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## OF JUDICIAL REVIEW, HIGH STANDARDS, AND EDWARD S. GODFREY

*David P. Cluchey\**

In July of 1987 I became Associate Dean of the University of Maine Law School. At that time I had known Ed Godfrey for some years as the mostly affable Dean Emeritus of the Law School and a retired Associate Justice of the Maine Supreme Judicial Court who regularly taught Trusts and Estates and Conflict of Laws. Ed always has been a delightful colleague, a person with whom to share a stimulating conversation over lunch on subjects ranging from current legal and social developments to the early history of the Law School.

As a new educational administrator, however, I found myself reencountering all of my colleagues in the more systematic and impersonal mode of class enrollments, student evaluations, and general levels of commitment and involvement with the Law School. In a very short time I became acutely aware of what I had only vaguely understood previously. At the core of the most appreciated, reliable, and committed members of the law faculty was Edward S. Godfrey. Although he taught only on a half-time basis (and periodically abandoned Maine winters for the relative warmth of New Mexico), his standing among the students was equal to any faculty member and superior to most. As important, at least from the standpoint of the Associate Dean, Ed was always prepared to give of his time to attend a function to chat-up a visiting dignitary, to judge a moot court argument, or to give a talk at a faculty forum. In short, he was one of those people who not only made the job a bit easier but whose commitment to the institution reminded you why individuals were sometimes willing to accept jobs in educational administration.

Ed is as humble and self-effacing as he is competent and respected. This is an unusual combination for a law faculty member. In each of the four years in which I prepared the Law School curriculum, Ed would appear at my door just about the time I was getting serious about the task. On each such occasion he would offer to retire for good, and although I never had the impression that he really wanted to retire, this was his way of graciously giving the Law School (and the beleaguered Associate Dean) an easy out if, for some unfathomable reason, his services were no longer desired. Typically he would make a joke about the waning faculties of a senior citizen. We would then engage in a brief negotiation about his course assignments for the next year, and he would depart. Invaria-

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bly I would reflect on the fact that Ed was several decades older than anyone else on the faculty, had retired from two distinguished careers, and remained one of our best faculty members. It was hard to avoid having a little of Ed's humility rub off in encounters like this.

I have been asked to comment on some of Ed's contributions to the law of Maine in the opinions he wrote while a member of the Supreme Judicial Court. I will do so in a moment. I cannot, however, avoid making a general comment about Ed's contributions to the University of Maine School of Law. There is no other person of whom I am aware who has given so much of himself to this institution. He presided at its rebirth in 1962. His competence and strength of character provided a model for students and faculty alike. Through his energy and commitment he gave the school purpose and direction, which he continues to provide. If the University of Maine School of Law is a respected institution of higher learning today, it is Edward S. Godfrey who made that achievement possible. We all owe him our gratitude.

I have chosen to comment on two opinions written by Justice Godfrey for the Supreme Judicial Court on various aspects of milk price regulation in Maine during the period 1977 to 1981. In several ways these decisions reflect Justice Godfrey's general approach to life and to the law and the strengths that he brings to both. The decisions incorporate high standards, are based on a clear understanding of complex issues, and are decisive and to the point. They are models of judicial decisionmaking.

In 1935 Maine adopted the Maine Milk Commission Act.<sup>1</sup> The purpose of the Act was "to prevent the disruption of the sale and distribution of milk through unfair, destructive and uneconomic practices."<sup>2</sup> The Maine Milk Commission Act was designed to protect Maine dairy farmers from the intense price competition characteristic of the 1930s. It gave to a state agency, the Maine Milk Commission, authority to set milk prices to be paid to milk producers, wholesalers, and retailers. Milk price regulation was a common response to the precipitous decline in milk prices during the depression of the early 1930s.<sup>3</sup> This regulatory approach led to considerable controversy concerning the interests being served and the impact of the regulation on retail milk prices.<sup>4</sup>

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1. P.L. 1935, ch. 13, §§ 1-9 (effective Feb. 27, 1935).

2. *Cumberland Farms Northern, Inc. v. Maine Milk Comm'n*, 377 A.2d 84, 86 (Me. 1977) (citing *Maine Milk Comm'n v. Cumberland Farms Northern, Inc.*, 205 A.2d 146, 153 (Me. 1964)).

3. See generally Jack Michel, *Hood v. Dumond: A Study of the Supreme Court and the Ideology of Capitalism*, 134 U. PA. L. REV. 657, 661-79 (1986).

