

IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Spears, 2016 NSPC 5

DATE: January 13, 2016

DOCKET: 2571965; 2571966;
2571967; 2571968; 2571969

REGISTRY: Halifax

BETWEEN:

Her Majesty the Queen

v.

R. v. Darrell Spears, Spears Framing Limited, Spears Concrete Formwork, Inc.,
and SCF Services Incorporated

DECISION ON STANDING - SECTION 8 CHARTER APPLICATION

JUDGE: The Honourable Judge Anne S. Derrick

HEARD: January 12, 2016

DECISION: January 13, 2016

CHARGES: section 380(1)(a) of the *Criminal Code* (Darrell Spears); section 327(1)(c) x 3 of the *Excise Tax Act* (Spears Framing Limited and Darrell Spears as an officer, director or agent; Spears Concrete Formwork Inc. and Darrell Spears as an officer, director or agent; and SCF Services Incorporated and Darrell Spears, as an officer, director or agent); and section 239(1)(d) of the *Income Tax Act* (Darrell Spears)

COUNSEL: Constantin Draghici-Vasilescu, for the Crown

David Bright, Q.C. and Edward Sawa, for the Defendants

By the Court:*Introduction*

[1] This decision addresses the issue of whether Darrell Spears has standing to advance a challenge to a search warrant executed in the course of the investigation that led to him being charged with fraud and income tax evasion.

[2] Also charged are three corporations which list Darrell Spears as an officer, director or agent. These corporations - Spears Framing Limited, Spears Concrete Formwork Inc. and SCF Services Incorporated - are charged with violating the *Excise Tax Act*.

[3] In the course of the Canada Revenue Agency (“CRA”) investigation that led to the charges a search warrant was executed on March 7, 2012 at the offices of Glenda Power, a Certified General Accountant. The search warrant contemplated the searching of Ms. Power’s office for financial records relating to Spears Framing Limited, Spears Concrete Formwork, Inc. and SCFS, Inc.

[4] SCFS, Inc. is not charged with any offences. Mr. Spears is not a director of that corporation. The sole director and shareholder of SCFS, Inc. is Joanne Spears, Mr. Spears’ ex-wife.

[5] During the execution of the search warrant, Ms. Power advised the CRA investigators that all records pertaining to SCFS Inc. were stored at her residence.

[6] The March 7 search warrant did not contemplate a search of Ms. Power’s residence. Investigators obtained a second search warrant for March 7 (“the residence search warrant”) so that they would be able to search Ms. Power’s home that day.

[7] The search warrant for Ms. Power’s residence authorized a search for the same dates as shown on the search warrant for her offices – “on any day during the 8 day period commencing on the 6th of March 2012 and ending on the 13th of March, 2012 inclusive.”

[8] The Justice of the Peace who issued the residence search warrant dated her signature on it as March 8, 2012. The search warrant was executed on March 7, 2012.

[9] Darrell Spears submits that the residence search warrant is facially invalid and violates his section 8 *Charter* rights to be secure against unreasonable search or seizure. He has applied to have the evidence obtained pursuant to it excluded under section 24(2) of the *Charter*. A claim for relief under s. 24(2) can only be made by

the person whose *Charter* rights have been infringed. (*R. v. Edwards*, [1996] S.C.J. No. 11, paragraph 45)

Standing – The Facts

[10] Standing is a threshold issue. The Crown has disputed Mr. Spears' entitlement to bring a *Charter* challenge against the residence search warrant.

[11] The residence search warrant states that the following was to be searched for:

Belonging or relating to SCFS Inc., for the period April 24, 2007 to March 31, 2008 inclusive:

- a) Banking records and copies thereof, including negotiated cheques, cheque stubs, and bank statements; and
- b) Spreadsheets and other accounting working papers created by Glenda Power.

[12] To advance his *Charter* claim, Mr. Spears must be able to demonstrate that his personal rights have been infringed. He must show that he enjoyed a reasonable expectation of privacy that was the subject of state interference.

[13] Two witnesses testified on the issue of Mr. Spears' standing – Glenda Power and Darrell Spears.

[14] Ms. Power advised that at the time of the residence search warrant she was a Certified General Accountant (CGA) and had been providing accounting services to Mr. Spears' and his companies since 1994. Her services included: payroll, HST, payroll remittances, inputting bank records into an accounting program known as Simply Accounting, preparing financial statements and T2's and doing Mr. Spears' personal income taxes.

