

COPY

Information No. 95-0318

ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

against

ANGUS MALCOLM MacDONALD

P L E A O F G U I L T Y

BEFORE THE HONOURABLE SENIOR JUDGE B. W. LENNOX
on September 12, 1995, at OTTAWA, Ontario

CHARGES: Section 139(2), C.C.

APPEARANCES:

C. Flanagan, Esq.

Counsel for the Crown

R. Wakefield, Esq.

Counsel for the accused

ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

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Tuesday,
September 12, 1995

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THE COURT: May I see the Information, Madam Clerk, for a moment?

I had thought at one point that we might be dealing with a photocopy of the Information. I have an original Information, in fact, that we'll be dealing with this afternoon.

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CLERK OF THE COURT: Angus MacDonald, you are charged that between the 24th day of August, 1993 and the 2nd day of September, 1993, inclusive, at the City of Cornwall in the said East Region, did unlawfully attempt to obstruct or defeat the course of justice by arranging for the payment of a sum of money to David Silmser, a witness in a criminal investigation, to dissuade the said David Silmser from participating in a criminal investigation or any proposed judicial proceeding contrary to s. 139(2) of the *Criminal Code of Canada*.

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On this charge, do you waive formal reading of the election?

MR. WAKEFIELD: Yes.

CLERK OF THE COURT: Election is...?

MR. WAKEFIELD: Mr. MacDonald elects to be tried by Your Honour.

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CLERK OF THE COURT: Waive re-reading of the charge?

MR. WAKEFIELD: Yes.

CLERK OF THE COURT: Thank you. How do you plead to this charge, guilty or not guilty?

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MR. MacDONALD: Guilty.

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CLERK OF THE COURT: Thank you, you may be seated.

MR. FLANAGAN: Your Honour will recall that we dealt with this matter before Your Honour at...

THE COURT: Yes, I understand. This is a matter which would normally, for the record, be dealt with in the City of Cornwall.

Mr. Flanagan, you're the Crown from Brockville, Mr. Wakefield is counsel from Ottawa, the pre-trial was conducted in Ottawa. And I understand in those circumstances it was decided to enter a plea here.

MR. FLANAGAN: And I can also indicate that the local judge in Cornwall, because of the nature of the players, would not be able to have heard it in Cornwall in any event, and it would have required Your Honour to dispatch a judge to that jurisdiction in any event.

THE COURT: That's fine.

MR. FLANAGAN: Your Honour, just very briefly. As a result of an investigation initially conducted by the Cornwall Police Service surrounding itself around allegations by a male person concerning alleged sexual assault or sexual improprieties involving a member of the Diocese of Alexandria, Cornwall, there was a meeting subsequent to that investigation being commenced. There was a meeting involving the lawyer for the Diocese, and that is a Mr. Leduc who is a local lawyer in Cornwall or the area, the Archbishop, as well as the accused before the court. Certain matters were discussed.

Subsequent to that, Mr. Silmser was invited and entered into a discussion with the accused

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before the court. And as a result of that, Mr. Silmsler eventually--and I'll come back to it in a moment--"settled", and I put "settled" in quotations, for an amount of \$32,000. That settlement, Your Honour, was between Mr. Silmsler, Father Charles MacDonald, the Bishop and the Roman Catholic Corporation for the Diocese of Alexandria, Cornwall, in Ontario.

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That settlement culminated with the signing of a full release and undertaking not to disclose. That full release and undertaking not to disclose was signed in the office of the accused before the court. Present for the signature of that full release and undertaking not to disclose was the accused before the court, Mr. Silmsler, Mr. Silmsler's lawyer, Mr. Adams, Mr. Adams also being a local lawyer not practising generally in criminal law in the area.

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I will enter as an exhibit a copy of the full release and undertaking not to disclose. And before I do that, I can tell Your Honour that Mr. Leduc, who I'd indicated was acting for the Bishop and the Corporation, had discussions with the accused before the court, was made aware that Mr. Silmsler would settle for that amount. And as a result of that, he provided to the accused before the court a copy of a release that Mr. Leduc had used in a previous file, non-criminal. That release, Your Honour, was in the French language and that release was translated by Mr. Leduc to the English language.

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So perhaps as the first exhibit, what I will hand to the clerk as Exhibit One is a copy of the sample release given to the accused before the court from Mr. Leduc, both the French copy and also the English translation.

