

Federal Court



Cour fédérale

Date: 20130207

Docket: T-2045-11

Citation: 2013 FC 133

Ottawa, Ontario, February 7, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

**THE MONEY STOP LTD and
TEL SUTHERLAND**

Respondents

REASONS FOR ORDER AND ORDER

Mr. Sutherland and The Money Stop Ltd., his business, have had every opportunity to satisfy an Order of this Court, or to purge their contempt, but have not done so. They chose not to attend their sentencing hearing.

Background

[1] The Minister of National Revenue required certain financial records in order to conduct an audit of The Money Stop Ltd, a “payday lender” with three locations in Alberta and whose director is Tel Sutherland.

[2] The Canada Revenue Agency [CRA] requested this information in July and August 2011, and it further asked that it be provided by October 2011. The respondents failed to comply.

[3] The Minister initiated an application for an order of compliance pursuant to section 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th supp), which Justice Harrington granted on February 6, 2012. The respondents did not comply with Justice Harrington’s Order.

[4] As a consequence of their failure to comply with Justice Harrington’s Order, the Minister initiated contempt proceedings. By Order dated April 3, 2012, Justice Gleason directed that the respondents appear before this Court to answer the allegation that they were guilty of contempt.

[5] At the contempt hearing on July 3, 2012, the respondents admitted that they had not complied with Justice Harrington’s Order. Based on that admission, and being satisfied that all other requirements had been met, on July 4, 2012 I issued an Order finding the respondents in contempt but permitted them a further period of 30 days to provide the following six items of information, failing which the Minister was at liberty to proceed with a request that this Court sentence the respondents for their contempt:

- a. The password and username for the electronic version of the respondents' QuickBooks records previously provided on an USB key;
- b. Individual cheque cashing transaction information in electronic format on a USB key, including password and username;
- c. Bank statements, cancelled cheques, and duplicate deposit books for all business bank accounts;
- d. Corporate Minute Book;
- e. Completed RC59, *Business Consent Form*, to allow the Canada Revenue Agency to deal with the individual or firm who prepared the amended Corporate Tax Returns; and
- f. Personal bank statements and cancelled cheques for 2006, 2007, 2008 and 2009.

[6] The Minister filed evidence that the respondents have failed to comply, they have failed to provide those six items, and accordingly the Minister asks that the respondents be sentenced now for their contempt.

[7] The sentencing hearing came on by way of videoconference between the Court in Ottawa, Ontario, and Edmonton, Alberta, on Tuesday, January 29, 2013. The respondents were properly served with notice of the hearing and, in fact, Mr. Sutherland had been in contact with the Court Registry prior to that date, making it clear that he was aware of the hearing. Nonetheless, and despite providing additional time for them to appear in case they were late, the respondents failed to

appear before the Court on January 29, 2013. In addition to having been served with the notice of hearing, the respondents had previously been served and were aware of the sentence that the Minister was seeking for their contempt. Further, I also specifically asked the applicant and the Court Registry to inform me if the respondents contacted either of them subsequent to the sentencing hearing. As of this date, neither has so informed me nor have the respondents apparently attempted to communicate with the Court in any way.

[8] The Minister filed additional affidavit evidence on this hearing which proves that, although the respondents “delivered five boxes of documents to a hotel near the offices of the CRA,” they failed to provide to the Minister with the following:

- a. The password and username for the electronic version of the respondents’ QuickBooks records previously provided on an USB key;
- b. Individual cheque cashing transaction information in electronic format on a USB key, including password and username;
- c. Corporate Minute Book;
- d. Completed RC59, *Business Consent Form*, to allow the Canada Revenue Agency to deal with the individual or firm who prepared the amended Corporate Tax Returns; and
- e. Personal bank statements and cancelled cheques for 2006, 2007, 2008 and 2009.

Further, although the respondents provided the Minister with some business bank statements and cancelled cheques, they did not provide those listed on Schedule A attached hereto.

[9] The respondents have provided no evidence either through affidavit or oral testimony to dispute the Minister's evidence, which the Court therefore accepts. I remain satisfied beyond a reasonable doubt that the respondents remain in contempt.

