Federal Court  Cour fédérale

Date: 20180704

Docket: T-1618-17

Citation: 2018 FC 683

Ottawa, Ontario, July 4, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

FARRELL CAMPBELL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Campbell challenges a requirement to disclose information issued by the Canada Revenue Agency [CRA]. He also challenges the constitutional validity of sections 231.1 and 231.7 of the *Income Tax Act*, RSC 1985 c 1 (5th suppl) [the Act], which empower CRA to issue such requirements. I am dismissing his application, because there is no evidence whatsoever that Mr. Campbell's constitutional rights have been breached and no reason to conclude that the impugned statutory provisions mandate such a breach.

I. Background

[2] Canada's income tax system is based on the principle of self-assessment. Nevertheless, CRA may conduct audits to ensure that taxpayers are correctly reporting their taxable income. To facilitate such audits, the Act empowers CRA to obtain information from taxpayers. Two specific provisions are relevant to this application. Section 231.1 of the Act allows CRA to "inspect, audit or examine the books and records of a taxpayer" and, for that purpose, to require the taxpayer to "answer all proper questions relating to the administration or enforcement of this Act." Section 231.7 empowers this Court to issue an order to a taxpayer who has failed to comply with a requirement made under section 231.1.

[3] CRA issued a requirement to Mr. Campbell under section 231.1, asking him to complete a 15-page questionnaire regarding his foreign assets.

[4] Mr. Campbell refused to answer, alleging that CRA was in effect pursuing a criminal investigation for tax fraud and that section 231.1 could not be used to advance a criminal investigation. He brought the present application to quash the requirement issued under section 231.1. He also sought a declaration that sections 231.1 and 231.7 were unconstitutional, as they infringed his rights protected by sections 7, 11(c) and 13 of the *Canadian Charter of Rights and Freedoms* [Charter].

[5] Pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106, Mr. Campbell obtained the information in possession of the decision-maker, that is, the CRA employee who was

responsible for his audit. That information has been filed in the Court record. By consent, the results of an access to information request were also filed. Mr. Campbell also sought to cross-examine two CRA employees and to introduce in evidence the contents of another court file. I denied that request (*Campbell v Canada (Attorney General)*, 2018 FC 412).

[6] Mr. Campbell now recognizes that he has no evidence whatsoever that CRA is pursuing a criminal investigation in the guise of a civil audit. At the hearing, he also limited his Charter arguments to those based on section 13. He now asks the Court to declare that section 13 applies to his answers to CRA's requirement and that he will only be compelled to answer if CRA provides him with an affidavit stating that no criminal investigation has been commenced. In the alternative, he asks the Court to declare sections 231.1 and 231.7 unconstitutional.

[7] Meanwhile, the Attorney General has made an application under section 231.7 to require Mr. Campbell to answer the questions put to him. By consent, this application was heard together with Mr. Campbell's application.

II. Analysis

A. *Basic Principles*

[8] While Mr. Campbell has now restricted his submissions to section 13 of the Charter, it is useful to review the protection against self-incrimination from a broader perspective. The following provisions of the Charter may be used to protect against self-incrimination:

7. Everyone has the right to life, liberty and security of the person and the right	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut

not to be deprived thereof except in accordance with the principles of fundamental justice.	être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit :
[…]	[…]
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;	c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;
13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.	**13.** Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

[9] Section 11(c) is not relevant to this case. It applies to persons "charged with an offence." Mr. Campbell is not charged with any offence at this time (see, by way of analogy, *Martineau v MNR*, 2004 SCC 81, [2004] 3 SCR 737; *Guindon v Canada*, 2015 SCC 41, [2015] 3 SCR 3).

[10] Neither is section 13 relevant at this stage. Section 13 applies when testimony is used to incriminate a person in "other proceedings." There are no such "other proceedings" at present. Section 13 will only apply if and when Mr. Campbell is charged with a criminal offence. If that point is ever reached, the court hearing the matter will determine whether a person who responds to a request made under section 231.1 is a "witness who testifies" under section 13 and what protection, if any, would then flow from section 13. I need not decide these issues now, because section 13 does not allow a witness to refuse to answer — it rather gives effect to a bargain according to which the witness must testify, in return for a guarantee that any incriminating

evidence he or she gives will not be used to incriminate him or her in the future (*R v Nedelcu*, 2012 SCC 59 at paras 6−7, [2012] 3 SCR 311 [*Nedelcu*]).

