Court of Queen's Bench of Alberta

Citation: R. v. Del Bianco, 2010 ABQB 129

Date:
Docket: 050386945S1
Registry: Calgary

Between:

Her Majesty the Queen

Respondent

- and -

David Del Bianco

Appellant

Reasons for Judgment
of the
Honourable Mr. Justice Sal J. LoVecchio

Introduction

[1] This is an appeal from a decision of Judge M.L. Graham dated September 5, 2008. In her decision, she found David Del Bianco guilty of violating cease-trade and director sanctions imposed by the Alberta Securities Commission, and she imposed a fine, probation and a lifetime ban on such activities. Mr. Del Bianco appeals both the Trial Judge's conviction as well as the sentence imposed.

[2] For the reasons that follow, the appeal is allowed in part. While I find that the Trial Judge had sufficient reason to convict Mr. Del Bianco, I find that the sentence imposed was unduly harsh.

Events Leading to the Charges

[3] In May 2002, the ASC found that Mr. Del Bianco had contravened Alberta securities laws by improperly distributing securities without a prospectus or exemption through Equal Rights Legal Defence Alliance Inc. The ASC prosecuted Mr. Del Bianco administratively and

imposed several sanctions, including that Mr. Del Bianco must: (a) resign any director/officer positions of any issuer within 30 days for a period of four years, (b) cease trading in securities for four years, (c) pay an administrative penalty of $10,000, and (d) pay costs of $5,000. Mr. Del Bianco's appeal of the ASC decision to the Court of Appeal of Alberta was dismissed by that Court on October 29, 2004.[1]

[4] Subsequently, an investigation of Alberta Corporate Registry records showed that Mr. Del Bianco was a director of eight corporations in 2004-2005, and it also revealed that Mr. Del Bianco owned 100% of the voting shares of the eight corporations.

The Charges

[5] Mr. Del Bianco was then charged under s. 194(1) of the *Securities Act*[2] for violating the cease-trade and director prohibitions imposed by the ASC and confirmed by the Court of Appeal.

[6] More specifically, on December 15, 2004 and April 7, 2005, Mr. Del Bianco was charged in two Informations with violating Alberta securities laws between February 14, 2003 and "the present" by acting as a director of several companies, violating the cease-trade order, and trading without registration. The Informations identified the location of the offences as Calgary, Alberta "and elsewhere".

The Decision and Sentence of the Trial Judge

[7] On September 5, 2008, Judge Graham in a written decision found Mr. Del Bianco guilty as charged. On July 28, 2009, she imposed: (1) a fine of $1000 per count plus a victim fine surcharge of 15%, for a total fine of $10,350, (2) 12 months of probation (3) a permanent cease-trade order, and (4) a lifetime ban on serving as director or officer of any issuer.

Issues

[8] The following issues were raised on appeal:

1. Did the Trial Judge err in law by finding that the terms "and elsewhere" and "the present" on the original Informations were too vague, thus engaging either Charter relief or some other remedy?

2. Did the Trial Judge err in law by finding that an offence pursuant to s. 194(1) of the *Securities Act* did not have a *mens rea* component?

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[1] *Del Bianco v. Alberta Securities Commission*, 2004 ABCA 344.

[2] R.S.A. 2000, c. S-4.

3. Did the Trial Judge err in law by finding that the corporations in which the accused was a 100 percent shareholder and sole director were "issuers" under the *Securities Act*?

4. Did the Trial Judge err in law by finding sufficient certainty in the original ASC Order with respect to the term "issuer" to deny Charter relief?

5. Did the Trial Judge err in law by imposing a sentence that was not fit and proper in the circumstances?

Analysis

Issue 1: Informations

[9] The Appellant asserts that the Informations were too vague in defining both the location and timing of the offences through the words "and elsewhere" and "the present", thereby causing the Appellant to be unable to provide full answer and defence to the charges.

[10] While the Informations could have more precisely stated the location of the offences, there is no evidence of any prejudice suffered by Mr. Del Bianco or an inability to understand and meet the charges he faced. The words "and elsewhere" appear to be superfluous as the Crown did not seek to go beyond the Alberta border in exercising its powers. All of the corporations the ASC alleged Mr. Del Bianco to be director and shareholder of were Alberta corporations. To the extent these words were vague, they were not prejudicial to the Appellant.

[11] Similarly, there is no evidence of prejudice due to the words "the present" in the description of the timing of the offences. Quite to the contrary, the words "the present" were an appropriate inclusion in the charges. They provided a logical end date to the charges described because Mr. Del Bianco's alleged breach of the ASC Order was ongoing. As a result, every day he served as a director of the various companies, he continued to breach the ASC Order, so the inclusion of the words gave some certainty as to the jeopardy he faced.

[12] There is no reason to interfere with the determinations of the Trial Judge in this area, and Mr. Del Bianco's appeal on this ground is dismissed.

