

**Date: 20090219**

**Docket: T-591-08**

**Citation: 2009 FC 181**

**Vancouver, British Columbia, February 19, 2009**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**COASTAL RESOURCES LIMITED**

**Applicant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Coastal Resources Limited (the “Applicant”) seeks judicial review of the decision of the Minister of National Revenue (the “Respondent”). In that decision made on December 14, 2007, the Respondent decided to maintain his earlier decision not to fully disclose an internal memorandum to the Applicant.

## I. Background

[2] The Applicant is a taxpayer. By letter dated July 20, 2007, it made a request, pursuant to the *Access to Information Act*, R.S.C., 1985 c. A-1 (the “Act”), for the production of an internal memorandum concerning the treatment of audits, after the delivery of the decision of the Federal Court of Appeal in *Minister of National Revenue v. Franklin* (2002), 288 N.R. 30 (C.A.).

[3] By letter dated September 18, 2007, from Ms. Danielle Jean-Venne, Director, Access to Information and Privacy Directorate with the Canada Revenue Agency (the “CRA”), the Applicant was provided with a redacted version of the document. Certain parts of the document had been redacted on the basis that those portions were exempt from disclosure pursuant to paragraphs 16(1)(c), 21(1)(b) and subsection 24(1) of the Act.

[4] The Applicant exercised its right to complain to an Information Commissioner, pursuant to paragraph 30(1)(a) of the Act.

[5] By letter dated December 14, 2007, from Ms. Nicole Murdock, Acting Manager, Access to Information and Privacy Directorate with the CRA, the Applicant was advised that some of the previously excerpted sections of the Memorandum would now be disclosed. The relevant section of the letter provides as follows:

As a result of discussions with an investigator from the Information Commissioner’s office, the exemptions applied on some of the information previously severed has now been fully disclosed as indicated on the enclosed pages. You will notice that we are still committed to maintain the exemption on page 5 of the document.

[6] The explanation for non-disclosure of part of page 5 was set out in a letter dated February 28, 2008, from the Office of the Information Commissioner of Canada, signed by Ms. Andrea Neill, Assistant Commissioner, Complaints Resolution and Compliance. Ms. Neill stated the following in her letter:

Having reviewed the remaining withheld information, it is my view that this information has been properly exempted under paragraph 16(1)(c). Under this provision, the head of a government institution may refuse to disclose any record that contains information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada. I am satisfied that disclosure of the withheld information could reasonably be expected to be injurious to the enforcement of the *Income Tax Act*. I am also satisfied that the department properly exercised its discretion in applying this exemption.

Since paragraph 16(1)(c) properly applies to the information, I need not consider the applicability of paragraph 21(1)(b) to this information. It should be noted that CRA no longer invokes subsection 24(1) of the Act.

[7] Subsequently, the Applicant applied to the Court for judicial review of the Respondent's decision to deny access to the requested document.

[8] Two affidavits were submitted in support of this application for judicial review. The Applicant filed the Affidavit of Ms. Sharon Snapkauskas, sworn May 14, 2008. Ms. Snapkauskas' Affidavit identifies the documents that are relevant to the Applicant's request for production of this Memorandum.

[9] For his part, the Respondent filed the Affidavit of Ms. Murdock, Acting Manager, Access to Information and Privacy Directorate with the CRA. In her Affidavit, Ms. Murdock describes the

process that she followed in dealing with the Applicant's request for information. Those steps are recorded in a Case Summary and an Amended Case Summary. The Case Summary was prepared in connection with the CRA's first reply to the Applicant and the Amended Case Summary relates to the second decision, the one that maintained an exemption only with respect to a part of page 5 of the Memorandum. The second decision is the subject of this application for judicial review.

[10] Ms. Murdock was cross-examined upon her Affidavit and the transcript of that examination is included in the Applicant's Application Record. In the course of her cross-examination, she referred to two other documents. The first document is a redacted e-mail from Bob Naufal and the second is a fax cover sheet dated December 11, 2007, from Ms. Carol Anne O'Connor, an employee of the CRA to Ms. Ginette Grenier of the Office of the Information Commissioner.

