

Date: 20090219

Docket: T-841-08

Citation: 2009 FC 184

Vancouver, British Columbia, February 19, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

DOUGLAS STEPHEN CUNLIFFE

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The Minister of National Revenue (the “Applicant”) seeks an Order pursuant to the *Federal Courts Rules*, S.O.R./98-106 (the “Rules”) that Mr. Douglas Stephen Cunliffe (the “Respondent”) is in contempt of this Court.

II. Background

[2] The Applicant is the Minister responsible for the administration of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “Act”). The Respondent is a resident of Victoria, British Columbia.

[3] Pursuant to an application, the Applicant obtained an Order dated June 23, 2008, requiring the Respondent to comply with a requirement to provide certain information and documents relating to his assets and liabilities (the “Compliance Order”). A certified copy of the Compliance Order was submitted as Exhibit A-1.

[4] By further application, the Applicant obtained an Order dated October 27, 2008, (the “Show Cause Order”) directing the Respondent to appear on December 8, 2008, and show cause why he should not be found in contempt of this Court. A copy of the Show Cause Order was submitted as Exhibit A-2.

[5] On December 8, 2008, the within matter was called for hearing. By direction of the Court the usher called out the Respondent’s name both in the area adjacent to the Courtroom and in the building foyer. There was no response. The Respondent did not identify himself in the Courtroom. The Respondent did not appear for the hearing on December 8, 2008.

[6] Two witnesses appeared on behalf of the Applicant, Ms. Melanie Kim Walch and Mr. Geoffrey Brian Harris. Ms. Walch is a Collections Officer with Canada Revenue Agency,

Vancouver Island Tax Services Office in Victoria, British Columbia. She was assigned to the Respondent's tax collection file in April 2008 with the task of pursuing avenues for the collection of his outstanding tax debt. She testified that the tax debt related to the Respondent's self-assessed tax returns for 1997 and 1998.

[7] Ms. Walch identified a document called "Requirement to Provide Information and Documents" (the "Requirement") dated October 10, 2007. This document was entered as Exhibit A- 3. Ms. Walch said that according to the diary maintained by the Department, the Requirement to Pay (?) was personally served on the Respondent. He was given thirty (30) days to provide the information requested, that is, information about the location of certain share certificates in his name with the Bank of Montreal, as well as a detailed accounting of his assets and liabilities.

[8] Ms. Walch testified that the Respondent did not provide the requested information, but he sent a letter dated June 12, 2008. The Respondent said that he had no income, no assets and "now no debts other than to my family." According to Ms. Walch, the letter was found to be non-responsive to the Requirement. A copy of the letter was entered as Exhibit A-4.

[9] After receipt of the letter of June 12, 2008, the CRA applied to the Court for a Compliance Order; that is, for an Order requiring the Respondent to comply with the Requirement. The Compliance Order was issued on June 23, 2008. Ms. Walch testified that she personally served the Compliance Order on the Respondent on July 9, 2008. She said that she was satisfied that the Respondent was served because he identified himself.

[10] Once again, the Respondent was given 30 (thirty) days to provide the requested information and documents. Ms. Walch testified that as of December 8, 2008, the CRA had not received any of the requested information and documents. Instead, the Respondent sent a letter dated July 18, 2008 to the Department of Justice, Government of Canada. This letter was passed on to the CRA. This letter, which was entered as Exhibit A-5, was considered to be non-responsive to the Compliance Order since it did not provide specific details about the Respondent's assets and liabilities.

[11] The Respondent sent a third letter dated October 23, 2008, to the Department of Justice. Ms. Walch received a copy of this letter from the Department of Justice. Again, the CRA did not consider this letter to be responsive to the Compliance Order. This letter was entered as Exhibit A-6.

[12] Ms. Walch then addressed the Show Cause Order. She said that she had personally served this Order upon the Respondent on November 7, 2008.