4. See, e.g., LLOYD C. IRLAND, MAINE STATE PLANNING OFFICE, A JUST AND REASONABLE PRICE: STATE CARTELIZATION OF MAINE'S MILK INDUSTRY (1982);

In 1975 the Maine Legislature enacted important revisions to the Maine Milk Commission Act.<sup>5</sup> These revisions prohibited any individual with a business connection to the milk industry from serving on the Maine Milk Commission. They gave the Commission significantly broader powers and duties to obtain information on the economics of the milk business in Maine and provided more specific criteria for setting milk prices. The thrust of the 1975 revisions was to require the Maine Milk Commission to obtain information in a rigorous and independent manner in order to establish retail milk prices at the lowest level consistent with a just and reasonable return to those involved in the industry. These revisions reflected an effort to transform the Commission from an industry-dominated body to an independent regulatory agency charged with striking a balance between industry and consumer interests. After forty years of industry domination, the transformation of the Maine Milk Commission was unlikely to be a simple task.

The first two price orders promulgated by the Maine Milk Commission under the 1975 revisions were immediate subjects of controversy. Maine milk dealers challenged the first order, Order 76-1, before the Commission on a petition for reconsideration on the ground that the prices provided in the order were inadequate. After two days of hearings the Commission issued a second order, Order 76-2, setting higher minimum prices. Both orders were appealed to the Maine Superior Court by Cumberland Farms Northern, Inc., a Massachusetts corporation with an interest in selling milk at retail as cheaply as possible in Maine. The Superior Court set aside both orders, primarily on the grounds that the Commission had made an inadequate investigation and had utilized the wrong standard in setting minimum prices. It is in this case that Justice Godfrey had his first opportunity to write for the Supreme Judicial Court regarding milk price regulation in Maine.

In *Cumberland Farms Northern, Inc. v. Maine Milk Commission*,<sup>6</sup> Justice Godfrey considered the impact of the 1975 revisions to the Maine Milk Commission Act. In a thorough review of the history of the Act and the language of the revisions, Justice Godfrey concluded that an “independent investigation is required as a basis for correctly understanding the milk industry and its economic problems” and that public hearings, without more, were insufficient to satisfy the Milk Commission’s statutory duties.<sup>7</sup> In passing, Justice Godfrey tossed a gentle barb at the defendants for suggesting that the revisions did not require an independent investigation, a

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PAUL MACAVOY, AMERICAN ENTERPRISE INSTITUTE FEDERAL MILK MARKETING ORDERS AND PRICE SUPPORTS (1977).

5. P.L. 1975, ch. 517, §§ 1-5 (effective Oct. 1, 1975).

6. 377 A.2d 84 (Me. 1977).

7. *Id.* at 88.

position which he perceived as clearly at odds with the reasonable interpretation of the statute.<sup>8</sup>

In a detailed examination of the Milk Commission's purported investigation of the structure and the finances of the milk industry, Justice Godfrey concluded, "[T]he information developed was wholly insufficient to provide the Commission with the independent critical perspective it needed to evaluate the complex and partisan testimony offered at the hearings."<sup>9</sup> The Godfrey opinion explicitly requires the Milk Commission to develop and implement "a comprehensive, on-going system of acquiring information about the financial condition of the milk industry in Maine."<sup>10</sup>

In addition to ruling on the nature and scope of the information-collecting responsibilities of the Milk Commission, Justice Godfrey's 1977 *Cumberland Farms* decision clarified and explained the factors to be considered by the Milk Commission in setting minimum prices. The 1975 statutory revisions required the Commission to take into account prevailing prices for milk in neighboring states and the public need for retail milk prices set at the lowest practicable levels.<sup>11</sup> Justice Godfrey suggested that these factors, along with the other factors listed in the same paragraph in the statute,<sup>12</sup> should be applied by the Commission in adjusting milk prices only after the lowest achievable dealer prices had been determined.<sup>13</sup> In effect Justice Godfrey in the 1977 *Cumberland Farms* decision provided the Maine Milk Commission with a roadmap for negotiating the complex price setting regulatory scheme established by the Legislature.

Unfortunately the Milk Commission proved to be less than adept at map reading, and four years later the Maine Supreme Judicial

8. "In further support of our conclusion that independent investigation is mandatory (a conclusion that might have been thought obvious had it not been so earnestly questioned) is the provision in the last sentence of subsection 2954.1 of the revised milk [sic] Commission Law . . . ." *Id.* at 89.

9. *Id.* at 90.

10. *Id.* at 91.

11. These criteria were added to a series of preexisting criteria in the statute. After revision the relevant statutory section read as follows:

In establishing and changing minimum wholesale and retail prices, the prices so established shall be just and reasonable taking into due consideration the public health and welfare and the insuring of an adequate supply of pure and wholesome milk to the inhabitants of this State under varying conditions in various marketing areas; prevailing prices in neighboring states; seasonal production and other conditions affecting the costs of production, transportation and marketing in the milk industry, including a reasonable return to producer dealer and store; taking into consideration the public need for the establishment of retail milk prices at the lowest practicable levels.

ME. REV. STAT. ANN. tit. 7, § 2954(2) (West 1989).

12. *Id.*

13. 377 A.2d at 93.

