Federal Court Cour fédérale

Date: 20091202

Docket: T-555-08

Citation: 2009 FC 1226

Ottawa, Ontario, December 2, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

RYAN MURPHY et al

Applicants

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This decision addresses a challenge to the Requirements for Information (RFIs) issued under the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (Act) to each of the Applicants who are alleged to be members of the UN Gang located in the Vancouver B.C. area. The Applicants rely on an alleged continuing course of illegal conduct carried out by certain officials of the Canada Revenue Agency (CRA) which are not authorized and were engaged in for purposes other than the enforcement of the Act.

[2] It is a central tenet of the rule of law that everyone is required to obey the law and all are entitled to the protections of the law, even those litigants who may be deserving of little sympathy. In that latter category would be members of gangs reputed to be engaged in some of the most serious of illegal misconduct in the Lower Mainland of British Columbia.

[3] It is not necessary or even within the scope of this inquiry to determine whether the Applicants are members of the UN Gang. However, the history of this litigation, involving change of the lead litigant due to "hits" on other members and other steps taken by the Applicants to protect personal information usually available in litigation due to the fear of harm from unknown persons, is consistent with membership in illegal gangs.

II. BACKGROUND

[4] This judicial review focuses on the decision by a member of CRA (purportedly on behalf of the Minister of National Revenue) to issue RFIs, the initiation of that process, its purpose and the manner in which it was carried out.

[5] The impugned actions of the CRA were those of the Special Enforcement Program (SEP) of the Vancouver Tax Service Office (VTSO) of CRA. The mandate of the SEP is to conduct audits and undertake other civil enforcement actions on individuals suspected of earning income from illegal activities. The SEP had significant contact with police units during the timeframe at issue in this proceeding.

[6] The principal police unit in question is the Proceeds of Crime Unit of the Combined Forces Special Enforcement Unit – British Columbia (CFSEU – BC). This organization is a combination of members of the federal, provincial and municipal law enforcement agencies.

[7] Critical to this case are the activities of Wayne Fjoser who was a Team Leader in the SEP. He is the individual who signed the RFIs. During the course of his time in the SEP, Fjoser dealt with various police forces and made presentations to those police forces on the mandate of SEP, the ability of CRA to obtain taxpayer information and the ability of CRA/SEP to communicate taxpayer information to police, including the limitations thereon. One of the tools used by CRA/SEP is the issuance of RFIs.

[8] Of particular relevance to this matter in respect of the issuance of RFIs, Fjoser, as a Team Leader, had not been given power to issue RFIs pursuant to the National Authorities Matrices "Matrices", a matter to be discussed later. The Matrices were the method by which the Minister's power to issue documents and institute process was delegated to specific levels or job categories within CRA.

[9] By letters of March 8, 2007 and March 20, 2007, Inspector Michael Ryan, a veteran RCMP officer and then the officer in charge of the Proceeds of Crime Team of the CFSEU – BC, provided Fjoser with a list of known or suspected UN Gang members. Ryan stated in his evidence that he had taken the initiative to make this referral to CRA. There was no suggestion in his evidence that he or CFSEU – BC were expecting anything in return.

[10] In sharp contrast to Ryan's evidence, Fjoser stated that it was he who had requested this information from Ryan after Fjoser had identified the UN Gang as an association whose members were likely to have unreported earned income from illegal activities. Fjoser's evidence was that he arrived at this conclusion based on a review of media reports.

[11] There are a number of difficulties with Fjoser's evidence on the subject of what led to the initiation of the RFIs. These difficulties have a significant impact on the legal requirement that the Minister have a "serious and genuine inquiry into the tax affairs of the taxpayer".

[12] For reasons to be discussed, the Court finds that Ryan's evidence is significantly more credible than that of Fjoser. Indeed Fjoser's evidence is generally weak and not persuasive on many important aspects of this case.

