

Federal Court



Cour fédérale

Date: 20170713

Docket: T-2044-16

Citation: 2017 FC 684

Vancouver, British Columbia, July 13, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN1

FREDERICK SHARP AND TERESA SHARP

Applicants

and

MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

[1] In this judicial review proceeding commenced on November 28, 2016, Mr. Frederick Sharp and Ms. Teresa Sharp [the applicants] challenge the legality of the decision of the Minister of National Revenue [respondent], dated November 1, 2016, to issue formal Requirements to Produce Information [Requirements], pursuant to subsections 231.1(1) and 231.2(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp). In a nutshell, the applicants allege that the Requirements were issued for the predominant purpose of establishing their criminal liability, thus unjustifiably breaching their rights to privacy and silence, and their right against self-

incrimination, as protected by sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [Charter]. However, at this early stage of the proceedings, this Court is only asked to rule on two motions respectively made by the applicants and the respondent following the discovery that allegations or statements made in the Notice of application and in an affidavit invoked by the applicants refer to or contain fabricated documents.

[2] On December 19, 2016, the applicants served in support of their application the affidavit of Ms. Dianne Kaiser, legal assistant to the applicants' counsel, Mr. David J. Martin, sworn on November 25, 2016 [the Kaiser Affidavit]. Ms. Kaiser states at paragraph 11 that, in July 2016, the Criminal Investigations Program of the Canada Revenue Agency [CRA] communicated with an individual (the Individual) allegedly associated with the applicant Frederick Sharp, urging him to become a cooperative witness in a criminal tax prosecution to be launched against the applicant. In support of this statement, Ms. Kaiser has attached as Exhibit H of her affidavit copies of the redacted correspondence between the Individual's counsel, Mr. Riley Burr of Bull, Houser and Tupper LLP, and Mr. Murray Walker, a CRA agent from the Vancouver Tax Services Office, "Criminal Investigation Program". There were also letters from Mr. Burr to the Individual. Also attached as Exhibit I of the Kaiser Affidavit is a letter dated November 24, 2016 from Mr. Ian Donaldson, counsel, seeking redactions in regards to Exhibit H for the purposes of preserving the anonymity of the Individual. Despite the request for anonymity made in the letter dated November 24, 2016, both parties and their respective counsel in these proceeding have publicly referred in their materials and oral submissions to Mr. Anand Nagin as being the Individual mentioned in the correspondence submitted under Exhibit H of Ms. Kaiser's affidavit.

[3] On February 28, 2017, the respondent filed a motion to dismiss the application on the grounds that the filing of these letters, which are fabricated, constitute an abuse of this Court's process which ultimately undermined this proceeding and the integrity of the judicial system. Indeed, the respondent found out that not only did Mr. Burr never received or wrote those letters, but also that no one under the name of Murray Walker was employed by the CRA during the same period at either the Vancouver Tax Services Office, or within the Agency's Criminal Investigation Directorate for any position for the period of time between January 1, 2014 and December 31, 2016(Affidavit of Riley R. Burr sworn on January 25, 2017 and Affidavit of Kimberley MacLeod sworn on January 27, 2017). Mr. Burr explains, in his affidavit, that he never received the letter, and that he never corresponded or dealt with an official at the CRA by that name. Furthermore, Mr. Burr states that the letters used outdated firm letterhead that was not used at the firm address on the letter. Mr. Burr, who is not involved in the present case, also expressly stated that he didn't want the letters purportedly written by him on the public record without being clear that he was not their author.

[4] On February 28, 2017, the applicants filed a motion to amend their application and to retrieve the fabricated letters from the Court file. The applicants, who rely on the affidavit filed by Mr. Sharpe in response to the respondent's motion and sworn on March 8, 2017, submit that the administration of justice would not be adversely affected by the withdrawal of the Kaiser affidavit from the Court file, which includes the fabricated documents. They submit that an "honest mistake" was made by Mr. Sharp in dealing with Mr. Nagin. On their face, the fabricated letters looked genuine and were clearly relevant to the central issues in the application, as they referred to an ongoing criminal investigation by the CRA of Mr. Sharp. Throughout, Mr. Sharp

believed the letters were genuine and indeed reinforced his belief, supported by statements in the media, that the CRA is investigating him for criminal liability.