[10] The Minister submits that the following sanctions are warranted and appropriate:

- (a) a fine of \$5,000 plus solicitor-client costs, to be paid within 30 days, failing which Tel Sutherland is to be imprisoned for 30 days; and
- (b) an order that the information set out in my Order dated July 4, 2012, other than that since provided, be provided to the Minister within 30 days of service of this Order, failing which Tel Sutherland is to be imprisoned until the respondents comply.

The Minister proposes other terms involving safeguards in case payment or disclosure is not possible, and the provision of warrants in the case of non-compliance.

[11] Rule 472 of the *Federal Courts Rules* outlines the Court's jurisdiction regarding penalties for contempt:

472. Where a person is found to be in contempt, a judge may order that

(a) the person be imprisoned for a period of less than five years or until the person complies with the order;

(b) the person be imprisoned for a period of less than five years if the person fails to comply with the order;

472. Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :

a) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;

b) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;

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| (c) the person pay a fine; | c) qu'elle paie une amende; |
| (d) the person do or refrain from doing any act; | d) qu'elle accomplisse un acte ou s'abstienne de l'accomplir; |
| (e) in respect of a person referred to in rule 429, the person's property be sequestered; and | e) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429; |
| (f) the person pay costs. | f) qu'elle soit condamnée aux dépens. |

[12] The Federal Court of Appeal in *Canada (Human Rights Commission) v Winnicki*, 2007 FCA 52, at para 17, endorsed that the following factors are to be considered when determining an appropriate penalty for contempt:

1. the gravity of the contempt in the context of the particular circumstances of the case as they pertain to the administration of justice;
2. whether the contempt offence is the first offence;
3. presence of any mitigating factors such as good faith or an apology; and
4. deterrence of similar conduct.

[13] The Minister also points to this Court's decision in *Minister of National Revenue v Marshall*, 2006 FC 788, at para 16 [*Marshall*], wherein this Court considered the following factors relevant to determining a sentence for contempt of an Order of this Court to disclose information pursuant to section 231.7 of the *Income Tax Act*:

- i. The primary purpose of imposing sanctions is to ensure compliance with orders of the court. Specific and general deterrence are important to ensure continued public confidence in the administration of justice;

- ii. Proportionality of sentencing requires striking a balance between enforcing the law and what the Court has called "temperance of justice";
- iii. Aggravating factors include the objective gravity of the contemptuous conduct, the subjective gravity of the conduct (i.e. whether the conduct was a technical breach or a flagrant act with full knowledge of its unlawfulness), and whether the offender has repeatedly breached orders of the Court; and
- iv. Mitigating factors might include good faith attempts to comply (even after the breach), apologize or accept responsibility, or whether the breach is a first offence.

[14] In my view, ensuring compliance with orders made by the Court pursuant to the *Income Tax Act* is critical because most everyone in Canada pays tax, and reporting is largely self-reporting. If efforts by the Minister taken to ensure that taxpayers have complied and accurately reported income are ignored or thwarted, the taxation regime is seriously compromised and that affects every Canadian as we are dependant on tax revenue to fund most of our social and other programs, and indeed our government as a whole. In that sense, compliance with the *Income Tax Act* is a fundamental civic duty which cannot be taken lightly or ignored.

[15] Moreover, the breach here is not unintentional. The respondents have known for many months of this Court's Order and they have been provided, more than once, with an opportunity to comply or explain their non-compliance. They have done neither. The recent delivery of five boxes of documents, to a location other than the offices of the CRA, might be deserving of more positive consideration if those boxes contained most of the materials ordered to be produced. However, as the record indicates, these respondents have yet to produce the majority of the items ordered. I am particularly disturbed by the respondents' failure to produce the password and username for the electronic version of the respondents' QuickBooks records previously provided on an USB key,

because this was specifically discussed when the respondents previously appeared before me. Mr. Sutherland not once suggested that it was unavailable; rather, despite my best efforts to obtain its disclosure in open Court, he claimed in the July 2012 hearing that he did not then recall it. This suggests, in particular, an intentional and deliberate flouting of the Court's Order.

