

[45] It is important to emphasize that the court's discretion is not unfettered. If it were – if trial judges could refuse to impose a minimum fine whenever they

considered it suboptimal to do so – minimum fines would be reduced in status from rules to mere suggestions.

[46] Section 59(2) addresses this concern by limiting the circumstances in which relief may be granted. The discretionary power not to apply a minimum fine arises only if, in the opinion of the court, the specified criteria are satisfied.

[47] The difficulty is that the criteria are worded vaguely. Section 59(2) requires trial judges to determine whether circumstances are “exceptional”; whether a minimum fine would be “unduly oppressive”; and whether a minimum fine would not be “in the interests of justice”. These are evaluative and comparative concepts that have no settled core meaning, and they appear to leave considerable room for interpretation and application.

[48] However, vague terms are not to be understood as radically indeterminate, such that they permit virtually any outcome. Vague terms must be interpreted in context, as the modern approach to statutory interpretation makes clear. “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87, adopted by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

[49] Thus, the discretion in s. 59(2) must be understood in the context of the Legislature's commitment to imposing minimum fines in a variety of public welfare contexts in order to promote the goal of deterrence. The OWRA does not establish a minimum fine that applies on a discretionary basis. The OWRA establishes a minimum fine that applies automatically on conviction for the relevant offence, subject only to the limited discretion of trial judges to grant relief under s. 59(2) of the POA.

[50] The intervener's submission that the interpretation of s. 59(2) should reflect the primacy of proportionality as a sentencing principle must be rejected. Where minimum fines are prescribed in public welfare legislation, or in the POA itself, they establish a floor – a starting point for consideration of the appropriate fine – that applies regardless of any concerns about proportionality. Proportionality is a relevant consideration in setting a fine above the prescribed minimum, but the principle cannot be invoked to subvert the Legislature's decision to establish a minimum fine. Obiter remarks in *R. v. Scantlebury*, 2016 ONCA 453, 350 O.A.C. 174, at para. 30, a decision granting leave to appeal a decision under the POA, are not to be read as authority to the contrary.

[51] Given the variety of legislation that establishes minimum fines and the myriad circumstances that may present themselves to the trial judge at sentencing time, it is not possible to be prescriptive about the operation of s. 59(2). Nevertheless, it is possible to provide general guidance.

***Exceptional circumstances***

[52] The power to provide relief from a minimum fine arises only in exceptional circumstances. Rosenberg J.A. reviewed the meaning of "exceptional" in the criminal law context in *R v. W. (R.E.)* (2006), 79 O.R. (3d) 1 (C.A.), and stated as follows, at para. 31:

> The theme that runs through use of the term "exceptional" in both criminal case law and legislation, is that it is intended to describe the clearest of cases. Such cases include those where applying the normal rules would undermine the purpose of the legislation, where the exercise of the unusual power is necessary or required, and where the exercise of the unusual jurisdiction is capable of explanation.

[53] I do not think it is helpful to canvass the sorts of circumstances that might be considered exceptional in the context of public welfare offences, or to speculate as to how often such circumstances may arise. Nor is it helpful to substitute for the term "exceptional" terms such as "rarely", "in the clearest of cases", and "in extraordinary contexts" – all of which are equally vague. Suffice it to say that trial judges must not recognize exceptional circumstances too readily, lest exceptional circumstances become unexceptional, or even routine, and the exercise of the discretionary power to provide relief from minimum fines undermine the deterrent effect minimum fines are designed to have.

[54] Key to the exercise of the discretionary power to provide relief from a minimum fine is not the exceptionality of the circumstances of a case, in general,

but the requirement that a minimum fine be either 1) unduly oppressive; or 2) otherwise not in the interests of justice. These requirements are disjunctive and must be understood as addressing different circumstances. As I will explain, "unduly oppressive" normally will be limited to addressing situations of personal hardship – typically financial – while "the interests of justice" allows consideration of broader residual concerns.



***Unduly oppressive***

[55] "Oppressive" suggests a moral judgment that something is harsh and wrongful on that account. At the same time, however, s. 59(2) makes clear that it is not sufficient that a minimum fine is considered oppressive; it must be unduly oppressive before relief can be provided. The language chosen must be taken to signal the Legislature's intention to establish a very high bar for granting relief from a minimum fine.