[11] According to statements made by Counsel for the Respondent in the course of the cross-examination of Ms. Murdock, the e-mail from Mr. Naufal to Ms. O'Connor was partially redacted in order to protect from disclosure an explanation from Mr. Naufal regarding the information that is the subject of this application for judicial review.

[12] In the course of the hearing of the application for judicial review, counsel for the Respondent advised that the letter referred to in the fax cover sheet, which was Exhibit B to the transcript of the cross-examination of Ms. Murdock, was not disclosed for the same reason, that is that disclosure of that letter would disclose information that is the subject of this application and that disclosure of the letter would make this judicial review proceeding moot.

[13] In the application for judicial review, the relief sought by the Applicant is an Order directing the Respondent to provide a complete unexpurgated copy of the Memorandum. In the course of argument, counsel for the Applicant asked also for the production of unexpurgated copies of Exhibits A and B to the cross-examination transcript.

## II. Discussion and Disposition

[14] The Applicant's request for disclosure of the Memorandum was made pursuant to section 4(1) of the Act. The purpose of the Act is set out in subsection 2(1), as follows:

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

[15] The application for judicial review is taken pursuant to section 41 of the Act, which provides as follows:

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[16] The Act contains provisions upon which full disclosure of a record can be refused. In the present case, full disclosure of the Memorandum was refused on the basis of paragraph 16(1)(c) of the Act which provides as follows:

16. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

...

(c) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of

16. (1) Le responsable d'une institution fédérale peut refuser la communication de documents :

...

c) contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois

Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information	fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment :
(i) relating to the existence or nature of a particular investigation,	(i) des renseignements relatifs à l'existence ou à la nature d'une enquête déterminée,
(ii) that would reveal the identity of a confidential source of information, or	(ii) des renseignements qui permettraient de remonter à une source de renseignements confidentielle,
(iii) that was obtained or prepared in the course of an investigation; or	(iii) des renseignements obtenus ou préparés au cours d'une enquête;
...	...

[17] The Act provides that decisions made on the basis of paragraph 16(1)(c) are reviewed upon the standard of reasonableness. This is set out in section 50, which provides as follows:

50. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose	50. Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige
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the record or part thereof,  
subject to such conditions as  
the Court deems appropriate,  
to the person who requested  
access to the record, or shall  
make such other order as the  
Court deems appropriate.

d'en donner communication  
totale ou partielle à la personne  
qui avait fait la demande; la  
Cour rend une autre  
ordonnance si elle l'estime  
indiqué.

[18] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada commented at paragraph 62, about the manner of identifying the appropriate standard of review, as follows:

62. In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[19] The application of section 50 of the Act was discussed by this Court in *X v. Canada (Minister of National Defence)* (1992), 58 F.T.R. 93 at 97 where the Court found that pursuant to section 50, disclosure could be ordered by the Court only if it is found that the head of the government institution did not have reasonable grounds upon which to base the refusal to disclose.

[20] In *Do-Ky v. Canada (Minister of Foreign Affairs and International Trade)*, [1997] 2 F.C. 907 (T.D.), aff'd (1999), 241 N.R. 308 (C.A.), the Court found that disclosure cannot be ordered by a reviewing court simply because it would have reached a different conclusion than the head of the government institution. The prior jurisprudence shows that the standard of reasonableness has been



adopted previously in judicial review proceedings of decisions where paragraph 16(1)(c) of the Act is at issue.

[21] The reviewing court may intervene only if it is satisfied that no reasonable person could have concluded that the record in question should be exempted from disclosure, on the basis of the evidence presented to the court.

[22] In this case, the Respondent relies on paragraph 16(1)(c) as the basis for refusing full disclosure. The Affidavit of Ms. Nicole Murdock, together with the transcript of her cross-examination upon that Affidavit, is presented as the evidence in support of an exemption from disclosure on the basis of paragraph 16(1)(c).

