

BETWEEN:

WILLIAM JAMES LOUGHEED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on August 15, 2011 at Hamilton, Ontario

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Bobby Sood
Lorraine Edinboro

ORDER

UPON motion by the appellant for, among other things, a declaration that the respondent is in contempt of an Order of this Court;

IT IS ORDERED that:

1. the motion is dismissed in its entirety; and
2. the respondent is awarded costs in respect of the motion in an amount fixed at \$4,550, which amount shall be payable by the appellant on or before September 30, 2011.

The Registry is directed to follow up with the case management judge

concerning the scheduling of the appeal.

Signed at Ottawa, Ontario this 26th day of August 2011.

“J. M. Woods”

Woods J.

Citation: 2011 TCC 405
Date: 20110826
Docket: 2006-2031(GST)G

BETWEEN:

WILLIAM JAMES LOUGHEED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] This is a motion brought by William James Lougheed in relation to an alleged breach by the respondent of an Order of this Court dated May 5, 2010 (the “2010 Order”). The main allegation is that the respondent is willfully withholding documents contrary to the Order. The respondent vehemently denies this. Mr. Lougheed further alleges that the respondent is attempting to run up costs and cause delays in order to exhaust his resources.

Background

[2] In 2006, Mr. Lougheed instituted an appeal in respect of a director's liability assessment issued to him under the *Excise Tax Act*. The amount payable under the assessment is \$248,222.59.

[3] In connection with the appeal, Mr. Lougheed brought a motion to, among other things, compel delivery of documents that were being withheld by the respondent. The motion was granted by order of Justice Favreau dated May 5, 2010, and the respondent was given 30 days to comply. The 2010 Order does not specify the documents to be delivered except that they are “currently being withheld.”

[4] At a show cause hearing held before me last June, Mr. Lougheed stated that he was not ready for trial because the respondent had documents that he needed. This motion was therefore scheduled, and by happenstance, it also has come before me.

[5] The relief that Mr. Lougheed seeks is reproduced in part below.

THIS MOTION IS FOR:

1. An ORDER declaring the Respondent is in Contempt of the Order of Favreau J., dated May 5, 2010 and a further ORDER allowing the Appellants' Appeal for reasons of the Respondents' failure to comply with the Order of Favreau J., dated May 5, 2010.

IN THE ALTERNATIVE,

An ORDER allowing the Appellants' Appeal for reasons that the Appellant has been found to have acted with reasonable care, skill and due diligence in this matter.

IN THE ALTERNATIVE,

An ORDER declaring the Respondent is in Contempt of the Order of Favreau J., dated May 5, 2010, and a FINAL Order to the Respondents (and also to the Trustee in the bankruptcy of EEC) to comply with the Order of Favreau J., dated May 5, 2010.

[...]

Discussion

(a) Should appeal be allowed?

[6] The first alternative relief can be readily disposed of. Mr. Lougheed seeks:

An ORDER allowing the Appellants' Appeal for reasons that the Appellant has been found to have acted with reasonable care, skill and due diligence in this matter.

[7] An order allowing the appeal based on a finding of due diligence is not appropriate in this preliminary motion. A due diligence finding can only be made after a full trial.

(b) Applications for contempt

[8] The remaining heads of relief requested each involve a declaration that the respondent is in contempt of the 2010 Order. The first head of relief requests that the declaration be accompanied by an order allowing the appeal. The third head requests that the declaration be coupled with an order for the respondent to comply with the 2010 Order.

[9] I would first comment concerning procedure in contempt applications. Section 172.4 of the applicable Rules sets out the procedure. The applicant must first apply for a show cause order and make a *prima facie* case. If granted, the show cause order will then require the person alleged to be in contempt to appear before a judge.

[10] The appellant did not follow this procedure. However, I will not pursue the matter because there was no objection to the procedure and it would not affect the outcome of the motion.

(c) Has contempt been established?

[11] Turning to the merits of the contempt allegation, Mr. Lougheed alleges that the respondent, Her Majesty the Queen, is in willful breach of the 2010 Order by deliberately withholding documents that were the subject of the Order.

[12] The evidence in support of the allegation consists of an affidavit sworn by Mr. Lougheed, with enclosures.

[13] The respondent responds to the allegation with two arguments, first that the affidavit should be struck, and second that the 2010 Order has been fully complied with.

[14] As for striking the affidavit, the respondent suggests that a substantial portion of the affidavit is improper. Counsel seems to acknowledge that if the affidavit is struck out, the appellant should be given an opportunity to file a new one. This would delay the litigation. It is not necessary to strike the whole affidavit and it is more efficient to deal with the allegation based on the relevant parts of the affidavit. I would prefer to do that.

[15] As for whether there was a willful breach of the 2010 Order, Mr. Lougheed attempts to prove this by the following sworn statements:

7. The Respondent has NOT complied with the Order and has failed to deliver the documents so Ordered; the details of the non compliance are attached,

referred to herein and follow in this Affidavit.

[...]

12. *In the Alternative*, I am respectfully asking for an Order enforcing compliance with Justice Favreaus' [sic] Order and, in that alternative, I am asking for:

Any and ALL EEC and GAMI *Source documents* (Contracts, Bank Statements, Cancelled Cheques, Shipping Manifests, Receiving Manifests, Cash Receipts, Debit or Credit Card Receipts. ALL Communications, inclusive of letters of Demand, Proof of Claims, communications to and from the Trustee in bankruptcy *that a reasonable man might use to prove or disprove a financial position or a reasonable "audit", complete with a statement of Cash Collected and Disbursements from the Trustee showing how much money is in EEC's trust account as at today's date.*

[16] Counsel for the respondent vehemently denies these allegations. In support, Mr. Lougheed was examined on his affidavit and the transcript was introduced into evidence. In addition, counsel introduced oral evidence at the hearing from Sandra McIntyre, a Canada Revenue Agency official who was the team leader on the relevant audit.