[56] There is nothing surprising about this, given the Legislature's purpose. Minimum fines are designed to deter and, as I have said, they are necessarily overinclusive to a greater or lesser extent. To take an example, the *Compulsory Automobile Insurance Act* establishes a minimum fine of $5,000 for driving without insurance. That is a high fine for most people and is especially so for people of modest means. But the cost of insurance is also high for most people and is also especially high for people of modest means. The Legislature chose to require drivers to have insurance regardless of the cost, and chose to enforce

this requirement with a mandatory minimum penalty. The Legislature chose, in other words, “to make it more financially onerous to offend the legislation than to bear the required cost of insurance premiums”: *Ade-Ajayi,* at para. 13. That choice was open to the Legislature, and it should not be undermined by a decision to refuse to impose a minimum fine simply because it seems high in particular circumstances. Minimum fines will often seem high; that is the point of deterrence in public welfare offences. Something more is required in order to establish that imposing a minimum fine would be “unduly oppressive” in particular circumstances, lest the court’s exercise of discretion have the effect of undermining the Legislature’s purpose in establishing a minimum fine.

[57] Although relief to corporate defendants on the basis that a minimum fine would be unduly oppressive cannot be ruled out, normally relief will be limited to individuals who can establish personal hardship based on consideration of their unique personal circumstances – hardship that rises to an extreme level they cannot be made to bear. Corporations seeking relief from a minimum fine normally will do so under the residual “interests of justice” category.

***Interests of justice***

[58] The “interests of justice” is a term that is used in a variety of contexts. The term is vague, but as I have said, it does not confer an unbounded discretion on trial judges to relieve against a minimum fine on that account. The meaning of

the term must be informed and limited by consideration of the context in which the interests of justice are asserted.

[59] There are many examples of trial judges determining whether imposition of a minimum fine would not be in the "interests of justice", but I do not think it helpful to review the case law here. Nor will I attempt to enumerate the factors that are properly considered in determining the interests of justice. As Doherty J.A. explained in another context, the relevant factors cannot be catalogued: *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363, 333 D.L.R. (4th) 326, at para. 97.

[60] Nevertheless, some general principles are clear. First and foremost, as with any discretionary authority, the discretion to relieve against a minimum fine on the basis that it would not be in the interests of justice to impose the fine cannot be exercised arbitrarily. Discretionary powers must be exercised having regard to the purpose of the relevant legislation and the purpose of the discretion in particular: *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

[61] In particular, the discretionary power authorized by the POA must be exercised against the backdrop of the Legislature's decision to emphasize deterrence by means of a system of minimum fines. Trial judges must consider not only the interests of an individual offender but also the interests of the community protected by the relevant public welfare legislation.

[62] The exercise of discretionary power to provide relief from a minimum fine can be understood as promoting fairness in sentencing, but fairness is not a freestanding test for determining the application of s. 59(2). Trial judges are not authorized to refuse to apply minimum fines simply on the basis that they consider that it would be "unfair" to apply them. Trial judges must provide reasons that explain and justify their exercise of discretion in accordance with s. 59(2). A bald appeal to "fairness" will not suffice.



**SUMMARY**

[63] I would summarize the above discussion as follows:

1) Minimum fines establish sentencing floors that apply regardless of ordinary sentencing principles. The imposition of fines above the minimum threshold is governed by ordinary sentencing principles, as well as any principles set out in the relevant legislation.

2) Section 59(2) of the POA vests a discretionary authority in trial judges to provide relief from minimum fines in exceptional circumstances. The burden is on those seeking the grant of relief to establish that relief is warranted based on the relevant considerations.

3) Section 59(2) applies exceptionally. It will be an unusual case in which the imposition of a minimum fine may be considered "unduly oppressive" or "otherwise not in the interests of justice".

4) Whether a minimum fine is unduly oppressive usually will depend on consideration of personal hardship. The bar for relief is set very high. Mere difficulty in paying a minimum fine is inadequate to justify discretionary relief.

5) Whether a minimum fine is otherwise not in the interests of justice involves consideration of not only the interests of an individual offender but also the interests of the community protected by the relevant public welfare legislation.

6) The discretion under s. 59(2) cannot be exercised arbitrarily. Trial judges must explain their reasons for invoking s. 59(2), and in particular must demonstrate both that the circumstances are exceptional and that it would be unduly oppressive or otherwise not in the interests of justice to apply the minimum fine.



