

Federal Court



Cour fédérale

Date: 20220419

Docket: T-575-21

Citation: 2022 FC 543

Ottawa, Ontario, April 19, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JESSE WILLMS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a second-level decision of a Manager of the Audit Division of the Canada Revenue Agency (the “Minister’s Delegate” or “Delegate”), dated March 23, 2021, denying the Applicant’s request for a third-party privilege review of all of the documents in the possession and control of the Canada Revenue Agency (CRA) with respect to

an audit of the Applicant's taxation from years 2008 to 2011 (the "Second-Level Review Decision").

II. Background

[2] In the years 2008 to 2011 (inclusive), the Applicant was operating various e-commerce businesses through a partnership in Alberta. The Applicant's business activities in these years have been the subject of multiple investigations and an audit in both the United States and Canada:

- i. In 2009, the United States Federal Trade Commission (the "US FTC") initiated an investigation of the Applicant and his related numbered corporations. In 2012, the Applicant reached a settlement with the US FTC.
- ii. The Competition Bureau of Canada and the Royal Canadian Mounted Police (RCMP) conducted an investigation, during which they searched and seized paper and electronic documents at the Applicant's office and residence (executed pursuant to search warrants), and commercial garbage bins outside the Applicant's office (executed without a search warrant) in April and May 2011.

In response to concerns raised by the Applicant, an arbitrator conducted a privilege review of the seized information in the possession of the Competition Bureau. This privilege review identified 90 per cent of the documents and information seized by the Competition Bureau and RCMP as protected by solicitor-client privilege. On July 20, 2018, the Competition Bureau decided not

to proceed with charges against the Applicant or his related numbered corporations.

- iii. In early 2013, the CRA commenced an audit of the Applicant's taxation for years 2008 to 2011, which is still ongoing. The CRA is concurrently auditing the Applicant's mother and the two related numbered corporations. This audit/investigation is the subject of this judicial review.

[3] In a letter, dated March 7, 2019, the Competition Bureau acknowledged to the Applicant that:

- i. It shared documents with two foreign law enforcement agencies, which had not been shared further and were destroyed; and
- ii. It shared two documents (which it identified to the Applicant) with an unnamed "Canadian law enforcement agency."

[4] The Applicant alleges that the "Canadian law enforcement agency" is the CRA.

[5] Between 2019 and 2020, the Applicant sent numerous letters to the CRA referencing privilege concerns with the documents it may be using in its audit and/or requesting a privilege review. Ultimately, the Applicant requested a third-party privilege review of all documents and information in the CRA's possession regarding the Applicant, his mother, and his two numbered corporations.

[6] In response to the Applicant's requests for a third-party privilege review the CRA provided two separate refusal letters: the First-Level Review Decision Letter dated February 11, 2021, and the Second-Level Review Decision Letter dated March 23, 2021.

[7] On April 6, 2021, the Applicant filed this application for judicial review seeking an Order:

- i. Allowing this application;
- ii. In the nature of *mandamus*, quashing and setting aside the Decision, on the basis that the CRA breached section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982, 1982, c 11 (UK)* (the "*Charter*") and/or is incorrect, and ordering the Minister of National Revenue (the "Minister") to conduct a third-party privilege review referring the matter back to the Minister for reconsideration;
- iii. In the nature of *certiorari*, quashing and setting aside the Decision, on the basis that the CRA breached section 8 of the *Charter* and/or is incorrect, and ordering the Minister to conduct a third-party privilege review referring the matter back to the Minister for reconsideration;
- iv. Costs of this application; and
- v. Any such other and further relief as this Honourable Court deems just, including but not limited to, undertaking its own privilege review of the documentation in

the possession of the CRA relating to the Applicant or appointing an *amicus curiae* to undertake a privilege review on behalf of the Parties.

III. Decision Under Review

[8] In the Second-Level Review Decision, the Minister's Delegate refused the Applicant's request for a third-party privilege review for the following reasons:

- i. The Applicant did not specify which privileged documents he claimed the CRA possessed, and instead baldly asserted that it was reasonable to conclude that during its audit the CRA accessed or relied upon privileged documentation and information.
- ii. The Applicant's assertion is predicated on his mistaken belief that the CRA possessed or relied on documents obtained from the US FTC, the Competition Bureau, or the Criminal Investigation Department.
- iii. The documents in the CRA's possession are "homogenous and simple in nature," including banking documents or invoices. Copies of these documents have been provided to the Applicant and he did not allege privilege.