THE COURT: All right, that will be Exhibit One then, the two documents.

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EXHIBIT NUMBER ONE - Sample release in French, and English translation. - Produced and marked.

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MR. FLANAGAN: Subsequent to that, Mr. Leduc, as I indicated, did not attend or was not present for the signing of the release on the day in question which was, for your information, Your Honour, September 2, 1993.

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Your Honour will see from the full release and undertaking not to disclose that paragraph 2 of that release - first of all, the release does not resemble the sample release that Your Honour has as Exhibit One. And more particularly and more pointedly for the subject of this charge, clause 2 of the full release and undertaking indicates that:

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"In addition to the aforesaid release and for the said consideration, I hereby undertake not to take any legal proceedings, civil or criminal, against any of the parties hereto and will immediately terminate any actions that may now be in process."

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The operative words "or criminal", of course, for the purposes of Your Honour this afternoon.

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As I mentioned to Your Honour, that release was done in the presence both of Mr. Silmsler and also in the presence of Mr. Silmsler's counsel, Mr. Adams. I can advise Your Honour that in addition to being signed in the presence of Mr. Adams and, of course, the accused, there is a certificate of independent legal advice signed by Mr. Adams stating - the gist of it certainly stating that he has explained the full force and effect of the release to his client. And there is, following that, an acknowledgement by Mr. Silmsler that that has been explained to him by his solicitor, Mr. Adams. Both of those are also signed the same day as the release, the 2nd day of September, 1993, and those documents can go in as Exhibit Two.

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THE COURT: So we have the release and also a certificate of independent legal advice.

MR. FLANAGAN: Yes.

THE COURT: Thank you.

MR. FLANAGAN: And also the acknowledgement, which is a separate part of - entitled "Acknowledgement."

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THE COURT: Thank you.

EXHIBIT NUMBER TWO - Signed release, certificate of independent legal advice and acknowledgement. - Produced and marked.

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MR. FLANAGAN: I can advise Your Honour that a decision at that point in time had not been made by the representative police agency with respect to the laying of criminal charges against individuals named by Mr. Silmsler with respect to

the sexual improprieties as alleged by Mr. Silmsler.

In furtherance to that agreement, also drafted for Mr. Silmsler by the accused was a direction to the Cornwall City Police, and effective Sergeant Luc Brunet and to Constable Heidi Sebalj. I'm sorry if I'm mispronouncing it, it's spelled S-E-B-A-L-J.

Detective Sergeant Luc Brunet was the senior officer overseeing the constable in relation to Mr. Silmsler's reporting to the Cornwall Police Service. And that "direction," for lack of a better word because it does not have a title, indicates:

"I, David Silmsler, hereby state as follows: I made a complaint with Cornwall City Police concerning Charles MacDonald. I received a civil settlement to my satisfaction and, before accepting it, I received independent legal advice. Now I do not wish to proceed further with any criminal charges. You may take this statement as a direction to you to close your file and stop further proceedings as far as I am concerned."

And that is dated, Your Honour, the same day, September 2, 1993. It is signed by Mr. Silmsler and it is witnessed by Mr. Adams. And that could be Exhibit Three, please.

THE COURT: Yes.

EXHIBIT NUMBER THREE - Direction to Cornwall Police Service. - Produced and marked.

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MR. FLANAGAN: Obviously, because of the plea of guilty that has been entered, there had not been a decision at that time whether or not to lay criminal charges, as I indicated, against the appropriate persons as a result of Mr. Silmsler's complaints. I can advise Your Honour that as a result of investigation by the Ontario Provincial Police, that no criminal charges were laid against Father MacDonald as a result of Mr. Silmsler's complaints.

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And just as a matter of housekeeping, I can advise Your Honour - initially I told you that the Cornwall Police Service were handling the investigation. That was reviewed and - "enhanced" is the wrong word - that was reviewed and further investigated by the Ontario Provincial Police. And at the end of the day, if you like, it was decided that criminal charges would not be laid.

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Subject to Your Honour's comments, that is the gist of the evidence in relation to the obstruct justice charge.

THE COURT: Thank you. Mr. Wakefield?

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MR. WAKEFIELD: Just the one matter that I'd like to expand on, Your Honour, and that's with respect to Mr. Silmsler's knowledge of what the police department was doing. And unfortunately, I don't have my copy of his statement, if I could just borrow the Crown's? There's a statement by Mr. Silmsler...

