Date: 20060906

Docket: T-1080-05

Citation: 2006 FC 1069

Ottawa, Ontario, September 6, 2006

Present: The Honourable Madam Justice Johanne Gauthier

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

GREATER MONTRÉAL
REAL ESTATE BOARD

Respondent

REASONS FOR ORDER AND ORDER

[1] The Greater Montréal Real Estate Board (GMREB) is asking that the Court cancel my order dated June 28, 2005, made *ex parte* under subsection 231.2(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA), authorizing the Minister of National Revenue to require that the GMREB provide information and documents (electronic files) concerning a group of unnamed taxpayers.

[2] In its original application, the GMREB asked the Court to declare that subsection 231.2(3) of the ITA and the order of June 28, 2005 were in conflict with sections 7, 8 and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, and that the order raised some problems in the light of the *Act Respecting the Protection of Personal Information in the Private Sector*, R.S.Q c. P-39. The GMREB confirmed at the hearing that it was no longer raising these arguments and was no longer making submissions in this respect, even though a notice of constitutional question was served on the Attorney General of Canada as well as the attorneys general of the provinces and territories concerned. In view of this modification, the Court will refer only to the information relevant to the issues still in dispute.

Context

[3] The GMREB is a non-profit organization incorporated in 1954 that counts close to 8,500 members, that is, about 71% of the real estate agents and brokers in Quebec. Some 21% of the GMREB's members have their place of business in the Montérégie/Rive-Sud region.

[4] The GMREB is one of the 12 real estate boards in Quebec. Its basic mission is to promote and protect its members' professional and business interests so that they successfully meet their business objectives. The GMREB operates an inter-agency services network dubbed EDGARD. In the course of the transactions made within this system between competing members, the GMREB collects information of various types in a databank that can be consulted by its

members. The GMREB is in possession of a number of elements of information of a personal nature concerning its members as well as 63% of all properties sold in Quebec.

[5] In her affidavit filed in support of the Minister's *ex parte* motion, Ms. Christiane Joly, an auditor of small and medium-sized businesses in the Montérégie/South Bank office of the Canada Customs and Revenue Agency (CCRA), stated that, in October 2004, she embarked on a project to audit certified real estate agents and brokers living or having their place of business in the territory served by the CCRA's Montérégie/South Bank tax services office.

[6] The purpose of this project was to determine, pursuant to subsection 9(1) and paragraphs 12(1)(a) and (b) of the ITA, whether the commissions received or receivable from the sale of properties were indeed being reported, and thus to assess whether the taxpayers concerned had complied with their duties and obligations under the ITA.

[7] During the start-up period for this project, Ms. Joly examined the GMREB's web site and established that it held a lot of relevant information. The relevance of this information was confirmed in March 2005, during the audit of a broker specifically named in the context of the project being led by Ms. Joly.

[8] The GMREB acknowledged that it had complied with some requests for information by the CCRA in the past because they were directed at designated individuals.

[9] At paragraph 17 of her sworn information, Ms. Joly stated:

> [TRANSLATION] To determine whether the real estate agents and brokers, members of the GMREB, living or having their place of business in the territory served by the CCRA's Montérégie/South Bank tax services office, have complied with the aforesaid provisions of the ITA, it is essential that the GMREB provide the Minister of National Revenue with the following information . . .
>
> (i) The list of GMREB members registered as real estate agents or as brokers or certified brokers.

[10] The minister provided electronic files to the GMREB and asked it to state thereon the first and last names, date of birth, address, telephone number, member code, certificate number, social insurance number and other information pertaining to these individuals. Finally, the Minister asked to be provided with the list of properties sold by each real estate agent in 2002, 2003 and 2004, including various information described in the requirement to provide information.

[11] At paragraph 18 of her sworn information, Ms. Joly added that she had reasonable grounds to believe that all of the individuals with respect to whom the information was demanded constitute an ascertainable group within the meaning of paragraph 231.2(3)(a) of the ITA (i.e. real estate agents and brokers who are members of the GMREB, living or having their place of business in the serviced territory, and whose postal codes are described in the requirement to provide information).

[12] Ms. Joly was examined on her affidavit by the GMREB's attorneys.

[13] For its part, the GMREB filed the affidavit of Mr. Beauséjour for the purpose of establishing that the information it holds is neither complete nor reliable because it is given on a voluntary basis, that the information on commissions may not be up-to-date, and that its members do not include the totality of real estate agents and brokers residing in the territory described by Ms. Joly.

