Federal Court  Cour fédérale

Date: 20110711

Docket: T-1528-10

Citation: 2011 FC 884

Ottawa, Ontario, July 11, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

EDWIN SIGGELKOW

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The present reasons for order and order arise from an order of Prothonotary Lafrenière of this Court, dated March 28, 2011, by which he dismissed the applicant's action (T-1528-10). The applicant sought to have judicially reviewed the issuance of search and seizure warrants under section 487 of the *Criminal Code*, RSC 1985, c C-46. Also, the applicant sought declaratory relief in respect to Canada Revenue Agency's capacity to obtain search warrants when investigating infractions under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) and the *Excise Tax Act*, RSC 1985, c E-15 with warrants under section 487 of the *Criminal Code*, rather than with the specific

provisions pertaining to warrants under the *Income Tax Act* and the *Excise Tax Act*. Prothonotary Lafrenière, for reasons detailed below, struck the application on the basis that it was completely bereft of any chance of success.

[2] As the same issues were arisen in the T-1523-10 and T-1524-10 files, the present order deals with the present motion brought before the Court pursuant to Rule 51 of the *Federal Courts Rules*, in the same manner as it is addressed in the other files.

I. Prothonotary Lafrenière's Order of March 28, 2011

[3] Prothonotary Lafrenière rendered an order by which the Court's inherent jurisdiction to quash application at a preliminary stage was exercised. Relying upon *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) [*David Bull Laboratories*], the Court ruled that the applications were "clearly bereft of any chance of success". The three Notices of Application alleged many grounds for review and declaratory relief pertaining to not only the individual warrants for the applicants' themselves, but also the actions and policies of Canada Revenue Agency (CRA).

[4] Firstly, Prothonotary Lafrenière was satisfied that CRA's decision to make an application for a search and seizure warrant was an "administrative and procedural step" and that, as such, it was not reviewable by the Court (*FK Clayton Group Ltd v Canada (Minister of National Revenue)*, (1988) 24 FTR 162) [*FK Clayton Group*]. Secondly, he emphasized on the fact that Justices of the

Peace issued the warrants. Hence, these decisions were not reviewable by the Federal Court as the matter of the issuance of the warrants fell “squarely within the jurisdiction of provincial courts”.

II. Analysis

[5] With respect, the motion, setting aside the order of Prothonotary Lafrenière, is granted. Prothonotary Lafrenière’s order is legally and factually sound. As will be seen below, it is to be set aside only because the materials submitted by the Applicant in support of the Rule 51 motion addressed issues that were not considered by Prothonotary Lafrenière in his order.

[6] As for seeking judicial review of the decision to issue the warrant themselves, Prothonotary Lafrenière’s Order exposes the correct elements of the law. Simply put, the Court has no jurisdiction whatsoever to review decisions of Justices of the Peace of provinces. The issuance of search and seizure warrants under the *Criminal Code* is a decision that does indeed falls squarely within the jurisdiction of provincial courts. Contrary to what some of the submitted material suggests, there is no implied hierarchy between the competence of judges, and the Court is wary of such insinuations. The same reasoning applies to the jurisdiction of the Prothonotaries of this Court are entrusted with. As such, the present motion is not granted on any basis pertaining to the Prothonotary’s jurisdiction, including the Applicant’s incorrect reading of Rule 50 of the *Federal Courts Rules*, or on the basis of any judges’ competence.

[7] This Court has benefited from further memoranda in support of the Rule 51 motion, in which the Applicant recognizes that many grounds of relief initially sought are not available to

them. In this light, the issues at the heart of the matter may not have been put clearly before Prothonotary Lafrenière. They have been put clearly before this Court, and for the following reasons, the order of March 28, 2011 is set aside.

[8] It is now apparent that what is to be considered as grounds for relief under sections 18 and 18.1 of the *Federal Courts Act*, is not the issuance of the search and seizure warrants *in and of themselves*. Rather, the argument brought forth is that CRA's practice of applying for these warrants under section 487 of the *Criminal Code* is illegal, as it "bypasses" the procedures for warrants under the *Income Tax Act* and the *Excise Tax Act*. The procedures under the *Income Tax Act* and the *Excise Tax Act* are argued to be more stringent, and are argued to be more responsive to the Applicant's rights under the *Charter*. Thus, the question is not the issuance of warrants in the Applicant's particular case, but whether, as a matter of policy, or practice, or as a simple matter of fact, if CRA's practice to proceed by the application of section 487 of the *Criminal Code* is legal.

