In the Provincial Court of Alberta

Citation: R. v. Nason, 2014 ABPC 33

Date: 20140214
Docket: 130430499P1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Donald Addison Nason

Ruling of the Honourable Judge H.A. Lamoureux
Section 551.1/*Rowbotham* Application

[1] The accused is charged with the following offences pursuant to the *Alberta Securities Act* RSA 2000, c S-4:

1 count under section 42(3);

2 counts under section 92(1)(b);

2 counts under section 92(3)(a);

2 counts under section 92(3)(b);

1 count under section (92)(3)(d);

5 counts under section 92(4.1);

5 counts under section 93.1; and

5 counts under section 110(1)

[2] The accused has brought a *Rowbotham/Fisher* Application (***R. v. Rowbotham***, 41 C.C.C. (3d) 1; ***R. v. Fisher***, 1997 CarswellSask 821) during the course of case management pursuant to s. 551.1 of the *Criminal Code*. Case management was ordered by the Chief Judge of the Provincial Court of Alberta on August 21, 2013, following a request by counsel for The Alberta Securities Commission. In the letter requesting case management under s 551.1, counsel for the Alberta Securities Commission requested case management based on the "time estimate, complexity and number of allegations" (Letter from Alberta Securities Commission, August 13, 2013).

[3] Case management commenced in September 2013 at the direction of The Chief Judge. At the commencement of case management, counsel for the Alberta Securities Commission and defence agreed that there would be two lay witnesses, two Alberta Securities Commission investigators and that the case would take approximately 5 days for Crown and defence to present their evidence. There are 8 binders of disclosure provided by the Securities Commission counsel to the defence. The Securities Commission alleges that Mr. Nason engaged in illegal trades, breached a cease trade order, and breached other sections of the *Alberta Securities Act* giving rise to alleged losses of $280,000. Mr. Thom, Q.C., of Miller Thomson, whose preferred area of practice is in the field of securities law makes this application for what is known as a *Rowbotham* Order, a declaration of *Charter* breach pursuant to s. 7 and 11(d) and an order staying proceedings until State funded counsel is in place for Mr. Nason and an order that accused counsel of choice be paid at a rate of $650 per hour, a rate higher than the Legal Aid tariff (which is $84.00 per hour). Mr. Nason seeks a judicial Stay of proceedings pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* pending the provision of funding and appointment of counsel. Mr. Thom makes this application pro bono on behalf of Mr. Nason.

[4] It is important to this decision that the counsel for the Alberta Securities Commission has advised the Court that in the event of conviction, the Prosecution will be seeking incarceration of the accused. The Court is advised that The Alberta Securities Commission has made a policy decision that breaches of its orders will be prosecuted in the Provincial Court of Alberta Criminal Division. Gaol will be sought on conviction. Counsel for the Alberta Securities Commission is also seeking a fine in the range of $150,000 to $200,000 on conviction. (Affidavit of Donald Addison Nason).

Background Facts

[5] Mr. Nason has filed an Affidavit in support of his application for State funded counsel and a conditional Stay of proceedings until counsel is provided. The Affidavit outlines the following relevant facts:

1. Mr. Thom, Q.C., is Mr. Nason's counsel of choice. Mr. Nason has a long standing relationship with Mr. Thom's firm Miller Thompson. Mr. Nason informs the Court that Mr. Thom's normal hourly rate is $650 per hour. Mr. Thom is requesting a retainer for trial (based on a 5 day trial) in the amount of $50,000. The estimate of the $50,000 retainer for the 5 day trial is based on one day of preparation for each one day of trial a budget of 10 days of total preparation and trial time. Mr. Thom estimates 8 hours per day multiplied by 10 days for a total of 80 hours and a total fee for trial and trial preparation at $52,000 rounded down to $50,000.

2. Mr. Nason swears under oath that he does not have funds to pay Mr. Thom and has been denied Legal Aid (Mr. Fey counsel for The Legal Aid Society advises that Legal Aid pays only $84.00 per hour. The total that would be available through Legal Aid would be $2500-$3000 for a 5 day trial). Thus even if Mr. Nason appealed the Legal Aid decision, Mr. Fey advises that the hourly rate of $84.00 per hour would not change. Mr. Nason cannot get competent counsel in securities law at the rate of $84.00 per hour.