[14] Mr. Beauséjour also stated that the GMREB would have to spend between 1,500 and 2,000 hours of work in order to provide the required information. However, since the filing of this evidence, the Minister has varied his position and the parties have agreed that if the order is declared valid, it will nevertheless have to be amended by the Court under the powers conferred on it by subsection 231.2(6) so as to exclude certain postal codes and specify in what form the information may be provided.[1]

Issues

[15] As I have stated, the GMREB is now only raising the following issues:

(i) Has the Minister established which group of unnamed persons in the request is ascertainable, as required by paragraph 231.2(3)(a) of the ITA?

(ii) Has the Minister established the existence of a genuine and serious inquiry in relation to the persons in the group covered by the request?

(iii) Is the information that is sought sufficiently conclusive to warrant an authorization under subsection 231.2(3)?

Analysis

(a) Ascertainable group

[16] In the order dated June 28, 2005, the Court stated that it was satisfied that the information requested of the GMREB concerned an ascertainable group of unnamed persons. In this case it was real estate brokers and agents, members of the GMREB, whose postal codes were listed in Appendix A of the request for information attached to the order.

[17] The GMREB challenged this finding. Although it acknowledged that this group is composed of persons it can clearly identify, it submitted that the case law (in particular *Fédération des Caisses populaires Desjardins de Québec v. Minister of National Revenue*, Superior Court, [1997] 2 C.T.C. 159, at paragraphs 13, 14, and 16 (S.C.); *Canada (Minister of National Revenue) v. National Foundation for Christian Leadership*, 2004 FC 1753, at paragraph 9, [2004] F.C.J. No. 2139 (QL); *Canada (Minister of National Revenue) v. Sand Exploration Ltd. et al.*, [1995] 3 F.C. 44 [*Sand*]; *Artistic Ideas Inc. v. Canada (Customs and Revenue Agency)*, 2005 FCA 68, at paragraphs 2, 10, [2005] F.C.J. No. 350 (QL); *Redeemer Foundation v. Canada (Minister of National Revenue)*, 2005 FC 1361, at paragraph 10, [2005] F.C.J. No. 1678 (QL), and *Canada (Minister of National Revenue) v. Welton Parent Inc.*, 2006 FC 67, at paragraph 30, [2006] F.C.J. No. 117 (QL)) requires that, in order to have a group within the meaning of paragraph 231.2(3)(a), there must be a set of persons who have each done something specific in the pursuit of an identical or common objective, for example the acquisition of the same tax shelter or an investment in the same real estate project.

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[1] The parties have informed the Court that the specific terms of such an order could not be provided to it until

[18] The GMREB submitted that the Minister cannot choose or identify his group on the basis of an arbitrary criterion such as membership in the GMREB or the holding of a postal code in a given territory. The GMREB noted that in its circular letter IC 71-14R3, entitled “The Tax Audit”, dated June 18, 1984, the Minister confirmed in paragraph 5(f) that categorizing taxpayers for audit purposes should be done on a rational and impartial basis. In this case, the identified group is only a part of the group of persons who are presumably the subject of a genuine and serious inquiry by the Minister.

[19] The GMREB argued that if we accept the kind of identifier proposed here, it would necessarily follow that some groups described by such vague terms as, for example, [TRANSLATION] “all persons residing in Quebec” or “all persons who are members of the Bar”, are identifiable groups within the meaning of paragraph 231.2(3)(a), and that cannot be a reasonable interpretation.

[20] The Court has carefully reviewed all of the cases cited, as well as the language of the relevant provision, which reads as follows:

231.2(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 person (in this section referred to as the “group”) where the	231.2(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 paragraphe (1) concernant une personne non désignée nommément ou plus d’une personne non désignée

September.

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).)	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).)

[21] It is fairly clear that in enacting subsection 231.2(3) in 1986, Parliament intended to remedy to the various deficiencies identified by the Supreme Court of Canada in *James Richardson & Sons, Ltd. v. Canada (Minister of National Revenue)*, [1984] 1 S.C.R. 614 [*Richardson*] and *Canadian Bank of Commerce v. Canada (Attorney General)*, [1962] S.C.R. 729 [*Bank of Commerce*].

[22] In *Bank of Commerce*, *supra*, Mr. Justice John Robert Cartwright, writing for the majority, stated at pages 738 and 739 that the former subsection 231.2(3), which gave the Minister the right to impose a requirement to provide information, should be strictly construed, that is, that the information should be relevant to the tax liability of some specific person or persons.