MR. FLANAGAN: If I might have a moment, please.

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MR. WAKEFIELD: The most recent, the last statement made. If I could just have one second, Your Honour, I think we can find it right away.

THE COURT: Sure.

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MR. FLANAGAN: Oh, the other thing I forgot to mention, Your Honour, is he did receive the money which I - I don't know if Your Honour was aware of that or not.

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And further, just also for housekeeping, I had indicated that Mr. Leduc, the lawyer for the two parties concerned, initially sent over drafts of releases that he had used in the past. It should be noted that he was not present for the signing of that release as Exhibit Two. A copy, however, of the release was sent to him. Mr. Leduc indicated that the copy was sealed in an envelope, that he did not open the envelope and that he re-directed the envelope to the Diocese.

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And I also could indicate that in relation to Mr. Adams, Mr. Adams did acknowledge that he read the release and indicates to the police that, through inadvertence, he does not recall seeing the clause in relation to civil or criminal. I could also state for Your Honour's purpose that to my knowledge--and I just want to confirm this--Mr. Adams had not done any criminal work. But the explanation given was inadvertence. He did not draw it up, but he said that he did read it and did explain it to Mr. Silmsler.

5 THE COURT: Mr. Wakefield, can you provide the court with the gist of what you're looking for? Mr. Flanagan may recall...

10 MR. WAKEFIELD: The gist of it was a statement by Mr. Silmsler that he had been called in August before the signature of the release and told by the Cornwall Police that they probably weren't proceeding with the charges. So that he knew when he entered into this agreement that the police probably weren't going to proceed with any charges. And I thought that was very explicit in the statement. I see the officer shaking his head.

15 THE COURT: I actually have some recollection from the brief, which I haven't seen for some time, of something like that. I don't know how material it is or if you want...

Is that in dispute, Mr. Flanagan?

20 MR. FLANAGAN: Well counsel, I take it, is not saying that a decision had been made prior by the police not to lay any criminal charges, just that Mr. Silmsler thought that none were going to be laid?

25 MR. WAKEFIELD: Somehow he had that impression.

THE COURT: That in all probability no charge would be laid as a result of the complaint was his state of mind at the time.

MR. WAKEFIELD: Was his state of mind.

MR. FLANAGAN: I don't take issue with that.

30 MR. WAKEFIELD: And I just say that because it characterizes the whole transaction when you put yourself in his position, he probably knew that

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there would be no criminal charges; and if that pressure was relieved, he would not effect any civil settlement unless he proceeded with this one.

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So that I can tell Your Honour since that time, Mr. Silmsler has reneged on this release and he started action against the church and Father MacDonald as well. And for - well I don't think I need to go into that any further. All that is being handled by their solicitors.

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There was some talk, although no action has been commenced and served on Mr. MacDonald, there was some talk by the solicitors involved in that action that they might sue Mr. MacDonald on behalf of the Church and on behalf of Father Charles MacDonald for not drafting a proper release. Clearly, a speculative position, we'll have to wait and see whether a court rules that it's a proper release or not.

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But as a result of that notification, I've had to notify the Law Society's insurers that there is a possibility of an action against Mr. MacDonald. The Law Society's discipline department had been notified independently of any call from me. I had asked them if they could give me any indication what impact this would have on his professional standing within the Law Society; they declined to give me any opinion in advance. But if I were to make a summary or have a feeling about what their position would be, it's that they would not take further action against him on these facts.

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And they did ask - the Discipline Council asked me to send down a copy of the brief, which I did, together with some submissions on facts that I thought were important.

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Your Honour, Mr. MacDonald was called to the Bar in 1954. And since that time, he's had a general practice in Cornwall. He has worked as a Crown Attorney, he's worked as a part-time Crown Attorney and a federal prosecutor; he has done criminal defence work. He's still practising in Cornwall.

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And I suppose the major impact of a conviction like this - and I will tell you the Crown's position is that he receive an absolute discharge and I think the Crown has been exceedingly fair in taking that position. I think they've taken it because - well my opinion is this would be some kind of technical conviction because the word "criminal" appeared in the release, that would fill out the statutory requirements of attempting to obstruct the course of justice by use of the word "criminal" in that release.