3. Mr. Nason has filed in his first Affidavit sworn January 14, 2014, a list of his assets and liabilities, his earnings from Home Depot, and his wife's earnings. Mr. Nason's wife is in the process of bankruptcy proceedings. Financial information filed by Mr. Nason in his Affidavit indicates a monthly income of $1,218.83 from Home Depot and $695.54 from Canada Pension. Mr. Nason has monthly expenses of $2,391.70, assets of $1,800, and liabilities of $128,820.03, pursuant to Exhibit E of the Affidavit. Mr. Nason's wife has income of $1,307 per month working at The Bay and receiving Canada Pension. She has liabilities of $36,630.58 and no assets according to Exhibit E of Mr. Nason's Affidavit.

4. In his further Affidavit sworn January 29, 2014, Mr. Nason addresses:

    a. past efforts made to raise funds to retain defence counsel;

    b. efforts to be made to raise funds for counsel before April 2014 trial;

    c. assets available to sell or to mortgage; and

    d. efforts to find other counsel other than Mr. Thom.

    In that context Mr. Nason avers the following:

> 4. I first found out about these charges in or about the end of April 2013, sometime after these charges were first filed which appears to be April 17, 2013 (see Exhibit "A" to my Affidavit). In answer to issues (a) and (b), since the end of April 2013, I have done or can do the following to try to raise funds to pay my counsel:
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> (a) I have not been able to go back to any family members to try to raise further funds to pay Counsel in these proceedings, because I had previously approached my family and obtained approximately $10,000.00 from them in order to pay legal fees to Tom Duke of Miller Thomson LLP in Edmonton, in order to defend civil proceedings where I had been sued by Mr. Werenka and Mr. Van Lant, the two investors which are noted as being Crown witnesses in the criminal charges in these proceedings (see Exhibit "A").

(b) I have taken $4,000.00 of that $10,000.00 which I obtained from my family and which was ear-marked but not needed for the Edmonton civil proceedings and have already paid that to Mr. Thom in partial payment of his services rendered to date. As noted in my previous Affidavit that amount of Mr. Thom's current account which was owing as of the end of December 2013 was $15,117.02 after that $4,000.00 was applied in partial payment.

(c) My wife has no money because she has filed for bankruptcy.

(d) I have already noted in my previous Affidavit my assets and liabilities, which show that I personally have no money at all to pay Counsel in these proceedings.

(e) Other than my previous efforts to borrow money from family, which were successful but which money has already been paid for other legal proceedings or these legal proceedings, I have no ability to go back to my family to borrow or raise further funds.

(f) I had approached my daughter Jillian Chow to borrow money from her, but she has no money to loan me because her divorce proceedings from which she might be able to obtain funds, have not resulted in any funds to her. I am advised by my daughter that these proceedings have not even started and as such there in no possibility of any funds coming from those proceedings in the near future, and certainly not before the April 2014 trial.

(g) I have sports memorabilia which I had originally told my lawyer that I would try to sell to raise funds to pay Counsel in these proceedings, but I have checked with an auctioneer and that sports memorabilia is worth at most $1,000.00, and probably less.

5. In a further answer to issue (b), I have no other way to raise any funds in the future, whether by April 2014 or otherwise.

6. In answer to issue (c), have no other assets available to either sell or mortgage, either by April 2014 or otherwise, other than as noted in my previous Affidavit, all of which cannot be sold or mortgaged.

7. Issue (d) is with respect to my efforts to find other Counsel to defend me in these proceedings and the following outlines that issue.

8. I was in Court on December 20, 2013 and present for the Case Management Conference which occurred, and which transcript is attached to my previous Affidavit as Exhibit "A".

9. On pages 11 to 17 of Exhibit "A" there is a discussion where I was advised that there are only a handful of lawyers that could properly and competently defend this *Securities Act* criminal prosecution, and that all of them would cost in the same range as Mr. Thom.