[23] In *Richardson*, *supra*, at paragraph 9, the Supreme Court of Canada quoted Mr. Justice Gerald Eric Le Dain, then in the Federal Court of Appeal, when he explained that:

> . . . In the majority opinion of Cartwright J. (as he then was) the words "some specific person or persons" are obviously understood as referring not to named person but merely to existing identifiable persons. A reference to all of the commodity trading customers of the appellant comes within this meaning of the words.

[24] It is evident, from the remarks by Mr. Justice Cartwright at the bottom of page 738 of the *Bank of Commerce* case, *supra*, that if a genuine and serious inquiry was being conducted concerning the customers of the broker Richardson, the Minister would have been entitled to order the disclosure of documentation in regard to them. This means therefore that, in the opinion of the Supreme Court of Canada, a group defined as [TRANSLATION] "clients of Richardson who trade on the commodities futures market" constituted an acceptable group or a group of specific persons.

[25] There is nothing in the words used in paragraph 231.2(3)(a) or in Parliament's intention in enacting this provision that would warrant restricting the usual meaning of the word "identifiable" — capable of identification. That interpretation reflects the intent of Parliament, in the light of the decision of the Supreme Court of Canada, which held that the Court must be able to determine whether the persons concerned are the object of a genuine and serious inquiry.

[26] In *Sand*, *supra*, Mr. Justice Marshall Rothstein rejected the argument that, for a group to be ascertainable, the Minister must establish that he is aware of the existence of at least one person in the group. He states at paragraph 25:

> . . . I see no logical reason, and nothing in the wording of paragraph 231.2(3)(a), which indicates ascertainability requires the Minister to show he knows one or more individuals exist. The group, purchasers of seismic data from the four respondents, is ascertainable. If there are only 12 purchasers, the respondents will say so. If there are more, they can be identified from the respondents' records.

[27] As the Supreme Court of Canada held in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at paragraph 33, it is essential to the proper functioning of a tax system based on self-reporting and self-assessment that the Minister of National Revenue have

> broad powers . . . to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of <u>random</u> monitoring may be the only way in which the integrity of the tax system can be maintained.
>
> [Emphasis added]

[28] The Minister has full discretion, therefore, to choose which taxpayers will be subjected to an inquiry or audit in regard to their tax liability. He must have elbow room. The determination of the size of the group to be audited is also entirely discretionary. Furthermore, there is no indication that the Minister is not complying with the guidelines laid down in circular IC 71-14R3 and that the choice he made was not impartial. As in *Sand*, *supra*, there is no logical reason to accept the GMREB's argument.

[29] The Court confirmed that the Minister had established to its satisfaction that, when he required the GMREB to provide information as per the authorization dated June 28, 2005, it concerned an ascertainable group of persons within the meaning of paragraph 231.2(3)(a).

(b) Genuine and serious inquiry

[30] The GMREB submitted that the project to which Ms. Joly referred in her affidavit was not a genuine and serious inquiry in the sense it was understood by the Supreme Court of Canada in *Richardson, supra*.

[31] It stated that Ms. Joly confirmed on her examination on her affidavit that it was a very extensive project directed at the brokerage community "at large" and that she knew the requested information was not sufficiently specific to enable her to assess any taxpayer covered by the request to provide information.

[32] Ms. Joly also confirmed, the GMREB stated, that the requested information would provide her with the data to serve as [TRANSLATION] "basic tools" at a subsequent stage in the project. Ms. Joly did not know why the CCRA had asked her to target this community and had no information to the effect that the taxpayers who were members of the GMREB were not abiding by the law.

[33] In *Richardson*, the Supreme Court of Canada held that if the Minister wished to audit in a general manner whether the commodity futures traders were complying with the law, he could not do so by means of a fishing expedition. It was under the former section 232.1 of the ITA (then 231(3)) that the Minister could make inquiries into the affairs of the customers of a commodities broker like Richardson.

[34] The GMREB noted that, in *Richardson*, at paragraph 20, the Court stated that if the Minister seriously thought the traders were as a rule not reporting their income, then he could, under the former s. 221(1)(d) of the ITA, require them to file returns relating to "their transactions in the commodities futures market. Having obtained such a regulation, he is then in a position to demand such returns at large without regard to whether or not any specific person or persons are currently under investigation."

[35] The GMREB argued that the Minister was, in this case, trying to do exactly what the Supreme Court of Canada said he could not do in *Richardson*. And it relied as well on the information circular IC 71-14R3, *supra*, to establish that an "audit project" is not an audit.

[36] Information circular IC 71-14R3, which describes the role of the tax audit and the relevant policies and practices, describes at paragraphs 14 to 19 the process of selection of files for audit.

