Federal Court  Cour fédérale

Date: 20140310

Docket: T-441-13

Citation: 2014 FC 232

Ottawa, Ontario, March 10, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

HAROLD COOMBS & JOAN COOMBS & PERCY G. MOSSOP

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an appeal from the Order of Prothonotary Aalto, made on July 2, 2013 which struck out the applicants' Notice of Application without leave to amend on the basis that the application was bereft of any chance of success. The applicant now seeks to set aside the Order and asks this Court to conduct a *de novo* review. The respondent agrees that the appeal should be considered to have been brought pursuant to Rule 51 of the *Federal Courts Rules*.

[2] As noted in the decision of the Prothonotary, the issues raised by the applicants, which arise out of the search and seizure of certain documents at 660 Eglinton Avenue East by the Canada Revenue Agency ("CRA"), have been the subject of five previous proceedings, all of which were dismissed.

[3] The respondent noted that Harold Coombs, together with others, has to date commenced a total of 14 applications and two actions against various entities and agencies of the Federal Government.

[4] On March 12, 2013, the applicants filed T-441-13 seeking declaratory relief from an illegal search and seizure in violation of sections 8 and 15 of the *Canadian Charter of Rights and Freedoms*.

[5] On October 21, 2013, Harold Coombs and Joan Coombs brought an application in this Court (T-1744-13), seeking relief for, among other things, an alleged breach of sections 8 and 15 of the *Charter* and section 231 of the *Income Tax Act*. In T-1744-13, the applicants are also seeking to have documents seized by the CRA returned. By order of Justice Hughes dated November 27, 2013, the application in T-1744-13 was consolidated with T-441-13. The respondent is moving to strike T-1744-13.

[6] Although the actions have been consolidated, a separate Order has been issued with respect to T-1744-13 and other related recent applications heard together on February 24, 2013.

[7] In T-1725-13, filed on October 18, 2013, Harold Coombs and Joan Coombs seek to quash a decision of the CRA Appeals Division, which confirmed the reassessment for taxation years between 2001 and 2007 of Select Travel Inc, a company in which Harold Coombs and Joan Coombs are majority shareholders.

[8] In T-1834-13, filed on November 7, 2013, Oleg Volochkov, Anne Volochkov, John F Coombs and Harold Coombs seek to quash a decision of the CRA Appeals Division, which confirmed the reassessment for certain taxation years between 1997 and 2008 of these individuals and Sun Air Travel Inc., a company in which Harold Coombs is president, sole director and a shareholder.

[9] By Direction of Prothonotary Aalto, dated February 13, 2014, the applications in T-1725-13 and T-1834-13 were consolidated and directed to be heard at the same time as T-441-13. The applicants argue that T-1725-13 and T-1834-13 are not simply applications to quash the decisions of the CRA Appeals Division but are applications for a *Charter* remedy. The respondent is also moving to strike these applications.

[10] All of these applications arise from a common set of facts, the details of which have been described in several other Orders of this Court and the Tax Court of Canada [“TCC”].

[11] The following background will provide a summary for the purpose of the applicants’ present appeal of the decision of Prothonotary Aalto.

Background

[12] The CRA sent a team to conduct a search at 660 Eglinton Avenue East in Toronto on September 20, 2006 pursuant to a search warrant issued under the *Criminal Code* by the Ontario Court of Justice on September 14, 2006 (the "Search Warrant"). The applicants allege and the respondent has acknowledged and the TCC has previously found that one of the members of the team that executed the Search Warrant, John Legros, was not named on the Search Warrant. John Legros assisted in the search and seizure by physically moving boxes. The applicants allege that Mr Legros seized documents that have been unaccounted for in the inventory of documents provided by the CRA. The CRA has provided a full inventory to the applicants. The applicants allege that documents they assert are now missing from their offices are not accounted for in the CRA's inventory, these documents must have been taken by John Legros and that this constitutes an illegal seizure. The CRA's affiant, Lynn Watson, who is the lead investigator and was responsible for the search of the applicants' premises, has attested that all of the documents seized were transported to the offices of the CRA and all were accounted for in the inventory.

[13] With respect to the Search Warrant, it is noted that on April 16, 2007, Harold Coombs launched an application (T-742-07) in this Court seeking to quash the Search Warrant and to regain possession of all the documents and property seized at 660 Eglinton Avenue East. On June 18, 2007, Prothonotary Aalto struck T-742-07 on the basis that the Court has no jurisdiction to set aside the Search Warrant or to order the return of any materials seized pursuant to it.

