Date: 20080710

Docket: T-555-08

Citation: 2008 FC 859

Ottawa, Ontario, July 10, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JORGE BARREIRO et al

Applicants

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER
(Re Motion to Strike Portions of Affidavit And Paragraphs of Notice of Application)

I. BACKGROUND

[1] The Respondent brings two motions to strike in the context of a case-managed judicial review of the circumstances involving the issuance of Requirements for Information (RFIs) under the *Income Tax Act*.

[2] The first is to strike Exhibit 6 and all references to it contained in the affidavit of Kevin Drolet, which relate to a transcript of the cross-examination on the affidavit of Wayne Fjoser, the Minister's witness in *Airth v. Canada (Minister of National Revenue – M.N.R.)* (T-1188-06).

[3] The second is to strike the relief requested in paragraphs 5 and 7 of the Notice of Application, namely, declarations of constitutional invalidity in respect of s. 241(3)*(a)* of the *Income Tax Act* and s. 462.48 of the *Criminal Code*.

II. RE: MOTION TO STRIKE PORTIONS OF THE DROLET AFFIDAVIT

[4] In the *Airth* case, Wayne Fjoser filed an affidavit as the Minister's representative. The offending part of the Applicants' affidavit of Kevin Drolet is the inclusion therein of Fjoser's cross-examination in the *Airth* proceeding. Neither the Fjoser affidavit nor many of its exhibits were attached to the Drolet affidavit.

[5] The rule in this Court regarding striking of affidavits or portions thereof is set out in *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.*, 2005 FCA 50, where the Court of Appeal held that such a motion is only justified where there is prejudice and the evidence is obviously irrelevant.

[6] While the evidence of Fjoser is not necessarily irrelevant, the evidence is prejudicial in that it is incomplete and contextualess. There is a legitimate concern with transferring evidence in one case to another without clearly establishing the contextual background. Moreover, this is not the *Airth* case itself – the present case must be proven and stand on its own merits.

[7] The Court has been advised that Fjoser will be a witness in this case. Therefore, to some extent, prejudice can be ameliorated by inclusion in his affidavit those parts of his *Airth* evidence which is necessary to add context. It was perhaps understandable that the Applicants would rely on Fjoser's evidence in *Airth* at the time of filing the Drolet affidavit since it was not known whether Fjoser would be a witness in this case.

[8] However, as understandable as that may be, it is not the proper procedure. If Fjoser had not been a witness here, the admissions and evidence could have been put to the Minister's other witness.

[9] In my view, the Applicants should have identified in the Drolet affidavit that evidence or admissions upon which they rely (as clearly the whole transcript is not in that category) with proper identification of its source (including relevant portions of affidavits, exhibits and testimony). That would afford the Respondent sufficient information to know what position to take and what evidence to adduce.

[10] Therefore, the Respondent's motion will be granted with leave to the Applicants to submit a revised affidavit conforming with these Reasons within 15 days of this Order or such other time as the parties may agree.

III. RE: MOTION TO STRIKE PARAGRAPHS 5 AND 7 OF THE NOTICE OF APPLICATION

[11] The Respondent seeks to strike the following paragraphs:

> 5. A declaration that section 241(3)(a) of the *Act* infringes sections 7 & 8 of the *Charter* in a manner that is not saved by section 1 of the *Charter* and is therefore of no force and effect, pursuant to section 52 of the *Charter*.
>
> 7. A declaration that section 462.48 of the *Criminal Code* infringes sections 7 & 8 of the *Charter* in a manner that is not saved by section 1 of the *Charter* and is therefore of no force and effect, pursuant to section 52 of the *Charter*.

[12] The Respondent's starting position is that the decision under review is that of the Minister to issue RFIs. A fair reading of the Applicants' Notice of Application is that its issues are broader than the issuance of RFIs. While the RFIs may play a central role in this matter, the Applicants attack the conduct, purpose, motive and plans of the Respondent.

[13] The basic rule for striking judicial review applications (I need not decide whether a portion of an application is to be struck) is set out in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), that such motions should only be granted when the judicial review application is bereft of any possibility of success. This is a very high threshold to meet.

[14] As I understand the Applicants' pleading, they are not seeking a bare declaration of invalidity absent some administrative action. Its declaratory relief is based upon the actions and purposes of the Respondent Minister and his officials.

[15] In seeking a declaratory relief, the Applicants had to proceed by judicial review. Prior to 1990, this type of relief was obtained by way of action under s. 17 of the *Federal Courts Act*. As the Court of Appeal has confirmed, the form of proceeding has changed but the substantive right has not. The Respondent contends that the Applicants might have obtained their remedy under s. 17. It is now the case that one must proceed for this relief under s. 18.1 which does not preclude converting a judicial review into an action.

[16] In *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, the Supreme Court held that the Federal Court has plenary jurisdiction "where an issue is clearly related to the control and exercise of an administrative agency". The Minister is such an agency and the Federal Court has jurisdiction to determine all issues related to the impugned administrative action, including the constitutionality of the legislation authorizing that action.

[17] Taking into consideration paragraphs 2, 5 and 6 of the Notice of Application, it appears that the Applicants' challenge is to the release of information under s. 241(3)*(a)* of the *Income Tax Act*. Therefore, the issue of a declaration engages the control and exercise of the Minister's administrative action. It would be premature to strike the relief under paragraph 5 at this stage as one cannot say it is bereft of any possibility of success.

[18] Section 462.48 of the *Criminal Code* operates in conjunction with s. 241 of the *Income Tax Act*, particularly s. 241(4), to create an exception to the general prohibition against disclosure of taxpayer information found in s. 241 of the *Income Tax Act*.

[19] However, even if there is some relationship between the *Income Tax Act* and *Criminal Code* provisions, the relief against s. 462.48 of the *Criminal Code* is more problematic as its nexus to the basis of the Applicants' claims is less obvious. A claim of fettering discretion and bias need not (and perhaps ought not) to be based on the *Charter* as these principles are applicable to administrative action generally as a matter of public law.

[20] Given the high threshold which the Respondent must meet in order to succeed on this motion, it is not plain and obvious that there is no relationship between the constitutionality of s. 462.48 and the Minister's inaction to object to s. 462.48 applications. It will be up to the Applicants to make out a clear case in this regard.

[21] Under the circumstances, the Court is not prepared to strike these paragraphs at this stage of proceedings. Nothing in these Reasons or Order should be taken to limit the Respondent's ability to raise all these issues before the judge hearing this judicial review.

[22] For these reasons, this part of the motion to strike is dismissed.

ORDER

FOR THE REASONS SET FORTH ABOVE, THIS COURT ORDERS:

(a) that the Respondent's motion to strike Exhibit 6 of the Kevin Drolet affidavit (3rd affidavit) and reference to the exhibit is granted with leave to the Applicants to serve and file a revised affidavit consistent with these reasons within 15 days of this Order or such other time as the parties may agree;

(b) that the Respondent's motion to strike paragraphs 5 and 7 of the Notice of Application is dismissed without prejudice to the Respondent to argue such issues in the judicial review; and

(c) costs shall be in the cause.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-555-08
STYLE OF CAUSE:	JORGE BARREIRO et al and MINISTER OF NATIONA REVENUE
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 25, 2008
REASONS FOR ORDER AND ORDER:	Phelan J.
DATED:	July 10, 2008

APPEARANCES:

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