Federal Court Cour fédérale

Date: 20160815

Docket: T-1049-16

Citation: 2016 FC 934

Ottawa, Ontario, August 15, 2016

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

ADE OLUMIDE

Applicant

and

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF NUNAVUT, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF YUKON, MINISTER OF NATIONAL REVENUE

Respondents

ORDER AND REASONS

[1] The Applicant filed a 31 page Notice of Application on June 4, 2016, naming as Respondents the Attorney General of Canada, the Attorneys General of Saskatchewan,

Nova Scotia, New Brunswick, Manitoba, Nunavut, British Columbia, Alberta and Yukon, and the Minister of National Revenue.

[2] The Notice of Application states that it is brought “pursuant to s. 41 of the Access to Information Act, “Act” re June 3, 2016 Information Commissioner Report re Minister of National Revenue s. 10(2) Act (…)”, but that it is also brought “pursuant to 18.1(a,b) 57 Federal Courts Act, 64 Federal Courts Rules, s. 42(1a) Canada Revenue Agency “CRA” Act, s. 24 Charter right to remedy for s. 12 Charter breach (…)” followed by a further list of disjointed references to other legislative provisions.

[3] The Application seeks the following relief:

> Declaratory relief that s. 10(2) Access to Information Act shall read “in a case of safety, security, criminal law, economic interest” after words “may but is not required”, in alternative, s 10(2) Privacy Act shall be read down, the Attorney General shall have 12 months to cure inconsistency, AND provincial Attorney Generals for Saskatchewan, Nova Scotia, New Brunswick, Manitoba, Nunavut, of British Columbia, Alberta, Yukon shall remedy any legislation that regulates access to information gathered as a result of an s57 Federal Courts Act notice, AND pursuant to s39 Act “Commissioner may… make a special report to Parliament” on s10(2).

[4] On July 25, 2016, the Applicant served and filed a motion record on a motion to amend his Notice of Application “to include relief re July 4, 2016 report of the Information Commissioner” and other relief. This motion was made for determination in writing, pursuant to Rule 369 of the *Federal Courts Rules*.

[5] On August 3, 2016, the Respondents Attorney General of Canada and Minister of National Revenue (hereafter referred to simply as "the Attorney General"), filed a motion record on a motion to strike the Application. That motion was also made for determination in writing pursuant to Rule 369. On August 4, 2016, the Attorney General served a responding record to the Applicant's motion to amend, as well as amended written representations on its motion to strike.

[6] On August 5, 2016, the Applicant filed a response to the Attorney General's motion to strike ("Reply to Respondent Motion to Strike served on August 4, 2016 around 3 pm") that appears to refer to and take into account the amended written representations served August 4, 2016. The Applicant also served on August 5, 2016 an other motion record that appears to be a reply to the Attorney General's response to the Applicant's motion to amend ("Motion Record (Reply)") and a document requesting that both the Applicant's motion to amend and the Attorney General's motion to strike be heard concurrently at the General Sittings in Ottawa on August 17, 2016.

[7] The Attorney General filed its reply to the Applicant's responding record on August 8, 2016. It objects to an oral hearing.

[8] Finally, the Applicant filed, on August 8, 2016, a motion record on a motion "pursuant to rules 64, 54" to be heard at the Ottawa General Sittings on August 17, 2016. That motion appears to be a motion to strike the Attorney General's motion to strike. A document entitled "Supplementary Motion Record (August 17 Motion) Affidavit –

Unprecedented Judicial Errors Against the Interest of Juctice (sic)" was also filed by the Applicant on August 10, 2016. It is unclear whether that supplementary motion record is in support of his latter motion or to supplement his response to the Attorney General's motion to strike.

[9] The first matter to be determined is whether the Applicant's motion to amend and the Attorney General's motion to strike should be heard orally, as requested by the Applicant, or determined on the basis of the written record.

[10] I have considered the reasons why the Court might order an oral hearing of a written motion as set out in *Karlsson v The Minister of National Revenue*, unreported reasons of May 25, 1995, as cited in *Semgyet am God v R* (1995), 98 FTR 68 and *Coffey v Canada (Minister of Justice)*, 2004 FC 1694 as well as the reasons set out in the Applicant's August 5 request. The Applicant's argument that the issues raise "quasi-constitutional right of access for over 30 million Canadians" is without any apparent merit, as is his assertion that the Attorney General "has a rich history of falsehoods in court and abuse of process". While the Applicant's written materials are prolix, difficult to understand and at times incoherent, the issues raised in the motions themselves are straightforward and the Court would derive no benefit from an oral hearing.

[11] I intend to consider first the Applicant's motion to amend his Notice of Application.