[13] However, having received the list from Ryan, Fjoser forwarded it to Jacqueline Gomez, a compliance officer in SEP. Gomez checked to see if the named individuals had filed tax returns. If they had not, a requirement to file a return was issued. With respect to the potential for issuing RFIs, Gomez did some public document searches of the various individuals.

[14] RFIs were prepared for specific years requesting net worth statements for 2005 and 2006 for all of the Applicants and 2004 for most of the Applicants. Fjoser prepared the RFI authorization

documentation and then authorized the RFIs by stamping them with the signature of Arlene White, Director of the VTSO who was authorized under the Matrices to sign and issue RFIs.

[15] It was Fjoser's evidence that he never discussed his UN Gang project with his Director, Assistant or Acting Director. His only discussions with these superiors were in respect to the current litigation.

[16] In the context of reportedly one of the most vicious crime gangs and involving a multi-force sophisticated police crime unit, Fjoser stated explicitly that only he and Gomez worked on the project and reported to no one.

[17] The RFIs were issued by Fjoser in April of 2007 but were not served until early 2008 (between February and April). These RFIs were served personally by Gomez on each of the Applicants and in most cases accompanied by and with the assistance of the police.

[18] The delay between authorization of the RFIs in 2007 and service in 2008 was attributed in part to the delay in securing police presence to assist with service.

[19] It was Fjoser who instructed Gomez to effect personal service with police assistance rather than effecting service as statutorily permitted, through lawyers, agents or by registered mail. In some very limited circumstances, an Applicant would have been served through counsel.

[20] Many of the police officers accompanying Gomez were members of the integrated gang task force; some of the Applicants were familiar to the police. The usual course was for Gomez to identify herself, and tell the Applicant that she was serving demands under the *Income Tax Act*. Police presence was clear and visible and highly obtrusive. The service of the documents was generally carried out late at night, with multiple police cruisers present, lights on and with all the paraphernalia of a police raid. Many of the officers were members of the integrated gang task force.

[21] Many of the Applicants were served at home at or around midnight by the police knocking on the door. In addition to the highly visible police presence to assist with service, there were numerous incidents where police entered the grounds of the particular Applicant's property, took notes concerning the people present, the vehicles on the property and other details of who and what was at the particular location. The police were present as both plain clothed and uniformed officers.

[22] On at least one occasion, Gomez provided the police upon request, and after effecting service, with the names, addresses and dates of birth of the persons served as well as details of their respective spouses/partners. The information came from the CRA's tax information system. The explanation for this disclosure was in response to a police request to know where they had been and what they had been doing.

[23] There is no evidence that Fjoser or Gomez took any steps or initiated any procedures to keep taxpayer information secure or to limit its use.

[24] After service of the RFIs, no enforcement steps were taken to secure the requested information and no order sought from this Court that such information be provided under seal pending the results of this litigation.

III. ISSUES

[25] The issues raised in this judicial review are:

a. Are the Requirements for Information invalid because they were not issued by a person authorized to do so?

b. Did the foundation for Requirements for Information issued lack the pre-requisite "genuine and serious inquiry into the tax affairs of the Applicants"?

c. Is it appropriate to apply the predominant purpose test to this matter and, if so, does the Minister's course of conduct meet the test?

d. In the alternative, is section 241(3)*(a)* of the Act inconsistent with sections 7 & 8 of the *Charter* and, to the extent of the inconsistency, therefore of no force and effect?

IV. ANALYSIS

A. *Authority to Issue the RFIs*

[26] The issue of whether Fjoser had the authority to decide to issue the RFIs is a jurisdictional question to be reviewed on a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9).

[27] The determination of the authority vested in Fjoser depends on the interpretation of statutory provisions, the scope of the delegation of the Minister's authority and the authority of a Ministerial delegate to sub-delegate the very authority specifically given. These issues have a wide and important range of implications not only to these parties but to other taxpayers as well. It is uncontested that Fjoser decided to issue the RFIs and to engage in the impugned actions. As Fjoser never discussed or communicated with Director White or any other official in a position of greater authority, the issue in this case is the scope of Fjoser's authority to act and not whether White had properly turned her mind to the issuance of the RFIs.