[11] Nevertheless, Mr. Campbell asserts that the protection afforded by section 13 applies to any subsequent proceedings, including civil or administrative ones. He grounds his argument on a number of passages from *R v Henry*, 2005 SCC 76, [2005] 3 SCR 609, where the Supreme Court asserts that section 13 affords a protection against the use of prior testimony for "any purpose" (para 49). However, what the Court meant by that phrase is that section 13 would extend to the use of prior testimony not only to prove the accused's guilt, but also to impeach his credibility. There was never any intent to suggest that section 13 would apply to the use of prior testimony in subsequent proceedings of a civil or administrative nature. The concept of "incriminating evidence," which lies at the heart of section 13, necessarily refers to the proof of guilt in criminal proceedings. While the prior testimony may have been given in a civil proceeding, as in *Nedelcu*, section 13 governs its use only in subsequent criminal proceedings. In *Nedelcu* at para 9, Justice Michael Moldaver defined "incriminating evidence" in a way that forecloses any application of section 13 to subsequent civil or administrative proceedings:

> What then is "incriminating evidence"? The answer, I believe, should be straightforward. In my view, it can only mean evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt, i.e., to prove or assist in proving one or more of the essential elements of the offence for which the witness is being tried.

[12] Section 7, however, affords a broader protection against self-incrimination, which extends beyond the specific situations contemplated by sections 11(c) and 13. Protection against self-incrimination is considered a principle of fundamental justice, which brings it under section

7 if someone's liberty is in jeopardy (*R v S (RJ)*, [1995] 1 SCR 451). The Supreme Court of Canada addressed the application of section 7 outside the criminal context in *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3. That case involved a challenge to the validity of a provision of British Columbia's *Securities Act* that requires the directors of issuers to answer questions under oath and to produce documents. The Court decided that section 7 may apply either at the time where testimony is compelled or at the time it is used in subsequent proceedings. At the time of compulsion, however, immunity will rarely be granted. The rule is that the person must testify. An exception will be made only where it is shown that the real purpose of requiring the person to testify is to incriminate the person. Where the purpose is related to the application of a regulatory scheme, testimony may be compelled and the person will benefit from use immunity in subsequent criminal proceedings. Thus, the provision of the *Securities Act* did not breach section 7.

[13] The Supreme Court summarized the main components of the right against self-incrimination under section 7 in *Re Application Under Section 83.28 of the Criminal Code*, 2004 SCC 42, [2004] 2 SCR 248 at para 71:

> Use immunity serves to protect the individual from having the compelled incriminating testimony used directly against him or her in a subsequent proceeding. The derivative use protection insulates the individual from having the compelled incriminating testimony used to obtain other evidence, unless that evidence is discoverable through alternative means. The constitutional exemption provides a form of complete immunity from testifying where proceedings are undertaken or predominately used to obtain evidence for the prosecution of the witness.

[14] The Supreme Court of Canada discussed the application of these principles to investigations conducted under the *Income Tax Act* in *R v Jarvis*, 2002 SCC 73, [2002] 3 SCR 757 [*Jarvis*]. The following propositions encapsulate the lessons to be learned from that case:

- There is no use immunity. CRA auditors may validly pass information gathered through section 231.1 to investigators. There is no derivative use immunity either (*Jarvis* at para 95).
- Once the predominant purpose of the investigation becomes the determination of penal liability, Charter protections become applicable. As a result, investigators must obtain a search warrant instead of using section 231.1 (Jarvis at para 96).
- Nevertheless, if a criminal investigation is conducted in parallel to a civil audit, auditors may continue to use section 231.1 for their own purposes, but investigators may not rely on that information (Jarvis at para 97; see also Romanuk v Canada, 2013 FCA 133; Bauer v Canada, 2018 FCA 62).

B. *Declaratory Judgment*

[15] Mr. Campbell first seeked an order that the documents to be produced in response to a requirement made under section 231.1 “are protected by sections 7, 11 and 13 of the Charter and therefore these information and documents cannot be used against the Applicant in another proceeding, of any nature, object or kind whatsoever.” As I mentioned above, Mr. Campbell now seeks a declaration with respect to section 13 only. He also clarified that the proposed declaration was not intended to preclude the use of the information in proceedings directly related to a new income tax assessment, for example proceedings in the Tax Court of Canada.

