

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Sutherland, 2009 NSPC 21

Date: May 4, 2009

Docket: 1929864

Registry: Shubenacadie

Her Majesty the Queen

v.

Mark Sutherland

DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: May 4, 2009

Oral Decision: May 4, 2009

Charges: *Occupational Health and Safety Act*
Section 74(1)

Counsel: Glenn Hubbard for the Crown
Brad Yuill for the Defence

[1] Mark Sutherland owns and operates a family dairy farm. It is his family's livelihood. Mr. Sutherland has been active in the farming community and has

been developing and improving his farm since acquiring it in 1996. He is 38 years old and supports two children. On August 13, 2006, one of his employees, Gary Boake, died in an accident at the farm property.

[2] Mr. Sutherland has pleaded guilty to an offence under the ***Occupational Health and Safety Act***, that he failed to take every precaution that is reasonable in the circumstances to ensure the health and safety of persons at the workplace. Mr. Sutherland's guilty plea relates to the fact that on August 13, 2006, there was a manure pit on the farm that did not have a barrier. Mr. Sutherland's responsibility to safeguard employees from risks associated with that manure pit arise under section 13(1) of the ***Occupational Health and Safety Act***. The ***Act*** also requires, under section 17(1), that every employee, while at work, shall "take every reasonable precaution in the circumstances to protect the employee's own health and safety...at or near the workplace."

[3] On August 13, 2006, Gary Boake, nineteen years old, met a ghastly and tragic death. He drowned in a manure pit. The tragedy that resulted in his death unfolded in a matter of minutes after he got to the farm. The facts establish that he had been out all night at a social event, and like many young people sowing their wild oats, had been drinking and had not slept. His blood

alcohol concentration was significantly over the legal limit for operating any kind of vehicle. Nevertheless, he was responsible enough to show up for his job at the Sutherland dairy farm. He probably should not have gone to work in his condition but he did, perhaps because he was not the kind of young man to let an employer down by not showing up. However he was in no condition to be operating equipment, which he needed to do to remove manure to the manure pit, and placed himself at risk. Mr. Sutherland's failure was in not securing the manure pit which had its damaged barricade removed while a new one was on order, or not arranging for an alternative to using the pit, alternatives that did exist on the farm at the time.

[4] The news of Mr. Boake's death was the news families dread. And it was the worst news imaginable. Not only had there been an accident, and farm work being inherently dangerous, accidents are a daily risk, but Mr. Boake had died. There is nothing that will bring any comfort to Mr. Boake's family: they are left to mourn the loss of such a young life. His mother, Bonnie McMullen continues to grieve. In her Victim Impact Statement she says the following:

" I think what upsets me the most is not really knowing what he was going through as he was being submerged deeper into the pit. I think of him every day, and yes, I have the memories, but it is just not the same. I want my baby back. Without the support of

my husband, family and friends, I would not have made it through this ordeal."

[5] Section 74(1) of the ***Occupational Health and Safety Act*** provides that the penalty for a corporation violating the regulations under the ***Act*** is a maximum fine of \$250,000. Section 75 establishes a range of additional sentencing options, sometimes referred to as "creative sentencing options" that can include: directing the offender to pay to the Minister an amount for the purpose of public education in the safe conduct of the activity in relation to which the offence was committed, and principles of internal responsibility provided for in the ***Act***; community service; and requiring the offender to comply with such other reasonable conditions as the court considers appropriate and just.

[6] The Crown and Defence have taken a joint position that the total amount of the fine in this case should be \$25,000. I have heard submissions on how this penalty should be broken down, into a fine portion and a portion representing the value of Mr. Sutherland's time and expertise in educating other farmers about farm safety and promoting a new Farm Safety Association.

[7] The legal framework for this sentencing has been constructed by the purpose and principles of sentencing found in sections 718 to 718.2 of the **Criminal Code**, which apply here by operation of Nova Scotia's **Summary Proceedings Act**, and the occupational health and safety cases applying these norms. The principles of sentencing for occupational health and safety violations that is reflected in these sections of the **Criminal Code** I mentioned has been described as follows:

There are three primary objectives of sentencing for a violation of the applicable health and safety legislation. First, there is the deterrence aspect of the sentencing process, both specific to the convicted party and generally for the community. Secondly, there is the retribution aspect of the sentencing process, indicating the moral wrong and the need to reinforce the value or standard that was violated. Thirdly, there is the rehabilitation-reform aspect of the sentencing process for the convicted party to be assisted in not repeating the offence.

