Federal Court  Cour fédérale

Date: 20200625

Dockets: T-416-18
T-240-18
T-245-18
T-247-18
T-275-18
T-384-18
T-385-18
T-417-18
T-418-18
T-529-18

Citation: 2020 FC 724

Ottawa, Ontario, June 25, 2020

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-416-18

BETWEEN:

FREDERICK SHARP

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

AND BETWEEN:

Docket: T-240-18

BETWEEN:

RICHARD HETHEY

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

AND BETWEEN:

Docket: T-245-18

BETWEEN:

MARY HETHEY

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

AND BETWEEN:

Docket: T-247-18

BETWEEN:

FREDRICK COOMBES

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

AND BETWEEN:

Docket: T-275-18

BETWEEN:

DANIEL BLAQUIERE

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

AND BETWEEN:

Docket: T-384-18

BETWEEN:

SHAMSHER G. HIRJI

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

AND BETWEEN:

Docket: T-385-18

BETWEEN:

CHARTERHOUSE CAPITAL INC.

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

AND BETWEEN:

Docket: T-417-18

BETWEEN:

BRUCE GASARCH

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

AND BETWEEN:

Docket: T-418-18

BETWEEN:

ZHIYING Y GASARCH

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

AND BETWEEN:

Docket: T-529-18

BETWEEN:

TERESA SHARP

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

ORDER AND REASONS

[1] The Defendant in these proceedings, the Minister of National Revenue [Minister], brings these motions seeking to strike out the Plaintiffs' Statements of Claim, in whole or in part, without leaves to amend.

I. Background

[2] These proceedings were initially commenced as applications but were converted on consent to actions by my Order dated October 1, 2018. Defences to these actions have not yet been filed.

[3] Each of the Plaintiffs' claims is substantially similar and, for convenience, where appropriate I will refer to the Statement of Claim filed by Frederick Sharp (docket T-416-18) on December 20, 2018. This single set of reasons will, however, apply to all of the proceedings.

[4] All of these claims arise from the Minister's attempts to obtain evidence from third parties, mainly involving the Plaintiffs' financial transactions. In issuing Third-Party Requirements [Requirements], the Minister was purporting to act under the audit authority conferred by ss 231.2(1) of the *Income Tax Act*, RSC, 1985, c1 (5th Supp) [ITA].

[5] All of the Plaintiffs challenge the legality of the Minister's attempts to use ITA audit authority as a means of gathering evidence that, they say, is intended to be used to further an ongoing criminal investigation. They also maintain that their s 7 and s 8 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24) [*Charter*] rights will be infringed if the Minister shares audit-

acquired evidence with domestic and foreign criminal law enforcement agencies as permitted by s 241 of the ITA.

[6] The Minister's claim to relief on these motions is based on the argument that the Plaintiffs' Statements of Claim do not disclose a reasonable cause of action and that the asserted claims are otherwise an abuse of process.

[7] The Minister concedes that it is not lawful to use audit authority under the ITA for the predominant purpose of furthering a criminal investigation. However, the Minister says that the Plaintiffs' allegations of an improper purpose are unsupported by any material facts. The pleadings are said to be speculative and conclusory, amounting to nothing more than a fishing expedition. In response, the Plaintiffs argue that their Statements of Claim include sufficient material factual allegations to meet the requisite pleading threshold.

II. The Applicable Legal Principles

[8] The parties argued these motions under the supposed authority of Rule 221 of the *Federal Courts Rules*, SOR/98-106, dealing with the striking of a Statement of Claim filed in support of an action. Where they differed was in the application of the applicable legal principles to the Plaintiffs' pleadings. What the Minister says is speculation, the Plaintiffs characterize as material facts.

[9] I have serious reservations about whether Rule 221 applies to these proceedings because the applications initially brought challenged discrete decisions by the Minister to issue the

Requirements. Although the applications were later reconstituted as actions on consent under ss 18.4(2) of the *Federal Courts Act*, RSC 1985, c F-7 and Statements of Claim substituted for the Notices of Application, the legal effect of that step is not to convert an application into an action in any legally substantive sense, nor does it require the replacement of a Notice of Application with a Statement of Claim: see *Brake v Canada*, 2019 FCA 274 at para 42-43, 311 ACWS (3d) 226. According to *Brake*, the Notice of Application can remain as the originating document and it may also be amended. A s 18 Order thus effects only procedural changes allowing the prosecution of the application "as if it were an action" and subject to the appropriate Rules governing the conduct of an action.