[16] It is not appropriate to issue such an order now as there is presently no live controversy concerning the eventual use of the information Mr. Campbell is asked to provide. Mr. Campbell is not now charged with any offence. The remedy sought by Mr. Campbell is in the nature of a declaratory judgment. In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 CSC 12 at para 11, [2016] 1 SCR 99 [*Daniels*], Justice Rosalie Abella of the Supreme Court of Canada outlined the circumstances in which it is appropriate to issue a declaratory judgment:

> […] The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties […].

[17] In this case, there is no indication that CRA intends to use the information sought from Mr. Campbell for the purposes of laying criminal charges. There is simply no practical need to determine the scope of the protection that the Charter will afford if and when charges are laid against Mr. Campbell. Indeed, if I were to do so, I would be usurping the role of the court of criminal jurisdiction hearing Mr. Campbell's case. That court could hear a motion to exclude evidence based on section 24(2) of the Charter. As there is an alternative remedy, a declaratory judgment is not appropriate.

[18] Mr. Campbell invokes *Seth v Canada*, [1993] 3 FC 348 (CA) [*Seth*], in which Justice Robert Décary observed that "[t]he use of compelled testimony […] is protected in subsequent criminal proceedings by section 13 of the Charter." However, the Court of Appeal did not issue any declaratory judgment to that effect. The statement quoted formed part of the reasons for which the Court declined to stay administrative proceedings in which the applicant would be

compelled to testify. The approach I adopt in the instant case is compatible with that of the Federal Court of Appeal in *Seth*.

[19] Moreover, to the extent that the proposed declaration simply refers to the protection of certain sections of the Charter, it lacks practical utility as it is merely "restating settled law" (*Daniels* at para 53). The Charter applies irrespective of any declaration that I may issue.

C. *Requiring CRA to Provide an Affidavit*

[20] Mr. Campbell also asks the Court to make any order compelling him to answer conditional upon CRA providing an affidavit stating that the predominant purpose of the audit is administrative and not criminal. Given that, in the context of an application for judicial review, Mr. Campbell has no right of discovery, this would be the only practical manner of ensuring compliance with the principles established in *Jarvis*.

[21] I cannot accede to that request. Mr. Campbell is effectively asking me to reverse the burden of proof, without any legal basis or precedent. There are also important policy reasons for not allowing applicants to question public officials regarding the conduct of investigations. The effectiveness of investigations could be compromised if their existence is disclosed (see, for example, *Attorney General of Nova Scotia v MacIntyre*, [1982] 1 SCR 175 at 187−189).

[22] Indeed, sections 16 to 16.5 of the *Access to Information Act*, RSC 1985, c A-1, set forth broad exemptions to the right to disclosure of information related to law enforcement investigations.

[23] The importance of privacy in administrative investigations was underlined by Justice Thomas Cromwell, then of the Nova Scotia Court of Appeal, in *Potter v Nova Scotia (Securities Commission)*, 2006 NSCA 45 at para 20:

> […] administrative actors should not have to reveal information which they are permitted (or required) to keep confidential simply because someone challenges their actions. The investigative process could break down if full access to its fruits were available simply by filing a judicial review application.

[24] Hence, Mr. Campbell's request is not only devoid of any legal basis, it is also contrary to principle.

D. *Validity of sections 231.1 and 231.7*

[25] In the alternative, Mr. Campbell is seeking a declaration that sections 231.1 and 231.7 are constitutionally invalid, because they breach sections 7, 11(c) and 13 of the Charter and are not saved by section 1. As a person to whom those provisions are applied, Mr. Campbell is entitled to ask this Court to rule on their validity.

[26] As I understand his argument, Mr. Campbell is alleging that sections 231.1 and 231.7 are invalid, either because they fail to state explicitly that the evidence gathered through that process may not be used in subsequent criminal proceedings, or because they somehow preclude the application of Charter guarantees.

[27] I am unable to accept Mr. Campbell's argument. Parliament is not required to restate in legislation the protections afforded by the Charter. This is because the Canadian Constitution is

"self-executing." It sets forth legal rules that are applied by the courts, whether those rules are reproduced in legislation or not. Subject to the rules of standing and justiciability, citizens may always ask the courts to enforce the Constitution (Barry Strayer, *The Canadian Constitution and the Courts*, 3rd ed, Toronto, Butterworths, 1988 at 145−146).

