
CANADA / JUDGMENT

R. v. Nicol

2013 BCSC 1936

COURT

Supreme Court of British Columbia

DECIDED

9 October 2013

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2013 BCSC 1936 R. v. Nicol

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nicol,

2013 BCSC 1936

Date: 20131009

Docket: 45363

Registry: Vernon

Regina

v.

Patrick David Nicol

Before: The Honourable Mr. Justice Betton

On appeal from: An order of the Provincial Court of British Columbia,

dated February 22, 2013 (R. v. Nicol, Vernon Registry No. 45363)

Oral Reasons for Judgment

Counsel for the Crown (Respondent):

N. Lerfold

Counsel for the Accused (Appellant):

M. Klein

Place and Date of Trial/Hearing:

Vernon, B.C.

July 5, 2013

Place and Date of Judgment:

Vernon, B.C.

October 9, 2013

Introduction

- [1] THE COURT: The appellant was convicted in Provincial Court of two counts of failing to comply with notices of requirement to file tax returns for the 2007 and 2008 taxation years, contrary to s. 238(1) of the Income Tax Act.
- [2] The appellant argues that the learned trial judge erred in dismissing the appellant's argument at trial that the Crown had failed to prove the offences as particularized and in dismissing the defence of due diligence. He also says that the judge failed to provide sufficient reasons for judgment.

Factual Background

- [3] On February 18, 2010, a Canada Revenue Agency field officer, Mr. Parker, served the appellant with the requirements referenced in the charges. Mr. Parker had been dealing with the appellant in respect of the appellant's outstanding income tax returns since October 13, 2009. Those requirements specified that the tax returns in issue were to be filed within 60 days. That 60-day period ended April 19, 2010.
- [4] On July 5, 2010, Mr. Parker prepared a "prosecution package" which began the process of formalizing the charges, which in turn led to the prosecution and the convictions under appeal.
- [5] Between October 2009 and being served with the requirements, the appellant had advised Mr. Parker that the returns would be filed by December 15, 2009, and then on December 15, 2009, that he hoped to have them filed by the end of December 2009. That did not occur.
- [6] The appellant testified that upon being served with the requirements, he undertook the process of gathering the information necessary to file his returns. On April 12, 2010, he contacted an agency known as the "Canadian Tax Team Consultants". He dealt with Veronica Xue, a certified general accountant with that business. He did not provide her with any documents or records relevant to the preparation of his tax returns before April 20, 2010.
- [7] On or about April 19, 2010, Mr. Parker received an authorization from Ms. Xue, executed by the appellant, authorizing the CRA and Mr. Parker to deal with Ms. Xue in respect of the appellant. Ms. Xue had emailed that document on April 13, 2010.

- [8] In his evidence, Mr. Parker testified that it was his practice to wait 60 days before recommending a prosecution, and that in reality an additional 60 days would likely expire before he actually swore an Information. When Mr. Parker served the appellant with the notices of requirement, he advised the appellant that there would be no further extensions given to file the returns. Mr. Parker gave similar information to Ms. Xue and explained that he could not give any extensions.
- [9] Ms. Xue believed that if she was working on the returns and kept Mr. Parker and the CRA informed, no prosecution would occur.

Proceedings before the Provincial Court

- [10] The trial proceeded in Provincial Court on July 12th and October 25th. The Crown and defence subsequently provided written submissions, and the decision under appeal was delivered on February 22, 2013.
- [11] The appellant advanced two defences to the charges. The first was articulated as a failure on the part of the Crown to prove the offences as particularized. The information says that the offences were committed on April 20, 2010, the day after the deadline imposed by the notices of requirement. The appellant argues that the communications between Mr. Parker and the appellant and/or Ms. Xue had the legal effect of changing the deadline that was set out in those notices of requirement.
- [12] Second was the defence of due diligence. In his argument, he said that his actions establish the defence. In summary of his arguments, he referred to the fact that he had advised Mr. Parker that he intended to comply, made a payment towards his tax obligations, requested an extension, and ultimately hired and relied upon Ms. Xue.
- [13] The learned trial judge outlined the issues at paragraph 3 of his decision as follows:

ISSUES

1. Was the deadline extended beyond April 19, 2010?
 2. Was the defence of due diligence established?
- [14] His decision in respect of each defence followed.
- [15] In respect of the extension of the deadline, the decision consists of three paragraphs as follows, beginning at paragraph 4:
- [4] Mr. Nicol was required to file the Returns within 60 days of service of the Notices of Requirement. He was served on February 18, 2010 so the deadline expired April 19, 2010.

