

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: The Securities Act v. Schriver, 2005 NSSC 149

Date: 20050509
Docket: S.H. 236645
Registry: Halifax

Between:

The Securities Act, R.S.N.S. 1989 As Amended (the "Act")

Appellant

v.

Bruce Patrick Schriver (the "Appellant")

Respondent

Judge: The Honourable Justice Gordon Tidman.
Heard: May 3, 2005, in Halifax, Nova Scotia
Oral Decision: May 9, 2005
Written Decision: June 7, 2005
Counsel: David G. Coles & Natalie Godbout, for the appellant
Agnes G. MacNeil, for the respondent

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Tidman, J. :

[1] Mr. Coles on behalf of the Appellant appeals from a decision of the Nova Scotia Securities Commission dated November 8, 2004 in which the Commission decided it had jurisdiction to deal with Allegation # 13 contained in the Statement of Allegations dated August 9, 2004. Allegation # 13 reads:

While still registered with Select and an Approved Person of the MFDA, Schriver entered into a referral arrangement with Portus on Behalf of Schriver Inc. dated January 21, 2004, unknownst to Select and contrary to MFDA Rules 1.2.1.(d)(iii), (v) and (vi), 2.1.1, 2.1.4 and 2.4.2, thereby contravening the provision of Section 30(3) of the Act.

[2] The ground of appeal is that the Commission erred in failing to find it did not have jurisdiction to proceed with the hearing with respect to Allegation # 13.

[3] The essence of Mr. Coles argument is that the Commission has no jurisdiction to originally determine whether the Appellant contravened the rules of the MFDA. He submits that, in fact, the commission delegated that power to the MFDA and has power only to review a decision made by that organization.

[4] Mr. Coles also submits that there are no provisions contained in the MFDA rules or by-laws conferring jurisdiction on the Commission to investigate or enforce MFDA rules or by-laws.

[5] The Mutual Fund Dealers' Association is a self regulatory organization created under the provisions of the *Nova Scotia Securities Act* and recognized by the Commission.

[6] S. 30 of the *Securities Act*, in dealing with self regulatory organizations, in part, provides:

30(1)The Commission may, on the application of a person or company which represents registrants and regulates the standards of practice and business conduct of its members, recognize the person or company as a self-regulatory organization.

...

30(3) Any member of a self-regulatory organization who trades in securities within the Province shall comply with the by-laws, rules, regulations and policies of the self-regulatory organization except to the extent that such by-laws, rules or regulations are inconsistent with this Act, the regulations or the policies of the Commission.

30(4) The Commission may delegate, on such terms and conditions as the Commission may determine, to a self-regulatory organization any powers or duties of the Director or the Commission pursuant to this Act or the regulations respecting the registration of persons or companies that are members of the self-regulatory organization, the conduct of audits of those persons and companies and the responsibility for ensuring compliance with the requirements of this Act and the regulations

30(5) An person or company which is a registrant and directly affected by a decision, order or ruling of a self-regulatory organization is entitled to a hearing and review of the decision, order or ruling by the Commission to the same extent as if the decision, order or ruling had been a decision of the Director.

[7] Section 134(1) of the *Securities Act* provides:

134(1) Where the Commission considers it to be in the public interest, the Commission, after a hearing, may order

(a) that a person or company comply with or cease contravening, and that the directors and senior officers of the person or company cause the person or company to comply with or cease contravening,

(i) a provision of this Act or the regulations.

(ii) a decision, whether or not the decision has been made a rule or order of the Supreme Court of Nova Scotia, or

(iii) a by-law or other regulatory instrument or policy or a direction, decision, order or ruling made under a by-law, rule, regulation or policy of a self-regulatory organization;

[8] S. 26(1) provides in part:

26(1) Any person or company directly affected by a decision of the Commission...may appeal to the Trial Division of the Supreme Court.

...

26(5) Where an appeal is taken under this Section, the Court may by its order direct the Commission to make such a decision or to do such other act as the Commission is authorized and empowered to do under this Act or the regulations and as the Court considers proper, having regard to the material and submissions before it and to this Act and the regulations, and the Commission shall make such decision or do such act accordingly.

[9] Mr. Coles in his argument deals with the issue as being in the nature of *certiorari* and makes submissions as to the scope of review of the Commission's decision by this Court and whether the standard is one of correctness or unreasonableness.

[10] Mr. Coles submits that the issue is one of law and thus the standard of review is one of correctness of the decision of the Commission.

[11] Ms. MacNeil does not take issue with that submission, although Ms. MacNeil characterizes Mr. Coles' action on behalf of the Appellant as an attack on the *Securities Act*.