[28] The authority to issue RFIs and the power of the Minister to do so is grounded in s. 231.2(1) of the Act:

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), of a comprehensive tax information	**231.2** (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord général d'échange de

exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,

renseignements fiscaux entre le Canada et un autre pays ou territoire qui est en vigueur et s'applique ou d'un traité fiscal conclu avec un autre pays, 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*) any information or additional information, including a return of income or a supplementary return; or

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

(*b*) any document.

b) qu'elle produise des documents.

[29] The power of the Minister to delegate to officers or a class of officers those powers and duties of the Minister are very specifically set forth in s. 220 and most particularly subsection 220(2.01):

220. (1) The Minister shall administer and enforce this Act and the Commissioner of Revenue may exercise all the powers and perform the duties of the Minister under this Act.

220. (1) Le ministre assure l'application et l'exécution de la présente loi. Le commissaire du revenu peut exercer les pouvoirs et fonctions conférés au ministre en vertu de la présente loi.

(2) Such officers, clerks and employees as are necessary to administer and enforce this Act shall be

(2) Sont nommés ou employés de la manière autorisée par la loi les fonctionnaires, commis et

appointed or employed in the manner authorized by law.	préposés nécessaires à l'application et à l'exécution de la présente loi.
(2.01) The Minister may authorize an officer or a class of officers to exercise powers or perform duties of the Minister under this Act.	(2.01) Le ministre peut autoriser un fonctionnaire ou une catégorie de fonctionnaires à exercer les pouvoirs et fonctions qui lui sont conférés en vertu de la présente loi.

[30] In accordance with this delegation power, the Minister established a delegation regime in which certain of his powers and duties were delegated to certain levels within the CRA bureaucracy. The National Authorities Matrices (which included the Legislative Matrix and the Policy Matrix) described in detail the functions which different positions, e.g. Assistant Deputy Minister, Director, etc., could perform as the delegate of the Minister.

[31] The authority to issue a RFI was delegated to several upper levels of the bureaucracy including that of a Director, the position held by White.

[32] The position of Team Leader, the position held by Fjoser, was included in the Matrices and certain functions were delegated to that position but not that of issuing RFIs.

[33] On November 2, 2004, White purported to delegate her powers to Fjoser due to "administrative and operational" requirements of her job and in order "to facilitate the efficient transaction of public business". This delegation authorized Fjoser:

(a) to exercise those powers and duties within her position parameters in the Legislative Authorities Matrix; and

(b) to stamp facsimiles of her signature.

[34] It is the Respondent's position that this form of sub-delegation allowed Fjoser to make the decision to issue RFIs.

[35] The Court is not persuaded that White had the authority to delegate to Fjoser in this manner in the face of clear statutory language governing delegation by the Minister and in view of the very thorough manner of delegation of various functions to certain levels of officials as set forth in the Matrices.

[36] In *Bancheri v. Canada (Minister of National Revenue – M.N.R.*), [1999] T.C.J. No. 22 (QL), a case materially similar to the present case, Tax Court Judge Porter held that where an explicit scheme for delegation exists that does not contemplate sub-delegation, sub-delegation is precluded. I adopt this rationale as it is most consistent with the statutory scheme and gives due regard to the nature of the powers delegated and the manner in which they were delegated.

[37] This is not an instance where delegation power may be inferred as is often the case in the day-to-day administration of a modern government. It is important to bear in mind that the function at issue, the initiation of RFIs, is not some benign bit of bureaucratic curiosity. RFIs have the force of law, they are invasive and they require a taxpayer to disclose information which may be

inculpatory. RFIs are a “searchless warrant” (as opposed to the pernicious “warrantless search”), but they have all the impact of compulsory disclosure.