[15] Financial documents relating to Mr. Spears and his companies were located in Ms. Power's residence because she had sold her accounting business and was working out of her home. She had retained the Spears' files and continued to provide services as before. The files she held at her home included financial records of SCFS, Inc. Ms. Power followed ethical accounting practice which requires that documents such as those in her home be treated as confidential between an accountant and her client.

[16] Mr. Spears testified that he understood Ms. Power would treat SCFS, Inc.'s financial documentation as private information not to be shared with anybody.

[17] It was Ms. Power's evidence that SCFS, Inc. was solely owned by Joanne Spears. Joanne Spears was the client although Ms. Power's dealings were primarily with Mr. Spears who managed the daily operations of the company. She very seldom had contact with Ms. Spears.

[18] This accorded with the testimony of Mr. Spears. It was his evidence that he handled the operations of SCFS, Inc. and provided instructions concerning the company to Ms. Power. He described Joanne Spears as "a figurehead only."

[19] Notwithstanding this characterization, when SCFS, Inc. needed to open a bank account it required the involvement of Joanne Spears as the owner of the company. Mr. Spears testified that he arranged for Ms. Power to go with Ms. Spears to the bank to open the account and instruct the bank to send the bank statements to Ms. Power.

[20] Ms. Power explained that as of 2008 she became an employee of SCFS, Inc. as did Mr. Spears. This was because the Canada Revenue Agency froze the company's bank account with the exception of permitting the payment of employee payroll. She and Mr. Spears continue to be employees of SCFS, Inc. to this day.

[21] It was Ms. Power's evidence that Joanne Spears had the authority to approve her being placed on SCFS Inc.'s payroll as an employee. Ms. Power did not see herself as an employee of Darrell Spears. Her employer was Joanne Spears, the legal owner of SCFS, Inc.

[22] Ms. Power also testified that although no one in particular directed her to keep the SCFS, Inc. documents at her home, it was Joanne Spears who had the authority to provide any such instructions.

[23] SCFS, Inc. had come into existence in 2007. Mr. Spears testified that it was incorporated in order to obtain a workers' compensation certificate that was required for the business of concrete formwork. Mr. Spears had owned several companies, including those named in the charges. It was his evidence that Spears Framing experienced financial difficulties and owed significant debts. The company was hit with law suits. Spears Framing ceased to operate. Mr. Spears incorporated a successor company, Spears Concrete Formwork. Workers Compensation would not provide the new company with the necessary certificate because it assessed the debts of Spears Framing against it. Mr. Spears was stymied. Incorporating Spears Concrete Formwork had not shaken off the debts of Spears Framing.

[24] Faced with this situation, Mr. Spears animated the incorporation of SCFS, Inc. with Joanne Spears as director. Although he and Ms. Spears had separated in 2004 she became the sole director and shareholder for this company.

[25] When SCFS, Inc. was first incorporated, the law firm preparing the documentation made Darrell Spears a director. He subsequently advised the lawyers that he did not want to be a director. Only his wife was to own the company.

[26] It was Mr. Spears' evidence that he had himself removed as a director of SCFS, Inc. so that the company could obtain the necessary Workers' Compensation certificate. SCFS, Inc. was not his company and his removal as a director meant it was not saddled with him and his previous companies' debts.

A Reasonable Expectation of Privacy

[27] "The principal purpose of section 8 of the *Charter* is to protect an accused's privacy interests against unreasonable intrusion by the State." (*R. v. Law*, [2002] S.C.J. No. 10, paragraph 15) As I noted at the start of these reasons, Mr. Spears' standing is dependent on him being able to show that he had a reasonable expectation of privacy in the SCFS Inc. documents, located in Ms. Power's home, that were the subject of the residence search warrant.

[28] The Supreme Court of Canada addressed the issue of standing in *R. v. Edwards*, [1996] S.C.J. No. 11. Mr. Edwards raised for the first time in that court a right to privacy in the drugs found in his girlfriend's apartment. He had told the courts below the drugs were not his and his privacy interest lay only in the apartment. The Court had the following to say:

In the case at bar, one of the bases upon which the appellant asserted his right to privacy in Ms. Evers' apartment was his interest in the drugs. It is possible, in certain circumstances, to establish an expectation of privacy in the goods that are seized ... (*paragraph 44*)

[29] In *Law*, the Supreme Court of Canada noted that it has adopted "a liberal approach to the protection of privacy" extending that protection not only to homes and "intimately personal items" but information that "we choose...to keep confidential." (*Law*, paragraph 16) Such information can include, as it did in *Law*, the financial records relating to a company.