[13] Ms. Walch then testified about corporate searches that she had conducted. She produced a document dated November 4, 2008, which she identified as a B.C. Company Search that she undertook for Elephant Bay Holdings Inc. This document was entered as Exhibit A-7. The search showed that Elephant Bay Holdings Inc. is an active company and that the Respondent is a director.

[14] Ms. Walch also produced a document that is a copy of the Central Securities Register for Elephant Bay Holdings Inc. This document shows that the Respondent holds one share in that

company. The document was obtained by Ms. Walch in response to a Requirement to Provide Information and Documents that was sent to Elephant Bay Holdings Inc. The copy of the Central Securities Register was entered as Exhibit A-8.

[15] Ms. Walch then produced a copy of a Land Title Search printout dated November 8, 2008. The document shows that Elephant Bay Holdings Inc. owns a property in the Sayward District on Vancouver Island. The document was entered as Exhibit A-9.

[16] Next, Ms. Walch produced a British Columbia Assessment Search that she conducted on Elephant Bay Holdings Inc. This document shows that the property owned by the Company is located on Maurelle Island and consists of 138 acres. The approximate value of the land in 2007 was \$600,000. This Assessment Search record was entered as Exhibit A-10.

[17] Ms. Walch then testified about banking searches that she conducted in Victoria at VanCity. She obtained a bank statement that shows that the Respondent had signing authority on a Stratford Corporation bank account. She testified that she determined that Stratford Corporation is not incorporated and that the CRA never issued it a business number. She learned that the Respondent has signing authority and that there are three accounts at VanCity.

[18] In this regard, Ms. Walch produced a document that purports to show that the Respondent has signing authority on the Stratford Corporation account with VanCity. She also produced a document purporting to show that Stratford Corporation maintains three accounts at VanCity.

Counsel for the Applicant asked that the Court admit the documents as exhibits, notwithstanding the fact that the documents do not meet the requirement for admissibility of banking records pursuant to subsection 37(6.1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 since they are not certified documents.

[19] Ms. Walch testified that she went to VanCity on November 6 and requested information. A ruling on admissibility of the bank statements was reserved.

[20] Then Ms. Walch produced a British Columbia Company Search that she conducted for C.T. Properties Limited. This search shows that C.T. Properties Limited is still active and that the Respondent is both a director and officer of the Company. The document was entered as Exhibit A-11.

[21] Ms. Walch produced two more records of corporate searches, the first for C.T. Construction Limited and the second for Specialty Trading Inc. In both instances, the Respondent was shown to be both a director and an officer. The search for C.T. Construction Limited was entered as Exhibit A-12 and the search for Specialty Trading Inc. was entered as Exhibit A-13.

[22] Ms. Walch testified that she conducted the company searches to determine if the Respondent was operating any businesses and earning income.

[23] Ms. Walch produced a document dated December 16, 2004. It is a declaration from the Bank of Montreal showing that the Respondent is the registered owner of Bank of Montreal shares. She testified that she believes that the Respondent is still the registered owner of the shares since the CRA receives quarterly dividends from the Bank of Montreal. The Declaration of Shares was entered as Exhibit A-14.

[24] Ms. Walch testified that the Respondent did not provide the CRA with the information requested about his assets and liabilities. The CRA collected information as a result of the various searches that it undertook.

[25] Then Ms. Walch testified that the documents that were entered as Exhibits A-7 to A-14 were personally served on the Respondent on November 7, 2008.

[26] Finally, Ms. Walch was shown a letter dated December 3, 2008. She identified this as a letter that was received from the Respondent. The letter was sent to the Department of Justice who forwarded a copy to the witness by facsimile. Paragraph 3 of the letter reads as follows:

I cannot accede, in all good conscience, to this process and its pre-determined result. Please review my previous 3 letters and attachments. I have written to you in this matter because only you in your capacity as Deputy Minister, in such a process, can re-direct this matter to avoid a perversion of justice, and the bringing of the administration of justice into disrepute. You have chosen not to respond.