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But when you look at all the circumstances, it's hard to tell whether it's a clever victim manipulating a good settlement for himself, or a clever lawyer trying to exploit him. And there's no suggestion that the latter was the case. This man had independent legal advice, he knew exactly what he was doing. Mr. MacDonald really didn't want to deal with him.
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Mr. MacDonald was only asked to deal with him

5 because, after discussions between Mr. Silmsler and Mr. Leduc, the relationship broke down to the point where Mr. Silmsler wouldn't talk to Mr. Leduc; so Mr. MacDonald was asked to see if he could find out what the settlement prospects were and he did that.

10 So that in all of the circumstances, I would join in the Crown's submission that an absolute discharge is appropriate and I would ask Your Honour to impose that disposition.

THE COURT: Mr. Flanagan?

15 MR. FLANAGAN: Yes. I can indicate to Your Honour that Mr. Wakefield and I spoke and, of course, Your Honour heard the pre-trial. Mr. Wakefield's position, of course, is an absolute discharge for his client. I am not objecting to that, based largely upon the following.

20 One, is the fact that we are dealing with a plea of guilty. This particular case would have been somewhat lengthy had it gone to trial. The estimate of time was three days; I suspect, because of the nature of the evidence, it would have gone slightly longer than that.

25 Secondly, it is not irrelevant that the police down the road, for lack of a better expression, decided not to lay criminal charges in relation to the incident. That decision, of course, was separate, was apart, and had completely nothing to do with the release in question. That was a decision independently made by the police agency based on the evidence

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that they had before them at the time. So notwithstanding Mr. MacDonald is appearing before this court on an attempt to obstruct-- it's an obstruct charge but in actual fact it's an attempt to obstruct--the obstruct justice concerns itself around a situation where no criminal charge would have been laid in any event.

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Thirdly, I am also looking at Mr. MacDonald's exemplary background, combined with his age, combined with the fact that, to my knowledge, Mr. MacDonald has been - perhaps I can put it this way: the matter is clearly a well-known matter in the City of Cornwall in relation to Mr. MacDonald, that is, Mr. MacDonald in this court; that's who I'm referring to in that sense.

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So based on those three considerations, the Crown is not opposed to an absolute discharge. I can state, however, that obviously it was a gross error, at the very least, in judgment of Mr. MacDonald. And on the other hand, one could say that, based on his experience as a lawyer, that, to put it in the vernacular, "he should know better."

That being said, based on the three reasons that I've given Your Honour, the Crown in this particular case is not objecting to an absolute discharge.

THE COURT: Thank you.

Mr. MacDonald, would you stand up, please, sir.

REASONS FOR SENTENCE

LENNOX, O.C.P.D.J.: (Orally)

Mr. MacDonald, as you well know, my role is somewhat limited when I am dealing with what amounts to a joint position. Reasons for the position have been stated both by Mr. Wakefield, and by Mr. Flanagan on behalf of the Crown. The only question that I have to answer is whether or not the joint position is in some way contrary to public interest or would tend to bring the administration of justice into disrepute.

In the circumstances explained by counsel, I have no hesitation in concluding that that is not the case. I do not disagree with the position taken by counsel, I intend to follow the joint submission. And therefore, sir, I grant you an absolute discharge.

I should perhaps--and I do not believe it was formally done because Mr. Wakefield went from his submissions on the offence to submissions with respect to Mr. MacDonald-- indicate that there is a formal finding of

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guilt. But no conviction will be registered, an
absolute discharge granted instead.

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MR. FLANAGAN: May I also just say for the
record, Your Honour, just for the record, that
the Crown also took into consideration that this
matter, of course, as Mr. Wakefield indicated,
will also be going to the Law Society and they
will be dealing also with Mr. MacDonald. Thank
you.

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THE COURT: Yes. And I take it, it is implicit
in Mr. Flanagan's suggestion that the questions
of specific and general deterrence, to the
extent they are a factor at all, have been
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addressed by the publicity attendant upon the
event and also the Law Society's involvement. I
took that as a given.

So thank you very much, sir.

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.....
THE HONOURABLE SENIOR JUDGE B. W. LENNOX
Ontario Court (Provincial Division)

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THIS IS TO CERTIFY that the foregoing is a true and accurate transcription from the record made by sound recording apparatus, to the best of my skill and ability.

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Rachelle E. Pickard

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Rachelle E. Pickard
Certified Court Reporter

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