- [5] Mr. Parker, the Canada Revenue Agency officer who had conduct of Mr. Nicol's file, sometimes did not strictly enforce the Notice deadline if he felt the person was doing his best to comply. He, however, always indicated to Mr. Nicol that the deadline would be strictly enforced.
- [6] Defence counsel submits that since the officer did not always insist on strict compliance then April 19, 2010 was not a firm deadline. I disagree. Mr. Nicol had no reason to doubt strict compliance with the deadline so he was bound by it. This argument is dismissed.
- [16] In respect of the defence of due diligence, the learned trial judge referred to an accepted articulation of the defence in *Home Depot Canada Inc. v. Canada*, 2009 TCC 281. He then summarized the chronology of action or inaction on the part of Mr. Nicol between the time that he was served with the notices of requirement and the deadlines set out in them, and concluded at paragraph 19, and the decision actually has -- at least my copy of it, has two paragraphs numbered 19. I will refer to each of them:

Mr. Nicol did not take reasonable precautions to comply with the deadline and was not duly diligent.

Mr. Nicol was served with Notices of Requirement to file his Income Tax Returns for 2007 and 2008 by April 20, 2010. He did not file his Returns by that deadline. The failure was not in spite of due diligence.

The Positions of the Parties

- [17] The appellant argues that the reasons of the learned trial judge were insufficient and prevent meaningful appellate review. The appellant notes that the learned trial judge did not comment upon Ms. Xue's evidence to the effect that, from her communications with Mr. Parker, she believed that no prosecution would be commenced, based on her indication that she was working on the returns for the appellant. The appellant says that this evidence, together with the evidence of Mr. Parker, where he acknowledged "an unwritten grace period" and that he had a "personal, discretionary policy to give a taxpayer more time which he was willing to exercise in this case" support the argument that the Crown had failed to prove the offence as particularized.
- [18] The appellant says that the learned trial judge's brief reasons dismissing the argument are insufficient and demonstrate that the trial judge misapprehended material evidence.
- [19] The respondent argues that addressing the appellant's argument first requires legal analysis of whether a deadline set out in a notice of requirement can be extended. It says that there is nothing in the legislation that provides for an extension of a deadline set out in a notice of requirement. It goes on to say that the learned trial judge concluded that there had been no extension. Having reached that conclusion, the respondent stresses that the evidence of Ms. Xue is of little relevance. That evidence related to actions she took almost exclusively after the April 20 deadline. It says the reasons, although brief, sufficiently address this issue.

- [20] The appellant also argues that the learned trial judge "erred in assessing and dismissing the defence of due diligence". Both the appellant and respondent rely on the *Home Depot of Canada v. Canada* decision referenced by the learned trial judge. The appellant says that the learned trial judge was required to determine whether what the plaintiff did was sufficient, not whether he could have done more.
- [21] In support of this argument and as part of it, the appellant again points out that the learned trial judge did not refer to Ms. Xue's evidence, and the argument that the appellant reasonably relied upon a tax professional is part of the evidence of due diligence.
- [22] The respondent stresses that the test for due diligence is an objective one, where the conduct of an accused person is assessed against that of a reasonable person in similar circumstances. The respondent points out that the learned trial judge comments on the actions of the accused in paragraphs 9 to 18 of his reasons for judgment, before concluding that the efforts did not amount to due diligence.
- [23] The respondent points out that the court had concluded that the April 20 deadline had not been extended or modified, and therefore any actions of the accused or Ms. Xue on behalf of the appellant after that date were irrelevant. They do not assist as to the issue of whether the appellant had been duly diligent prior to that date.

Analysis

- [24] The offence created in s. 238(1) of the *Income Tax Act* is a strict liability offence. This means that the Crown must prove beyond a reasonable doubt the *actus reus* of the offence, but there is no requirement that it prove *mens rea*. The appellant did have available to him the defence of due diligence.
- [25] The trial judge correctly described that defence at paragraph 8 of his reasons as follows:
- [8] *Home Depot of Canada Inc. v. Canada*, 2009 TCC 281 accepted the definition of due diligence set out in [the Federal Court decision] *Corporation de l'Ecole Polytechnique v. Canada*

28 The due diligence defence allows a person to avoid the imposition of a penalty if he or she presents evidence that he or she was not negligent. It involves considering whether the person believed on reasonable grounds in a non-existent state of facts which, if it had existed, would have made his or her act or omission innocent, or whether he or she took all reasonable precautions to avoid the event leading to imposition of the penalty.