[9] The Minister's Delegate reminded the Applicant that his request was made in the context of a proposed reassessment under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the "*Act*") – a reassessment had not yet commenced. The CRA had explained the basis for the proposed reassessment and recently provided electronic copies of the documents upon which the

reassessment may be based. The Applicant would be provided a reasonable amount of time to review the documents and would be able to make additional submissions in which he could raise privilege concerns.

[10] Furthermore, the Minister's Delegate informed the Applicant that if he continued to believe the reassessment (if conducted) was supported by documents obtained in breach of section 8 of the *Charter*, he may serve a notice of objection to the Minister or appeal the processes to the Tax Court of Canada or the Federal Court of Appeal in accordance with sections 165 and 169 of the *Act*.

[11] After a review of the documents and information in its possession, the CRA concluded that they do not possess any privileged documents and are not aware of any requirement to submit to a privilege review. As such, the Minister's Delegate refused the Applicant's request for a third-party privilege review.

IV. Issues

[12] The issues are:

- (1) As a preliminary issue, whether this application should be quashed on the grounds that *mandamus* (or an order in the nature thereof) is not available in this case?
- (2) As a preliminary issue, whether this application should be quashed because it is premature?

(3) As a preliminary issue, whether this Court should exercise its discretion to refuse to undertake this judicial review because an adequate alternative remedy is available through the Tax Court of Canada?

(4) Was the Decision reasonable?

V. Standard of Review

[13] The preliminary issues before this Court do not engage a standard of review.

[14] The standard of review of an administrative decision that allegedly impacts *Charter* rights is reasonableness as set out in *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*] (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 57).

VI. Analysis

A. *Preliminary issue: whether this application should be quashed on the grounds that mandamus (or an order in the nature thereof) is not available in this case?*

[15] An order of *mandamus* is a common law prerogative writ power of a superior court to order a lower court or government agent to perform a mandatory duty correctly; it is a fundamental principle that *mandamus* requires a public legal duty to act (*Canada v. Arsenault*, 2009 FCA 300 at paragraph 32, citing *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FC 742 (CA) affirmed *Apotex Inc. v. Canada (Attorney General)*, [1994] 3 SCR 1100).

[16] The Applicant argues that the CRA has a public legal duty to conduct a third-party privilege review because its administrative policies and guidelines speak to the importance of respecting solicitor-client privilege, specifically the CRA Audit Manual and Communiqué AD 10-01.

[17] The CRA Audit Manual sets out a process for an auditor if solicitor-client privilege is invoked by a taxpayer. This process instructs an auditor to seek guidance from the Department of Justice – there is no mention of a third-party privilege review. The CRA Communiqué states that privilege claims can be resolved before the courts (*i.e.*, section 231.7 of the *Act* or section 289.1 of the *Excise Tax Act*, RSC 1985, c E-15) or through alternative dispute resolution procedures (*i.e.*, use Department of Justice counsel from another office or section to review contested documents).

[18] As stated by the Minister’s Delegate in the Second-Level Review Decision, there does not appear to be either a mandatory or a discretionary duty for the CRA to undertake a third-party privilege review. The CRA administrative policies and guidelines are just that; they do not constitute a legal duty or statutory requirement. Therefore, the orders of *mandamus* sought by the Applicant are unavailable.

[19] There is no similar requirement of a legal duty for orders of *certiorari*. *Certiorari* can only be issued when the decision maker has exceeded or failed its jurisdiction or has breached the rules of natural justice. These circumstances have not arisen in this case and as such *certiorari* is also not appropriate here.

[20] The remedies that the Applicant is seeking in this case are not available to him.

B. *Preliminary issue: whether this application should be quashed because it is premature?*

[21] As the Federal Court of Appeal held in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paragraph 31, “absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course.” This principle “applies to all matters that arise during the administrative process” (*Herbert v. Canada Attorney General*), 2022 FCA 11 at paragraph 8).

[22] As stated above, the Applicant filed this application in the context of an audit and a proposed reassessment by the CRA – no Notice of Reassessment has been issued to the Applicant by the CRA.

[23] In addition, the Minister’s Delegate stated in the Second-Level Decision Review that the documents that the CRA reviewed during its audit were provided to the Applicant to review and that the Applicant would be provided the opportunity to make submissions if he had privilege concerns. Based on the Certified Tribunal Record, it appears that the Applicant was provided an opportunity to review the documents before the CRA after the filing of this application, as he claimed privilege over certain documents, and these documents were not disclosed to this Court.

[24] Furthermore, *if* a reassessment were to be conducted, the Applicant may object or appeal under sections 165 and 169 of the *Act*.