[27] Ms. Walch said that the “little operating account” mentioned by the Respondent is the Stratford Corporation’s bank account at VanCity. She said her knowledge in that regard is based upon her actions in issuing a requirement to pay to that branch on November 6. The letter of December 3, 2008, from the Respondent was entered as Exhibit A-15.

[28] Mr. Geoffrey Brian Harris was the second witness called on behalf of the Applicant. He is employed as a Resource Officer/Complex Case Officer with the CRA in Victoria. He was asked to serve certain documents on the Respondent. He testified that he served the Central Securities Register for Elephant Bay Holdings Inc., Exhibit A-8, on the Respondent by personal service on November 14, 2008, by attending at the Respondent’s home and asking for the Respondent. He said that the Respondent identified himself and he served the document.

III. Discussion and Disposition

[29] This is a motion for an Order pursuant to Rule 466 of the Rules. Rule 466(b) is relevant and provides as follows:

Contempt	Outrage
466. Subject to rule 467, a person is guilty of contempt of Court who	466. Sous réserve de la règle 467, est coupable d’outrage au tribunal quiconque :
...	...
(b) disobeys a process or order of the Court;	b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;

[30] Rule 467 is also relevant and provides as follows:

Right to a hearing

467. (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt

(a) to appear before a judge at a time and place stipulated in the order;

(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(c) to be prepared to present any defence that the person may have.

Droit à une audience

467. (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint :

a) de comparaître devant un juge aux date, heure et lieu précisés;

b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;

c) d'être prête à présenter une défense.

[31] Rule 470 provides that evidence in a contempt proceeding shall be oral. Rule 470 provides as follows:

Evidence to be oral	Témoignages oraux
470. (1) Unless the Court directs otherwise, evidence on a motion for a contempt order, other than an order under subsection 467(1), shall be oral.	470. (1) Sauf directives contraires de la Cour, les témoignages dans le cadre d'une requête pour une ordonnance d'outrage au tribunal, sauf celle visée au paragraphe 467(1), sont donnés oralement.
Testimony not compellable	Témoignage facultatif
(2) A person alleged to be in contempt may not be compelled to testify.	(2) La personne à qui l'outrage au tribunal est reproché ne peut être contrainte à témoigner.

[32] The burden of proof in a contempt hearing lies upon the moving party, in this case the Applicant. According to the decision in *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217, contempt of court is a matter of criminal or quasi-criminal jurisdiction. The constituent elements of contempt must be proven beyond a reasonable doubt.

[33] In the present case, the first matter to be addressed is whether the Respondent had notice of the hearing that was held on December 8, 2008. On the basis of the oral evidence of Ms. Walch, I am satisfied that the Respondent was personally served with the Show Cause Order that was issued by Prothonotary Lafrenière on October 27, 2008.

[34] The Show Cause Order specifically ordered that the Respondent be served with the following documents:

2. The Applicant shall, no later than November 14, 2008, serve the Respondent personally with a copy of this Order, a list of the witnesses that the Applicant intends to call at the hearing, and copies of documents that the Applicant will adduce at the hearing that have not to date otherwise been filed on the Court record.

[35] On the basis of the oral evidence of Ms. Walch and Mr. Harris, I am satisfied that the Respondent was served with the documents that were entered as Exhibits A-7 to A-14, inclusive.

[36] The banking documents that Ms. Walch obtained from VanCity will not be entered as exhibits since they fail to comply with the requirements of subsection 37(6.1) of the *Canada Evidence Act* which provides as follows:

Evidence

(6.1) The court may receive into evidence anything that, in the opinion of the court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence.

Preuve

(6.1) Le tribunal peut recevoir et admettre en preuve tout élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut fonder sa décision sur cet élément.

[37] These records are not certified.

