

ONTARIO
SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

against

ALAN BENLOLO, ELLIOT BENLOLO,
SIMON BENLOLO and VICTOR SERFATY

REASONS FOR SENTENCE

— Before MADAM JUSTICE MOLLOY, held at the Court House, City of Toronto, on
Friday, the 1st day of October, 2004.

APPEARANCES:

Robert Goldstein)	federal Crowns
Valerie Chenard)	
Michal Fairburn)	provincial Crowns
Grace Choi)	
Lorne Sabsay	for Alan Benlolo and Elliot Benlolo

REASONS FOR SENTENCE

Molloy, J. (Orally):

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In sentencing any offender, I'm required to bear in mind the twin principles of proportionality; the sentence must be proportionate to the gravity of the offence and the sentence must be proportionate to the degree of responsibility of the offender. I must also bear in mind the objectives of sentencing as stipulated in the Criminal Code, those being: (a) denunciation; (b) general deterrence; (c) specific deterrence; (d) rehabilitation; (e) protection of society; (f) reparation for harm to victims or to the community; and (g) the promotion of a sense of responsibility in the offender.

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A sentence for a particular offence must be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. That said, the particular circumstances of each offender must be taken into account, including any mitigating or aggravating circumstances. Parliament has also stipulated that imprisonment should only be used where there are no other appropriate sanctions.

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With these general principles in mind, I turn to consider the appropriate sanctions for the offenders now before me. I will consider first

the nature of the offence and then the degree of responsibility for each of the accused.

The Gravity of the Offence

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First, the gravity of the offence. All four accused were charged under section 52(1) of the Competition Act with "knowingly or recklessly" making a representation to the public that was false or misleading in a material respect. The Crown proceeded by way of indictment, which means that the offence is punishable by a fine or by imprisonment for a maximum period of five years or both. Although this provision is often referred to by the short form "misleading advertising", it would be a mistake to take from that description that the conduct covered by the section is trivial in nature. Actually, a very broad range of conduct is covered, from advertising that is mildly deceptive to conduct amounting to fraud. The amounts of money involved may be small or they may be massive in scale. What is important to note, however, is that this is a mens rea offence. That was not always the case. However, significant revisions were made to the legislation in this area in 1999. Changes were made to deal with misleading advertising and deceptive marketing practices with a combination of available routes in the civil and criminal regimes. It is clear from a review of the House of Commons debates at the time that the intent was to leave criminal sanctions in place for the most

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serious cases, e.g. situations akin to fraud where individuals wilfully set out to deceive. For that reason, the mens rea requirement was added since the intent was to treat the egregious cases as criminal and to funnel the cases more akin to sharp practice through the civil stream.

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I agree with the submissions of the Crown that the 1999 amendments are significant and that sentences imposed on offenders under the old regime must be looked at carefully for that reason. I also agree with the Crown that it is not appropriate to look at this offence as being a victimless crime or to consider its seriousness only in relation to the impact on each person who paid an invoice. Although each invoice was for the relatively modest amount of \$25.52, the invoices were sent to hundreds of thousands of businesses and non-profit organizations across Canada and many thousands of those recipients paid them. Indeed, the relatively low amount of the invoice was one of the features that made this operation so successful. The amount involved was
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sufficiently low that it was given little scrutiny by busy small business people or low level accounts payable clerks in larger companies.

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The impact of the crime goes beyond its impact on the specific individuals who lost money.

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There is a broader impact on the community generally and on the economy. The impact on the economy was one of the factors noted in the House of Commons debates prior to the 1999 amendments. Further, it is not simply a matter of the profit made by each of the accused and/or their corporate entities. The accused seek to minimize the extent of their crime by deducting their expenses from the monies received and looking at the net profits rather than receipts. I agree with Mr. Goldstein's submission that this is akin to a bank robber seeking to reduce the extent of his crime by deducting the cost of the getaway car. That is not to say that the amount of the profit is irrelevant. It certainly is. However, one must not lose sight of the overall magnitude of the crime based on the number of invoices mailed and the total receipts, which were extensive, in excess of one million dollars.

