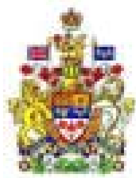
Federal Court of Appeal



Cour d'appel fédérale

Date: 20120424

Docket: A-273-11

Citation: 2012 FCA 125

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DOUGLAS LEWRY AND PATRICIA LEWRY

Respondents

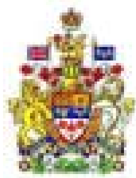
Heard at Edmonton, Alberta, on April 17, 2012.

Judgment delivered at Ottawa, Ontario, on April 24, 2012.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
STRATAS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] The Attorney General has launched three appeals from a decision of the Federal Court. The decision applied to three separate applications for judicial review filed by Mr. Siggelkow, Mr. Blerot, and Mr. and Ms. Lewry respectively (collectively the respondents). Since the appeals are from the same decision, and the issues raised in all three appeals are the same, the same reasons will apply to all of these appeals; a copy of these reasons will be filed in Court file no. A-267-11, Court file no. A-272-11 and Court file no. A-273-11.

[2] The decision under appeal is that of Mr. Justice Simon Noël of the Federal Court (the Federal Court Judge or the Judge), reported at *Blerot v. Canada (Minister of National Revenue - M.N.R.)*, 2011 FC 882, [2011] F.C.J. No. 1083 [*Blerot*], *Siggelkow v. Canada (Attorney General),* 2011 FC 884, [2011] F.C.J. No. 1085 [*Siggelkow*], and *Lewry v. Canada (Minister of National Revenue - M.N.R.)*, 2011 FC 883, [2011] F.C.J. No. 1084 [*Lewry*]. In this decision, the Federal Court Judge allowed the respondents' appeals from a decision of Prothonotary Lafrenière (the Prothonotary), in which the latter struck out the notice of application filed by each of the respondents in the Federal Court. In each case, the notice of application challenged in various ways the issuance of a search warrant under s. 487 of the *Criminal Code*, R.S.C., 1985, c. C-46. In *Blerot* and *Lewry* the search warrants were issued by a justice of the peace for the Province of Saskatchewan, while in *Siggelkow*, the warrant was issued by a judge of the Alberta Provincial Court.

[3] The notices of application are not identical, but they all seek substantially the same relief:

> 1 - The quashing of the search warrants issued in respect of each of the respondents, a declaration that the search warrants are invalid, and a return of all material seized pursuant to the warrants.
>
> 2 - A declaration that the Canada Revenue Agency (CRA) is barred from invoking the search warrant provisions found at s. 487 of the *Criminal Code* in the course of investigating criminal offences under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), or under the Excise Tax Act, R.S.C., 1985, c. E-15, and that it must instead use the search warrant provisions found at s. 231.3 of the *Income Tax Act* AND AT S. 290 of the *Excise Tax Act.*
>
> 3 - A declaration that the CRA's decision to obtain search warrants under s. 487 of the *Criminal Code* is a violation of the respondents' rights under sections 7, 8, and 26 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], and an order under s. 24 of the *Charter* excluding the evidence obtained through the use of such warrants from any

> proceeding brought against the respondents under the *Income Tax Act* or under the *Excise Tax Act.*
>
> 4 - A declaration that the individuals who obtained the search warrants were not duly authorized at law to apply for such warrants.

[4] I should add that in summarizing the relief sought in the notices of application, I have described the relief in legal terms rather than in the terms used by the respondents. For the most part, this consists of substituting the phrase “a declaration that” for the phrase “a decision as to whether”. I should also add that the respondents’ primary argument, that the Minister should have applied for search warrants under the specific enabling provisions of the *Income Tax Act* as opposed to the general provisions of the *Criminal Code*, also applies to proceedings under the *Excise Tax Act*, R.S.C., 1985, c. E-15. However, since the warrant provisions of the two acts are materially the same, I have referred only to the *Income Tax Act*.

[5] Following the filing of these notices of application, the Minister brought motions pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106, to strike the notices of application on the ground that they were bereft of any chance of success. The motions were considered and allowed by the Prothonotary.

[6] The Prothonotary found that the CRA’s decision to apply for the search warrants was an administrative and procedural step, and as such, was not subject to review: *F.K. Clayton Group Ltd. v. M.N.R.*, [1988] F.C.J. No. 1066, (1988) 24 F.T.R. 162 [*F.K. Clayton Group*].

[7] The Prothonotary also found that since the search warrants in question were issued by either a justice of the peace for Saskatchewan or an Alberta Provincial Court judge, the proper forum in which to challenge the issuance of these warrants was the provincial courts. The Prothonotary reasoned that the Federal Court should decline to exercise its jurisdiction if the grounds for the applications fell squarely within the jurisdiction of the provincial courts. In these cases, he found the respondents had an adequate alternate remedy in the provincial courts. He went on to add that the provincial courts had the jurisdiction, either under the *Charter* or under the inherent jurisdiction of the superior courts, to deal with allegations that the applications for the search warrants were made arbitrarily or in bad faith, or for improper motives or irrelevant considerations.

[8] In the end, the Prothonotary held that each of the notices of application should be struck out as an abuse of process.

[9] In disposing of the appeal from this decision, the Federal Court Judge noted that while the Prothonotary's decision was legally and factually sound, it was to be set aside, but only because the respondents raised issues on the appeal that were not put before the Prothonotary.