[10] What is at the heart of this conversion of sorts is the need to overcome – in appropriate cases – the evidentiary limitations that are inherent in the summary nature of an application. This point was addressed at paragraphs 38-39 of the decision in *Association des crabiers acadiens Inc v Canada (Attorney General)*, 2009 FCA 357, [2009] FCJ No 1567 (QL):

> [37] The courts have developed certain analysis factors that apply to an application for conversion so as to better frame the exercise of the discretion set out at subsection 18.4(2). It goes without saying that each case involving an application for conversion turns on its own distinct facts and circumstances. And, depending on those facts and circumstances, the individual or collective weight of the factors may vary. We will now go over those factors.
>
> [38] The conversion mechanism makes it possible, where necessary, to blunt the effect of the restrictions and constraints resulting from the summary and expeditious nature of judicial review. These are, for example, far more limited disclosure of evidence, affidavit evidence instead of oral testimony, and different and less advantageous rules for cross-examination on affidavit than for examination on discovery (see *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1998), 146 F.T.R. 249 (F.C.)).

[11] In *Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2018 FCA 228, 302 ACWS (3d) 5, the Court also made the point that a Rule 18.4(2) Order should specify in what procedural ways the subject application is to be treated and proceeded with, for instance, with respect to the scope of appropriate discovery.

[12] In my view, the relief the Minister seeks on these motions is not available under Rule 221. Rather the motions must be resolved under the substantive principles that apply to the striking of applications. In a number of respects the two approaches are similar but there are also some differences, most notably in the general reluctance of the Court to summarily strike applications. This reluctance is reflected in the following passage from *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at para 9-18, [2016] FCJ No 102:

> [9] Currently, the leading case in this Court on motions to strike applications for judicial review is *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557. At paragraphs 47-48, this Court set out the test for striking an application for judicial review:
>
> > [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
> >
> > [48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes:

> *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, [R.S.C. 1985, c. F-7], subsection 18.1(2) and section 18.2. An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective.

[10] In a decision postdating *JP Morgan*, the Supreme Court has emphasized the need for modern litigation to proceed to resolution faster and more simply: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. This underscores the important role that motions to strike can play in removing clearly unmeritorious cases from the court system. This case is a good example.

[11] This threshold for a motion to strike is met here. The applicant challenges a decision made by the Board right at the outset of its administrative proceedings. Its administrative proceedings are far from completed. The respondent's objection that the application for judicial review is premature is, in the circumstances of this case, a "show stopper." In these circumstances, it is clear that this Court cannot entertain the application for judicial review.

[12] Applications for judicial review of decisions made at the outset of administrative proceedings or during administrative proceedings normally do not lie.

[13] The general rule is that applications for judicial review can be brought only after the administrative decision-maker has made its final decision. At that time, administrative decisions made at the outset of administrative proceedings or during administrative proceedings can be the subject of challenge along with the final decision.

[14] The relevant law on point and the rationale for it is as follows:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: [citations omitted]

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway…

(Canada (Border Services Agency) v. C.B. Powell Limited, 2010 FCA 61, [2011] 2 F.C.R. 332 at paragraphs 30-32; see also *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, 467 N.R. 201 at paragraphs 30-32.)

[15] As *C.B. Powell* recognizes (at paragraph 33), there are exceptional circumstances where this Court will entertain an application for judicial review of an administrative decision made at the outset of administrative proceedings or during administrative proceedings: for a more complete explanation of what qualifies as exceptional circumstances, see *Wilson*, above at paragraph 33. Many of these exceptional circumstances mirror those where prohibition lies.

> [16] On the record before us in this case, the prematurity objection is made out and there are no exceptional circumstances warranting the hearing of this application for judicial review at this time.
>
> [17] After the Board has finally decided upon the applicant's complaint, she may launch an application for judicial review advancing the grounds she raises in this application and any other relevant, admissible grounds.
>
> **D. Proposed disposition**
>
> [18] Accordingly, I would grant the motion and strike out the application for judicial review. The applicant does not seek its costs and so none shall be granted.