10. I was further advised that the rate for such experienced Counsel would be between $500.00 and $800.00 per hour (on page 17) and that is why I have not sought Counsel other than Mr. Thom to defend these matters because no other counsel would be any cheaper than his hourly rate of $650.00, and secondly Mr. Thom has previously booked off the April 28-May 2, 2014 dates for trial so I have stayed with Mr. Thom rather than choosing other Counsel who would be busy and unlikely to be available for that previously scheduled trial date, which the Judge said is not easy to adjourn now that it is set as a trial date.

11. In that same discussion at the Pre-Trial Conference, I was advised about the likelihood of needing in the range of $70,000.00 as funds available for the legal fees to properly defend the charges in these proceedings, which amount was noted on page 19.

12. I have no information that contradicts any of the information that I was given at the December 20, 2013 Case Management Conference, about the positive availability of other *Securities Act* experienced Counsel.

13. Another reason for me not having sought out other potential defence Counsel is that Miller Thomson LLP was my law firm in the civil action started by the two Crown witnesses in these proceedings, and as such I consider Miller Thomson LLP to by my law firm relating to these matters. I am comfortable with this firm, and the

> Edmonton office of Miller Thomason already has (through the civil proceedings) some knowledge relating to witnesses in these criminal proceedings.

Submissions of Defence and Crown

[6] The Prosecution for the Alberta Securities Commission argues that Mr. Nason has working knowledge of the *Alberta Securities Act*, and sufficient education to mount his own defence to the charges. The Prosecution categorizes this case as "Securities Law – 101". This submission by the Prosecutor appears to be in conflict with the initial request of the Alberta Securities Commission counsel for case management under section 551.1 of the *Criminal Code*. At the time of application for case management under s. 551.1, the Prosecution indicated that the case merited case management given the evidence, the trial time and the complexity of the issues. Case management under s. 551.1 of the *Criminal Code* is not routine. While the section does not set out relevant factors to be considered leading to appointment of case management, it appears that case management under this section is to be directed where it is necessary for the proper administration of justice. It is relevant to look at the powers that are granted to case management judges under the *Criminal Code* as outlined in section 553.3(1). The case management judge has a broad range of powers including assisting the parties to identify witnesses, encouraging admissions and agreements, encouraging parties to consider matters that would promote a fair and efficient trial, establishing schedules, assisting the parties to identify issues and generally adjudicating issues that can be decided before trial including disclosure of evidence, admissibility of evidence, expert witnesses, severance of counts and separation of trials on one or more counts. It would seem therefore that s. 551.1 appointments are reserved for cases in which a trial is expected to be reasonably complex. In this case, the Court disagrees with Prosecution when it describes this case as "Securities Law – 101".

[7] Generally offences under securities legislation such as the *Alberta Securities Act* are offences of strict liability. Accordingly, there are affirmative defences that may be advanced both under statute and at common law in the area of due diligence. Strict liability offences follow the law as outlined in ***R. Sault Ste. Marie (City)***, [1978] 2 S.C.R. 1299. Accused persons charged with strict liability offences must raise a defence of due diligence and must prove that defence on a balance of probabilities. As stated by the Supreme Court of Canada ***R. Sault Ste. Marie (City)***, *supra*:

> [60]. . . it [is]open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

[8] In addition to the defence of due diligence, securities legislation may also allow an accused person to avoid liability by raising certain defences recognized by common law. Reasonable mistake of fact is a recognized common law defence to strict liability offences. ***R. v. Kelly*** [1997] B.C.J. No. 1349, ***R. v. Plastic Engine Technology Corp.,*** [1991] O.J. No. 1490, and ***R. v. Woods***, (1994) 88 C.C.C. (3d) 287. The law of reasonable mistake of fact was discussed in

the decision of ***R. v. Finguld*** (1999) O.J. No. 369, and commented upon in the Provincial Court of Ontario in ***R. v. Sisto Finance NV*** (1994) O.J. No. 1184, at paragraph 21-23:

> 21 It should be noted that under this formulation, while a defence of "mistake of fact" is available to one charged with an offence of strict liability, it must be a "reasonable" mistake, and not just an "honest" mistake such as would provide a defence to a true criminal, or mens rea, offence (Dickson J.'s first category), as held in cases such as Pappajohn v. The Queen (1980) 52 C.C.C. (2d) 148 (S.C.C.) and Reg. v. Davidson (1971) 3 C.C.C. (2d) 509. In a true criminal case, the reasonableness or otherwise of the mistake is only a factor to be taken into account in assessing the honesty of the defendant's belief in a mistaken view of the facts; in a strict liability offence, the mistake must be reasonable to constitute a defence.
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> 22 It should be noted further that, even in true criminal offences, a deliberate failure to inquire when one knows that there is reason to inquire constitutes wilful blindness to the facts, and does not afford a defence of mistake of fact: Sansregret v. The Queen (1985) 18 C.C.C. (3d) 223 (S.C.C.).
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> 23 Finally, it should be noted that the mistake must be of fact, not of law: the Provincial Offences Act, R.S.O. 1990, c. P. 33, s. 81. This was made clear by the Supreme Court of Canada in Molis v. The Queen (1980) 116 D.L.R. (3d) 191. In that case the issue was whether it was a defence to a charge of trafficking in a restricted drug contrary to the Food and Drug Act, R.S.C. 1970, c. F-27, that the accused was not aware that the drug that he was manufacturing had been added to the Schedule of restricted drugs by Regulation after he had been manufacturing it for some time. In holding that it was not, Lamer J., delivering the judgment of the Court said at p. 298:
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> > ... the defence of due diligence that was referred to in Sault Ste. Marie is that of due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation.

[9] Finally, in addition to due diligence defences, reasonable mistake of fact defences, the accused may also be able to raise other statutory defences once the Crown proves the *actus reus* of the offence beyond a reasonable doubt.

[10] There are further complex aspects to the *Alberta Securities Act* in addition to the matrix of potential defences available. Potential triable issues relate to statutory definitions of the terms contained within the *Act*. For example, s. 92(3)(a) of the *Act* prohibits the giving of an undertaking relating to future value or price of a security with the intent of effecting a trade in security. Undertaking is defined as a statement "indicative of intention and commitment". It includes a promise, assurance, pledge, guarantee or contractual covenant: ***Maitland Capital Ltd., Re,*** 2007 ABASC 357. In order for a statement to be construed by the Court as an undertaking, the Court must examine the context from which the statement is made and of course must be satisfied that it fits within the definition by statute of "undertaking". There is case law which further defines undertaking as outlined in the ***National Gaming Corp., Re,*** (2000) 9 ASCS 3570. There are distinctions between predictions, invitations to treat, puffery and undertakings in law.

The accused therefore, who seeks to raise defences under the statute, must have a full understanding of the legal definition of undertaking under s. 92(3)(a) of the *Act*.

[11] In addition to the complexity of the word "undertaking", the accused person must also understand the legal definition of representation as contained in s. 92(3)(b) of the *Act*. The purpose of this particular section was discussed in the case of ***Limelight Entertainment Inc., Re,*** 2007 ABASC 710. Representations deal with a wide variety of statements which induce investment insecurities based on a prospect of a liquid market in which to trade and a potential profit from increases in value. The Court, in considering what amounts to representations, must look at the context of the evidence and the investor's understanding of the statements made, if any. Further, accused persons charged under the *Act* must understand the concept of unfair practice as defined in s. 92(5) of the *Act*. Unfair practices include a number of different activities including unreasonable pressure, taking advantage based on a list of factors, imposing harsh, oppressive or one-sided restrictions or terms, and other proscribed activities.

[12] Section 92 of the *Alberta Securities Act* requires an accused person to understand the term reasonably ought to know, and the legal definition of a misleading statement which would reasonably be expected to have a significant effect on the market price or the value of a security or "an exchange" document. As outlined in ***Mandyland Inc., Re,*** 2012 ABASC 436, individuals charged under s. 92(4.1) of the *Act*, must understand the nature of reasonable knowledge, material statements, contextual analysis of what amounts to a material statement and the concept of what kind of statements might have a significant effect on the market price or value of a security. Finally, there is a possibility of the accused raising defences such as reliance on legal advice as a defence to allegations of misstatements. In the Ontario Securities Commission case of ***Mega-C Power Corp. (Re)***, (2011) 33 OSCB 8290, which was affirmed by the Alberta Securities Commission in ***Arbour Energy Inc., Re***, 2012 ABASC 131, the Commission reviewed a defence based on reliance on legal advice. There are a number of criteria which must be shown by an accused to rely upon this particular defence as discussed in those cases.