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The accused in this case took the position that this operation was not a complete fraud or sham but rather an actual service was being provided. It was not necessary for the jury to make a determination as to whether this was a legitimate business enterprise. However, in considering the seriousness of the offence, it is relevant for me to take it into account based on the evidence at trial with the onus being on the Crown to prove this aggravating factor beyond a reasonable doubt. I am

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completely satisfied that this entire enterprise was a scam designed to bilk unsuspecting recipients of these fake invoices. I acknowledge that there was an actual website with business listings. However, I find this to be nothing more than a ruse, an attempt to provide cover for the underlying fraudulent activity. The first mailing in particular was a blatant attempt to trick recipients into paying, on the mistaken impression that it was a Bell Yellow Pages directory bill and on the impression that the recipient was an existing customer with an outstanding account. Subsequent mailings were modified somewhat due to complaints received but continued to be overtly and deliberately misleading. These supposed invoices were the only attempt by this business enterprise to obtain revenue. There was no other advertising or solicitation of business from customers or sponsors. The sole income stream and entire focus of the business was these misleading mailings. I therefore reject any suggestion that this is merely an example of overreaching or an exaggeration of a product that somehow crossed the line. Rather, the conduct here was much further along the continuum towards criminal fraud. It was completely appropriate for the Competitions Bureau to elect to follow the criminal track in respect of this matter and further to proceed by way of an indictment in order to engage the penalties at the maximum end of the range of

remedies in the legislation.

That said, this was certainly not the worst crime imaginable that could fit within section 52 of the Act. It is, in my view, closer to the worst case end of the spectrum than to the least objectionable end, but it is not sufficient to warrant the maximum penalty under the statute.

The Responsibility of the Offenders

With respect to the degree of responsibility of each accused, I take my direction primarily from the jury findings. The jury convicted Elliot Benlolo and Alan Benlolo on all counts relating to all five mailings. In light of this finding, I conclude that the jury saw these two accused as the main people behind the whole scheme. They bear the greatest responsibility for the crimes. I see no basis for distinguishing between them. They each bear equal responsibility for all of the mailings.

On the other hand, Simon Benlolo was convicted only in respect of the last mailing. Simon Benlolo had worked in the office of yellowbusinesspages.com from at least sometime in July 2000. He was not convicted of any offence in respect of the July, August or October mailings, he was convicted only in respect of the December mailing. The

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difference in his involvement in December was that he set up a corporation and a bank account to receive the monies generated by the December mailing. Since this was the only offence he was convicted of, the jury must not have found him to have been involved with the others in a joint criminal enterprise prior to that. I believe that the reasonable conclusion from the jury's verdict was that Simon Benlolo's involvement stemmed from these actions to facilitate the commission of the December offences. By then, charges had already been laid in respect of the earlier mailings, which I find to be an aggravating factor. However, he cannot be regarded as one of the planners or facilitators prior to that. He is responsible only in respect of the last mailing and necessarily on a much lower scale than the others, even in respect of that mailing.

Victor Serfaty was not convicted of any offence in respect of the first mailing in May of 2000. I draw from this that the jury did not see him as the primary instigator here. He was not involved in the planning or design of the scheme. Therefore, his degree of responsibility is considerably less than that of Alan and Elliot Benlolo. However, he was certainly the hands-on operator of the enterprise for all but the first mailing. He was not a mere facilitator of the criminal enterprise, he was an active participant in a

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supervisory role, fully aware of all aspects of the business.

Denunciation and General Deterrence

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The effects of this criminal enterprise were far reaching. Many thousands of businesses all across the country received invoices. Within those organizations, many individuals would have been aware of the invoices and the problems with them. The Competition Bureau itself received a record number of actual complaints, over 4400 of them. There was also considerable media attention at the time, suggesting a level of public interest in the matter.

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This kind of dishonest business practice is not a trivial matter. It is not merely a matter of sharp practice or questionable business ethics. If a significant sentence is not imposed, a message is sent that this crime is not a serious one. The tendency to minimize this kind of offence as misleading advertising or mere unethical conduct is concerning. So-called white collar crime is still criminal conduct and should be treated as such. A significant sentence is required to denounce this conduct as the criminal activity it is and to deter others who would seek to follow a similar path to easy money.

