

Regina vs. Tender Choice Foods

Decision on Non-Suit Motion

The matter before the court arises as a result of a private charge filed by Joanna Chapman against Tender Choice Foods Inc. for making contributions in excess of \$750 to any one candidate in an election, in this case, to Larry Dilanni, candidate for Mayor in the November 2003 Hamilton municipal election through associated corporations, those being Tender Choice Foods Inc. and Paletta International Corporation, and this is contrary to Section 71(1) and 72 of the Municipal Elections Act.

Evidence tendered by the prosecution at trial was that Tender Choice Foods and Paletta International, both contributed the maximum \$750 to Larry Dilanni's campaign during the 2003 election period which was in direct contravention of section 71(1) of the Municipal Elections Act since they were deemed to be associated companies under the Income Tax Act.

The Court heard testimony from Joanna Chapman, which it found to be very credible and straightforward. The Crown also provided the Court with numerous documents to support its case, including Financial Statements and Auditor's Reports, Corporation Profile Reports for both Corporations, ^{and} cancelled cheques and refunds to the two corporations. The Crown rested its case and defense counsel asked the court to consider a non-suit motion. // Defense Counsel suggested that the prosecution had failed to satisfy an essential element of the offence, that being that no evidence was tendered with respect to shareholdings and that this is a requirement for the purposes of Section 256 of the Income Tax Act.

Defence counsel argued that the prosecution had presented no evidence in order to establish that these two corporations should be deemed associated with one another as required under Section 256 of the Income Tax Act. He based his argument on the fact that Subsection 1.2 of Section 256 provides a definition for a group of persons as it relates to section 256 (1) of the Act.

This definition refers to “persons each of whom owns shares” and not to officers or directors of the corporations. As a result, it was defense counsel’s position that this therefore constitutes an essential element of the offence and the prosecution had not presented any evidence with respect to share structure or ownership.

The prosecution argued that the language in section 256(1)(b) is clear and that evidence had been presented on all of the essential elements as required by the Income Tax Act. The prosecution referred to the tremendous commonality between the two corporations in terms of management structure, the board of directors and officers of the companies. In addition, the prosecutor pointed out the Auditor’s Report and the Mayor’s Financial Statements, both indicating that monies had been returned because of over-contributions. Furthermore, the prosecution referred to the cheques themselves and the refund letters. In the prosecution’s view there was a great deal of evidence provided to the court including the cheques, the Auditor’s Report, the Mayor’s Financial Statement, the money being returned, and the Corporation Profile Reports, sufficient evidence to support a denial of the non-suit motion.

It is important

~~The court is mindful of the fact~~ that in a Non-Suit Motion the Court must not weigh the evidence it has been presented with. The test is not whether the evidence is satisfactory to prove beyond a reasonable doubt that an offence has been committed, but only whether there has been some evidence presented on each of the essential elements of the offence. The question then becomes whether share ownership is a requirement under the Income Tax Act.

In making a determination, the Court first refers to Sections 71(1) and 72 of the Municipal Elections Act which read as follows:

Section 71(1):

71(1) A contributor shall not make contributions exceeding a total of \$750 to any one candidate in an election.

Section 72 of the Municipal Elections Act states:

72. For the purposes of sections 66 to 82, corporations that are associated with one another under Section

256 of the Income Tax Act (Canada) shall be deemed to be a single corporation.

It is clear from reading section 72 that Section 256 of the Income Tax Act is applicable in determining associated corporations. The Court then looks to Section 256 and in particular, section 256(1)(b), which is the relevant portion of the Act being relied upon by the prosecution.

Section 256(1)(b) reads as follows:

256. (1) For the purposes of this Act, one corporation is associated with another in a taxation year if, at any time in the year,

(b) both of the corporations were controlled, directly or indirectly in any manner whatever, by the same person or group of persons.

If one were to read only subsection 256(1)(b) without referring to the balance of the section, there might be a case for the Court to deny the non-suit motion.

However, as pointed out by defense counsel, Section 256 of the Income Tax Act contains further subsections, including subsection (1.2) which reads as follows:

256(1.2) For the purposes of this subsection and subsections 256(1), 256(1.1) and 256(1.3) to 256(5),

- (a) A group of persons in respect of a corporation means any two or more persons each of whom own shares of the capital stock of the corporation.

If the test to establish association is under clause (b) of Section 256 (1) which is the case before the court today, it is the Court's decision that in fact subsection (1.2) is also applicable. Therefore, given that subsection 1.2 speaks directly to shares of the capital stock and to shareholders, the Court has determined that this then is an essential element of the offence.

The Court notes that if the intent of the legislation was that corporations who have similar management structure and similar

Boards of Directors should be considered associated companies, then this should have been set out clearly in the legislation. The legislation has defined a group of persons for the purposes of the Income Tax Act under section 256(1) and since we are dealing with a corporation which includes two or more persons, it is the decision of the Court that the definition with respect to the matter before the court is applicable.

Evidence to support commonality between the corporations is not sufficient if it does not provide evidence that includes share structure or ownership since this is an essential element of the offence.

Therefore, given that no evidence was provided by the prosecution with respect to shares and shareholdings and since the court has determined that this is an essential element of the offence, the non suit motion is granted and the case before the court is dismissed.