Court again was faced with an appeal of a Superior Court determination on a Maine Milk Commission order. In the second case of *Cumberland Farms Northern, Inc. v. Maine Milk Commission*,<sup>14</sup> the Court considered the question whether the Milk Commission had complied with the statutory process and criteria in promulgating Commission Order 80-6. Once again Justice Godfrey wrote for a unanimous court, setting aside the price order issued by the Milk Commission.

Justice Godfrey reviewed the Court's 1977 *Cumberland Farms* decision. He then noted with some force: "Our conclusions in *Cumberland Farms, 1977*, were not intended as mere recommendations. They were an explication of the substantive law controlling the Commission's price setting."<sup>15</sup> Quoting from his 1977 decision, Justice Godfrey pointed out (with a great deal of restraint) that the Milk Commission had yet to set up a system for the reporting of financial information by participants in the Maine milk industry. There was substantial question about the accuracy of the data the Commission had collected and used in support of its price order, and the Court concluded once again that the Milk Commission had not satisfied the independent investigation requirement of the statute.<sup>16</sup>

Similarly, Justice Godfrey reviewed the two-step price setting process he had outlined in his 1977 opinion. The first step in this process, the establishment of the lowest achievable price for milk, required a determination independent of existing Maine milk production costs. The Milk Commission failed to appreciate this requirement and based its determination on an extrapolation of actual production costs. This, in the eyes of Justice Godfrey and the Court, was a fatal flaw in the Commission's process for arriving at a price order.<sup>17</sup>

Justice Godfrey also rejected the Milk Commission's attempt to apply the factors set forth in the Commission's legislation,<sup>18</sup> the second step in the price setting process. In undertaking the adjustments provided for in the statute, the Milk Commission "cited the existence of cost-elevating factors as a rationale for, in effect, disregarding the baseline prices completely."<sup>19</sup> In effect, the Commission also ignored the statutory factors and simply set prices at a level that would ensure that the most efficient dealers, who produced fifty percent of Maine milk, earned a reasonable return.<sup>20</sup> Restating the holding in the 1977 *Cumberland Farms* decision, Justice Godfrey

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14. 428 A.2d 869 (Me. 1981).

15. *Id.* at 875.

16. *Id.*

17. *Id.* at 876-77.

18. *See supra* note 11.

19. *Cumberland Farms Northern, Inc. v. Maine Milk Comm'n*, 428 A.2d at 877.

20. *Id.* at 877 n.7.

noted that "the Commission must begin with the theoretically lowest achievable prices and adjust them upward only if, and to the extent that, each of the considerations listed in 7 M.R.S.A. § 2965(2) individually compels such an adjustment."<sup>21</sup>

In conclusion, Justice Godfrey stressed the necessity that the Milk Commission follow the Supreme Judicial Court's interpretation of the Milk Commission statute in setting milk prices. With restraint, clarity, and forcefulness, Justice Godfrey drove home the fundamental point that the Supreme Judicial Court interprets the statute and the Milk Commission must adhere to that statute as interpreted in exercising its authority to set minimum milk prices.

The two *Cumberland Farms* opinions are excellent examples of judicial craftsmanship. Called upon to interpret the meaning of a complex regulatory statute of great import to consumers and to producers, wholesalers, and retailers of milk in Maine, Justice Godfrey, on behalf of the Court, performed a clear, rigorous analysis of the statute and outlined the process by which the Milk Commission should establish minimum milk prices. Justice Godfrey's analysis reflected the subtlety of the Legislature's effort to transform the Milk Commission from an industry-dominated regulatory body into one that balanced consumer and producer interests. When the Commission essentially ignored the Court's 1977 *Cumberland Farms* decision, Justice Godfrey firmly insisted upon adherence to the Court's interpretation of the statute. Although the 1981 *Cumberland Farms* decision overturning a milk price order of the Commission led to a very brief period of deregulated wholesale and retail milk prices in Maine,<sup>22</sup> the Legislature remedied the situation with emergency legislation, and the Milk Commission thereafter made earnest efforts to adhere to the Court's decisions.<sup>23</sup> The short-term impact of adherence to the Court's interpretation of the Maine Milk Commission Act was a steady decrease in the real wholesale and retail prices of milk in Maine.<sup>24</sup>

For more than three decades Edward S. Godfrey has devoted his life to the law in Maine. He has fashioned lawyers and he has fashioned law. In the process he has served as a model for us all. It is altogether fitting that this issue of the *Maine Law Review* is devoted to a review of Dean and Justice Godfrey's contributions to Maine law.

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21. *Id.* at 878.

22. See FINAL REPORT OF THE MAINE MILK STUDY PANEL, DEP'T OF AGRIC., FOOD, AND RURAL RESOURCES, MILK PRICING ALTERNATIVES FOR MAINE 26 (1985).

23. *Id.* at 25.

24. *Id.* at 26.