[13] In summary, this Court disagrees with the statement of the Prosecution that the charges against Mr. Nason amount to "Securities Law – 101". While the Prosecution, with its considerable experience, may view this case as "straightforward" – which then leads to the question as to why they requested case management in the first place – this Court views that mounting a successful defence requires not only extensive knowledge of securities law, case law, Commission rulings, but also knowledge of the affirmative defences, their legal definitions and the rules of evidence that may apply to mounting those defenses.

[14] Mr. Nason's defence is neither simple nor straightforward. Mr. Nason is not a lawyer and cannot be expected to be aware of all defences that might apply to his particular prosecution. Even though he may be educated, the Court does not view this as denying him the right to counsel especially where Prosecution makes it clear that upon conviction they will be seeking gaol.

The *Rowbotham* Test

[15] This Court is bound by the decision in ***R. v. Rain***, 1998 ABCA 315. This Court is also bound by the decision in ***R. v. Chan,*** 2000 ABQB 728. An accused who seeks a *Rowbotham* order must establish a breach under s. 7 and 11(d) of the *Charter*. An accused person who seeks a *Rowbotham* order must prove on a balance of probabilities that the lack of properly funded counsel will impair the accused' right to a fair trial as that term is defined in the *Charter*. In considering the question of whether an accused' right to a fair trial would be infringed if he is require to defend himself without counsel, the Court must consider a number of factors. The factors include the number and nature of the charges, the seriousness of the consequences upon conviction, the length of the trial, the types of issues that will be litigated during the course of the trial, Mr. Nason's education and experience, his ability to understand the trial process, his ability to learn about the trial process, his familiarity with the disclosure and his ability to understand it.

[16] There are 23 counts in this Information. The nature of the charges requires the accused to raise affirmative defences if the Crown proves the *actus reus* beyond a reasonable doubt. These affirmative defences exist at common law and by virtue of statute. Mr. Nason would have to be fully cognisant of the common law, of reported decisions and the *Alberta Securities Act* provisions if he were to mount his own defence. Mr. Nason would have to also understand the rules of evidence, the principle of *stare decisis*, the processes of effective cross-examination, the nature of the process for introduction of contested Exhibits, and generally the law in connection with *Securities Act* prosecutions.

In the Court's view, even though Mr. Nason may be intelligent and have experience with respect to the conduct of business, nevertheless his capacity to mount affirmative defences, to understand the rules of evidence, read and interpret the laws and case law, is non-existent and certainly not at a level that would allow him an opportunity to have a fair trial while unrepresented. This Court concludes on a balance of probabilities that the accused *Charter* rights under s. 7 and 11(d) would be breached and that a fair remedy under s. 24(1) is a temporary Stay of proceedings. Competent counsel in this case, requires counsel who has a preferred area of practice in the area of securities law. An ordinary criminal defence lawyer will not have the necessary expertise to defend Mr. Nason under this particular legislation. There are only a small number of lawyers in southern Alberta who have a preferred area of practice in securities law who would be available and competent to assist in Mr. Nason's defence. The average billing rate for these lawyers is $500 per hour. Most of these lawyers are members of large firms.[1] Their hourly billing rates are by virtue of their association with large firms and their specialized expertise. Mr. Thom, in his pro bono representation of Mr. Nason on the *Rowbotham* application, advises the Court that the total cost of the trial will be $50,000. It is the Court's conclusion that the defence meets the onus set out in *Rowbotham*. The prosecution is stayed until state funding is paid to fund Mr. Thom's trust account for the defence of Mr. Nason.

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1 See case management Transcript, December 20, 2013, pages 13-18 inclusive for a list of counsel and average billing rates. Appended to Nason Affidavit sworn January 14, 2014.

Failing agreement between Alberta Justice and Mr. Nason on quantum of funding, the parties may speak to the *Fisher* application on February 28, 2014.

Dated at the City of Calgary, Alberta this 14th day of February, 2014.

H.A. Lamoureux
A Judge of the Provincial Court of Alberta

Appearances:

Shelley J. MacDonald
for the Attorney General

Tom McCartney
for the Alberta Securities Commission

Jeffrey N. Thom, Q.C.
. for the Accused