- [26] Paragraph 29 of that decision goes on to say:

It is easy to be critical of behaviour after an error has been committed. In considering whether a taxpayer acted with due diligence to minimize the possibility of error, one can always find something else the taxpayer might have done. But that is not the test. The test is whether what the taxpayer in fact did was sufficient reasonable precaution - not that the taxpayer did not hold the hand of the employee throughout every single task no matter how menial, though Deloitte Tax went a long way to doing exactly that.

- [27] There have been numerous comments from the Supreme Court of Canada regarding the sufficiency of reasons of trial courts. Reference is often made, as it was by the appellant here, to the Supreme Court of Canada decisions in *R. v. Sheppard*, 2002 SCC 26, and *R. v. R.E.M.*, 2008 SCC 51. Again, as referenced in argument by the appellant, these are summarized in the decision of *R. v. Mehan*, 2010 BCSC 629, as follows at paragraph 34:
- [34] The principle that emerges is that if the appeal court can identify at least the essential decisions that had to be made by the trial judge in reasoning to his or her conclusion on the disputed issue or if it is plain from an examination of the reasons given and the trial record why an accused has been convicted or acquitted, then the reasons will be adequate. But if the trial judge's reasoning on the disputed issue is unknown or unclear, so as to prevent meaningful appellate review for correctness, then there is error of law and a new trial is required.
- [28] The length of a trial judge's reasons is not a measure of their adequacy. The key conclusion of the court affecting all of the appellant's arguments was that the applicable deadline was in fact April 20. While he did not refer to the evidence of the appellant or Ms. Xue in dealing with that argument, it was not necessary for him to do so. His conclusion is clearly based on the evidence of Mr. Parker and the content of the notices. The evidence of the appellant and Ms. Xue did not contradict Mr. Parker, but rather indicated what their assumptions were, based on communications with him. Those assumptions would in turn have been relevant to the due diligence defence if the deadline had in fact been extended, but were of no benefit to the appellant in respect of this argument.
- [29] The learned trial judge found as a fact in paragraphs 5 and 6 of his reasons that Mr. Parker had always indicated to the appellant that the deadline would be strictly enforced. He goes on in paragraph 6 and dismisses the suggestion that any practice of not insisting on strict compliance with the date in the notices meant those notices were not firm deadlines.
- [30] The trial judge succinctly distinguished between actions that extended the deadline and a discretion as to when to initiate a prosecution for failure to comply with an established deadline.

- [31] As was pointed out by the respondent, both at trial and on appeal, Ms. Xue's involvement came only shortly before the deadline, and that she spoke with Mr. Parker for the first time on April 20, 2010. It was not necessary for the learned trial judge to specifically comment on her evidence in these circumstances, having concluded that there had never been a variation from the deadline set out in the notices. The reasons are sufficient and the disposition of this argument is not reversible.
- [32] In dealing with the due diligence defence, the trial judge applied the proper test. As mentioned above, he was also correct to focus on the conduct of the appellant up to April 20. The trial judge summarized the facts that prompted him to conclude at paragraph 19 that the appellant did not meet the test for due diligence. It is a fair observation that reference is made to things the appellant did not do, including filing his returns "without all the information" (paragraph 16), or hiring someone "to start on the Returns while he gathered his receipts" (paragraph 17). I do not agree that, having done so, the court was applying the wrong test.
- [33] In his submission, counsel for the appellant pointed out that:
- the Learned Trial Judge erred by looking at the Appellant's actions in hindsight instead of addressing his positive efforts such as maintaining contact with CRA, making a good faith payment, asking for an extension, or engaging a professional tax specialist who assured him that he would be brought in compliance.
- [34] An observation that the appellant engaged a professional tax specialist is put in context by observing, as the learned trial judge did, that the engagement did not occur until April 8, 2010, when, based on experience, the appellant knew that it was not adequate time to prepare the returns. This is amplified by the evidence that he did not deliver any of his tax information to the tax specialist before the deadline that had been imposed. The trial judge used his comments as the method of articulating that what the appellant did do fell short of what was necessary to establish due diligence.
- [35] Whether the judge notes that the appellant did not provide his information to Ms. Xue before April 20th or that he provided it to her on April 20th are just converse ways of saying the same thing. The observation that the appellant asked for an extension must be put in context that the request was not made until April 20th by Ms. Xue and that it was refused. The task of assessing what a reasonable person would do and measuring the conduct of the appellant against that standard requires some consideration of what was not done. Such a task can, and was in this case, be undertaken without offending the guidance offered in Home Depot at paragraph 29 as set out above.
- [36] In all of the circumstances, it is my conclusion that there is no reversible error on the part of the learned trial judge's disposition of the arguments presented at trial. The reasons for judgment are sufficient and the appeal is dismissed.

Betton J.

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