Also see *Tolksdorf v Canada (AG)*, 2019 FCA 158, 305 ACWS (3d) 454.

[13] It is thus apparent that a Notice of Application will be struck as an abuse of process where it is bereft of any possibility of success or where it is based on an obvious, fatal flaw striking at the root of the Court's authority to grant relief: see *Canada v JP Morgan Asset Management (Canada) Inc v Minister of National Revenue*, 2013 FCA 250 at para 47, [2013] FCJ No 1155. At the same time the pleadings are to be read holistically and practically without fastening on to matters of form: see *Domtar Inc v Canada*, 2009 FCA 218 at para 28, [2009] 6 CTC 61, and *Canada (AG) v TeleZone Inc*, 2010 SCC 62 at para 78, [2010] 3 SCR 585. All of this is not to suggest that a pleading in support of an application need not contain material facts in support of the legal claims to relief. Bald allegations unsupported by fact continue to remain insufficient: see *JP Morgan* at paras 39-40 and 42-45.

[14] If I am wrong about the test to be applied, I will also consider the principles that apply to the striking of a Statement of Claim under Rule 221.

[15] The test for striking a Statement of Claim is whether it discloses a reasonable cause of action, which is to say that it will be struck if it is plain and obvious, assuming the facts pleaded are true, that the claim has no reasonable prospect of success: see *The Queen v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17, [2011] 3 SCR 45.

[16] The pleading of a legal theory will be insufficient in the absence of supporting material facts. At the same time, pleaded facts are to be taken to be true even where the claimant is, at that moment, unable to prove them.

III. Analysis

[17] The problem presented by cases like these is whether what has been asserted broadly as fact is in truth merely "conjecture, speculation and innuendo" or a "bald conclusion": see *Brooks v Canada*, 2019 FCA 293 at para 8, 312 ACWS (3d) 665. Distinguishing between material facts and bald allegations is not assisted by a "bright line". Instead, the issue must be assessed along a continuum with a view to ensuring to that a defendant or respondent knows the case to be met and to establishing the parameters of relevancy: see *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16-19, [2015] FCJ No 1245 (QL). With these points in mind, the Court will consider the sufficiency of the Plaintiffs' pleadings.

[18] At the heart of the Plaintiffs' claims to relief are allegations that the Minister has used the civil audit powers contained in ss 231.1 and 231.2 of the ITA for the predominant purpose of furthering tax evasion investigations. Such a use is said to be contrary to the holding in *R v*

Jarvis, 2002 SCC 73, [2002] 3 SCR 757 [*Jarvis*], that the ITA audit powers cannot be used to effectively circumvent the protections afforded by ss 7 and 8 of the *Charter*.

[19] According to the Statement of Claim filed by Frederick Sharp, he and his business (Corporate House) have been targets of a Canada Revenue Agency [CRA] investigation for several years "involving coordination" between the CRA's Audit Division [Audit Division], its Criminal Investigations Directorate [CID] and a number of domestic and foreign law enforcement agencies, the details of which are only known to the CRA (Statement of Claim, para 10).

[20] Mr. Sharp further alleges that, on November 13, 2013, the Audit Division forwarded a memo to the CID detailing a complex scheme orchestrated by Mr. Sharp and Corporate House designed to assist clients to evade taxes through the use of offshore accounts. According to Mr. Sharp, by at least November 2013, the Audit Division of the CRA had concluded that he was guilty of tax evasion and the investigation was thereafter predominantly criminal in nature. Paragraph 13 of Mr. Sharp's Statement of Claim further asserts that, in February 2016, the CID executed a search warrant at the premises of Corporate House based on an Informant naming Mr. Sharp and a number of related companies and business associates in connection with a complex tax evasion scheme. The purpose of the warrant was said to be the identification of the parties involved and to obtain further details of the scheme.

[21] It is alleged in paragraphs 15 to 24 of the Statement of Claim that throughout 2016 the CRA had identified a number of targets for audit based on information obtained from foreign

allies and that coordinated investigations with international partners were underway.