[37] At paragraph 16, it states:

> While the majority of files audited are selected in the screening process described above, there are three other common means of selection. These are:
>
> (a) Audit projects - Frequently, the compliance of a particular group of taxpayers is tested. If the test results indicate that there is significant non-compliance within the group, its members may come under audit on a project basis which may have local, regional or national application.
>
> (b) Leads - Information from other files, from audits or investigations or from outside sources including informers may lead to the selection of a particular file for audit;
>
> (c) Secondary files - A file may be selected for audit because of its association with another file previously selected. For example, if several

> taxpayers share a single place of business and are under the same control, and one of their files has been selected for audit, it is usually more convenient both for the Department and the taxpayers to have all the records examined during the same audit engagement. In addition, the affairs of such taxpayers are often so interwoven as to require the auditor to examine them together.
>
> [Emphasis added]

[38] Although the screening process is one of the CCRA's activities, the GMREB argued, it is only a preliminary step. At that point, there is no genuine and serious inquiry or audit of a taxpayer within the doctrine propounded in *Richardson*.

[39] The GMREB stated it was not disputing the lawfulness of subsection 231.2(3), even though two conditions that had been added to the Act after the *Richardson* judgment were repealed in 1996. It did submit, however, that the Minister, by repealing these conditions that he had himself adopted in response to the decision in *Richardson*, cannot disregard that judgment, which clearly limits his latitude.

[40] The Minister argued that Ms. Joly's project is clearly not a survey to determine compliance by a group of taxpayers. Indeed, the applicant submitted that, during her examination, Ms. Joly clearly stated that the decision had already been made to audit the group of taxpayers identified in the affidavit. She even said that if there are 300 members of the GMREB, she would have to examine 300 files.

[41] The Minister further stated that the expression “project to audit” was not used as a term of art and did not refer to the “audit project” referred to in this directive, which he did not even have in mind and which in any event is not binding.

[42] The applicant Minister stated that it is clear that, when the CCRA conducts such an important program or audit plan, it must, as an initial step, obtain the information that will enable it to establish some priorities, as well as the basic information that will be used in the course of the audits performed both in the office and on site.

[43] The Minister argued that the CCRA has a duty to secure compliance with the Act, and this means that it often conducts random audits. It must have the same power when it is auditing records selected by a computer as when it chooses to target a locally situated group, as in the Montérégie region.

[44] An inquiry is genuine and serious, the Minister stated, if it is conducted solely for the purpose described in paragraph 231.2(3)(b) and applies to an ascertainable group within the meaning of paragraph 231.2(3)(a). He submitted that Ms. Joly’s testimony and her affidavit clearly show that the request for information made to the GMREB was not done capriciously and that it met both of these requirements.

[45] The parties agree that, notwithstanding the changes made in the Act since the Supreme Court decisions in *Bank of Commerce* and *Richardson*, the strict construction of section 231.2 still holds, since it is penal in nature (see *R. v. Jarvis*, [2002] 3 S.C.R. 757, at paragraph 80).

[46] However, the Supreme Court provided few indications in *Richardson* of what would constitute a genuine and serious inquiry. It provided only some counter-examples, for instance a fishing expedition. It also stated that the compilation of general data on a class of persons does not amount to a genuine and serious inquiry that can bring section 231.2 into play.

[47] Two years later, Parliament enacted subsection 231.2(3). The Minister now had to obtain judicial authorization before imposing a requirement on a third party to provide documents relating to an unnamed taxpayer. He had to fill four conditions in order to obtain that authorization. In addition to the two that still stand, the Minister had to establish that he had reasonable grounds to believe that there was non-compliance with the Act, and that the information was not otherwise more readily available.

[48] In *Canadian Forest Products Ltd. v. Canada (Minister of National Revenue)*, [1996] F.C.J. No. 1147, at paragraph 7, Associate Chief Justice James Alexander Jerome noted that these four conditions were designed to protect taxpayers and third parties from abusive investigations.

[49] In *Sand*, *supra*, Mr. Justice Marshall Rothstein made the same point, stating that these four conditions were designed to ensure that the request was made in the course of a genuine and serious inquiry:

> 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. In *Richardson*, at page 622 Wilson J. outlines the mischief that could result from a broad interpretation of the former subsection 231(3):
>
> > The language of s. 231(3) of the *Income Tax Act* is unquestionably very broad and on its face would cover any demand for information made to anyone having knowledge of someone else's affairs relevant to that other person's tax liability. It would, in other words, if construed broadly, authorize an exploratory sortie into any taxpayer's affairs and require anyone having anything to contribute to the exploration to participate. It would not be necessary for the Minister to suspect non-compliance with the Act, let alone to have reasonable and probable grounds to believe that the Act was being violated as required in s. 231(4). Provided the information sought had a bearing (or perhaps even could conceivably have a bearing) on a taxpayer's tax liability it could be called for under the subsection.
>
> 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.