Issue 2: Mens Rea

[13] The Appellant asserts that the Trial Judge erred in law by holding that securities offences are regulatory or strict liability offences to which the only defence available is due diligence. The Appellant submits that such an offence, where the penalty is so great, should be a *mens rea* offence and that Mr. Del Bianco should have had the opportunity to give evidence as to his subjective knowledge and understanding of the ASC Order.

[14] I have several responses to this argument. First, the law is fairly clear that an offence under the *Securities Act* is a strict liability offence: see, for example, *R. v. Boyle*[3] and *R. v. Felderhof*[4]. Section 194 of the *Securities Act* states simply that a person who contravenes Alberta securities laws is guilty of an offence. "Alberta securities laws" are defined in the Act to include ASC decisions. Section 194 does not contain any word such as "knowingly", "wilfully" or "intentionally" which would bring the offence into a *mens rea* category.

[15] Rather, as was held by the Trial Judge, s. 194 offences are strict liability offences to which the only defence is due diligence: *R. v. Sault Ste. Marie (City)*[5]. Mr. Del Bianco did not introduce any evidence of due diligence, so there was no evidentiary basis for such a defence, and the Crown bears no burden to establish a lack of diligence on the part of Mr. Del Bianco as part of the offence.

[16] Even assuming there is a *mens rea* element to s. 194, I am not sure the argument made by Mr. Del Bianco's Counsel in this regard has any validity. Why?

[17] Because if I understood the argument of his Counsel, it was suggested that Mr. Del Bianco simply did not understand the scope of the ASC Order. That is not really a *mens rea* argument; it is an ignorance of the law argument.

[18] So, even if a new trial were ordered in which the defence could call evidence as to Mr. Del Bianco's intent, simply giving evidence of Mr. Del Bianco's misunderstanding about the ASC Order does not amount to a *mens rea* defence. Mr. Del Bianco's knowledge or understanding of the law is not relevant to such a defence.

[19] There was no uncertainty as to what the ASC Order said: it clearly stated Mr. Del Bianco could not be a director or officer of any issuer, and "issuer" is a term of art defined in the *Securities Act.* It is clear as a factual matter that shares in the eight companies were issued to him by those corporations and that he was a director of the companies.

[20] There may have been some ambiguity in Mr. Del Bianco's mind as to what he thought the word issuer meant, in that he may have thought it did not include private issuers. However, the ASC Order used a word from the *Securities Act,* and I am not aware of any principle that would require the ASC to ensure Mr. Del Bianco understood every legal term used in such an order. If there was any ambiguity, it was only in Mr. Del Bianco's mind. Further, as will be seen below, the Trial Judge found there was no ambiguity in the word used or its legal interpretation, a finding with which I agree.

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[3] 2001 ABPC 152.

[4] 2007 ONCJ 345.

[5] [1978] 2 S.C.R. 1299.

[21] Mr. Del Bianco's subjective confusion is irrelevant, and him simply not understanding the words "any issuer" does not amount to a *mens rea* defence. Therefore, even if there were a *mens rea* element to the offence (which is an assumption in conflict with the specific determinations in this case), there would still be no reason to order a new trial as the argument raised would not lead to a different result.

[22] The second ground of appeal also lacks merit.

Issues 3 and 4: Issuer Definition

[23] The Appellant asserts that the Trial Judge erred in holding that Mr. Del Bianco's companies were issuers.

[24] The Appellant's main submission about whether or not these companies were "issuers" centres around the definitions of "issuer" and "private issuer" found in the *Securities Act* at the time of the offences.

[25] At the time the ASC Order was issued, the definitions section of the *Securities Act* contained a definition for "issuer" and a definition for "private issuer". The definition of "private issuer" has now been removed from the general definitions section of the *Securities Act* but still exists in National Instrument 45-106. The Appellant submits that because there are two terms, each with a separate definition, any corporation that is by definition a "private issuer" cannot by implication also be an "issuer". With respect for the argument, that need not be case. Whether or not it is the case is a question of interpretation.

[26] The term "issuer" in the *Securities Act* is very broad in its scope. It includes any company that has outstanding securities: s. 1(cc)(I). That definition has not changed since 1981. It does not contain any exclusions.

[27] The *Securities Act* also contains the notion of a "reporting issuer". In more colloquial terms, reporting issuers would be known on the street as public companies. Those "issuers" are to be contrasted with"private issuers", which are corporations used day to day by individuals that would be more colloquially known on the street as private companies. That is where the real distinction in issuers lies. The term "issuer" is simply a defined term which is broader in scope and, as a matter of interpretation, encompasses both.

[28] All of the companies of which the Appellant was director had issued shares to the Appellant. Shares are included in the definition of a security in the *Securities Act*. Because these companies had issued shares to Mr. Del Bianco, and because the definition of securities includes shares, the companies had outstanding securities. Therefore, these companies were issuers under the *Securities Act*.