Alan and Elliot Benlolo

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The principles of denunciation and general deterrence are relevant factors to take into account in sentencing Alan and Elliot Benlolo. Both are well known in their communities, they have relatively lavish lifestyles with large homes that could fairly be described as mansions, expensive cars and SUV's. Many letters of support were filed with the court as part of the sentencing hearing. A number of people, including rabbis, also testified on their behalf. It would appear from all accounts that both Alan and Elliot Benlolo are devoted to their families and are wonderful fathers to their children. That is all very well, but it does not change the facts of the crimes they have committed. My concern is that many of their supporters do not seem to appreciate that this is truly a criminal matter rather than some sort of exaggerated advertising mistake.

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With respect to that smaller community and with respect to the larger general community across Canada who were aware of these invoices, it is necessary for this court to treat this crime seriously. It must be denounced. The sentence imposed must be sufficiently stringent to serve as a general deterrent to those who might see this kind of activity as an appropriate route to achieve the kind of lifestyle the Benlolo's have been able to enjoy until now. The defence urges me to impose a fine and no jail term as

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an appropriate penalty for Alan and Elliot Benlolo. In my opinion, that is far too lenient a sentence given the gravity of the offence, the extent of their involvement and the need for general deterrence.

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Their counsel submits that they have demonstrated remorse and that they have suffered greatly as a result of what these charges have done to their reputations in the community. I accept that these gentlemen sincerely regret their actions at this point. Their regret, however, in my view, springs more from the consequences of their actions. They do not like the adverse publicity, they do not like losing their liberty, they do not like losing their lifestyle. But I do not see a true recognition that their conduct is criminal. I do not believe they see it that way even yet. They continue to be outraged that anyone should go to jail for misleading advertising. They have participated in organizing adult education seminars on business ethics in their community as if this was nothing more than an ethical problem. They do not appear to see themselves as criminals. It is true that their names have been tarnished in their community. However, it must immediately be noted that this is a result not only of these offences before me now, but also the other criminal fraud charges to which they ultimately pleaded guilty.

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In my opinion, a fine in these circumstances would be no more than a licencing fee for criminal-type behavior. I have taken into account the fact that there have been no previous cases in which a prison term has been imposed. I distinguish those other cases on two fundamental grounds. First, they predate the changes to the legislation, and many are in fact quite dated. Second, they are, for the most part, examples of legitimate businesses which made misrepresentations in the course of an advertising campaign.

In the case before me, the whole purpose of the business was as a front to support the invoices sent to unsuspecting recipients. There was nothing other than that, notwithstanding the fact that the website did exist.

I have also considered the sentences imposed upon Peter Kuriliw and James Tetaka, the gentlemen who took over the web site from Yellow Business Directory after December 2000. They pleaded guilty and received fines. There is obviously less precedential value in a sentence imposed on the joint submissions from the Crown and defence after a guilty plea. Further, those two gentlemen did not hatch this particular plan, they simply took advantage of an opportunity that presented itself. Alan and Elliot Benlolo were the masterminds of this whole venture. Theirs was a planned and

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deliberate scheme, one with a considerable degree of sophistication designed to extract small sums of money from a large number of people. I do not accept the submission that the offence committed by Mr. Kuriliw and Mr. Tetaka is more serious because they had notice of the charges against Messrs. Serfaty and Benlolo and of the legislation and nevertheless elected to proceed in any event.

The Benlolos are in precisely the same situation. There was a complaint and warning from the Competition Bureau which was largely ignored. Even if the Benlolos did not get personal notice of that, they were certainly aware of the charges under the Competition Act. Notwithstanding those charges in November, they proceeded with yet another mailing in December in attempts to pull out funds and move them off shore. They literally thumbed their noses at the Competition Bureau and carried right on with their scheme.

In addition, there was a further aggravating circumstance in respect of their prior criminal record. Alan Benlolo has a criminal record in the United States for mail fraud, a crime not dissimilar in nature from the one here. I believe he was sentenced to two years imprisonment for that offence. He started serving that sentence in 1998 but was released after six months due to some system of sentence

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credits which I do not fully understand but which does not matter for present purposes. What is key is that Alan Benlolo was barely out of jail from that mail fraud charge when he started the planning and carrying out of the offences before me and the other criminal charges to which he has now pleaded guilty. I say that not because I treat those other charges as a prior record but to demonstrate that making an honest living did not seem to be much of a priority for Alan Benlolo. His was a life of crime.