[16] The Minister references the fact that Mr. Sutherland has appeared at each hearing as a mitigating factor. Had he also appeared at the sentencing hearing, it may well have weighed in his favour. Having failed to appear at this important and critical hearing to explain the respondents' actions or to dispute the Minister's evidence, however, I give it little weight.

[17] In *Marshall*, unlike this case, the respondents were not given a further opportunity to comply beyond the section 231.7 compliance order. These respondents were given a further opportunity to comply by virtue of my July 4, 2012 Order. The following penalty was ordered in *Marshall*:

1. The respondent is guilty of contempt of this Court's order dated March 2, 2006, and shall pay a fine of \$3,000.00 within 30 days from the date of service of this Order, and shall pay the applicant's legal costs in the amount of \$2,000.00 within 30 days from the date of service of this Order. Failure to pay this fine and the legal costs within 30 days shall subject the respondent to 30 days' imprisonment.
2. The respondent shall also provide the information and documents set out in the Court's order dated March 2, 2006 within 30 days from the date of service of this Order, or provide the Minister with a full explanation why the respondent does not have this information and these documents, failing which the respondent shall be imprisoned for 10 days, such term to run consecutive to any other term of imprisonment imposed by this Order.
3. The respondent shall not be imprisoned for failure to pay the fine or the legal costs if within 30 days from the date of service of this Order the respondent arranges with the Minister for an oral

examination under oath and provides evidence satisfactory to the Court that she is not able to pay the fine or the legal costs, or that she needs an extended time period in which to pay.

4. If the Minister informs the Court by affidavit that payment of either the fine or the legal costs has not been made within 30 days from the date of service of this Order, and that the respondent has not arranged with the Minister for an oral examination under oath with respect to her ability to pay the fine or the legal costs, the Court shall issue a warrant for the imprisonment of the respondent for 30 days.

5. If the Minister informs the Court by affidavit that the respondent has not provided the information and documents set out in the Court's order dated March 2, 2006, within 30 days from the date of service of this Order or provided the Minister with a full explanation why the respondent does not have this information and these documents, then the Court shall issue a warrant for the imprisonment of the respondent for a term of 10 days, such term to run consecutive to any other term of imprisonment imposed by this Order.

[18] These respondents have already had the benefit of lenience shown in the earlier Orders granting them time to comply and purge their contempt. Having failed to take advantage of that and having failed to either appear to explain their contempt or to provide evidence of compliance, they are deserving of little more. A swift and serious penalty is appropriate to compel compliance from these respondents, act as a general deterrent, and maintain the public's confidence in the administration of justice. Justice is tempered by ordering no more than is necessary to accomplish these legitimate ends; a balance I have considered in arriving at my Order.

[19] The Minister is also seeking solicitor-client costs and has provided a Bill of Costs showing a total of \$19,905.74, being \$18,200.95 in fees and \$1,704.79 in disbursements. The amount appears to the Court to be reasonable and, in these circumstances, it is appropriate that the Minister not be out of pocket for having to enforce this Court's Orders.

ORDER

THIS COURT ORDERS that:

1. The respondents, having been found on July 4, 2012, guilty of contempt of this Court's Order dated February 7, 2012, and having failed to provide the Minister with the information and documents set out in the Court's Order dated July 4, 2012, and having provided no defence or explanation for having failed so to do, shall pay a fine of \$5,000.00 within 30 days from the date of service of this Order, and shall also pay the applicant's legal costs in the amount of \$19,905.74 within 30 days from the date of service of this Order. Failure to pay this fine and the legal costs within 30 days shall subject the respondent, Tel Sutherland, to 30 days imprisonment.

2. The respondents shall also provide the information and documents set out in the Court's Order dated July 4, 2012, except those described in these Reasons for Order as having been provided since that date, within 30 days from the date of service of this Order, failing which Tel Sutherland shall be imprisoned for three (3) years, such term to run consecutive to any other term of imprisonment imposed by this Order.