[30] *Edwards* establishes that a reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. (*paragraph 45*) The Court set out the factors to be considered in assessing the “totality of the circumstances” as including:

- (i) presence at the time of the search;
- (ii) possession or control of the property or place searched;
- (iii) ownership of the property or place;
- (iv) historical use of the property or item;
- (v) the ability to regulate access, including the right to admit or exclude others from the place;
- (vi) the existence of a subjective expectation of privacy; and
- (vii) the objective reasonableness of the expectation.

[31] Mr. Spears cannot claim to have been present at the time of the search, in possession or control of the property or place searched, an owner of the property or place, nor can he claim to have had the ability to regulate access at the place searched, which was Ms. Power’s home. He had no historical use of that residence. And while the Defence brief asserts that Ms. Power’s home “has historically housed documents in relation to Mr. Spears’ business” and that “The actual items seized are business records relating to Mr. Spears’ business”, the status of the SCFS, Inc. records as business records of Mr. Spears is a hotly disputed issue.

[32] What remains of the *Edwards*’ criteria to be considered is the subjective expectation of privacy and the objective reasonableness of the expectation. Before I address these issues I will note that submissions were made about whether the SCFS, Inc. documents, being business records, can be the subject of a heightened expectation of privacy. Having reviewed the authorities provided, I am satisfied that the information in such records does not necessarily have a lower privacy interest attaching to it than more “personal” documents. (*R. v. Spurrell, 2008 CanLII 55108 (NLPC), paragraphs 38 - 41; R. v. Law, paragraph 16*) This is not the issue that is dispositive of Mr. Spears’ application.

[33] Mr. Spears has testified that he expected Ms. Power, in her capacity as the accountant for SCFS, Inc., to safeguard the privacy of the SCFS, Inc. documents. There is no evidence before me that the SCFS, Inc. documents contained information that could not justify there being a privacy interest. The pivotal issue is whether Mr. Spears has standing to assert such an interest.

[34] It is Mr. Spears' submission that his expectation of privacy in the SCFS, Inc. documents seized from Ms. Power's home is objectively reasonable. He says that he exercises hands-on control of SCFS, Inc. and that while Joanne Spears legally owns the company, she has no involvement in running it. He notes that there is no evidence that contradicts his description of how the company functions.

[35] I find that Mr. Spears' operations management of SCFS, Inc. does not establish that his expectation of privacy in the SCFS, Inc. documents is objectively reasonable. Mr. Spears made a conscious decision not to be a director of SCFS, Inc. He deliberately divested himself of any legal status in relation to the company. He is not an owner. He is an employee only. He is an employee whom the company has accorded considerable responsibility. But that does not give him the right to assert a privacy interest in the company's financial records.

[36] As the Crown has submitted, if Mr. Spears was a legal owner or director of SCFS, Inc. there would be no issue of standing to be determined. In that capacity he would have standing to challenge the residence search warrant. But Mr. Spears is neither a legal owner nor a director of SCFS, Inc. He does not acquire an interest in SCFS, Inc. or its financial records because he owned Spears Framing and Spears Concrete Formwork. He stepped away from being a director of SCFS, Inc. in order to ensure it was not encumbered by the financial problems that plagued those companies. He ensured that SCFS, Inc. would be solely owned by Joanne Spears. When he had himself removed as a director, he abandoned any entitlement to assert a privacy claim over the documents of the company. He handed the legal responsibilities, obligations, and rights associated with ownership to Ms. Spears exclusively. He cannot now claim a piece of those rights back in order to mount a *Charter* challenge in relation to the SCFS, Inc. documents.

[37] Mr. Spears cannot pick and choose how to characterize his legal relationship with SCFS, Inc. It would be unreasonable to permit Mr. Spears, for the purpose of conducting concrete framework contracts, to have no legal relationship with SCFS Inc., but allow him to have a legal relationship to SCFS Inc.'s documents for the purpose of challenging the residence search warrant.

[38] There is only one person who could have standing to challenge the residence search warrant and that is Joanne Spears. She is not charged with any offences. I find Darrell Spears does not have standing to advance a section 8 *Charter* challenge to the warrant as his expectation of privacy in the SCFS, Inc. documents is not objectively reasonable.