[9] Firstly, judicial review of CRA's practice, if indeed it is common practice, to proceed under section 487 of the *Criminal Code* is in line with an expanding notion of what is to be considered as a decision or order and a matter to be reviewed under sections 18 and 18.1 of the *Federal Courts Act*. In support of this broader view of judicial review, the authority provided by the Federal Court of Appeal in the recent case of *May v CBC/Radio Canada*, 2011 FCA 130 is highly relevant.

[10] Secondly, the Respondent submits, on the basis of the cases of *Canada (Royal Canadian Mounted Police) v Canada (Attorney General)*, [2007] FCJ No 752 [*RCMP*]; *R v Multiform Advertising Co*, [1990] 2 SCR 624 [*Multiform Advertising Co*]; *R v Grant*, [1993] 3 SCR 223

[*Grant*]; and *FK Clayton Group*, that the issues of law arising from the applications have been dealt with previously by the Courts, so as to deprive the applications of any chance of success. In support of this contention, the Respondent cites the case of *LJP Sales Agency Inc. v Minister of National Revenue*, 2007 FCA 114, which holds that for such a finding to be made that the facts of the cases must be "materially indistinguishable" (para 4), as they must also not require "further development of the factual record" (para 8).

[11] *Prima facie*, the cases of *RCMP, Multiform Advertising Co, Grant* and *FK Clayton Group* are indeed arguably materially distinguishable and do require further development of the factual record. As this will likely prove to be a contentious issue at trial, suffice to say that the high threshold for quashing an application at a preliminary stage has not been met in this respect. One argument in support of this is the sole existence of litigation pertaining to the constitutionality of the search and seizure applications under the previous version of the *Income Tax Act*, which had been deemed unconstitutional by the Supreme Court in *Baron v R*, [1993] 1 RCS 416.

[12] Furthermore, it can be said that the records as they now stand do not support a contention that they do not require further development of the factual record. This can be said in light of the different statutes interpreted in the case at bar than those relevant in the aforementioned cases. Also, it can be said that more information is required as to the nature of the "decision" by CRA to proceed by applying for warrants under section 487 of the *Criminal Code*.

[13] One can do no better than to cite the words of Justice Strayer in *David Bull Laboratories* where it was said that "the direct and proper way to contest an originating notice of motion which

the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself". The same can be said of the present motion to quash the application. Surely, both parties seem to present arguable cases, and this is not a case where the application "is clearly bereft of any chance of success", when it is considered in respect to the seeking of warrants under section 487 of the *Criminal Code*, rather than under the sections of the *Income Tax Act* and the *Excise Tax Act*.

[14] As the Respondent recognized, the issues raised by the Motion to Strike were vital to the final issues of the case, and the Court's *de novo* review is warranted. Moreover, as discussed above, the wholesale quashing of the application itself was based on a *bona fides* misapprehension of the facts and issues of the case *David Bull Laboratories*. Again, many claims found in the initial Notice of Application were indeed to be stricken from the record. But the same cannot be said as to the underlying issue to be tried, which is, the legality of CRA's practice (if it is that) of proceeding under section 487 of the *Criminal Code* when applying for search and seizure warrants.

[15] As such, the motion brought under Rule 51 is granted, and the order of Prothonotary Lafrenière, dated March 28, 2011, is set aside.

[16] As the case implies the same questions of law, the proceeding for this case and the T-1523-10 and T-1524-10 files will move forward as case-managed proceedings and will be heard jointly, in a manner to be determined by the case-management judge.

[17] Prothonotary Lafrenière had ordered fixed costs against the applicant. In light of the above and the initial material submitted by the applicant, the Court will exercise its discretion under Rule

400 of the *Federal Court Rules* and no costs will be granted for the present motion or the motion to strike and shall follow the cause.

[18] As the records likely need to be perfected to reflect the present order and to better address the issues that will be dealt with at trial, the case-management judge shall set out a timeline in which supplementary submissions shall be submitted.

ORDER

THIS COURT ORDERS that

- the motion pursuant to Rule 51 of the *Federal Courts Rules* is granted;
- Prothonotary Lafrenière's order, dated March 28, 2011, is set aside;
- the proceedings will continue as case-managed proceedings, jointly with the T-1523-10 and T-1524-10 files;
- Prothonotary Lafrenière is herein designated as case-management judge;
- Costs are to follow the cause.

"Simon Noël"

Judge