Elliot Benlolo also has a criminal record, although of an unrelated sort. He was convicted in January 1993 of two counts of conspiracy to traffic in a narcotic, I believe cocaine. A large amount was involved and he was sentenced to two years less a day concurrent on both offences. As I've said, this was not the same kind of offence. It was also quite a while ago. Nevertheless, he was only out of prison a few years before he also was engaged again in planning criminal activity. Elliot's criminal record is less of a factor than is Alan's but it is nevertheless a concern and relevant to take into account. That said, it seems to me that Elliot and Alan Benlolo acted together in this criminal enterprise and I see no reason to treat one more leniently than the other. They should receive the same sentence.

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The Crown submits that the appropriate sentence for each of them should be three years, plus a \$400,000.00 fine. I agree that a significant term of imprisonment is required. This is not the worst case or worst offender possible and so the maximum sentence of five years is not appropriate. However, they are more at the upper end of the scale than the beginning and well past the halfway mark. I agree with the Crown's submission that a three year term is appropriate.

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I also agree with the suggested fine amount. This recognizes that they did not receive 1.2 million dollars in profit. It is nevertheless high enough to reflect the extent of the harm done.

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Mr. Goldstein for the Crown has taken the position that the sentence imposed in this case should be served concurrent with the sentence on the other charges. Ordinarily, given that these offences are completely unrelated to the other offences, the sentence here should be consecutive, not concurrent. However, I accept there is an issue about the totality of the sentence that needs to be considered. Also, Mr. Goldstein has taken this position in consideration of the Benlolo guilty plea on the other charges. I will not go behind that. I agree that in all of the circumstances, the sentences on these offences should be

concurrent to the other charges.

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Counsel for the Benlolos submits that I should give credit for the pretrial time they served under house arrest, which was approximately three months, and for the one week in custody after the jury verdict. I agree that some adjustment is appropriate. However, the house arrest terms were not particularly onerous in all of the circumstances and I am not persuaded that a straight one-for-one credit is warranted for that portion. I would credit each of the accused with two months. Therefore, the sentence imposed today is 34 months.

Victor Serfaty

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Victor Serfaty has no criminal record. The jury acquitted him of the charges with respect to the May mailing. It follows from this finding that they did not consider him to be the mastermind and designer of the scheme. His culpability is not as great as that of Alan and Elliot Benlolo even for the four mailings in which he was involved. That said, his involvement was extensive. He was the front person. He did all of the day-to-day management, he was fully aware of the content of the mailing, he had a measure of control, he was actively involved in the December scheme even after the Competition Bureau had already laid charges in respect of the earlier mailings. Everything I have already said about

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the seriousness of the offence also applies to Mr. Serfaty.

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However, a large mitigating factor is that this appears to be his one and only venture into criminal-type activity. I also am mindful that he has suffered considerable personal hardship since the time of these offences. His marriage has broken down. He has declared bankruptcy. His reputation has suffered. He has had considerable difficulty finding employment, but has now been able to do so. He is paying support to his ex-wife and his four children in the amount of \$1500. a month. He reports, and I accept, that he is working several jobs days, nights and weekends, trying to support himself and his children.

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For the same reasons as I have indicated with respect to Alan and Elliot Benlolo, a mere fine is not appropriate here. A custodial term is required. However, given Mr. Serfaty's more limited involvement and the mitigating factors, the appropriate range of sentence is under two years. In my view, the appropriate sentence is in the upper reformatory range of 18 to 24 months less a day.