[14] On or about March 30, 2009, Mr Justice Gans of the Superior Court of Justice issued an Order instructing the CRA to retain the seized documents until such time as "the appeal period for

any civil tax court proceedings" expired. On October 10, 2013, the CRA sent a letter to Harold Coombs advising him that it would, in the near future, make an application to the Superior Court of Justice for an Order to return the seized documents. This letter includes an inventory of the seized documents and the name of the person who seized each individual item.

[15] At the hearing on February 24, 2014 of T- 441-13, T-1744-13, T-1725-13 and T-1834-13, Mr Coombs acknowledged that the CRA had made efforts to have the documents returned to him through the appropriate Court proceedings. However, he indicated that this would only result in the return of documents noted on the CRA inventory and not the documents he alleges are missing and, therefore, he was not interested in having the inventoried documents returned.

[16] On March 12, 2013, the applicants commenced the application in T-441-13, now the subject of the current appeal, seeking relief from the "illegal search and seizure" conducted on September 20, 2006 on the grounds that "John Gargos", who was not named on the Search Warrant, had seized documents on that day. The applicants allege that the search violated their section 8 and 15 rights under the *Canadian Charter* and that a remedy should be provided under section 24 of the *Charter*. The applicants also sought a declaration from this Court to have appeals heard on common evidence.

[17] On June 18, 2013, the respondent moved to strike T-441-13. On July 2, 2013, Prothonotary Aalto struck T-441-13 on the basis that the application is bereft of success and that the application amounts to an abuse of process, being frivolous and vexatious.

The decision – Prothonotary Aalto's Order

[18] The Prothonotary summarized the relief requested as follows:

> *This application seeks declaratory relief arising from an alleged illegal search and seizure that was conducted by officials of the Canada Revenue Agency (CRA) which it is alleged by the Applicants amounted to a denial of fundamental justice at a Tax Court of Canada (TCC) hearing in 2008. Specifically, the relief sought is that the appeals heard in the TCC being Nos. 2005-3602 (IT), 2005-3623 (IT) and 2005-4191 (IT) were a violation of the Charter of Rights and Freedoms (the Charter).*

[19] The Prothonotary summarised the applicant's argument, which is the same argument and theory advanced at the hearing on February 24, 2014.That argument is that: the search was executed illegally because an unnamed person participated in the search and that documents now missing are not accounted for on the inventory provided by the CRA; as such, the only possible conclusion is that the unaccounted for documents were taken by the unnamed person, "John Gagros". The Prothonotary noted that the applicants had pursued complaints to the CRA.

[20] The Prothonotary cited the TCC's judgment in *Coombs v The Queen*, 2008 TCC 289 at para 104, 2008 DTC 4004 [*Coombs TCC*]:

> [104] During that hearing, the judge indicated that there are court procedures available for the production of documents that would be available for the appellants who had appeals then under the general procedure. It was also mentioned by counsel for the Crown that procedures are in place under the Criminal Code to obtain the documents. The appellants had ample time to deal with this issue prior to the trial and they chose not to.

[21] The Prothonotary also noted that the TCC's decision was appealed and that the Court of Appeal cited approvingly the above passage, before dismissing the appeal for delay (*Coombs v Canada (Attorney General),* 2009 FCA 74 at para 10, 387 NR 361, [*Coombs FCA*]).

[22] The Prothonotary considered the applicants' argument that this application is different because subsection 24(1) of the *Charter* is invoked, but concluded that this argument is futile because the propriety of the Search Warrant and its execution have been determined in prior Court proceedings, whereas subsection 24(1) of the *Charter* is a remedial provision in play only if there is a breach of *Charter* rights.

[23] The Prothonotary remarked that, in effect, the applicants' claim amounts to a collateral attack on the 2008 decision of the TTC, which falls outside the jurisdiction of this Court. The Prothonotary concluded that this application is bereft of any chance of success, is vexatious and frivolous, and amounts to an abuse of process:

> *Mr. Coombs says that this matter is different because section 24(1) of the Charter is invoked and the other two Applicants were not party to the prior applications. Section 24(1) of the Charter does not help the Applicants. That section deals with remedies for a breach of Charter rights. The issue of the propriety of the search warrants and their execution has been determined in prior Court proceedings. This application is simply a variation on a well-worn theme.*
>
> *In effect, part of the relief sought in the notice of application is a collateral attack on the decision of the TCC from 2008. That decision was appealed to the Federal Court of Appeal and dismissed. There is no jurisdiction in this Court to review the TCC decision in question. The issues relating to the search warrants have previously been dealt with and this notice of application amounts to an abuse of process and is a frivolous and vexatious application. The application must be dismissed. In coming to this conclusion, I have reviewed carefully the Applicants' motion record and the Applicants' written submissions. However, they are not persuasive. There is ample authority as outlined in the written representations of the Respondent as to why this application is bereft of any chance of success and must be dismissed.* [Emphasis added]

The Applicants' Position

[24] The applicants submit that the Order which struck out their application for judicial review should be set aside because it concerned questions that are vital to the case and was based upon a wrong principle or a misapprehension of the facts (*Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425, [1993] FCJ No 103 (FCA) [*Aqua-Gem*]).