[23] I note that the Respondent provided copies of the unredacted page 5 of the Memorandum, together with clear copies of Exhibits A and B that were produced during the cross-examination of Ms. Murdock, during the hearing of the application for judicial review. These documents were submitted to this Court in triplicate, in sealed envelopes and have been reviewed by the Court.

[24] An exemption on the basis of paragraph 16(1)(c) of the Act requires consideration of the purpose of the governing legislation in issue, in this case, the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) (the “Income Tax Act”).

[25] The Income Tax Act governs the collection of taxes to be remitted to the consolidated revenue fund, such fund to be used for the general purpose of the Government of Canada. The tax collection system is based upon self-reporting. The Minister has access to a range of remedies under the Income Tax Act to review the remittance of taxes, including assessment and auditing processes.

[26] The Respondent resists production of a fully unredacted version of the internal memorandum requested by the Applicant on the grounds that such production is exempt on the basis of paragraph 16(1)(c) of the Income Tax Act, that is, that the disclosure would “reasonably be expected to be injurious to the enforcement of any law of Canada”. Having regard to the purpose of the Income Tax Act and the nature of the document in issue, I am not satisfied that the decision to withhold production meets the test of reasonableness as discussed in *X v. Canada (Minister of National Defence)* and *Do-Ky v. Canada (Minister of Foreign Affairs and International Trade)*.

[27] The evidence of Ms. Murdock does not provide a reasonable basis for the non-disclosure. In this regard, I refer to the following extracts from the transcript of the cross-examination of Ms. Murdock:

Q. That would mean investigations carried out pursuant to the *Income Tax Act*?

A. No. Actually, the 16(1)(c) does speak about injurious to lawful investigations and as well injurious to any act of Canada. And I believe this was a mistake that was put in because our - - our template puts that little phrase in.

Q. And so what are you saying it should have said then? Injurious to an act of Canada?

A. Yes.

Q. And act with a Capital A, in other words a statute?

A. It's the *Income Tax Act*.

Q. And it's the *Income Tax Act*?

A. Yes.

Q. What does that mean then, injurious to the *Income Tax Act*?

A. If the information - - in this case if the information were to be released it would prejudice the use of -- of maybe the audit techniques or - -

Q. Injurious to the - - perhaps I could use the word administration or implementation of the *Income Tax Act*; would that be fair?

A. I think so.

Q. Now, I realize that there's certain questions you won't want to answer because it will render the whole judicial application moot if I ask you well, what was it? But just in a general sense then what was the reasoning here? Can you be a little bit more specific? Was it thought that the disclosure of that part of the memorandum, not the facts part, but the other part about the effect of Franklin on page 5 of the memorandum, was it the considered opinion of you and the people at the commissioner's office that the disclosure of that to a taxpayer, which would, I guess, mean to the citizenry at large, would be injurious to the administration somehow or another of the *Income Tax Act*? And I don't mean to put words in your mouth, but is that the gist of what you're saying?

A. I'm trying to understand what you're saying. The information that was taken out is information that our audit techniques or plans and if disclosed it could prejudice the - - I guess the *Income Tax Act*.

It could prejudice our way of doing things. And this is - - I think this is how it is.

[28] Accordingly, the application for judicial review is allowed with costs to the Applicant.

The decision of December 14, 2007, is quashed and the unredacted version of page 5 of the Internal Memorandum shall be provided to the Applicant upon the expiration of the Applicant's appeal period, and if a Notice of Appeal is filed, then upon the further Order of a Court.

[29] There is no basis upon which to order disclosure of the unredacted version of the exhibits that were attached to the transcript of the cross-examination of Ms. Murdock and no order will be made in that regard.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the application for judicial review is allowed with costs to the Applicant. The decision of December 14, 2007, is quashed and the unredacted version of the Internal Memorandum shall be provided to the Applicant upon the expiry of the relevant appeal period, and if a Notice of Appeal is filed, then upon further Order of a Court.

“E. Heneghan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-591-08

**STYLE OF CAUSE:** COASTAL RESOURCES LIMITED  
v. THE MINISTER OF NATIONAL REVENUE

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** December 11, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HENEGHAN, J.

**DATED:** February 19, 2009

**APPEARANCES:**

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