

Date: 20080709

Docket: T-555-08

Citation: 2008 FC 850

Ottawa, Ontario, July 9, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JORGE BARREIRO et al

Applicants

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER
(Re Motion for Extension of Time to file Affidavits and
Motion for Directions re Confidentiality of
Exhibits 6 to 19 of the Fjoser Affidavit)

I. BACKGROUND

[1] This is a motion by the Respondent which arises in the context of a case-managed judicial review. That judicial review attacks the actions of the Minister (in particular, his officials at the Canada Revenue Agency (CRA)) and the Requirements for Information (RFIs), their purpose and the legislative framework supporting the RFIs and actions of CRA.

[2] The affidavit in question by a principal witness for the Respondent contains various information over which there is a dispute as to confidentiality of certain exhibits. Pending resolution of that dispute, the Respondent has asked for an extension of time to file the affidavit until seven (7) days after the ruling on this confidentiality motion. The Applicants consent to this extension of time and the Court pronounced orally that the extension of time is granted.

[3] The evidence at issue in Mr. Fjoser's affidavit is of two distinct types. The first is a series of printouts which contain income tax return information and some compilation of income tax information (income information). The second is information from a credit agency, PPSA search results, land titles search results and the like (asset information).

[4] The importance of all of these documents is said to be that they are the documents used by the Respondent in deciding to issue the RFIs. In that regard, they form part of the "record".

[5] The Respondent states that some of the documents are in the public domain while concurring that others are not. The Applicants contend that even if some of the documents are in the public domain, e.g. motor vehicle details, they can only be obtained by use of some confidential information such as a social insurance number.

II. ANALYSIS

[6] The issue in dispute engages both s. 241 of the *Income Tax Act* and Rule 151 of the *Federal Courts Rules*.

[7] The confidentiality regime of the *Income Tax Act* (Act) admits of an exception related to the administration and enforcement of the Act. In particular, s. 241(3)(b) reads:

241. (3) Subsections 241(1) and 241(2) do not apply in respect of

...

(b) any legal proceedings relating to the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

241. (3) Les paragraphes (1) et (2) ne s'appliquent :

...

b) ni aux procédures judiciaires ayant trait à l'application ou à l'exécution de la présente loi, du Régime de pensions du Canada, de la Loi sur l'assurance-chômage ou de la Loi sur l'assurance-emploi ou de toute autre loi fédérale ou provinciale qui prévoit l'imposition ou la perception d'un impôt, d'une taxe ou d'un droit.

[8] The Supreme Court has addressed in detail the structure of s. 241(3) in *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430. A critical aspect of the voluntary tax reporting scheme of the Act is the confidentiality of what a taxpayer discloses to the tax authorities. The Court noted that s. 241 involves a balancing of competing interests – the privacy interests of the taxpayer with the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the administration and enforcement of the Act.

[9] There can be no issue that the information at issue is taxpayer information in the hands of the Minister. Nor is there any doubt that such information can be disclosed in legal proceedings related to the administration and enforcement of the Act. As such, the Minister may disclose such information (to the extent that it is relevant) at the hearing of this matter.

[10] The real issue is when is such disclosure authorized or should it be permitted. Therefore, Rule 151 becomes relevant.

151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

[11] In the course of normal litigation involving an action, the documents in question would be produced at discovery but generally subject to the express (or implied) undertaking of confidentiality. The result is that such information in the litigation would only be publicly available at the trial.

[12] The Federal Court changed its procedures for the relief of declaration (which is the principal relief sought) from the use of an action to the current procedure of a judicial review. As a consequence, affidavit evidence (usually the type of evidence heard in an action at trial) is available when filed with the Registry. To some extent, the pre-trial disclosure protections are lost by the form of the proceeding.

[13] As to whether this is an appropriate instance under Rule 151 to impose a confidentiality order, the Court is guided by *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.

[14] In *Sierra Club of Canada*, the Supreme Court set out the appropriate test for a R. 151 order to be issued when:

- an order is necessary to prevent risk to an important interest. This involves a consideration of real and substantial risk; a finding that the interest in issue is a public interest in confidentiality; and an obligation to restrict the remedy as much as is reasonable while preserving the interest.
- the salutary effects of the confidentiality order outweigh its deleterious effects.

[15] The first category of information at issue (income information) is largely the information the Applicants supply on their tax filing. There is a recognized public interest in the Act in maintaining

confidentiality over such voluntary disclosure. Disclosure at this stage harms a privacy interest and a public interest in the Act.

[16] Furthermore, since any confidentiality order would operate only up to the commencement of the hearing, any adverse effects on the open court principle is largely ameliorated.

[17] Litigation, particularly at this stage, does not justify the Minister in disclosing taxpayer information simply because there is litigation (nor is a taxpayer entitled to be treated as if in a cocoon). The Court therefore concludes that the income tax information and compilations are to remain confidential until the hearing of this matter, at which time the parties may address the need to continue to maintain such information and compilations confidential.

[18] With respect to the “asset information”, particularly the information which is in the public domain, the Applicants point out that it was the method of obtaining the information which made it confidential. The Applicants rely on *Scott Slipp Nissan Ltd. v. Canada (Attorney General)*, 2005 FC 1479. In that case, there was evidence of harm by the disclosure of information which should not continue even if the harm was minimal. However, in the present case, the Applicants have not produced evidence of potential harm by the disclosure of information in the public domain.

[19] In addition, there is no evidence that in order to obtain information such as PPSA or land titles search results, one needed to have access to confidential information. The Applicants have not established some derivative use of confidential information.

[20] Finally, there is no suggestion here (as there was in *Airth v. Canada (Minister of National Revenue – M.N.R.)*, 2007 FC 370) that the Respondent has stepped outside the bounds of adducing material that is relevant and necessary to the case in affidavit evidence.

[21] Information such as PPSA searches and the like are clearly in the public domain available in public government registries. The evidence from credit agencies does not have the same characteristic of being publicly available; however, it appears to be information which is proprietary to the agencies – not to the subject of the reports. Therefore, that information has not been shown to be confidential to the Applicants or between the Applicants and the Respondent. This information will not be covered by this confidentiality order.

ORDER

FOR THE REASONS GIVEN, THE COURT ORDERS as follows:

1. The time for filing the original affidavits of Wayne Fjoser and Jacqueline Gomez is extended to seven (7) days following the date of this Order.
2. The original affidavit #2 of Wayne Fjoser containing the confidential information shall be sealed in the Registry and shall remain confidential except for purposes of this litigation until otherwise ordered by the Court.
3. The Respondent is, within the same seven (7) days, to serve and file a “public” version of Wayne Fjoser’s affidavit, with all information herein ruled confidential removed.
4. Costs shall be in the cause.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-555-08

STYLE OF CAUSE: JORGE BARREIRO et al
and
MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: June 25, 2008

**REASONS FOR ORDER
AND ORDER:** Phelan J.

DATED: July 9, 2008

APPEARANCES:

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