[50] That is why the courts have not up to now had to decide whether all these conditions are necessary in order to satisfy the principle laid down in *Richardson*.

[51] The GMREB's position that the Minister must, notwithstanding the 1996 amendments, establish that he has a good reason to investigate, that he is not conducting a fishing expedition and that this information is actually necessary and cannot be obtained otherwise is not easy to harmonize with the clear intent expressed by Parliament in 1996.

[52] It appears as well that the Court's power to examine this question is limited by subsection 231.2(6), which describes the role of the judge on a review of an order made pursuant to subsection 231.2(3).

[53] In view of the evidence before me, it will not be necessary to answer this question today, for even if the Court were to adopt the Department's position that an inquiry is genuine and serious when it is conducted for the purpose described in paragraph 231.2(3)(b) and is directed to an ascertainable group, the Court must rule that the order should be vacated.

[54] As the Minister's representative stated at the hearing, the Minister chose not to explain his decision to proceed with the project.

[55] The result is that the evidence before the Court on the nature of this project is not very clear. Unfortunately, the GMREB did not confront Ms. Joly with information circular IC 71-14R3 and her testimony raised a number of questions but yielded few answers.

[56] It appears, at times, that a decision was indeed taken to audit each and every one of the real estate agents and brokers belonging to the GMREB, and thus that we are undeniably dealing with a genuine and serious investigation of these individuals. But, at times, Ms. Joly states she was part of the workload development team. As she put it, this means that she is the one who will select the files to be transferred to audit. She stated:

> [TRANSLATION]
> A. . . . I was instructed, in fact, I am part of the workload development team. This means that I am the one, based on the project, who will select some files and transfer them to the audit, which will be . . . The files will be assigned to some auditors.
> (at page 128 Applicant's Record)
>
> [Emphasis added]

[57] She also noted that once the information is received from the GMREB, she will compare it with the information already in the CCRA's possession:

> [TRANSLATION]
> A. . . . And that will be the relative importance of things. In fact, an agent who reported an income that may not have been very high compared with some transactions that are quite numerous, that could be the subject matter of some additional work in terms of that file, which might be selected to go a little farther in the project's risk management.
> (at page 127 of the Applicant's Record)

[58] Having read and reread the evidence, in particular the transcript of Ms. Joly's examination and the circular letter, the Court is no longer satisfied that the Minister has established on a preponderance of the evidence that he is conducting a genuine and serious inquiry into the group identified in the requirement to provide information and in the authorization dated June 28, 2005. The Minister has not established that, at this stage of the project, the request for information is intended to determine whether each and every one of the

GMREB members (real estate agents and brokers) has complied with the Act by reporting all of their income (paragraph 231.2(3)(b)).

[59] Clearly, this finding will not prevent the Minister from obtaining this information if it is necessary. In fact, the Minister may readily apply for a new authorization supported this time by more ample evidence in which he will explain that a genuine audit is under way in regard to each and every one of the members of this group and not only an investigation or project aimed at selecting the members of the group who are to be audited later.

(c) Information likely to be conclusive

[60] The applicant did not dispute that the requested information is not complete or conclusive in itself. Ms. Joly indicated, however, that the list of names and transactions she will receive from the GMREB might be used, first, to establish quickly whether there are a certain number of non-filers in the group identified in her sworn information.

[61] The language of the Act is clear. The information and documents requested must be for the purpose of verifying whether the persons being investigated have complied with some duties or obligations set out in the Act. The courts have held that the information must be “relevant” to the inquiry. Nowhere is there any requirement that it be likely to be conclusive.

[62] The GMREB has acknowledged, as of this date, that its argument is not supported by the doctrine or the case law. The Court cannot accept it. This is not a criterion that the Court is authorized to take into account under subsection 231.2(6).

(d) Conclusion

[63] The Court rules that it is not persuaded that the conditions set out in subsection 231.2(3), and particularly in paragraph (3)(b), have been met. The order dated June 28, 2005 is therefore vacated with costs.

ORDER

THE COURT ORDERS that:

The order dated June 28, 2005 is vacated with costs.

"Johanne Gauthier"

Judge

Certified true translation
François Brunet, LLB, BCL

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1080-05
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