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# Energy & Environmental Law

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## THE ONTARIO COURT OF APPEAL LIMITS RELIEF FROM MANDATORY MINIMUM FINES IN PUBLIC WELFARE OFFENCES — WHERE DO WE GO FROM HERE?

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The *Ontario Provincial Offences Act* R.S.O. 1990, CHAPTER P.33 (P.O.A.) provides relief from mandatory minimum sentences.

> 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 issue before the Ontario Court of Appeal in *R. v Henry of Pelham*, 2018 ONCA 999 was whether an offence under the *Ontario Water Resources Act* (OWRA) which involved aesthetic discolouration of a neighbouring pond and faint odour for which a first time offender had responded with remedial action and pleaded guilty, entitled the offender to relief from the $25,000 mandatory minimum fine. There was no evidence the offender was unable to pay the fine. The sentencing court and summary appeal court had determined that based on these facts and the Crown's difficulty proving its case, fines initially of $600 and on appeal $5000 were appropriate. The Ontario Court of Appeal on December 7, 2018 allowed the Crown's appeal and imposed the mandatory minimum fine of $25,000 under the OWRA concluding that:

> "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." (at par.3)

### Position of Henry of Pelham and the Criminal Lawyers Association

The Respondent argued that the phrase: "not in the interests of justice" in ss. 59(2) should be interpreted as meaning "unfair" and that the court's power to extend relief from minimum fines should extend whenever exceptional circumstances exist not just when the offender's ability to pay was at issue. The Criminal Lawyers Association which was granted intervenor status, argued against setting a priori rules limiting the application of s.59(2). The dominant principle of sentencing should be that of proportionality which would involve consideration of not simply the defendant's circumstances, but the nature of the


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conduct and whether punishing it advances or frustrates the public welfare goal of the statute. The Court of Appeal disagreed:

> "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." (at par.50)

The Court of Appeal reasoned at par. 40 that:

> "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."

**The Court of Appeal's Grounds for Relief**

The test which the Court applied focused on the criteria set out in the statutory provision of relief in ss. 59(2) of the P.O.A. The Court focussed on the words "unduly oppressive and "the interests of justice". Unduly oppressive circumstances would generally apply to individuals in cases of personal hardship, typically financial. (par.54) But the financial hardship would undoubtedly need to exhibit unique and extreme circumstances.

> "the bar of relief is set very high. Mere difficulty in paying a minimum fine is inadequate to justify discretionary relief." (63)

The reasoning of the Court in this regard appears slightly earlier on at par. 53:

> "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."

With regard to the interests of justice, the Court agreed with the Crown that consideration had to be given not just to the offender, but to the community's interest protected by the relevant public welfare legislation. The Court discounted as irrelevant the factors considered by the lower courts in undercutting the minimum fine. The absence of a prior conviction was of no import as the OWRA specifically addressed the relevance of prior convictions in setting minimum fines. The Court further criticized the lower court judges for a 'counterfactual analysis' in determining that there were factors which would have rendered the prosecution difficult . The lower courts speculated that no one really

knew what had happened to the water in the pond and the faint organic smell was far from conclusive of culpability. The strength of the Crown's case was irrelevant because "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." (at par. 70) The determination that the offence was minor was also not open to the sentencing court since the Legislature had determined that first time offenders should be subject to a $25,000 minimum fine. Mitigation factors such as the guilty plea were only relevant in the determination of whether a fine above the minimum should be imposed. Finally, acting responsibly following the commission of the offence was hardly exceptional. It was what was expected.

**Where Do We Go From Here?**

Defence counsel need to review with clients before pleas are entered that the chances of obtaining relief from a mandatory minimum fine for offences for which they are charged are remote. Practically, counsel should look to alternative charges either laid or that can be put before the court which do not carry mandatory minimum sentences. For example, if the activity or omission consisted of breaching a condition of an approval not involving a numerical value or concentration level, a plea to those offences, in contrast to charges of pollution, failure to notify Ministry officials, obstruction or providing false information may avoid mandatory minimum fines.

Alternatively, counsel should consider challenging mandatory minimum sentences as cruel and unusual punishment under s. 12 of the *Charter of Rights and Freedoms*. The Court of Appeal does not squarely address in Henry of Pelham whether the Charter could be applied to independently measure the constitutional validity of a mandatory minimum fine under a regulatory regime with a relief valve such as s.59(2) P.O.A. In *R. v Lloyd* 2016 SCC 13 a mandatory minimum sentence of 1 year for possession of drugs for the purposes of trafficking had been imposed because the offender had been convicted of a drug offence within 10 years of his most recent conviction. The Supreme Court of Canada held that the mandatory minimum sentence amounted to cruel and unusual punishment contrary to s. 12 of the *Charter of Rights and Freedoms*. The Supreme Court had noted that Section 10(5) of the *Controlled Drugs and Substances Act* S.C. 1996, c. 19, provided a statutory relief valve to the minimum one-year sentence if the offender had, prior to sentencing, successfully completed a drug treatment court program or another program approved under the *Criminal Code*. Significantly however, the Court was prepared to review this exception to the mandatory minimum penalty and concluded that it did not cure the constitutional infirmity. The law's shortcoming was that it was so broad that it caught individual cases which did not merit mandatory minimum sentences.

> "If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences." (at par.35)

In granting leave to appeal in the *Henry of Pelham* case on January 8, 2018 Court of Appeal Justice Nordheimer made reference to Crown's statistic that there were over 600 provincial offences that carried statutory imposed minimum fines and that guidance was therefore needed as to when s.59(2) could be invoked. The guidance ultimately offered by the Court of Appeal remains insufficient to prevent a mandatory minimum fine from catching an offender like Henry of Pelham who pleads guilty to a relatively trivial occurrence which technically qualifies as an offence.

The Court of Quebéc in *Directeur des poursuites criminelles et pénales c. Bédard* 2017 QCCQ 7437 applied the reasoning in Lloyd to the Building Act in Québec and a mandatory minimum penalty of $10,481 for acting as a building contractor without holding an appropriate licence. Bédard had installed a shower for a client and had instructed changes to the drain installation in accordance with the original design. He had ordered plumbing supplies and rented equipment. The contract was worth $241. The Court, as in Lloyd, regarded the mandatory minimum fine as over-reaching the legislative aim of the regulation which was to catch contractors who were defrauding the government by operating lucrative businesses over time outside the regulatory framework. The Court substituted a fine of $50.