[10] The Judge began by confirming that the Federal Court has no jurisdiction to review orders of justices of the peace or provincial court judges. He agreed that the issuance of search warrants under the *Criminal Code* is a matter that falls squarely within the jurisdiction of the provincial courts.

[11] He then went on to consider the submissions that the respondents had not raised before the Prothonotary. He found that what the respondents were challenging under ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, was not the issuance of the search warrants in and of themselves but rather, the CRA's written policy of applying for search warrants under s. 487 of the *Criminal Code*, as opposed to under s. 231.3 of the *Income Tax Act*.

[12] The Judge agreed with the respondents' submissions that a policy falls within the expanding notion of what can be judicially reviewed under the *Federal Courts Act*: *May v. CBC/Radio Canada*, 2011 FCA 130, [2011] F.C.J. No. 519.

[13] The Judge also agreed with the respondents' submissions that the cases relied upon by the Minister, such as *F.K. Clayton Group*, cited above, *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General*), 2007 FC 564, [2007] F.C.J. No. 752, *R v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624, [1990] S.C.J. No. 83 [*Multiform*], and *R v. Grant*, [1993] 3 S.C.R. 223, [1993] S.C.J. No. 98 [*Grant*], were distinguishable. He found support for this view in the fact that a previous version of the search warrant provisions in the *Income Tax Act* had been found to be unconstitutional by the Supreme Court of Canada in *Baron v. Canada*, [1993] 1 S.C.R. 416, [1993] S.C.J. No. 6. He also appeared to be influenced by the fact that other federal statutes were at issue in those cases, and not the *Income Tax Act*. Finally, he felt that a better factual record was required in order to dispose of the respondents' applications.

[14] The Federal Court Judge concluded his analysis by noting that many claims in the initial notices of application were to be struck for the reasons given by the Prothonotary. However, he continued by noting: "the same cannot be said as to the underlying issue to be tried, which is, the legality of CRA's practice (if it is that) of proceeding under section 487 of the *Criminal Code* when applying for search and seizure warrants."

[15] The appeals from the decision of the Prothonotary were allowed and his order set aside.

ANALYSIS

[16] Though both the Prothonotary and the Federal Court Judge alluded to the doctrine of collateral attack, neither of them addressed it directly. That doctrine applies with full force and effect in these cases and is a complete answer to the respondents' notices of application. As a result, I would allow the appeal.

[17] The substance of the doctrine of collateral attack is set out by the Supreme Court of Canada in *R v. Wilson*, [1983] 2 S.C.R. 594 at pages 599-600:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist.

> Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

[18] On the facts of this case, the search warrants issued by the provincial authorities are orders. Those orders must be challenged in the forum in which they were made, using the procedure available in that forum. In an application to the provincial courts to quash these warrants or to exclude the evidence seized under the authority of these warrants, the applicability of the decisions *F.K. Clayton*, *Multiform* and *Grant* can be argued. However, it is not for the Federal Court, nor this Court to decide these issues so as to purport to bind the provincial courts.

[19] The only question remaining is whether the Federal Court Judge erred in finding that there was, in this factual matrix, an issue that was subject to review on administrative law grounds. The Federal Court Judge framed that issue as "the legality of CRA's practice (if it is that) of proceeding under s. 487 of the Criminal Code when applying for search and seizure warrants." Based on the representations made to us by the two respondents who appeared at the hearing of the appeal, it appears that the question they seek to have determined is the legality of the CRA's *policy* of proceeding *exclusively* under s. 487 of the *Criminal Code* when applying for search warrants.

[20] Assuming without deciding that this question is otherwise properly the subject of an application for judicial review, it is a question which, in the circumstances of this case, should be decided by the courts having jurisdiction over the warrants and whose issuance gave rise to these proceedings. Those courts have full jurisdiction to deal with all questions which could lead to a finding that the search warrants were not lawfully issued or executed, including compliance with a

departmental policy which is contrary to law: see *R. v. Collins*, [1987] 1 S.C.R. 265, [1987] S.C.J. No. 15, at para. 23, *R v. Porisky*, 2012 BCSC 68, [2012] B.C.J. No. 93, *R v. 2821109 Canada Inc.*, [1995] N.B.J. No. 435 , 167 N.B.R. (2d) 78 (C.A.). By declining to exercise its jurisdiction, the Federal Court avoids creating a situation in which it interferes with the review processes available in the jurisdictions where the search warrants issued. In short the doctrine against collateral attack and the policies which underlie that doctrine apply with full force here.

[21] The fact that the respondents' applications in the Federal Court are not obviously doomed to failure on their merits does not make them any less of a collateral attack.

[22] In light of the fact that the Federal Court Judge was, by his own admission, deciding a question that was not put to the Prothonotary, the standard of review is that applicable to an appeal from a decision of a judge of first instance on a question of law, that is, correctness: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. In my view, the Federal Court Judge erred in law by not giving effect to the doctrine of collateral attack in deciding whether the respondents' notices of application should be allowed to proceed.

[23] In the result, I would allow the appeal in each file with costs to the Attorney General throughout, set aside the order of the Federal Court Judge, and restore the order of the Prothonotary.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-273-11
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA and DOUGLAS LEWRY AND PATRICIA LEWRY
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 17, 2012
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	GAUTHIER J.A. STRATAS J.A.
DATED:	April 24, 2012

APPEARANCES:

Wendy Bridges Brin Frape	FOR THE APPLICANT
Douglas Lewry	SELF REPRESENTED

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE APPLICANT