[12] The Notice of Application initiating this application, filed July 4, 2016, specifically invokes the Federal Court's jurisdiction to review a refusal of access pursuant to s 41 of the *Access to Information Act* RSC 1985 c A-1 ("*ATIA*"). The refusal identified in the original Notice of Application concerns the Applicant's request for records of certain telephone calls to or from a certain CRA employee, and CRA's response that no such records were found. The Information Commissioner's report of investigation dated June 3, 2016, pursuant to which the application purports to be instituted, concluded that no such records existed. As mentioned, the Notice of Application also seeks various declaratory reliefs in respect of the interpretation and application of s 10(2) of the *ATIA*.

[13] The motion to amend has two distinct purposes. First, it seeks to include a prayer for relief in respect of a second report of the information Commissioner, dated July 4, 2016. That report relates to a request for information relating to the training attended and audits performed by a different CRA employee. The CRA's refusal in respect of that request was not based on the non-existence of records but on an exemption under subsection 19(1) of the *ATIA*. The grounds the Applicant proposes to raise in an amended notice of application are entirely separate and distinct from those raised in the original Notice of Application.

[14] Without pronouncing on or considering the merits of the original application or of the proposed amendments, it is obvious that there is no commonality between the original application and the proposed additions other than the fact that they relate to access to information requests made to the CRA. The motion to amend is essentially a motion to

consolidate in the existing application an application that could and, if it has any merit, should have been the subject of a distinct application. Amendments may be permitted where they would help determine the real question in controversy, where they would not create an injustice that cannot be compensated by costs and where it would serve the interest of justice (*Canderel Ltd v R*, [1994] 1 FC 3). Adding a new and unrelated application for review to the existing application would clearly distract from, rather than assist in, determining any question in controversy in the first application. There is no basis to permit the Applicant to amend so as to effect a *de facto* consolidation of a new and separate application into an existing application. To do so is to invite litigants to use applications as a pipeline in which to funnel any and all grievances they may have against a respondent as they arise, whether or not they are related, and is clearly not in the interest of justice.

[15] The second purpose of the amendment is to add arguments in respect of a bill to amend Saskatchewan’s access to information legislation. It is plain and obvious that this Court has no jurisdiction over provincial legislatures or legislation and that the proposed amendments cannot form the basis of any arguable case.

[16] The Court notes that in his reply submissions, the Applicant proposes yet further amendments to his Notice of Application. None addresses or cures the flaws identified above. The Applicant’s motion to amend is, accordingly, dismissed.

[17] I now turn to the Attorney General’s motion to strike.

[18] To the extent the application is an application pursuant to s 41 of the *ATIA* for judicial review of the CRA's refusal to disclose the telephone records requested, I am satisfied that it is plain and obvious that it cannot succeed. Our Court has made it clear on a number of occasions that where, in response to a request for information (whether under the *ATIA* or the *Privacy Act*, RSC 1985 c P-21), a department responds that a record does not exist, such a response does not constitute a refusal of access. Absent a refusal, the Court does not have jurisdiction in judicial review pursuant to s 41 of the *ATIA* or the *Privacy Act*, unless there is some evidence, beyond mere suspicion, that records do exist and have been withheld. See *Clancy v Canada (Minister of Health)*, 2002 FCJ No 1825, *Wheaton v Canada Post Corp*, 2000 FCJ No 1127, *Doyle v Canada (Minister Human Resources Development)*, 2011 FC 471, *Blank v Canada (Minister Environment)*, 2000 FCJ No 1620.

[19] As mentioned, it is plain that the "refusal" here is based on the CRA's conclusion that no records such as those requested exist, and the Information Commissioner's report of investigation agrees with that conclusion. No evidence, or even cogent argument, has been submitted by the Applicant to support a conclusion that the records exist or are being withheld. It is plain and obvious that this Court can have no jurisdiction in this matter pursuant to s 41 of the *ATIA*.

[20] To the extent the Notice of Application is an application for a declaration pursuant to s 18.1 of the *Federal Courts Act*, I am also satisfied that it is plain and obvious that it cannot succeed. The application takes issue with s 10(2) of the *ATIA*, which reads as follows:

10 (1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

(a) that the record does not exist, or

(b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,
and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

10 (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa 7a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :

a) soit le fait que le document n'existe pas;

b) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.

(2) Le paragraphe (1) n'oblige pas le responsable de l'institution fédérale à faire état de l'existence du document demandé.

[Emphasis added.]

[21] Although difficult to follow and at times incoherent, the Notice of Application appears to argue that the ability of government departments to rely on s 10(2) of the *ATIA* to refuse to indicate whether or not documents exist breaches s 12 of the *Charter of Rights and Freedoms* and other legislative provisions, because it somehow allows them to hide evidence. The sole relief sought is the above mentioned declaration as to how s 10(2)

should be read, an order that the Attorney General "cure" the inconsistency within 12 months, that the Attorneys General of the named provinces and territories "remedy" their corresponding legislations and that the Information Commissioner make a special report to Parliament on s 10(2) of the *ATIA*.