[25] This application is premature. A third-party privilege review is not necessary – both Parties have seen all the documents used for the audit and the Applicant has been able to claim privilege on certain documents.

C. *Preliminary issue: whether this Court should exercise its discretion to refuse to undertake this judicial review because an adequate alternative remedy is available through the Tax Court of Canada?*

[26] During the hearing, counsel agreed that the Tax Court of Canada has no jurisdiction to order a third-party privilege review.

[27] As stated above, *if* a reassessment were to be conducted by the CRA, the Applicant may object or appeal under sections 165 and 169 of the *Act*. In addition, the Tax Court of Canada has the jurisdiction to determine whether a breach of section 8 of the *Charter* has occurred, and if so, what the appropriate remedy would be (see for example, *SPE Valeur Assurable Inc. v. The Queen*, 2019 TCC 174; *Brown v. The Queen*, 2012 TCC 251).

[28] The refusal of this Court to undertake this judicial review, whether on the grounds of prematurity or as an exercise of its discretion, will not prevent the Applicant from opposing or appealing a reassessment if it occurs and availing himself of remedies under the *Charter*. The Applicant's appropriate remedy, if any, lies in proceeding before the Tax Court of Canada.

D. *Was the Decision reasonable?*

[29] As stated above, the standard of review of an administrative decision that allegedly impacts *Charter* rights is reasonableness as set out in *Doré (Vavilov)* at paragraph 57).

[30] Under the *Doré* framework, an administrative decision that engages a *Charter* right will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate of the decision maker. The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives, always asking whether the decision falls within a range of reasonable outcomes. The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Doré* at paragraph 56 to 57; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 at paragraph 37 to 42 and 68; *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 at paragraph 35 to 36).

[31] The Applicant argues that the Delegate's Decision refusing his request for a privilege review violates his section 8 rights, is unreasonable, and unjustifiably limits his right to be secure against unreasonable search and seizure.

[32] Section 8 of the *Charter* protects against unreasonable search and seizure. The Supreme Court of Canada in *Canada (Procureur général) v. Chambre des notaires du Québec*, 2016 SCC 20 at paragraph 27 directs that in order to determine whether a government action was contrary to section 8 of the *Charter*, a court must determine i) whether the government action intruded

upon an individual's reasonable expectation of privacy, constituting a seizure within the meaning of section 8, and ii) whether the seizure was an unreasonable intrusion on that right to privacy.

[33] A "seizure" under section 8 is the "taking of a thing from a person by a public authority without that person's consent."

[34] As stated above, there does not appear to be any mandatory duty or statutory provision in the *Act*, notwithstanding audit guidelines of the CRA, which allows or requires the CRA to perform a third-party privilege review as requested by the Applicant.

[35] On numerous occasions, including the Second-Level Review Decision, the CRA informed the Applicant that it was not relying on any document that appeared to be privileged for the purposes of its audit. Despite knowing the two documents that were provided by the Competition Bureau to "an unnamed law enforcement agency," the Applicant did not advise the CRA as to the specific two documents that he had concerns about. If the Applicant had concerns about those specific documents, it was incumbent upon him to identify those specific documents and ask for them to be returned, and for copies to be destroyed.

[36] In this case, the details of those documents were withheld from the CRA. The Respondent only became aware of the identification of those documents as a result of materials filed by the Applicant on this application.

[37] The actions of the CRA do not constitute a seizure. All documents before the CRA for the purpose of their audit were provided to the Applicant and the Applicant was able to make submissions and claim privilege over certain documents.

[38] As such, the CRA's refusal to conduct a third-party privilege review was not contrary to section 8 of the *Charter*. There is no indication that a third-party privilege review is necessary or that such a review would provide any further insight or protection to the Applicant's rights than has been afforded. As stated previously, *if* a reassessment is conducted, the Applicant may object or appeal under sections 165 and 169 of the *Act*.

[39] Therefore, the Second-Level Review Decision is reasonable. It reflects a proportionate balancing of the *Charter* protection with the statutory mandate of the decision maker. The CRA engaged reasonable possibilities to give effect to *Charter* protections fully in light of the objectives of its audit to confirm that the Applicant was fulfilling his tax obligations, following tax laws correctly, and receiving the benefits and refunds to which he was entitled. The Second-Level Review Decision falls within a range of reasonable outcomes.

E. *Conclusion*

[40] This application is dismissed. Costs to the Respondent.

JUDGMENT in T-575-21

THIS COURT'S JUDGMENT is that

1. The Application is dismissed.
2. Costs to the Respondent.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-575-21

STYLE OF CAUSE: JESSE WILLMS v ATTORNEY GENERAL OF CANADA

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