[5] The respondent no longer asks for the striking of the Notice of application, but would be content with an order of the Court disposing of both motions in the following manner:

- (a) the notice of application dated November 25, 2016 be amended in the form of Schedule A attached to the applicants' notice of motion;
- (b) paragraph 11 and Exhibits H and I to the affidavit of Dianne Kaiser sworn November 25, 2016 be struck out on the basis that they refer to and/or contain fabricated documents;
- (c) any copies of the affidavit of Dianne Kaiser sworn November 25, 2016 to be filed in Court shall clearly indicate that paragraph 11 and Exhibits H and I have been struck out by order of the Court; and
- (d) the respondent is awarded costs in the lump sum amount of \$8000, inclusive of disbursements payable forthwith.

[6] The applicants are in agreement with the reliefs mentioned above in subparagraphs (a), (b) and (d), but instead of the relief mentioned in subparagraph (c) above, they seek an order granting leave to remove the Kaiser affidavit from the Court file and to replace the same by the affidavit sworn by Dianne Kaiser on February 1, 2017 which is attached as Schedule B to the applicants' motion.

[7] As can be seen by the representations made to the Court, the only remaining point of difference between the parties is whether the struck evidence should remain on record. The respondent says it should, but with a notation – whenever the Kaiser affidavit is included in the applicants' record to be served and filed pursuant to Rule 309 of the *Federal Courts Rules*,

SOR/98-106, as amended [Rules] – that paragraph 11 and Exhibits H and I have been struck out by order of the Court. The applicants, on the other hand, say that the most convenient and fair way to proceed is simply to replace the Kaiser affidavit with an identical affidavit except with the struck evidence removed.

[8] In the exercise of my discretion, I have notably considered the fact that according to Rule 306, the Kaiser affidavit and appended exhibits are deemed to have been filed by the applicants on December 19, 2016, when the proof of service of same was filed in the Registry. Moreover, Rule 74 provides that the Court may order that a document that has not been filed in accordance with the Rules or pursuant to an order of the Court or an Act of Parliament be removed from the Court file. This is not the case here. The fact that the Kaiser affidavit refers to and contains fabricated documents—which the applicants say were fabricated without their knowledge or participation—does not alter the fact that they were properly served and filed in the Court with their consent.

[9] Today, there is no compelling reason justifying that in the administration of justice, the Court exercises its discretion to allow the removal from the Court file of the Kaiser affidavit. The applicants did not make any inquiries about the authenticity of the fabricated letters before including them in the affidavit of Ms. Kaiser. The applicants must bear the consequences of their negligence, as well as the costs of these motions, which I find entirely reasonable. This is not a case where a solicitor has done something unauthorized to the detriment of his client. Indeed, while confessing his ignorance that the letters provided to him by Mr. Nagin were fabricated, Mr. Sharp paid Mr. Nagin's legal fees to retain Mr. Donaldson and attended a meeting between Mr.

Donaldson and Mr. Nagin. The applicants suggest that not removing the Kaiser affidavit “has the potential to create confusion and administrative and logistical issues for the parties [and] the Court Registry”. I disagree. The fabricated letters should remain in the Court record. The present order and reasons are public. Moreover, the Court is ordering that any copies of the Kaiser Affidavit to be filed in Court shall clearly indicate that paragraph 11 and Exhibits H and I have been struck out by order of the Court. Therefore, there is no risk of confusion.

[10] For these reasons, the motions shall be allowed in part. I am satisfied that the relief proposed in respect of both motions in paragraph 28 of the respondent’s written representations dated June 22, 2017 is appropriate in the circumstances of this case. This is reflected in the order accompanying these reasons.

ORDER in docket T-2044-16

THIS COURT ORDERS that:

1. The motions respectively made by the applicants and the respondent are allowed in part;
2. The notice of application dated November 25, 2016 shall be amended in the form of Schedule A attached to the applicants' notice of motion;
3. Paragraph 11 and Exhibits H and I to the affidavit of Dianne Kaiser sworn November 25, 2016 are struck out on the basis that they refer to and/or contain fabricated documents;
4. Any copies of the affidavit of Dianne Kaiser sworn November 25, 2016 to be filed in Court shall clearly indicate that paragraph 11 and Exhibits H and I have been struck out by order of the Court; and
5. The respondent is awarded costs in the lump sum amount of \$8000, inclusive of disbursements payable forthwith.

"Luc Martineau"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2044-16

STYLE OF CAUSE: FREDERICK SHARP AND TERESA SHARP v
MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JULY 12, 2017

JUDGMENT AND REASONS: MARTINEAU J.

DATED: JULY 13, 2017

APPEARANCES:

Bridget Gilbride
Mark D. Andrews Q.C.

FOR THE APPLICANTS

Neva Beckie
Carl Januszczak

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP
Vancouver, British Columbia

FOR THE APPLICANTS

Deputy Attorney General of Canada
Vancouver, British Columbia

FOR THE RESPONDENT