Paragraph 25 described the following concern:

> The Plaintiff alleges that the CRA coordinated investigative efforts targeting the Plaintiff with the RCMP, the IRS, and other law enforcement agencies, both domestic and foreign. In furtherance of this coordinated effort, the CRA supplied the Plaintiff's private taxpayer information, compelled through the Audit Division's Audit Powers, to domestic and international law enforcement agencies. The Plaintiff alleges that in doing so, the CRA shared his private taxpayer information in violation of his *Charter* rights.

[22] The Third-Party Requirements that are subject of Mr. Sharp's challenge are detailed at paragraph 32. They are all alleged to have been issued on or after June 1, 2016.

[23] The Sharp Statement of Claim summarizes the legal theories underpinning his claim to declaratory and injunctive relief at paragraphs 34 and 35:

> 34. At all material times, the CRA, through its Audit Division, sought to statutorily compel information from the Plaintiff for the predominant purpose of obtaining evidence for use in a criminal investigation both domestically and internationally. In *Jarvis*, the Supreme Court of Canada held that while the Audit Division may continue to proceed with a civil audit at the same time the CID is pursuing a criminal investigation, the CID should not be permitted access to information that was obtained pursuant to Audit Powers that were exercised after the investigation into penal liability had commenced. By issuing the impugned Personal Requirements and Third-Party Requirements, as referenced above, for the use and assistance of domestic and international criminal investigation, the CRA has unjustifiably breached the Plaintiff's rights under s. 7 and s. 8 of the *Charter*.
>
> …
>
> 35. The Plaintiff challenges the constitutionality of the 241 Amendments, which permit the dissemination of confidential information obtained by the Audit Division to

> domestic and international law enforcement and to CSIS. The Plaintiff alleges that the 241 Amendments, individually and cumulatively, violate his s. 7 and s. 8 *Charter* rights as they authorize the transfer of private information compelled without prior judicial authorization to criminal law enforcement unencumbered by use limitations.

IV. *Jarvis*

[24] The leading authority dealing with the problem of an inappropriate overlap between the CRA's audit and its criminal investigation functions is *Jarvis*, above. The concern, of course, is that the CRA could use its broad and significantly unrestrained audit authority to obtain evidence in aid of a criminal investigation. The Court held that CRA audit powers could not be used where their predominant purpose was to further a criminal investigation. This point is made in the following passage at paragraph 88:

> In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.

[25] In this context, the factors that apply to assessing the predominant purpose of an audit inquiry are set out at paragraphs 93-94:

> 93 To reiterate, the determination of when the relationship between the state and the individual has reached the point where it is effectively adversarial is a contextual one, which takes account of all relevant factors. In our opinion, the following list of factors will assist in ascertaining whether the predominant purpose of an inquiry is the determination of penal liability. Apart from a clear

> decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself, but courts must assess the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual.
>
> 94 In this connection, the trial judge will look at all factors, including but not limited to such questions as:
>
> (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
>
> (b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
>
> (c) Had the auditor transferred his or her files and materials to the investigators?
>
> (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
>
> (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
>
> (f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?
>
> (g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?
>
> It should also be noted that in this case we are dealing with the CCRA. However, there may well be other provincial or federal governmental departments or agencies that have different organizational settings which in turn may mean that the above factors, as well as others, will have to be applied in those particular contexts.
>
> [Emphasis in original.]

[26] It is apparent from the above that in looking for the predominant purpose of a CRA audit, a highly nuanced and contextual factual analysis is required. Included in that analysis is the

consideration of the working relationships and information sharing, if any, between the auditors and the investigators, whether at the time of the audit reasonable grounds were present to bring charges, and whether the information being sought by the auditors was relevant and of likely value to the investigators.

[27] In *Stanfield v Canada (Minister of National Revenue)*, 2005 FC 1010, [2005] FCJ No 1249 [*Stanfield*], the applicants sought a declaration that demands for information issued ostensibly under ss 231.1(1) of the ITA were invalid. From the evidence contained in the certified tribunal record, the Court concluded that the demands were unlawful because they had been issued for the predominant purpose of furthering a criminal investigation. That conclusion was based on a thorough assessment of evidence showing a close and inappropriate collaboration between CRA auditors and its criminal investigators. In addition to the *Jarvis* factors, the Court identified of the following matters:

(a) Were the CRA audits and criminal investigations being concluded simultaneously or otherwise interconnecting and, if so, to what end?

