

Date: 20051004

Docket: T-657-05

Citation: 2005 FC 1361

BETWEEN:

REDEEMER FOUNDATION

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER

HUGHES J.

[1] This is an application for judicial review of a decision of an Auditor of the Canada Revenue Agency acting on behalf of the Respondent Minister of National Revenue, to request third party donor information and documentation from the Applicant on May 14, 2003 purportedly pursuant to subsections 231.1(1) and 231.2(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) as amended (“*Act*”).

[2] The Applicant, Redeemer Foundation (“Foundation”), describes itself as a registered charity in existence since 1987. It operates a fund, the Forgivable Loan Program (FLP), which is said to be used exclusively for the advancement of learning based on the Christian teachings of the Redeemer

University College (“College”). Part of this program involves the provision of funds by parents and other persons closely involved with students of the College to the Foundation. Such persons are referred to as donors. At one point early on in the operation of this program a tax ruling was obtained in respect of some aspects of the scheme administered by the Foundation.

[3] The Foundation was audited by CCRA three times: in 1998 (for the 1997 taxation year), in 2001 (in respect of the 1998-2000 taxation years), and in 2003 (in respect of the 2001 and 2002 taxation years). In October 1998 the Canada Customs and Revenue Agency (“CCRA”) conducted an audit of the Foundation as a result of which the CCRA identified donors who had contributed to the FLP in the 1997 taxation year. In the 2001 audit the CCRA requested and received from the Foundation a list of donors to the FLP. As a result of both audits, CCRA sent letters to several of those donors stating an intention to reassess their tax liabilities and disallow certain credits claimed in respect of their donations to the FLP. In subsequent correspondence, and without explanation to the donors, CCRA sent a further letter informing these donors that there would be no reassessment and no change to the claimed credits.

[4] On May 14, 2003 an auditor representing the CCRA, in a meeting with the Foundation, orally requested such information respecting the Foundation’s donors to the FLP for the 2001 and 2002 taxation years. The Foundation again provided a list of the donors for those years. In or about the end of 2004 or early 2005 the Foundation became aware that CCRA was communicating with

several of the donors on the list provided, indicating that a reassessment would be made and credits in respect of the FLP disallowed.

[5] Further, CCRA in May 2004 again made a request to the Foundation for information respecting the identity and transactions with donors to the FLP. By this time the Foundation had received advice to the effect that it would be improper for CCRA to receive such information for use other than to audit the Applicant without CCRA having first obtained an Order from this Court pursuant to section 231.2(2) and (3) of the *Income Tax Act*. The Foundation, therefore, refused to disclose such information. The Minister has neither asked for nor received such an Order and has taken no further steps in respect of this request for such information.

[6] The subject of this judicial review application is only in respect of the donor list and related information sought by CCRA orally on May 14, 2003 and given “voluntarily” by the Foundation to CCRA. No Order of this Court was sought or given in respect of this information before the request was made, or at any time. The Foundation seeks a declaration that the request made for such information was improper, that the information be returned and that the Minister be prevented from acting upon such information, for instance, be prevented from reassessing the donors identified by that information.

[7] Relevant to this review are the provisions of sections 231.1(a) and 231.2(1), (2) and (3) of

the *Income Tax Act*:

231.1. (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

231.2. (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

(3) On ex parte application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed

231.1. (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois:

a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi

231.2. (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application et l'exécution de la présente loi, y compris la perception d'un montant payable par une personne en vertu de la présente loi, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis:

a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu'elle produise des documents.

(2) Le ministre ne peut exiger de quiconque -- appelé "tiers" au présent article -- la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

(3) Sur requête ex parte du ministre, un juge peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou production de documents prévue au

person (in this section referred to as the "group") where the judge is satisfied by information on oath that

- (a) the person or group is ascertainable; and
- (b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.
- (c) (Repealed by S.C. 1996, c. 21, s. 58(1).)
- (d) (Repealed by S.C. 1996, c. 21, s. 58(1).)

paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément -- appelée "groupe" au présent article --, s'il est convaincu, sur dénonciation sous serment, de ce qui suit:

- a) cette personne ou ce groupe est identifiable;
- b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;
- c) (Abrogé par L.C. 1996, ch. 21, art. 58(1).)
- d) (Abrogé par L.C. 1996, ch. 21, art. 58(1).)

[8] The circumstances concerning the request made by CCRA, represented by Mr. Consoli, are set out in paragraphs 21, 22 and 23 of the affidavit of Mr. van Staalduinen, Executive Director of the Foundation. He says:

21. On May 14, 2003, I met with Mr. Dominic Consoli, another tax avoidance auditor in the same office as Mr. Walmsley. Mr. Consoli requested various items including a list of 2001 and 2002 taxation year FLP participants and donation receipts including donor names, amounts, dates and receipt numbers. My handwritten notes for this meeting specifically record that Mr. Consoli was to get back to me "before they do any reassessment of donors and give us a chance to comment and have our accounting and legal advisers involved." This reference is consistent with my view that Mr. Consoli's purpose in requesting the 2001/2002 donor names was to investigate the charitable deductions claimed by donors. A copy of my handwritten notes taken during this meeting are attached as Exhibit "I".