**THE APPEAL JUDGE ERRED IN PROVIDING RELIEF UNDER S. 59(2)**

[64] The appeal judge properly concluded that the trial justice erred in second-guessing the Crown's decision to prosecute under Part III rather than Part I. That was a decision the Crown was entitled to make in the exercise of its prosecutorial discretion, and the exercise of prosecutorial discretion is not a relevant consideration under s. 59(2). The appeal judge also properly concluded that the trial justice erred in treating the absence of any prior conviction as a mitigating factor. As the appeal judge noted, the absence of an aggravating factor does not count as a mitigating factor. Moreover, in ss. 109(2) and 110.1(1), the OWRA specifically addresses the relevance of prior convictions in setting minimum penalties.

[65] However, the appeal judge erred in concluding that the circumstances of this case were exceptional and that it would not be in the interests of justice to impose the minimum fine under the OWRA. His error flowed from his conclusion that "the interests of justice" means no more than "fairness".

[66] As I have explained, unfairness is not the test under s. 59(2). The Legislature has decided what is fair in establishing minimum fines. Trial judges are required to apply those fines unless they conclude, in accordance with the requirements set out in s. 59(2), that relief from a minimum fine is warranted.

[67] The appeal judge's decision that imposing the minimum fine would be unfair – and thus "not in the interests of justice" – was based on his view that the breach of the OWRA was "a very modest incident" and that the Crown might not have been able to prove the charge. "In my view," he stated, "on the facts that I have before me, if push came to shove, it is a case that the Crown might not have been able to prove but for Henry of Pelham's guilty plea."

[68] Essentially, the appeal judge engaged in a counterfactual exercise, considering several factors that in his view would have rendered prosecution difficult, had it occurred. The facts in this case were "so minimal", he concluded, that they created exceptional circumstances for the purposes of s. 59(2). No one knew what had really happened to the water in the pond, nor, he added, was the faint organic smell conclusive: "We all know that as we walk through a forest, there is always a faint organic smell in the fall." In these circumstances, the appeal judge found that the respondent's plea of guilt was a "substantially mitigating circumstance".

[69] With respect, the appeal judge's counterfactual analysis involved speculation on matters that he was not entitled to consider. His reliance on the

idea of fairness led him to characterize the respondent's offence as minor and relatively insignificant – a characterization that was not open to him in light of the Legislature's determination that a minimum fine of $25,000 should be imposed for first-time corporate offenders. The appeal judge erred, further, in concluding that the respondent's guilty plea mitigated the minimum fine. Where the Legislature has established a minimum fine, mitigation is relevant only in the determination of whether a fine above the minimum should be imposed. As the Crown points out in its submissions, the vast majority of provincial offences are resolved by guilty plea. Guilty pleas cannot be considered exceptional circumstances, nor can the interests of justice be invoked to permit guilty pleas to undermine a minimum fine regime.

***The strength of the Crown's case was irrelevant given the plea of guilt***

[70] As for the strength of the Crown's case, the respondent cannot at once plead guilty to having committed an offence and maintain that the case against it was weak and might not have been proven. Those charged with having committed regulatory offences are free to contest the charges and so require that the Crown prove the commission of the offences beyond a reasonable doubt. If they choose not to do so, a guilty plea is just that: it is an admission that the offence has been committed, regardless of how easy or difficult it might have been for the Crown to prove the charge.

***The minimum fine ought to have been imposed***

[71] At the end of the day, the appeal judge varied the fine to an amount below the minimum because he considered that what had occurred was relatively minor in nature – in essence, no great harm had occurred and the respondent had acted responsibly in all the circumstances.

[72] I agree that, on the agreed facts, the respondent acted responsibly following commission of the offence. But just as acting responsibly to correct a problem following a regulatory breach is not a mitigating factor on sentence (*Ontario (Labour) v. Flex-N-Gate Canada Company*, 2014 ONCA 53, 119 O.R. (3d) 1, at para. 23), it is not a relevant consideration for the purpose of applying the discretion in s. 59(2) to provide relief from a minimum fine. Regardless of its post-offence conduct, the fact remains that the respondent pleaded guilty to impairing the quality of water – an aggravating factor under the OWRA – and doing so over a two-week period. I see nothing exceptional in this and no basis for concluding that the interests of justice justify granting relief from the minimum fine prescribed in the OWRA in these circumstances.

**CONCLUSION**

[73] I would allow the appeal and vary the sentence by imposing the minimum fine of $25,000.

Released: December 7, 2018 “DW”

"Grant Huscroft J.A."

"I argee. David Watt J.A."

"I agree. Fairburn J.A."