[25] The applicants argue that the Prothonotary erred in law and failed to consider that the language of subsection 24(1) of the *Charter* is broad enough to include the remedy of damages for breach of their rights (*Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [*Ward*]). As such, the applicants submit that the Prothonotary erred by finding that subsection 24(1) of the *Charter* has no application. The applicant also submits that the TCC does not have jurisdiction to grant the remedy sought in this application and therefore the Federal Court should assume this jurisdiction.

[26] The applicants further submit that the Prothonotary exceeded his jurisdiction pursuant to Rule 50(1)(f) of the *Federal Courts Rules* by deciding issues that concern section 7 of the *Charter*, involving their life, liberty, and security of the person. The applicants submit that their allegations and evidence clearly establish that their life, liberty, and security were at risk. Although the applicants acknowledge that their liberty may no longer be at risk, because no criminal proceedings have been instituted, they argue that their liberty has been put at risk by the uncertainty in the status of the possible criminal proceedings and the delay in receiving information about who participated in the search.

[27] The applicants also submit that the Prothonotary erred in law by relying on the Affidavit of Maria Vojnovic, because no evidence should be led on a motion to strike a notice of application (*Jodhan v Canada (Attorney General)*, 2008 FC 781 at para 16, 330 FTR 226).

[28] The applicants argue that motions to strike an application for judicial review should be resorted to only in the most exceptional circumstances, since justice is better served by allowing the application judge to deal with all the issues that are raised, given that a judicial review application proceeds in much the same way a motion to strike a notice of application would proceed, i.e. on affidavit evidence and arguments before a judge (*Eidsvik v Canada (Minister of Fisheries and Oceans)*, 2011 FC 940 at paras 24-25, [2011] FCJ No 1165 citing *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588, [1994] FCJ No 1629 (FCA) [*David Bull*]; *Amnesty International Canada v Canada (Canadian Forces*), 2007 FC 1147, 320 FTR 236 [*Amnesty*]. The applicants argue that no exceptional circumstances exist in the present circumstances to warrant striking out their application at this stage.

The Respondent's Position

[29] In response to the applicant's argument that the Prothonotary exceeded his jurisdiction by making an order "relating to the liberty of a person", contrary to Rule 50(1)(f) of the *Federal Courts Rules*, the respondent submits that the applicants' motion did not fall within any of the exceptions enumerated in Rule 50(1). Therefore, Prothonotary Aalto acted within his jurisdiction in making the Order striking out the application.

[30] The respondent further submits that there is no basis to set aside or vary the Prothonotary's Order under Rule 399, which provides a party with an opportunity to move to set aside or vary an Order made *ex parte*. In this case, the respondent notes that the motion was determined in writing, with both parties having filed materials.

[31] The respondent agreed, despite that the applicants had not referred to the appropriate rule, that Rule 51 should be relied on to appeal the Prothonotary's Order.

[32] The respondent submits that the Prothonotary's decision was not based on a wrong principle of law or a misapprehension of facts. The respondent submits that the Prothonotary correctly determined that the applicants are, in effect, seeking declaratory relief that they were denied fundamental justice at the TCC, which amounts to a collateral attack on the conclusions of the TCC, which were upheld by the Court of Appeal. Furthermore, the respondent argues that subsection 24(1) of the *Charter* does not apply in this case, as the propriety of the Search Warrant and its execution have been determined in prior Court proceedings.

[33] The respondent submits that the Prothonotary has jurisdiction to strike an application for judicial review where such an application is clearly "bereft of any possibility of success" (*David Bull, supra* at para 15).

[34] The respondent notes that this Court has already struck five prior applications brought by Harold Coombs for want of jurisdiction.

The Issues

[35] The issues are: whether the decision of Prothonotary Aalto should be set aside because he applied the wrong legal test in determining whether to strike the applicant's application for judicial review; and, if the decision is set aside, whether, on a *de novo* review, the Court should dismiss the respondent's motion to strike and order that the application be heard on its merits.