[38] Counsel for the Applicant asked that the documents be admitted in the exercise of my discretion. Since a contempt proceeding is akin to a criminal prosecution where the Applicant bears the burden of proof, the onus lies on the Applicant to submit properly certified documents if he

wants to rely on such documents. In any event, in my opinion the documents in question are not relevant to the issue now before the Court, that is, whether the Respondent is in contempt of the Compliance Order that was issued on June 23, 2008. Further, there is no evidence that these documents were served on the Respondent in accordance with the Show Cause Order of October 7, 2008.

[39] The Compliance Order provides as follows:

- d) names and branches of all banks where the Respondent maintains accounts or safety deposit boxes or both, including information detailing amounts on deposit as of October 11, 2007;
- e) details of all brokerage accounts maintained by the Respondent, whether or not registered in his name, providing names and addresses of brokers, balances due as at October 11, 2007 with long and short positions of each stock;
- f) details of all bonds, common shares and preferred shares owned by the Respondent, whether or not registered in his name, including the individual cost per share and the current location of each security;
- g) details of all real property owned by the Respondent, whether or not registered in his name including the legal description, and amount of any encumbrances;
- h) details of all insurance carried by the Respondent, with names of insurance companies, face value of policies, policy numbers, cash surrender values and accrued dividends where applicable and location of policies;
- i) details of all mortgages and loans receivable in which the Respondent has a beneficial interest, giving details of amounts due to the Respondent as of October 11, 2007, dates of registration and legal description of the property encumbered. Where applicable provide terms of repayment, maturity date, and names of addresses of all mortgagors or other debtors;

j) details of all mortgages and loans payable by the Respondent as of October 11, 2007, including the current market value of all security given, together with a legal description of all property pledged;

k) details of all automobiles, owned by the Respondent, as of October 11, 2007, including year, style and make of car, license number, names and addresses of lien holders or encumbrances and cost of each vehicle;

l) full details of any other assets owned by the Respondent, whether or not registered in his name, but not included in the foregoing;

m) details of all money received from employment and other sources during the period January 1, 2005 to October 11, 2007, including the names and addresses of the payer and the nature of the payments;

n) details of unsatisfied judgments against the Respondent, including the nature of the debt and name and address of judgment creditor; and

o) for the period between January 1, 2005 to October 11, 2007, a list with the dates and individual amounts of all payments made to any pension trust, fund or other type of annuity giving the exact location of such pension trust and the current amount standing to the Respondent's credit and/or the credit of the beneficiaries;

THIS COURT FURTHER ORDERS pursuant to section 231.7 of the *Income Tax Act* that the Respondent shall comply with the notice issued by the Minister and shall forthwith, and in any event not later than 30 days after being served with this Order, provide the Information and Documents to a Canada Revenue Agency officer acting under the authority conferred by the *Income Tax Act* or other person designated.

[40] I am satisfied that the Respondent did not satisfy the terms of this Order. His letter of June 12, 2008 that was entered as Exhibit A-4 is not relevant since this letter preceded the issuance of the Compliance Order and nothing else is the subject of this hearing.

[41] The second letter from the Respondent is dated July 18, 2008, and is Exhibit A-5. This letter provides, in part, as follows:

It has been over a month now since you received my letter of June 12th instant (see attached), and I have not received any response from you to the serious concerns raised therein. In fact, all that you have done is to proceed to take your odd judgement (attached) against me personally, notwithstanding my concern in that regard as well.

The real issue here is this, in a nut shell: Who in your Agency placed an Agency lien for \$2.2 Million against my sole asset of value, BC-registered company C.T. Properties Ltd. In 2004, and why it was placed? What benefit did it achieve, and what compensation will your Agency pay to the company shareholders (i.e. myself and brother)? After a forced appeal and many months causing irretrievable damage to the company, myself and family, the lien was quietly removed without comment. (There are other transgressions, but this the worst). The Agency has just posted a \$20 Billion surplus. So why not give some of that back? A lot of people have been injured here.