[22] First, it is abundantly clear that this Court has no jurisdiction in respect of the relief sought against the Attorneys General of the provinces and territories

[23] With respect to the declaration sought as to the manner in which s 10(2) of the *ATIA* should be read and applied, the fatal flaw is that the remedy is purely theoretical. The declaration does not flow from the review of any decision, order or action of a federal board, commission or other tribunal. The CRA's answer to the Applicant's request for access expressly stated that the records did not exist, and accordingly plainly did not invoke the application of s 10(2) of the *ATIA*. Neither the CRA's response to the request for access nor the Information Commissioner's investigation and report engaged the application of s 10(2) of the *ATIA*. The Court's jurisdiction pursuant to s 18 and 18.1 of the *Federal Courts Act* to grant relief "against any federal board, commission or other tribunal" or in respect of a decision or order of a federal board, commission or other tribunal cannot therefore be invoked or engaged in the circumstances. I have noted that the Notice of Application alleges that the Information Commissioner's Report "shows that for about 3 years CRA has relied and is relying on s 10(2) to prevent the applicant from receiving all the records to which he is entitled". However, this assertion is patently unsupported on the very face of

the report on which it purports to be based. I am satisfied that the Court's jurisdiction in judicial review is not properly engaged in this matter.

[24] The Applicant invokes Rule 64 of the *Federal Courts Rules*, to the effect that proceedings are not subject to challenge on the ground that only a declaratory order is sought, and that the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed. However, as found in *Bonamy v Canada (AG)*, 2009 FCA 156, citing *Pieters v Canada (Attorney General)*, 2004 FC 27 and *Democracy Watch v Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, the rule does not permit an applicant to simply tack a constitutional challenge onto an improperly brought application. There must be some basis on which the application is brought and not merely some abstract desire to obtain clarification.

[25] Given the conclusion above that the Notice of Application cannot possibly succeed as an application pursuant to s 41 of the *ATIA* or as a judicial review application, the request for declaratory relief of unconstitutionality is a request for a bare declaration of unconstitutionality without any factual foundation whatsoever and cannot succeed. This would be so even if the Applicant had brought the proceeding as an action rather than an application (*Danson v Ontario (Attorney General)*, [1990] 2 SCR 1100). It is plain and obvious that this is not one of these exceptional cases where unconstitutionality can be determined as a pure question of law. Indeed, I note that the Notice of Application purports to have some factual foundation, but that that foundation is entirely made of serious,

unfounded and speculative allegations of fraud, cover-ups, discrimination and lies. In this respect, the Notice of Application is also abusive, scandalous, frivolous and vexatious.

[26] I am satisfied that the Notice of Application should be struck because it is devoid of any chance of success whatsoever, and further because it is abusive, scandalous and vexatious.

[27] I note that none of the amendments proposed in the Applicant's motion to amend, in his reply to that motion or in his response to the Attorney General's motion to strike would cure the defects noted in these reasons. I am also satisfied that no amendment could possibly cure these defects, such that the application will be struck without leave to amend.

[28] Given my determination that this application should be struck without leave to amend, the Applicant's motion filed August 8, 2016 is moot and will be dismissed. As mentioned earlier, this motion and the supplementary record filed August 10, 2016 appear to argue that the Attorney General's motion to strike should be struck. If possible, this material is even more incoherent and the allegations and accusations made therein even more inflammatory and abusive than the Applicant's previous submissions. To the extent this material was intended to set out new grounds to dismiss or strike the Attorney General's motion to strike, these grounds should have been included in the Applicant's responding record. The Applicant's attempt to put these arguments before the Court in a supplementary record or in a motion presentable orally, and after the Attorney General has

filed its reply, is a transparent attempt to bootstrap his request for an oral hearing of the motion to strike, is abusive and should not be permitted.

[29] Out of an abundance of caution, however, I have considered these materials to attempt to discern whether they might contain any reasonable defence to the motion to strike that might justify the Court hearing the motion prior to dismissing the application. I have found nothing of merit.

ORDER

THIS COURT ORDERS that:

1. The Applicant’s motion to amend is dismissed;

2. The motion of the Attorney General of Canada and of the Minister of National Revenue to strike the Notice of Application is granted;

3. The Notice of Application is struck, without leave to amend;

4. The Applicant’s motion pursuant to Rules 64 and 54 made returnable on August 17, 2016 is dismissed as moot;

5. Costs of the motion to strike shall be payable by the Applicant to the Respondents Attorney General of Canada and Minister of National Revenue, in the amount of $1100.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1049-16
STYLE OF CAUSE:	ADE OLUMIDE v ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF NUNAVUT, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF YUKON, MINISTER OF NATIONAL REVENUE

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	**TABIB P.**
DATED:	**August 15, 2016**

WRITTEN REPRESENTATIONS BY:

Mr. Ade Olumide	FOR THE APPLICANT
Mr. Daniel Caron	FOR THE RESPONDENTS (ATTORNEY GENERAL OF CANADA AND MINISTER OF NATIONAL REVENUE)

SOLICITORS OF RECORD:

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