The Standard of Review of a Prothonotary's decision

[36] In *Apotex Inc v Eli Lilly Canada Inc*, 2013 FCA 45 at para 4, 444 NR 103, the standard of review previously established in *Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425, [1993] FCJ No 103 (FCA) and restated at para 19 of *Merck & Co v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459, leave to appeal to SCC refused [2004] SCCA No 80, was reiterated:

> It is trite law that discretionary orders of Prothonotaries ought not to be disturbed on appeal to a Judge unless:
>
> > (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of facts; or
> >
> > (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case.
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> (*Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 at paragraph 18, endorsing *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 at 462-463 (F.C.A.)).

[37] The applicants submit that the questions are vital to the final issue of the case and that the order of the Prothonotary was wrong.

The Prothonotary did not err

[38] I have considered whether the Order of Prothonotary Aalto is clearly wrong, i.e. whether he exercised his discretion based upon a wrong principle of law or upon a misapprehension of facts.

[39] Prothonotary Aalto fully considered and understood the applicants' arguments and the premise the applicants relied on to argue that their *Charter* rights were breached. He also applied the correct legal test. The Prothonotary did not err; he did not base his decision on a wrong principle of law nor did he misapprehend the facts.

[40] Although the question at issue would be vital to the final issue in the case, given that once the application is struck, the matter is concluded, the test requires the Prothonotary to have exercised his discretion improperly. This is not the case.

[41] The Prothonotary correctly determined that the applicants are, in effect, seeking a declaration they were denied fundamental justice at the TCC, which amounts to a collateral attack on the conclusions of the TCC, which were upheld by the Court of Appeal. In fact, even though a *Charter* breach was not directly in issue in the TCC, Justice Woods in *Coombs TCC*, *supra* at paras 101-106, nevertheless considered allegations concerning the propriety of the Search Warrant and its execution:

> 101 Before concluding these reasons, I wish to make a comment about a procedural issue raised by Mr. Coombs in argument.
>
> 102 The procedural issue has to do with a seizure of records in the course of a criminal investigation against a number of individuals, including Harold Coombs, in September of 2006. Mr. Coombs argues that the seizure has caused prejudice to the appellants in

> reference to these appeals because they have not had the necessary documents to properly prepare their cases.
>
> 103 I do not think that the appellants can complain of unfairness in this regard. I would note that this issue was raised in a case management hearing before Justice Bowie on July 30, 2007.
>
> 104 During that hearing, the judge indicated that there are court procedures available for the production of documents that would be available for the appellants who had appeals then under the general procedure. It was also mentioned by counsel for the Crown that procedures are in place under the Criminal Code to obtain the documents. The appellants had ample time to deal with this issue prior to the trial and they chose not to.
>
> 105 Mr. Coombs argued that these steps would not have been fruitful because it appeared that some of the documents are no longer in the Crown's possession. Mr. Coombs' theory is that they were likely taken by a CRA official who, according to Mr. Coombs, illegally participated in the search and seizure. First, I note that this is an unproven allegation on which there is not a sufficient evidentiary basis to support it. I reject any notion that an official from the CRA is hiding documents in this case.
>
> 106 I am also not satisfied that the seizure was illegal even if someone not named in the warrant was invited to participate by the officer in charge. In this regard, I note the decision of the Supreme Court of Canada in *R. v. Strachan*, [1988] 2 S.C.R. 980 and the decision of the Nova Scotia Court of Appeal in *R. v. B.*, 52 C.C.C. (3d) 224. [Emphasis added.]

[42] This very same passage was cited by the Court of Appeal in dismissing the appeal due to delays (*Coombs FCA*, *supra* at para 10).

[43] The Prothonotary was therefore justified in reaching the conclusion that he did, namely, "the issues relating to the search warrants have previously been dealt with and this notice of application amounts to an abuse of process and is a frivolous and vexatious application…" and that "there is

ample authority as outlined in the written representations of the Respondent as to why this application is bereft of any chance of success and must be dismissed."

[44] Although the applicants contend that in the earlier proceedings they did not seek relief pursuant to section 24 of the *Charter* for breaches of their section 8 and 15 rights (the applicant also referred to a breach of section 7), the circumstances that the applicants rely on in these allegations are the very same circumstances considered by the TCC. The allegations of *Charter* breaches all stem from the allegations regarding the search and seizure of documents. Justice Woods clearly rejected the bald allegations that an official of CRA is hiding documents. In addition, Justice Woods noted that the Supreme Court of Canada had established in *R v Strachan*, [1988] 2 SCR 980, 56 DLR (4th) 673 [*Strachan*] that the participation of a person not named in the search warrant does not invalidate the warrant or its execution. These are the very same allegations and, whether characterized as a *Charter* breach or otherwise, the issues have been previously determined.