[42] Ms. Walch, as an employee of the Applicant, testified that this letter was not responsive to the Compliance Order because the letter did not provide the information and documents that were originally requested under the requirement to provide such information and documents.

[43] In my view, it is within the authority of the Applicant to decide whether a response from a taxpayer, such as the Respondent, is an adequate reply to a Requirement to Provide Information and Documents. In any event, if it is open to this Court to assess the “responsiveness” of the Respondent’s letter, I agree with the Applicant that the letter does not provide the material sought to be produced by the Compliance Order.

[44] The same applies to the letter from the Respondent dated October 23, 2008, entered as Exhibit A-6. The main message in this letter is that the actions undertaken by the CRA are inappropriate and unnecessary.

[45] Again, it is for the Applicant to assess whether this letter satisfies the Compliance Order. According to Ms. Walch, it did not. In my opinion, that assessment is reasonable.

[46] Finally, I refer to the last letter sent by the Respondent, that is, the letter dated December 3, 2008, which was entered as Exhibit A-15.

[47] This letter appears to be an objection to steps undertaken by the CRA in attaching funds on deposit in a bank account. The within matter is not dealing with any steps that were undertaken by the Applicant to collect any monies from the Respondent. Any complaints in that regard should be made in another forum. This letter is of limited relevance to the present proceeding.

[48] In any event, Ms. Walch testified at the end of her evidence that the Respondent did not provide any information about “my little operating account” other than the statements he made in the letter of December 3, 2008.

[49] In *Lyons Partnership, L.P. v. MacGregor* (2000), 5 C.P.R. (4th) 157, the Court said that the Rules codify the common law of contempt. The moving party, here the Applicant, must prove beyond a reasonable doubt that the alleged contemtor had personal knowledge of the Court order

in issue, that he was a primary actor, expressly or impliedly, in the conduct that is the subject of the motion, and that he possessed the necessary *mens rea* or intention to disobey the Court order.

[50] In the present case, I am satisfied that the Applicant has discharged his burden of proof, that is, proof beyond a reasonable doubt, with respect to the three elements. The Applicant personally served the Respondent with the Compliance Order of June 23, 2008. The Compliance Order was directed to the Respondent only, so he was the primary actor who was responsible for replying to and satisfying the Compliance Order. The necessary mental element, that is, the intention or *mens rea* to fail to comply with the Compliance Order, can be inferred from the Respondent's failure to provide the requested information and documents.

[51] In the result, I am satisfied that the Applicant has met the test for a finding that the Respondent is in contempt of an Order of this Court and an Order will issue accordingly.

[52] Rule 472 deals with the penalties that may be imposed after a finding of contempt. In *Canadian Human Rights Commission v. Winnicki* (2007), 359 N.R. 101, (F.C.A.) the Federal Court of Appeal instructed that a person should be given an opportunity to make submissions on the appropriate penalty before the Court addresses that issue. A further hearing shall be held in that regard.

ORDER

THIS COURT ORDERS that:

1. The Respondent is guilty of contempt as he failed to comply with the Order of the Court dated June 23, 2008;
2. The Applicant shall serve the Respondent with a certified copy of the written Reasons for Order and Order no later than March 15, 2009, and file proof of service with the Registry of this Court;
3. The Applicant shall advise the Court in writing, on or before March 10, 2009, of a proposed date for a sentencing hearing and Directions will issue as to the process to be followed, including Directions as to further Notice to the Respondent about the date for the sentencing hearing and the filing of written submissions; and
4. Costs will be addressed at the sentencing hearing.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-841-08

STYLE OF CAUSE: MNR v. DOUGLAS STEPHEN CUNLIFFE

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: December 8, 2008

**REASONS FOR ORDER
AND ORDER:** HENEGHAN, J.

DATED: February 19, 2009

APPEARANCES:

Erica Louie	FOR THE APPLICANT
No appearance	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada Vancouver, BC	FOR THE APPLICANT
N/A	FOR THE RESPONDENT