

Federal Court



Cour fédérale

**Date: 20180417**

**Docket: T-1618-17**

**Citation: 2018 FC 412**

**Ottawa, Ontario, April 17, 2018**

**PRESENT: The Honourable Mr. Justice Grammond**

**BETWEEN:**

**FARRELL CAMPBELL**

**Applicant**

**and**

**CANADA REVENUE AGENCY AND  
ATTORNEY GENERAL OF CANADA**

**Respondents**

**ORDER AND REASONS**

[1] The Canada Revenue Agency [CRA] issued a requirement to Mr. Campbell to answer a number of questions in order to assist the CRA in assessing Mr. Campbell's income tax. The issuance of such a requirement is provided by section 231.1(1) of the *Income Tax Act*, RSC 1985, c 1 (5<sup>th</sup> suppl) [Act].

[2] Mr. Campbell applied to this Court to have this requirement set aside. He argues that the CRA is pursuing a criminal investigation of him. The Supreme Court of Canada held, in *R v Jarvis*, 2002 SCC 73, [2002] 3 SCR 757 [*Jarvis*], that evidence obtained through a requirement under section 231.1 cannot be used in the context of a criminal prosecution. Thus, according to Mr. Campbell, the CRA is now disentitled from resorting to section 231.1.

Mr. Campbell also asks this Court to declare section 231.1 unconstitutional, for reasons that were not addressed by the Supreme Court in *Jarvis*.

[3] Mr. Campbell has not filed any affidavits in support of his application. Nor did the respondents, who are effectively representing the CRA. Thus, as things now stand, the only evidence before the Court is the certified tribunal record prepared under Rule 317 of the *Federal Courts Rules*. Under Rule 317, the applicant may require the body making the decision under review, in this case the CRA, to file with this Court relevant material that was before it.

[4] Under Rule 312, Mr. Campbell now seeks permission to supplement that record by filing a copy of the record in a different court file. That file, bearing no. T-919-16, concerns an application made by the Minister of National Revenue against Citibank, N.A., for an order requiring the disclosure of certain information concerning a number of taxpayers resident in Canada. That application was granted on consent by Justice Russell on July 21, 2016.

[5] Moreover, Mr. Campbell seeks permission to cross-examine two persons who signed affidavits in that other file. These two persons are CRA employees.

I. Rule 312: Context, Purpose and Interpretation

[6] Rules 300 to 319 of the *Federal Courts Rules* set out the procedure for applications for judicial review. As compared to actions, this procedure is simplified. Litigants do not have a full right of access to evidence in possession of the other party. There is no discovery process. Rather, parties may adduce, through affidavits, evidence that is in their possession. They may also cross-examine the other party's affiants. If a relevant piece of evidence is not in their possession but was before the administrative decision-maker, Rules 317 and 318 provide for a mechanism to require the decision-maker to produce that evidence. These restrictions to the means by which the parties may add to the record promote the speedy resolution of applications for judicial review.

[7] These restrictions pertain to the means by which evidence may be adduced on judicial review. There are also restrictions regarding the substance of that evidence. This second set of restrictions reflects the role of the Federal Court as a court of judicial review, which is to assess the legality of the decision challenged and not to conduct a *de novo* hearing. For that reason, the basic rule is that the evidence must be restricted to what was in the record before the administrative decision-maker. There are, however, exceptions to that rule. In *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 11 [*Tsleil-Waututh*], Justice Stratas of the Federal Court of Appeal described the categories of evidence that may be admitted on judicial review even though they were not part of the record before the administrative decision-maker:

These cases show that there are three recognized exceptions and the list of exceptions is not closed:

- Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review.
- Sometimes an affidavit is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can engage in meaningful review for procedural unfairness.
- Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

The last two are really just one exception: where a tenable ground of review is raised that can only be established by evidence outside of the administrative decision-maker's record, the evidence is admitted.

[8] That is the context in which Rule 312 must be understood. Rule 312 provides for additional means for adducing evidence. Its operation is subject to leave of a judge of this Court. This shows that it is an exceptional measure.

[9] In *Tsleil-Waututh* at para 11, Justice Stratas summarized the criteria that are relevant to decide a Rule 312 motion:

- the evidence will assist the court (in particular, its relevance and sufficient probative value);
- admitting the evidence will cause substantial or serious prejudice to the other side;
- the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

[10] These criteria relate to the availability of the mechanism offered by Rule 312. They do not set aside the need to show that the evidence that is sought to be adduced is of the kind that is admissible on judicial review. In other words, these criteria must be met in conjunction with the criteria mentioned earlier concerning the admissibility of evidence that was not in the record before the administrative decision-maker.

## II. Application to this Case

[11] This motion arises in the somewhat unusual context where both parties declined to file affidavits. Therefore, no cross-examination may take place under Rule 308. The only evidence in this Court's record is the administrative decision-maker's record, produced according to Rule 317.

[12] Mr. Campbell now says that information coming from court file no. T-919-16 may assist him in proving one of the essential elements of his case, the allegation that the CRA has begun a criminal investigation.