[12] The Court accepts the submission of Mr. Coles and will thus determine whether the decision of the Plaintiff was made within the bounds of the Commission's jurisdiction. Ms. MacNeil attacks the appeal on two fronts and submits that she is correct on both, but success on either front should defeat the appeal.

[13] Firstly, Ms. MacNeil submits that the Court consider the notice of hearing in determining the Commission's jurisdiction. The notice provides that the purpose of the hearing will be for the commission to consider whether pursuant to certain sections of the *Act*, it is in the public interest for the Commission to:

(1) suspend or cancel the registration of each of the respondents for a period of three years pursuant to s. 33(1) of the *Act*;

(2) make an Order denying each of the respondents any or all of the exemptions described or referred to in s. 134(1)(c) of the *Act*;

(3) impose an administrative penalty in the amount of \$25,000 in respect of each of the respondents, pursuant to s. 135(b) of the *Act*; and

(4) order costs in respect of the investigation and hearing of this matter against each respondent pursuant to s. 135(a) of the *Act*.

[14] Ms. MacNeil submits that the commission under the provisions of the *Act* has the authority to decide what is in the public interest and specifically, the authority to order all of the four actions set out in the Notice.

[15] She submits further that the listed allegations attached to the Notice of Hearing simply provide accused persons or groups with the specifics of the alleged sins committed that would cause the Commission to do in the public interest one or more of the four acts set out in the Notice of Hearing.

[16] Secondly, Ms. MacNeil submits that, in any event, the Commission has concurrent jurisdiction with the MFDA to determine whether a person has contravened the MFDA rules or by-laws.

[17] In order to decide the issue before the Court it is helpful to consider the purposes of the *Securities Act* and the Securities Commission established under its provisions.

[18] Obviously the *Securities Act* governs those persons and organizations who sell securities including mutual funds to the public to ensure the investing public is protected.

[19] Although the first purpose may be to provide for a supply of capital for economic purposes, the secondary purpose is to maintain the integrity of the supply vehicles and in doing so to protect the interest of the investing public.

[20] The Commission is the body created by the *Act* to carry out the duties which give effect to the *Acts'* aims. In order to assist the Commission the *Act* provides that it may recognize a person or a company as a self regulatory organization and delegate to such entity any of its powers it sees fit to delegate. Examples of such

S.R.O.'s are the Investment Dealers Association and the Mutual Fund Dealers Association, the latter being the S.R.O. here in issue.

[21] The crux of Mr. Coles argument is that once the Commission has given a body the power to regulate its members, including the power to establish rules and by-laws, such body, in this case the MFDA, the Commission cannot act unless it has first been established by the S.R.O. that its own rules or by-laws have been contravened. Mr. Coles contends this is evident since s. 30(5) provides for a review by the Commission of such a finding by the S.R.O.. Ms. MacNeil contends that the rules and by-laws of an S.R.O. are approved and incorporated by reference as rules, regulations and by-laws of the Commission. Mr. Coles points out that nowhere in the *Act* is a specific provision stating that rules, regulations and by-laws of an S.R.O. are deemed to be rules, regulations and by-laws as established by the Commission.

[22] On the other hand, there is nothing in the *Act* that provides that once the Commission has delegated the power to an S.R.O. that it can no longer itself exercise such power.

[23] In the Court's view there is no need for such a provision since, in the Court's view, Mr. Coles' proposition defies common sense. To find otherwise would lead to the impossible situation where the Commission would in certain circumstances be unable to act against an S.R.O. member unless the S.R.O. first took action. Inaction by the MFDA cannot preclude action by the Commission.

[24] The Concise Oxford Dictionary 7th Edition defines the verb "delegate" inter alia "send as representative, commit authority or powers et cetera to an agent." Relationships analogous to the Commission and S.R.O. would be principle and agent, president and ambassador, principal and attorney, I doubt that anyone including Mr. Coles would argue that the president or principal in those analogies could not continue to exercise those same powers.

[25] I accept the submission contained in the conclusion in the brief prepared by R. Scott Peacock and presented to the Commission on this issue wherein he states and I quote, as stated by J.G. MacIntosh and C.C. Nicholls in referring to the I.D.A. and MFDA in Ontario:

Both organizations operate under the auspices of the OSC...


That is the Ontario Securities Commission:

...and association members remain subject to OSC disciplinary actions, notwithstanding the disciplinary powers the associations themselves may wield.

The Court finds itself in agreement with that view. That quote can be found under Canadian Securities Regulations and Regulatory Instruments contained in Tab J of Volume 2 of the Record of proceedings before the Commission in this issue.

[26] Consequently I find that the Commission has original jurisdiction to consider whether the applicant contravened MFDA rules, specifically allegation # 13 and I would therefore dismiss the appeal.

[27] The Commission is entitled to costs in the amount of two thousand dollars (\$2,000).



Tidman, J.