22. By letter dated May 20, 2003, I delivered a list of 2001 and 2002 taxation year donors to the Foundation requested by Mr. Consoli at our meeting on May 14, 2003. A copy of my letter to Mr. Consoli dated May 20, 2003 with the list of 2001 and 2002 donors is attached as Exhibit "J". The donor list contained approximately 1000 names, gift dates, gift amounts and gift receipt numbers. These lists have been left out of Exhibit "J" to respect the privacy of the donors. The lists will be made available to the Court if necessary.

23. I turned the documents over to Mr. Consoli as I believed the Foundation was required by law to do.

[9] The position taken by the Foundation in this application is that such request, even if verbal and voluntarily complied with at the time, is a nullity in that an Order as provided in section 231.2(3) *Income Tax Act* was not previously sought by the Minister or given, thus the request is a nullity, the information must be returned and any action taken in respect thereof against the donors so identified must be quashed.

[10] The position taken by the Respondent Minister is that it was perfectly appropriate for the CCRA auditor to request such information under the audit powers provided for in section 231.1(1) of the *Act*, and if the information was given voluntarily, there was no need for the Minister to resort to section 231.2 which is available only when there is refusal to comply voluntarily. The Minister further argues that the Foundation has no standing to challenge the steps, including reassessment of donors, taken by the Minister, only the donors have standing. As well, the Minister challenges the jurisdiction of this Court to preclude the Minister from taking any steps in acting upon this information.

[11] The nature and effect of the provisions of sections 231.2(1), (2) and (3) were recently considered by the Federal Court of Appeal in *Artistic Ideas Inc v. Canada (CCRA)*, February 25, 2005, 2005 F.C.A. 68 in which the Court reviewed the same authorities as submitted here by the Minister and made the same arguments as made by the Minister. Rothstein J.A. for the Court found at paragraphs 8 to 11 of this decision:

8 As I understand the scheme of section 231.2, the Minister may require a third party to provide information and documents pertaining to the third party's compliance with the Act. However, the Minister may not impose a requirement on the third party to provide information or documents relating to unnamed persons whom he wishes to investigate, unless he first obtains the authorization of a judge. The judge may authorize the Minister to require such information only if the unnamed persons are ascertainable and only if satisfied that information or documents relating to them is required to verify compliance by them with the Act.

9 The Minister says that the restriction against obtaining information or documents relating to unnamed persons only applies where the third party itself is not under investigation. Where, as here, the third party, Artistic, is under investigation, subsection 231.2(2) does not apply. The Minister relies on authorities such as *James Richardson and Sons, Ltd. v. M.M.R.*, [1984] 1 S.C.R. 614 and *Canadian Bank of Commerce v. Attorney General of Canada*, [1962] S.C.R. 729 for the proposition that the Minister's power to obtain the names of unnamed persons is very broad and the fact that the documents required to be produced may contain confidential information relating to unnamed persons is irrelevant. He argues that subsection 231.2(2) only applies to preclude him from going on a "fishing expedition" in respect of other taxpayers where the third party itself is not under investigation. These authorities pre-date subsections 231.2(2) and (3), although it is apparent that their enactment was prompted, at least in part, by the Richardson case. While they provide useful background, the relevant legislation is different today than at the time of those decisions.

10 According to the evidence in the present case, the donors are intended to be the subject of investigations by the Minister. They are precisely the persons to whom subsections 231.2(2) and (3) apply. If the Minister wants to obtain the names of the donors from Artistic, he must obtain an authorization from a judge to do so. The Minister has not obtained such authorization and therefore he cannot require Artistic to provide information about the donors.

11 However, where unnamed persons are not themselves under investigation, subsections 231.2(2) and (3) do not apply. Presumably, in such cases the names of unnamed persons are necessary solely for the Minister's investigation of the third party. In such cases a third party served with a requirement to provide information and documents under subsection 231.2(1) must provide all the relevant information and documents including the names of unnamed persons. That is because subsection 231.2(2) only pertains to those unnamed persons in respect of whom the Minister may obtain an authorization of a judge under subsection 231.2(3).

[12] In the present case there is evidence that the Minister used the information delivered by the Foundation pursuant to the May 14, 2003 request, to contact donors so identified in respect of reassessment. Mr. van Staalduin says in paragraph 32(a) of his affidavit that he is aware of

approximately 25 donors who have received notices of reassessment. During cross-examination he indicated that this number, he estimated, had risen to between 45 and 50 (Question 302).