[13] For the purposes of this motion, I am prepared to assume that evidence of such an investigation would fall within one of the exceptions to the rule whereby only evidence before the administrative decision-maker is admissible in this Court. There may be an analogy with evidence of procedural defects that are not apparent from the decision-maker's record.

[14] However, the evidence that Mr. Campbell seeks to adduce must be relevant. That means that this evidence must have a logical relationship with the allegations that Mr. Campbell must

prove. It must make those allegations more likely to be true. To repeat, the central allegation is that the CRA has begun a criminal investigation with the goal of laying tax fraud charges against Mr. Campbell.

[15] I have reviewed court file no. T-919-16. It is an application for leave to impose a requirement on Citibank to disclose information regarding transactions involving Cayman National Bank and unnamed residents of Canada. It was granted on consent. It was supported by affidavits of two CRA employees, Mr. David Letkeman and Ms. Stephanie Henderson. These affidavits describe how the CRA came to believe that the requirement could lead to the production of information regarding Canadian taxpayers' undisclosed foreign assets and tax liability. Both parties agree that certain information provided by Citibank as a result of this requirement brought Mr. Campbell's situation to the attention of the CRA.

[16] Mr. Campbell asserts that these affidavits show that he is under criminal investigation. He says that Mr. Letkeman and Ms. Henderson work with the CRA is related to criminal investigations and that their affidavits show that a corporate entity related to Cayman National Bank pleaded guilty to charges of tax fraud in the United States. In my view, these assertions are unsupported by the evidence.

[17] Mr. Letkeman and Ms. Henderson are employed with the Offshore Compliance Section at the CRA. Mr. Letkeman described himself as an "auditor," which suggests that he is not tasked with criminal investigations. Ms. Henderson is a manager. Nothing in their affidavits suggests that they are conducting criminal investigations. While their unit is ultimately part of a

larger branch of the organization whose mission apparently includes criminal investigations, that does not prove that their unit is conducting criminal investigations. Mr. Letkeman also mentions that as a result of the investigation of another taxpayer's affairs, a notice of assessment was issued. This is the only sanction mentioned in the affidavits and it is of a civil, not a criminal nature.

[18] The affidavits state that criminal tax fraud charges were laid in the United States against two entities of the corporate group to which Cayman National Bank belongs and that the defendants pleaded guilty. It is also stated, however, that while Cayman National Bank was also under investigation, no charges have been laid against it. It follows logically that the transactions which were the subject of the requirement to disclose in file no. T-919-16 were not those that led to criminal charges in the United States. They involved Cayman National Bank, which was not charged. The same can be said of Mr. Campbell, who apparently dealt with Cayman National Bank and not the entities that pled guilty. Thus, these statements may have been intended to cast a shadow over the activities of Cayman National Bank in general, but they do not lead to the inference that Mr. Campbell is under criminal investigation.

[19] Mr. Campbell argues that if Mr. Letkeman and Ms. Henderson were cross-examined, they could be asked whether they are assigned to criminal investigations and whether a criminal investigation of Mr. Campbell has been initiated and the situation would be clarified. That may well be true. But a motion to cross-examine them must be based on more than mere speculation. As I have explained above, their affidavits contain no suggestion that Mr. Campbell is under criminal investigation. Their affidavits were made in the context of a civil proceeding.

[20] I am also unpersuaded by Mr. Campbell's argument that he seeks to adduce this evidence as "general background" to the application, so as to bring it under the first of the three categories of exceptions mentioned in *Tsleil-Waututh*. It is clear that Mr. Campbell seeks to cross-examine Mr. Letkeman and Ms. Henderson about facts that are a central element of his case, and not about the general background.

[21] It may well be that Mr. Campbell has the burden of proof and that all the evidence, if any, is in the CRA's hands. Nevertheless, as I mentioned above, the Rules are not intended to afford him a full right of discovery. He does not have the right to cross-examine the decision-maker and to ask him whether he is under criminal investigation. Absent cogent reasons, Rule 312 should not be applied so as to allow him to cross-examine CRA employees other than the decision-maker, to ask essentially the same question. If criminal charges are ever laid against Mr. Campbell, he will then have a much broader right to summon relevant witnesses to prove a *Charter* violation.

[22] Given that Mr. Campbell has not shown that file no. T-919-16 contains evidence relevant to the issues in this case, I am of the view that that file should not be produced in the record in this case, and that it is unnecessary to cross-examine Mr. Letkeman and Ms. Henderson.

[23] In light of the above, I do not need to decide whether the motion was brought on a timely basis.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the motion is dismissed, with costs in the cause.

“Sébastien Grammond”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1618-17

**STYLE OF CAUSE:** FARRELL CAMPBELL v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** MONTRÉAL, QUEBEC (BY VIDEOCONFERENCE)

**DATE OF HEARING:** APRIL 16, 2018

**ORDER AND REASONS:** GRAMMOND J.

**DATED:** APRIL 17, 2018

**APPEARANCES:**

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