[28] Where the application of valid legislation results in the breach of a Charter right in one particular case, the proper course of action is to challenge that particular action and to ask for an individual remedy under section 24 (see, for example, *R v Duarte,* [1990] 1 SCR 30). Where the exercise of a discretionary administrative power impinges on a Charter right, the Supreme Court has established a framework for ensuring that any deleterious effects on protected rights are proportionate to the public objectives that are pursued by the legislation in question (*Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395).

[29] It is only where the legislation foreseeably mandates or requires a breach of the Charter that it will be declared inoperative, according to section 52 of the *Constitution Act, 1982*. It follows that legislation is not unconstitutional for failing to mention Charter guarantees explicitly or to provide a process for the enforcement of those guarantees.

[30] In this case, there is nothing in sections 231.1 and 231.7 that leads inexorably to a Charter breach. As *Jarvis* makes clear, the application of those provisions will, in the vast majority of circumstances, not result in any Charter breach. If, in a particular case, the Crown seeks to use information obtained through those sections in a manner that would breach section 7, that evidence could then be excluded under section 24(2). And there is nothing in sections 231.1 and

231.7 that would prevent a competent court from granting a remedy should it find a Charter breach. Hence, there is no reason to declare sections 231.1 and 231.7 constitutionally inoperative.

[31] A similar argument was made in *Del Zotto v Canada*, [1997] 3 FC 40 (CA), rev'd [1999] 1 SCR 3. Justice Strayer, whose dissenting reasons were adopted by the Supreme Court, said (at 61–62):

> This is not a case such as *Hunter* or *Baron* where the section can have little or no valid application because it lacks an essential ingredient. The gravamen of the appellants' complaint is that in certain circumstances an inquiry established under this section, or a particular subpoena issued by such an inquiry, or the production of a particular document, or the use in subsequent proceedings of evidence gleaned by the inquiry, could violate someone's constitutional rights under sections 7 or 8 of the Charter . The same could be said of an inquiry established under the federal *Inquiries Act* and the various comparable provincial statutes which authorize in the broadest possible terms the establishment of commissions of inquiry with powers of subpoena, etc. There have been many instances of successful attacks on particular terms of reference of such commissions or on particular actions or findings of commissioners, some relating to constitutional rights similar to those in question here. But just because the *Inquiries Act* could on occasion be used for unconstitutional purposes, this would not justify a declaration of its total invalidity. Nor in my view do theoretical and potential invalid uses or consequences of the use of section 231.4 justify a declaration as to its invalidity.
>
> […]
>
> In short if there are circumstances in which the use of this inquiry power, or the subsequent use of evidence derived from it, may impinge on constitutional rights there will be opportunities to assert those rights at the time when an intrusion is imminent and demonstrable. So far the Court has only been treated to hypothetical possibilities.
>
> For these reasons I am of the view that the appeal should be dismissed and that no declaration should be made at this time of invalidity of either the Act or the inquiry.

[32] I also note that a similar argument was rejected in *Beaudette v Alberta (Securities Commission)*, 2016 ABCA 9.

[33] Thus, I reject Mr. Campbell's challenge to the constitutional validity of sections 231.1 and 231.7 of the Act.

E. *The Section 231.7 Application*

[34] Mr. Campbell does not seriously oppose the Attorney General's application under section 231.7. He argues that an order made under that section should be made subject to the requirement of providing an affidavit establishing the dominant purpose of the investigation, but I have already rejected this contention. Mr. Campbell does not take issue with the fact that the conditions for issuing an order under section 231.7 are met.

[35] In the result, Mr. Campbell's application for judicial review is dismissed and the Attorney General's application for an order under section 231.7 is allowed, with costs against Mr. Campbell.

JUDGMENT in T-1618-17

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to remove the Canada Revenue Agency as a respondent;
2. Mr. Campbell's application for judicial review is dismissed in its entirety;
3. The Attorney General's motion pursuant to section 231.7 of the *Income Tax Act* is allowed;
4. Mr. Campbell is ordered to provide to a person authorized by the Minister of National Revenue certain documents and information required in the Requirement for Information dated September 28, 2017;
5. Mr. Campbell is ordered to pay the costs of the application for judicial review and the motion pursuant to section 231.7.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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