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Given that the sentence is under two years, I must next consider whether it is appropriate that the sentence be served in the community as opposed to a prison. Mr. Goldstein has fairly

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conceded that Mr. Serfaty is a good candidate for a conditional sentence but argues against it because of the need for general deterrence. I agree Mr. Serfaty is a good prospect for a conditional sentence. He does not represent any kind of threat to the community. I believe he can abide by conditions set and I doubt that he will be engaged in this kind of conduct again. The principles of general deterrence and denunciation are important in this case as I have already noted. However, in all of the circumstances, I do not see them as so important that they override the advantages of keeping Mr. Serfaty in the community, in his employment and supporting his children. I am therefore imposing a conditional sentence of 18 months. For the first six months of the conditional sentence, there will be conditions that are more stringent than for the balance of the sentence. There will be a period of house arrest for that six-month period with exceptions for community service, religious observance, any medical appointments, work and anything in connection with his children. That includes travel to places where the children will be, and attending with children anywhere. But, Mr. Serfaty, I want you to understand that during that six-month period, this is not a time where you have any personal recreation time. You work, you take care of your children, you do community service, that's it. Otherwise, you're in your residence, and I do

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not know what the address is. What is it?
THE ACCUSED SERFATY: 2177 Avenue Road,
apartment 203.

THE COURT: Thank you.

For the balance of the 12 months of the
conditional sentence, only the statutory terms
will apply.

With respect to a fine, I agree that a fine is
an appropriate additional sentence to be
imposed. However, ability to pay is a
significant factor and Mr. Serfaty has many
other obligations. In all of the
circumstances, I am going to impose a fine of
\$15,000. with three years to pay that fine and
I will not make any disposition with respect to
time served if there is a default. I will
leave that to the discretion of whatever judge
deals with any default that might occur.

I neglected to include in the conditional
sentence the requirement that you serve 100
hours of community service as directed by the
supervisor of the conditional sentence.

Simon Benlolo

The jury obviously felt that Simon Benlolo
played a minor role and that his involvement
was restricted to the last mailing. He is 32
years old and has no criminal record. He had a
limited connection with the criminal mail fraud

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in the United States with his brother Alan but was very young at the time and was diverted from the criminal system. I am treating him as a first-time offender. He appears to be of previously good character. People speak highly of him. He is in a position to pay a fine. Last year for 2003, he earned \$96,875. through the family business Domain Registry.

However, for reasons I have already stated, a mere fine, in my view, is not appropriate in this case even for Simon Benlolo whose involvement was clearly less than the others. In my view, a conditional sentence of 9 months is the appropriate disposition in all the circumstances, the most compelling being Simon Benlolo's lack of criminal record and limited involvement in the enterprise. In addition, there will be a fine of \$100,000. with three years to pay, and again, I will leave the issue of time served in default of that payment to be dealt with if and when a default arises.

With respect to the conditional sentence, there will be a period of house arrest for the first three months of the conditional sentence with the following exceptions: to attend work; religious observance; any medical appointments; and any time spent with his nieces and nephews, and that includes going to and from and attending any events with the children and spending any time with the children. That is a

complete exception. For the remaining period of the sentence, merely the statutory provisions will apply.

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Other

With respect to the fine imposed on Alan and Elliot Benlolo of \$400,000., there will be a period of six years to pay that. Given the amount of time that these gentlemen have been sentenced to, both with respect to this offence and the other offence that we dealt with this morning, I do not think it is appropriate to leave in place the automatic or presumptive amount of time to be served in default and I will say that in default of payment of that fine, there will be an additional one year.

Is there anything I have left out?

MR. GOLDSTEIN: Just the prohibition orders, Your Honour:

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THE COURT: Prohibition orders?

MR. GOLDSTEIN: Which are in front of you.

THE COURT: Prohibition orders as requested by the Crown will issue.

MR. SABSAY: The one other thing, and I think I know what you mean, but hope always springs eternal.. Your Honour referred throughout the course of the reasons to four hundred thousand dollar fine for Alan and Elliot. Is that each?

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THE COURT: Each. It is.

I have signed the prohibition orders.

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MR. GOLDSTEIN: Your Honour, just for the

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purposes of clarification, Miss Fairburn drew something to my attention. That community service order in respect of Mr. Serfaty, I take it you don't mean it that it's to be served during the first six months, what you meant, I think, is that there's an exception in his house arrest that he can do his community service but the hundred hours were over the course of his house arrest.

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THE COURT: That's correct, right. No, that's exactly right

Anything else?

MR. SABSAY: Not for me, Your Honour.

THE COURT: Thank you.

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