3. Tel Sutherland shall not be imprisoned for failure to pay the fine or the legal costs described in paragraph 1 of this Order if within 30 days from the date of service of this Order the respondents arrange with the Minister for an oral examination under oath and provide evidence satisfactory to the Court that they are not presently able to pay the fine or the legal costs, or that they need an extended time period in which to pay.

4. Tel Sutherland shall not be imprisoned for failure to produce the documents and information described in paragraph 2 of this Order if within 30 days from the date of service of this Order the respondents arrange with the Minister for an oral examination under oath, and provide evidence satisfactory to the Court that they are not able to produce those documents or information and that their inability to do so does not stem from their own intentional actions, recklessness, or negligence.

5. If the Minister informs the Court by affidavit that payment of either the fine or the legal costs described in paragraph 1 of this Order has not been made within 30 days from the date of service of this Order and that the respondents have not arranged with the Minister for an oral examination under oath with respect to their ability to pay the fine or the legal costs, and the respondents have not satisfied the Court in accordance with paragraph 3 of this Order, the Court shall issue a warrant for the imprisonment of Tel Sutherland for 30 days.

6. If the Minister informs the Court by affidavit that the respondents have not provided the information and documents set out in paragraph 2 of this Order within 30 days from the date of service of this Order and that the respondents have not arranged with the Minister for an oral examination under oath with respect to their ability to produce those documents and information, and the respondents have not satisfied the Court in accordance with paragraph 4 of this Order, then the Court shall issue a warrant for the imprisonment of Tel Sutherland until the Minister informs the Court by affidavit that the respondents have provided all of the information and documents set

out in paragraph 2 of this Order, or a term of three (3) years, whichever is earlier. Such term shall run consecutive to any other term of imprisonment imposed by this Order.

“Russel W. Zinn”

Judge

SCHEDULE "A"

Bank Note	Account #	2007	2008	2009
			All for the year (Y/N)	
BMO	Redacted	Y	Y	Y
TD Canada Trust	Redacted	Y	Y*3	N/A
TD Canada Trust	Redacted	Y	Y*1	N/A
ATB	Redacted	Y	Y	N*7
ATB	Redacted	Y	Y	N*6
ATB	Redacted	Y	Y	N*6
ATB	Redacted	Y	Y	N*6
Royal Bank				
^	Redacted	Y	Y	N*9
TD Canada Trust	Redacted	Y	Y*5	N/A
TD Canada Trust	Redacted	Y	Y*4	N/A
ATB	Redacted	Y	Y	N*6
ATB	Redacted	Y	Y	Y*8
ATB	Redacted	Y*	Y	N*6
BMO	Redacted	N/A	Y*2	Y

*Missing Feb, 2006 Stmt

*1- Account closed March 9, 2007

*2- Account opened March 28, 2007

*3- Account closed March 9, 2007

*4- Account closed March 9, 2007

*5- Account closed April 10, 2007

*6- Missing Jan 2008 Stmt

*7- Missing Dec 2008 & Jan 2009 Stmt

*8- Account closed June 11, 2008

*9- Missing all statements – Feb 2008 to Jan 2009

^ - Also require Jan 2006 & Feb 2009 bank statements as monthly bank statements do not go to end of month. i.e. Jan 31st.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2045-11

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v
THE MONEY STOP LTD AND TEL SUTHERLAND

**HEARING HELD VIA VIDEOCONFERENCE ON JANUARY 29, 2013, FROM
OTTAWA, ONTARIO, AND EDMONTON, ALBERTA.**

**REASONS FOR ORDER
AND ORDER:** ZINN J.

DATED: February 7, 2013

APPEARANCES:

Wendy Bridges FOR THE APPLICANT

Nil FOR THE RESPONDENTS
– ON HIS OWN BEHALF

SOLICITORS OF RECORD:

WILLIAM F. PENTNEY FOR THE APPLICANT
Deputy Attorney General of Canada
Edmonton, Alberta

- NIL - SELF REPRESENTED
RESPONDENTS