[17] The transcript of Mr. Lougheed's examination establishes that when the audit was completed, Mr. Lougheed received back 24 boxes of documents that had originally been provided to the CRA. He also acknowledged signing a receipt for this. Further, he admitted that in response to the 2010 Order, he received two large binders of documents from the respondent.

[18] Ms. McIntyre testified that subsequent to the 2010 Order she was asked by her counsel to provide everything that the CRA had. She also testified that she followed up with CRA staff in order to diligently comply with this request. There is no reason for me to doubt this testimony and I accept it.

[19] In my view, Mr. Lougheed has not made even a *prima facie* case that the respondent is willfully withholding documents. The two paragraphs from his affidavit that are reproduced above are not sufficient proof, and neither is any of the material included in the motion record.

[20] Based on transcripts of case management hearings held before the earlier motion, it appears that the respondent had a *bona fide* objection to the production of certain documents. In granting the 2010 Order, Favreau J. apparently disagreed with these objections. However, there is no reliable evidence before me that documents were being withheld without a *bona fide* reason.

[21] In paragraph 12 of his affidavit, Mr. Lougheed states that he is seeking a wide range of documents. The implication seems to be that these documents were provided to the CRA and have wrongfully been kept. I am not prepared to conclude based on the vague statement of facts in the affidavit and the attached material that this is the case. At my request, Mr. Lougheed provided at the hearing a more detailed list of documents that he are allegedly being withheld; however, this list also suffers from vagueness.

[22] In some of the material before me, Mr. Lougheed alleges that one or two CRA auditors pilfered the 24 boxes that were delivered at the commencement of an audit. The allegation seems to be that the auditors continued with this wrongful conduct, and chose to defy the 2010 Order.

[23] Even if the auditors acted in such a deceitful manner, it would not be sufficient to succeed in a contempt proceeding against the respondent because the Crown cannot be committed for contempt based on the actions of specific officers: *Kumar v The Queen*, 2004 TCC 521, 2004 DTC 3048, para 5.

[24] In any event, I am not satisfied that Mr. Lougheed has made a *prima facie* case that either of the CRA auditors wrongfully withheld documents that were contained in the boxes. It seems unlikely that CRA officers would engage in this type of deliberate conduct, and in this case greater evidence of the breach is required. There is simply not a sufficient evidentiary basis to establish even a *prima facie* case and take the contempt proceeding to the next stage contemplated by section 172.4 of the Rules.

[25] In addition to the allegation regarding withholding documents, Mr. Lougheed also states at para 8 of his affidavit that the 2010 Order was breached for failure to pay costs in a timely manner. Mr. Lougheed has not established a deliberate breach of the 2010 Order with respect to costs. It appears that there was a dispute about the amount of costs, which took many months to resolve in accordance with the Rules. There is no basis for thinking that the respondent did not have *bona fide* reasons for challenging the amount of costs requested by Mr. Lougheed.

[26] I would also comment concerning the statement at paragraph 9 of the affidavit. It reads:

9. Justice Favreaus' [sic] Order also "[placed] the burden of producing EEC documents in support of this appeal on the respondent".

[27] I mention this paragraph partly because the parties are not in agreement that the judge intended this to be part of the 2010 Order, and if so what the judge meant by the term “burden.” In light of this dispute, I suggested to the parties that this be clarified before the hearing of the appeal. In any event, I am unable to discern any allegations that such an order has been breached.

[28] Finally, during oral submissions Mr. Lougheed placed much emphasis on a decision of the Ontario Court of Justice which dismissed a criminal charge that Mr. Lougheed had deliberately failed to file an income tax return on time.

[29] I do not agree with Mr. Lougheed that the decision in the criminal matter provides support for this motion. In particular, although the judge questions the wisdom of the Crown’s decision to bring the criminal charge, she does not find that the decision was taken for an improper purpose.

[30] In conclusion, the motion brought by Mr. Lougheed will be dismissed in its entirety, with costs to the respondent.

[31] As for the amount of costs, the respondent provided me with a draft bill of costs in respect of the motion in the amount of \$4,550. These costs are quite high, but I am satisfied that are appropriate in light of the short timeframe that the respondent had to respond to allegations that were very serious. In particular, I find that it was appropriate to add a second counsel to the file, to arrange for an examination of Mr. Lougheed on his affidavit, and to arrange for a transcript of that examination. This was all done within about 10 days.

[32] The respondent will be awarded costs in respect of the motion in an amount fixed at \$4,550. This amount shall be paid by Mr. Lougheed to the respondent on or before September 30, 2011.

[33] I also canvassed the parties concerning their availability for trial. They indicated that they would be available during the week of March 5, 2012. I would direct that the Registry follow up with the case management judge concerning the scheduling of the appeal.

Signed at Ottawa, Ontario this 26th day of August 2011.

“J. M. Woods”

Woods J.

CITATION: 2011 TCC 405
COURT FILE NO.: 2006-2031(GST)G
STYLE OF CAUSE: WILLIAM JAMES LOUGHEED and HER
MAJESTY THE QUEEN

PLACE OF HEARING: Hamilton, Ontario

DATE OF HEARING: August 15, 2011

REASONS FOR ORDER BY: Hon. J.M. Woods

DATE OF ORDER: August 26, 2011

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Bobby Sood
Lorraine Edinboro

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm:

For the Respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Ontario