(b) What was the nature and timing of the flow of information between the auditors and investigators?

(c) What was the level of importance of the contacts between the auditors and investigators?

(d) To what extent did the complexity of the situation impact on the predominant purpose of the demands?

(e) To what extent would the deprivation of the information inhibit legitimate CRA audit functions?

In finding that the predominant purpose of the audit demands was to further the CRA's ongoing criminal investigations, the Court was primarily concerned with the substantial interconnections between the work of the auditors and the investigators. This led to a finding that the investigators were effectively using the auditors as their evidence-gathering agents and, in doing so, beached the taxpayers' *Charter* rights. The demands were, accordingly, quashed.

[28] I am satisfied that the Plaintiffs' pleadings are sufficient – if barely so – to withstand these motions to strike insofar as they seek to quash the Requirements on the basis of the *Jarvis* criteria. The pleadings assert that the Requirements were issued by the auditors long past the commencement of a tax evasion investigation and after the execution of a search warrant at the business premises of the Plaintiff, Frederick Sharp. The Information to obtain the warrant is said to have outlined in detail a complex tax evasion scheme involving Mr. Sharp, Yvonne Gasarch and others to be determined. One of the purposes of the warrant is asserted to be the need to identify other culpable parties. Paragraph 19 of the Sharp Statement of Claim also quotes the Royal Canadian Mounted Police [RCMP] Commissioner as saying on May 2, 2016 that "there are tremendous suggestions of criminality". The Requirements were issued in the following months.

[29] These allegations are arguably sufficient to establish, if later proven, that the Requirements were issued in the face of an ongoing criminal investigation where reasonable grounds to lay charges then existed.

[30] The Statement of Claims are notably lacking in information about the extent of any collaboration between the auditors and the investigators but that could possibly be explained by the numerous redactions applied to the record supplied by the Minister. The Plaintiffs do plead the content of a newspaper report dated May 9, 2016 quoting the Minister. It is alleged that the Minister stated that the CRA was identifying targets for audits and "if there needs to be criminal prosecutions, there will be prosecutions". This is, of course, hearsay and not particularly strong evidence but, if verified, it could help to establish that the audits were being pursued with a prosecution motive in mind and at a time when reasonable grounds to prosecute were present.

[31] Even if the Plaintiffs' allegations of an unlawful purpose are sufficiently supported by material fact to be left undisturbed, the question remains as to whether an arguably viable cause of action remains.

[32] The Minister contends that, on the strength of the decision in *Romanuk v Canada*, 2013 FCA 133, [2013] 6 CTC 180 [*Romanuk*], *Piersanti v Canada*, 2014 FCA 243, [2014] FCJ No 1128 [*Piersanti*], and *Bauer v Canada*, 2018 FCA 62, 2018 DTC 5041 [*Bauer*], the Plaintiffs' only available recourse lies in the defence of any subsequent criminal prosecution. In other words, the bare establishment of the misuse of the Minister's ITA audit powers does not give rise to an independent claim to *Charter* relief. According to this view, the remedy, if one is due, is to exclude the third-party evidence from any subsequent prosecution. The Minister cites the following passage from *Romanuk,* above, in support of this position:

> [10] As a result, it is plain and obvious that the appellant cannot succeed in her additional claims assuming that the additional facts as pled are proven. Even if the CRA were contemplating an investigation of the appellant before any requirement for

> information was made by the CRA, this does not suspend the right of the CRA to make such requests for information for the purposes of administering the *Act* using the inspection and audit powers as set out in subsections 231.1(1) and 231.2(1) of the *Act*. Any information or documents obtained using such powers could be used to reassess the appellant (including the assessment of penalties under subsection 162(1) and 163(2) of the *Act*). Whether such information or documents could also be used for the purpose of an investigation of an offence under section 239 or the prosecution of such offence is not a matter for the Tax Court of Canada. The only issue before the Tax Court of Canada is the validity of the reassessment, *i.e.*, whether the appellant's claim in relation to the losses of the partnership that were allocated to her is correct and whether the assessment of the penalties under subsections 162(1) and 163(2) is correct.