[13] Does the situation change when the Minister's request is made orally, rather than in writing and does it change if the taxpayer then volunteers the information? The mischief that section 231.2 was intended to address was considered by Rothstein J. (as he then was) in *MNR v. Sand Exploration Ltd.*, [1995] 3 F.C. 44 at paragraphs 14 (in part), 15 and 18:

14 *While Richardson and Bruyneel provide a useful background, it is important to note that the relevant legislation is different today than at the time of those decisions. The strict approach adopted in those decisions was necessitated by a broad statutory provision which, if interpreted too broadly, left open the possibility of abuse by tax enforcement officials...*

15 *Counsel for the Minister submits, and I accept, that section 231.2 was enacted to address these difficulties. By contrast with subsection 231(3), subsections 231.2(2) and (3) expressly provide a process with which the Minister must comply in order to require third parties to provide information or documents relating to unnamed taxpayers. A ministerial requirement to third parties to provide information about another person's tax affairs now requires a Court authorization. Pursuant to subsection 231.2(3) there must be evidence on oath that: the person is ascertainable; the purpose is to verify compliance by the person with the Act; it is reasonable to expect, on any grounds, non-compliance with the Act; and the information is not otherwise more readily available. Forcing the Minister to comply with this procedure addresses the mischief identified in Richardson and is intended to prevent fishing expeditions.*

....

18 *Intrusion into the privacy of individuals is always a sensitive matter, especially when third parties, who themselves may have valid reasons for not wanting to disclose, are required to provide the information. Undoubtedly this is the reason Parliament saw fit to require the Minister to obtain Court authorization for such intrusion upon satisfying the Court of the matters specified in subsection 231.2(3). But provided the requirements of this subsection are met, such intrusion is authorized. There is no absolute prohibition from obtaining the names of taxpayers from third parties and indeed section 231.2 now provides a procedure for obtaining such information.*

[14] Taking a functional and pragmatic approach to this legislation, it is clear that Parliament intended to protect third parties from having information relating to their activities obtained from other persons audited by the Minister, who then will use it for taxation purposes. While section 231.2 provides for a request by the Minister in writing and a refusal the requirement for a prior Order cannot be limited to a situation where only that occurs. To do otherwise would encourage the Minister's officials and agents to attempt by other means to secure the information whether by friendly means, subterfuge or guile and prey upon the innocence, inadvertence or mistake of one taxpayer in order to secure otherwise unavailable information about another. Parliament would not have provided for a Court Order to be obtained, first before securing such information if that provision could be so easily circumvented.

[15] Thus to obtain information from an audit of one taxpayer as to other taxpayers, for the purpose of using that information to reassess those other taxpayers, without first having obtained the appropriate Order of this Court, is wrong. In this case the CCRA auditor acted wrongly in requesting that information and the Minister acted wrongly in using it.

[16] The Minister's counsel argues here that, even if such action was wrong, the Foundation has no status to challenge that action. It is argued that section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 provides only that the Attorney General, or "person directly affected" by a matter can make such a challenge. Such an argument was raised in *Friends of the Island Inc. v. Canada*

(*Minister of Public Works*), [1993] 2 F.C. 229 where Reed J. reviewed extensively the legislative background of section 18.1 and concluded at page 283:

I think the wording in subsection 18.1(1) allows the Court discretion to grant standing when it is convinced that the particular circumstances of the case and the type of interest which the applicant holds justify status being granted.

[17] Here it is the information of the Applicant that is at issue. That information was created by and maintained by the Applicant. That information is being used in a way that clearly disrupts the Applicant's relationship with the donors listed in the information. The Applicant is clearly a person directly affected by the conduct at issue and has status to bring this application.

[18] The Minister argues that the auditor, in requesting the information, was acting as a federal board or tribunal and made a decision in respect of which the standard of review is patent unreasonableness. The auditor is not a "*board or tribunal*", and no "*decision*" was made. The auditor was simply acting outside the bounds of the *Act*. He did an illegal act. No question of deference arises.

[19] The issue then arises as to the nature of the relief, if any, that can be given. The Applicant is clearly entitled to a declaration and to the return of any documents and materials in the possession of the Minister that were improperly obtained. Can the Minister be prohibited from acting upon such information?

[20] The Minister argues that only the Tax Court can review and set aside an assessment. That is not the question here. The question here is whether this Court can restrain the Minister from making an assessment in the first place where it was based on information improperly obtained and whether this Court can require the Minister to abandon or revoke such an assessment already made. There appears to be no real precedent in this regard.

[21] Section 18.1(3) of the *Federal Courts Act* sets out the powers of the Court to grant relief in circumstances such as this:

18.1(3) Powers of the Federal Court On an application for judicial review, the Federal Court may

- (a) *order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or*
- (b) *declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.*

18.1(3) Pouvoirs de la Cour fédérale Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

- (a) *ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;*
- (b) *déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.*

[22] This power includes the power to “*set aside....prohibit or restrain a decision, order [or] act.*” Here the initial improper act was the obtaining of information as to donors illegally, that will be set aside. Consequent upon that illegal act were the subsequent acts in reassessing such donors. Section 18.1(3) is not limited to the specific decision at issue: when it says “*a decision*” such

wording is broad enough to include acts consequent upon the initial illegal act. Thus the Minister's reassessments based on the illegally obtained information will be set aside.

[23] The Applicant, being successful, is entitled to its costs to be taxed at the upper end of Column III.

Toronto, Ontario
October 4, 2005

“Roger T. Hughes”

JUDGE

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-657-05

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and
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