[45] The applicants' argument that *Strachan* should be distinguished because in that case, the officer in charge of the search attempted to seek judicial authorization by advising the judge that two other officers would participate, does not change the fact that the Supreme Court of Canada clearly indicated at para 29:

> This requirement is met when the officer or officers named in the warrant execute it personally and are responsible for the control and conduct of the search. The use of unnamed assistants in the search does not violate the requirement of s. 10(2) so long as they are closely supervised by the named officer or officers. It is the named officers who must set out the general course of the search and direct the conduct of any assistants. If the named officers are truly in control, participate in the search, and are present throughout, then the use of assistants does not invalidate the search or the warrant.

[46] The Court did not put any additional caveats on this general proposition.

[47] The Prothonotary did not err in permitting the respondent to submit the affidavit of Maria Vojnovic. This affidavit merely put the previous decisions and orders of this Court, the TCC and the Federal Court of Appeal, all of which are matters of public record, before the Prothonotary.

[48] The Prothonotary acted within his jurisdiction as conferred by Rule 50 of the *Federal Courts Rules*. Rule 50 provides that a Prothonotary may make any necessary orders relating to a motion, except, among other circumstances, in a motion relating to the liberty of a person. While the applicants have alleged a breach of section 7 of the *Charter* and an infringement of their life, liberty and security of the person, the Prothonotary's decision was not related to the applicants' liberty, but whether the applicant's matter was bereft of success because it has already been dealt with by the TCC and the Court of Appeal. In this case, the applicants' bare allegations that their liberty is at stake, or was previously at stake, in light of a previous finding of the TCC that the search was not illegal and the allegations were bald, do not oust the Prothonotary of his jurisdiction pursuant to Rule 50.

[49] Although motions to strike an application for judicial review should not be made except in the most exceptional circumstances, I disagree with the applicants that no such exceptional circumstances exist in the present case. The circumstances are indeed exceptional given the multiplicity of proceedings brought by the applicants all arising from the same set of facts, all with various nuances in an attempt to package the applications as new and different. These circumstances

clearly justify the exercise of the Prothonotary's discretion to strike the application. The applicant relied on *Amnesty* in which Justice Mactavish summarised the principles governing motions to strike. Those principles are not in dispute and were applied correctly by the Prothonotary. It is true that different considerations are at play when considering whether to strike out a Notice of Application for Judicial review than a statement of claim.

[50] In *Amnesty*, *supra* at paras 26-27, Justice Mactavish noted:

> [26] As a result, the Federal Court of Appeal determined that applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success".
>
> [27] The Federal Court of Appeal further teaches that "Such cases must be very exceptional and cannot include cases ... where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion": *David Bull*, at ¶15.

[51] The Prothonotary reached the conclusion that the merits of the application were "so clearly improper as to be bereft of any possibility of success".

[52] With respect to the applicants' argument that they are entitled to approach this Court for a remedy pursuant to section 24 of the *Charter*, in accordance with the decision of the Supreme Court of Canada in *Ward,* I note that the applicants do not appear to appreciate that a remedy pursuant to section 24 must be based on a breach of a *Charter* right. Although the applicants assert that their applications differ from earlier applications because they now allege breach of *Charter* rights, as noted above, the applicants rely on the very same facts to support the alleged *Charter* breach that were found by the Tax Court of Canada to not constitute an illegal search. The Prothonotary addressed this issue and noted:

> *Mr. Coombs says that this matter is different because section 24(1) of the Charter is invoked and the other two Applicants were not party to the prior applications. Section 24(1) of the Charter does not help the Applicants. That section deals with remedies for a breach of Charter rights. The issue of the propriety of the search warrants and their execution has been determined in prior Court proceedings. This application is simply a variation on a well-worn theme.*

[53] The applicants have not established that the decision of the Prothonotary should be set aside. Moreover, the applicants have made the same arguments before me as they made before Prothonotary Aalto and, in so doing, had yet another opportunity to raise the same issues, just as if they had a *de novo* review. If I had concluded that the Prothonotary erred, which I have not, and had conducted a *de novo* review, I would arrive at the same conclusion: that the application is an abuse of process and must be dismissed. Despite the applicants' commitment to pursuing every possible option, repackaging or re-characterizing the same application time and time again with the same allegations that have previously been adjudicated upon will not open up new avenues of relief or yield a different result.

[54] The application is dismissed.

ORDER

THIS COURT ORDERS that the application is dismissed.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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Sonia Singh	FOR THE RESPONDENT

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