[29] The ASC chose to use the words "any issuer" in its order, and we must take something from the employment of those words, namely that the ASC intended its order to be as broad as possible. Had the ASC wanted to only restrict Mr. Del Bianco from trades and the like in

"reporting issuers" or, more colloquially, only public as opposed to private companies, it could have used in the ASC Order a term defined in the *Securities Act* to achieve that more limited purpose.

[30] It is not for me to speculate why the ASC used in the ASC Order a defined term more broad in its scope, and that is really what the Appellant wants this Court to do. The ASC Order is very broad in its scope, and that is what the Trial Judge found. She further found that by failing to resign as director of these companies, Mr. Del Bianco was in breach of the ASC Order. I agree.

[31] These two grounds of appeal are therefore dismissed.

Issue 5: Sentence

[32] Finally, the Appellant submits that the sentence the Trial Judge imposed was not fit and proper for the offences committed.

[33] The Appellant submits that the fine of $1000 per offence, for a total fine of $10,350 including a 15% victim surcharge, was excessive. I disagree. This fine is the same as the original administrative penalty imposed against Mr. Del Bianco by the ASC in February 2003. For unknown reasons, Mr. Del Bianco never paid the original administrative penalty imposed by the ASC, and he later breached the ASC Order, essentially making him a second-time offender. Therefore, imposing this fine rather than the $500 per count sought by the Appellant, was fit and reasonable. I find no reason to interfere with the monetary fine.

[34] I do, however, have a concern with the remainder of the sentence imposed by the Trial Judge. Initially, the ASC imposed four-year director and trading bans on Mr. Del Bianco. This was increased in both cases to lifetime bans.

[35] The Crown presented me with two Alberta Provincial Court decisions in support of its sentencing submissions: *R. v. Seto*[6] and *R. v. Rusnak*[7].

[36] In the *Seto* case, Judge Wenden imposed a 12-year director and trading ban on the accused, who had made prohibited trades in securities of a reporting issuer while under a cease trade order. The Trial Judge in her sentencing decision found the accused in the *Seto* case to have been "a much more sophisticated individual [than Mr. Del Bianco, who] had lied to the Court in more than one way."

[37] The Trial Judge similarly contrasted Mr. Del Bianco against the accused in the *Rusnak* case, who was convicted of fraud and given a three-year prison sentence. The *Rusnak* case

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[6][2005] A.J. No. 994.

[7] Unreported, action numbers 061509295P1and 070654355P1.

involved illegal conduct within publicly traded companies, and Mr. Rusnak was a lawyer. In such circumstances, a lifetime ban may be warranted, but the Trial Judge in this case specifically observed that the conduct of Mr. Del Bianco was not as egregious.

[38] An appellate judge should only vary a sentencing decision if the sentence imposed is demonstrably unfit: *R. v. McDonnell*[8] or violates a principle in sentencing. One such principle is the parity principle.

[39] In looking at the *Rusnak* case, the only case put forward by the Crown to support a lifetime ban, that case had significantly greater aggravating factors than this case. The accused was a lawyer in a fiduciary position who was convicted of fraud and sentenced to three years imprisonment. He dealt with securities in publicly traded companies, while Mr. Del Bianco issued shares only to himself. While I do not condone Mr. Del Bianco's behaviour, I do feel that the lifetime ban is unduly harsh and, given the observations of the Trial Judge, is contrary to the parity principle.

[40] While I agree that Mr. Del Bianco has shown disregard for the ASC and its authority, I do not believe Mr. Del Bianco should be banned for life from serving as a director or officer of any issuer. The ASC, whose mandate is public protection, felt that a four-year ban was sufficient after Mr. Del Bianco's first offence. Given that his second offence did not involve any publicly traded companies and securities issued only to himself, I find that a more fit sentence would be to double the initial four-year ban imposed by the ASC to eight years.

[41] I therefore order that Mr. Del Bianco cease trading in securities in Alberta for eight years and that he be prohibited from becoming or acting as a director or an officer or both of any issuer for eight years.

[42] Finally, the Appellant asserts that the Trial Judge's imposition of a 12-month probation order was also unduly harsh given that this was a regulatory offence and probation is inconsistent with non-criminal law. I agree with the Appellant that the terms of the probation order, namely that Mr. Del Bianco must submit himself to and attend treatment as directed by a probation officer, are unnecessarily harsh and unrelated to the offences for which he was convicted. The probation order is set aside.

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[8] [1997] 1 S.C.R. 948.

Conclusion

[43] Mr. Del Bianco's conviction appeal is denied and his sentence appeal is allowed in part. In the result, the sentence order is varied by the probation order being struck, and the lifetime director/officer ban and lifetime cease-trade order being reduced from a lifetime ban to an eight-year ban in each case.

Heard on the 22nd day of January, 2010.
Dated at the City of Calgary, Alberta this 19th day of February, 2010.

Sal J. LoVecchio
J.C.Q.B.A.

Appearances:

Robert W. Hladun Q.C.
For the Appellant/David Del Bianco

Don Young
for the Respondent/Crown