[8] Principles of sentencing that must be examined closely in arriving at a fit and proper disposition are proportionality, parity and restraint. The principle of proportionality requires that Mr. Sutherland's sentence be proportionate to his moral blameworthiness for the offence of failing to take reasonable precautions to address the problem of the damaged barricade having been

removed at the entrance of the manure pit. Other factors that are relevant to the issue of proportionality in this case are the fact that Mr. Sutherland is before me as an individual not a large corporation and the fact that Mr. Boake also had responsibilities under the ***Occupational Health and Safety Act*** that he did not meet.

[9] The principle of parity in sentencing requires that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances", but this case does not lend itself easily to comparisons. I am satisfied that it cannot be equated to ***Occupational Health and Safety Act*** cases where fatalities have led to high fines being imposed against a corporate offender. Punishment should be mitigated by Mr. Sutherland's lesser degree of culpability. He also has no prior record for ***Occupational Health and Safety Act*** violations. It is material to me as well that the evidence in Exhibit 1, containing diagrams and photographs of Mr. Sutherland's farm, and the submissions of Mr. Yuill, indicate clearly that Mr. Sutherland was conscientious about safety issues before August 13, 2006 and has endeavored to address and improve safety at his farm since the tragedy of Mr. Boake's death. He has made substantial changes to the farm since August 2006, including building a new dairy barn. These plans were in

the works before Mr. Boake's death but have been informed by this tragedy, including a safer method for disposing of manure, through gravity fed tightly spaced gratings that Mr. Sutherland designed himself.

[10] The primary goal in sentencing Mr. Sutherland is general deterrence; the sending of a message to other employers that safety in the workplace must be rigorously maintained. Satisfying the imperatives of general deterrence in sentencing however has to be accomplished in a manner that reflects the particular circumstances of the case. General deterrence may mean different things in different cases.

[11] Having accounted for the mitigating factors that apply in this case, Mr. Sutherland's guilty plea and the steps he has taken since Mr. Boake's accident to improve safety at the farm, I am satisfied that the joint recommendation of counsel for a total penalty of \$25,000 is appropriate in this case. I accept the submission that a \$25,000 penalty is a significant penalty for Mr. Sutherland.

[12] I also accept that the penalty should include a significant contribution by Mr. Sutherland to farm safety initiatives. Nothing can bring Mr. Boake back

to life but the experience of the tragedy and, very importantly, Mr. Sutherland's knowledge of addressing farm safety issues, can assist in preventing the loss of another life, which at least will mean that however heartbreaking the loss of Mr. Boake's life, he will not have died in vain.

[13] I am going to direct that the fine portion of the penalty be paid, as is jointly recommended, to the Canadian Farmers' Disability Registry. That amount will be \$15,000. In addition I am directing that Mr. Sutherland perform 160 hours community service specifically with respect to farm safety, including preparation and travel to meetings associated with the issue. I can say that I regard the total penalty that I am imposing here to be a substantial penalty for Mr. Sutherland, accepting that this is a family run dairy farm. Mr. Sutherland is before me as an individual. I have, of course, taken into account that the failure to have met the requirements of the ***Occupational Health and Safety Act*** here did result in a fatality and so that is material in recognizing the appropriateness of a substantial penalty.

[14] I am not imposing a Victim Surcharge for the reason that I consider it to be an undue hardship in Mr. Sutherland's circumstances and also because the joint recommendation, which I have accepted, did not propose a Victim

Surcharge portion and recommended that Mr. Sutherland be responsible for an amount totaling \$25,000, and in doing so, recognized that the components would be a straight fine and community service.

[15] I will finally note that while I certainly appreciate that farmers do not work 40 hour weeks, that if one takes a conventional 40 hour week, obviously 160 hours is four such weeks and that is how I arrived at the 160 hour figure. That is a substantial contribution directly by Mr. Sutherland to farm safety in light of his other responsibilities with respect to his dairy business.

J.