[33] In response, the Plaintiffs say that the decisions in *Romanuk*, *Piersanti* and *Bauer*, above, are distinguishable because they addressed only the issue of the admissibility of evidence obtained under ostensible audit authority in a Tax Court proceeding. They argue that the Federal Court of Appeal decision in *Kligman v Canada (Minister of National Revenue)*, 2004 FCA 152, [2004] 4 FCR 477, [*Kligman*], is directly applicable to their claims to declaratory relief because it involved a successful pre-emptive challenge by judicial review to the legality of Requirements issued under the authority of s 231.2 of the ITA. Although the reasons given in *Kligman*, above, were mainly concerned with whether the investigation in question had "crossed the Rubicon" into penal territory, the issue of prematurity was discussed. In the reasons provided by Justice Gilles Létourneau, the right to seek *Charter* relief preventively was recognized and the Requirements were quashed. In doing so Justice Létourneau expressly rejected the Minister's argument that the taxpayer's only recourse was to comply with the Minister's demand and challenge the admissibility of the evidence in any subsequent prosecution: also see *Stanfield*, above.

[34] The decisions in *Romanuk*, *Piersanti* and *Bauer*, *above*, do raise questions about the earlier majority holding in *Kligman*, above. However, I am not in a position on these motions to resolve those questions. The benefit of doubt must be resolved in favour of the Plaintiffs.

[35] I am of a different mind in considering the Plaintiffs' allegations that the Minister has breached or intends to breach the Plaintiffs' *Charter* interests by sharing audit information with domestic and foreign law enforcement agencies.

[36] Apart from the broad statement that unspecified audit-derived information can, under current legislation, be broadly shared with law enforcement and external taxation authorities, the Plaintiffs have pleaded no material facts describing the nature of the information they seek to protect, the sources of its acquisition, the circumstances of its actual or likely disclosure, the authority under which it is expected to be shared, to whom it has been or is expected to be given, and for what purposes.

[37] What the Plaintiffs are seeking are broad declarations of unconstitutionality of a host of statutory provisions that authorize the distribution of taxpayer information whether or not those provisions have been or ever will be employed against their interests. These claims are nothing more that speculative conclusions that something unlawful could happen.

[38] This is the kind of unfocussed and factually empty pleading that the Courts routinely refuse to entertain. Hypothetical *Charter* challenges are inappropriate because there is no factual matrix to support the legal theories that are being advanced. In the result, paragraphs 34 to 73,

and 74(b) to (h) are struck from the Sharp Statement of Claim. The paragraphs to the same effect contained in the other Plaintiffs' Statements of Claim are also struck.

[39] Having regard to the divided success of the motion, costs will be in the cause.

ORDER in T-416-18, T-240-18, T-245-18, T-247-18, T-275-18, T-384-18, T-385-18, T-417-18, T-418-18 AND T-529-18

THIS COURT ORDERS that

1. Paragraphs 34 to 73, and 74(b) to (h) are struck from the Sharp Statement of Claim. The paragraphs to the same effect contained in the other Plaintiffs' Statements of Claim are also struck.

2. Costs will be in the cause

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-416-18 T-240-18 T-245-18 T-247-18 T-275-18 T-384-18 T-385-18 T-417-18 T-418-18 T-529-18
STYLE OF CAUSE:	FREDERICK SHARP v MINISTER OF NATIONAL REVENUE RICHARD HETHEY v MINISTER OF NATIONAL REVENUE MARY HETHEY v MINISTER OF NATIONAL REVENUE FREDRICK COOMBES v MINISTER OF NATIONAL REVENUE DANIEL BLAQUIERE v MINISTER OF NATIONAL REVENUE SHAMSHER G. HIRJI v MINISTER OF NATIONAL REVENUE CHARTERHOUSE CAPITAL INC. v MINISTER OF NATIONAL REVENUE BRUCE GASARCH v MINISTER OF NATIONAL REVENUE ZHIYING Y GASARCH v MINISTER OF NATIONAL REVENUE TERESA SHARP v MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	VANCOUVER, BC

DATE OF HEARING: JANUARY 15, 2020

ORDER AND REASONS: BARNES J.

DATED: June 25, 2020

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