[38] In *Bancheri*, above, an appeals division team leader made a decision that Mrs. Bancheri was not entitled to E.I. He then affixed the stamp of the Chief of the Appeals Division on behalf of the Minister. The Tax Court judge quashed the decision despite concluding that had the decision been made by the proper authority, it would have been well founded. There was evidence that the Chief of the Appeals Division had delegated her authority to the Team Leader. However, the Tax Court found that given a specific scheme of delegation from the Minister to the Chief with no mention of sub-delegation, any further delegation of authority to make the decision at issue was precluded.

[39] In my view, the ratio of *Bancheri* is sound law and applicable in this case. In the present case, there is an elaborate and comprehensive scheme of delegation of Ministerial power to specifically identified levels within the CRA. There is no suggestion that the person holding the delegated authority had authority to further sub-delegate. A Team Leader did not have the delegated authority to issue RFIs and the official holding the power to issue RFIs (White) did not have delegated authority to further sub-delegate.

[40] The Court’s view that s. 220(2.01) of the Act does not permit the further delegation of powers to those positions not named in the Matrix is supported by the maxim “*delegatus non potest delegare*” – the delegate cannot delegate. The maxim is a principle of statutory construction and

there is nothing in the legislative scheme that would suggest that the power given to the Minister to delegate could be further sub-delegated.

[41] Further, as held in *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, the *delegatus non potest delegare* rule prevents the holder of a power which entails the exercise of a discretion from conferring the exercise of that power on some other person or agency.

[42] Since at least the decision in *R. v. Harrison*, [1977] 1 S.C.R. 238, it is recognised that a power entrusted to a minister will often be performed, not by the minister, but by delegation to responsible officials in the department. However, there are clear limits to this form of delegation even in a modern bureaucracy. One of those limits must be where there is a specific delegation framework where specific powers are given to specific positions and the same power is withheld from other positions. It would be inconsistent with the scheme of delegation to allow a sub-delegate to delegate a power further down the chain of authority when the Minister was not prepared to do so directly.

[43] The issuance of a RFI is a discretionary exercise, not a purely administrative power. The holders of the power are limited down to those at a Director level (e.g. Ms. White). As a consequence of the operation of the *delagatus non potest delegare* rule, Ms. White, as the delegate of the Minister's discretionary power, had no authority to delegate the exercise of that power to Fjoser.

[44] The conclusion that there were strict limits on the delegation of powers and no authority in a delegate to sub-delegate is consistent with the legislative history of s. 220(2.01).

[45] The provision came into effect with the legislation to create the Canada Customs and Revenue Agency (CCRA). It was a central concern at the time that the Minister of National Revenue retain various elements of control over what was to be a quasi-independent agency. It is clear that while the legislation allowed the Minister to delegate certain powers to the newly formed CCRA, such delegation was done under strict conditions.

[46] Given all the factors addressed in the preceding paragraphs, a general scheme of sub-sub-delegation or a power in the delegate to sub-delegate cannot be implied or read-in.

[47] Therefore, I have concluded that as the Minister had explicitly delegated his authority to issue RFIs, there is nothing in the legislation or the delegation scheme which supports sub-delegation. Sub-delegation is precluded and it is therefore irrelevant whether White intended, or in fact did, delegate her authority to initiate RFIs to Fjoser.

[48] Aside from the Respondent’s argument that there was a proper sub-delegation to Fjoser, the Respondent also argues that s. 244(13) of the Act presumes that the RFIs were validly made, signed and issued and that the presumption can only be challenged by the Minister – not by the targeted taxpayer (the Applicants) or before this Court.

[49] Section 244(13) deems documents to have been signed, made and issued by authorized persons unless called into question by the Minister or a person acting for the Minister or Her Majesty. Section 244(13) reads:

244. (13) Every document purporting to have been executed under, or in the course of the administration or enforcement of, this Act over the name in writing of the Minister, the Deputy Minister of National Revenue, the Commissioner of Customs and Revenue, the Commissioner of Revenue or an officer authorized to exercise a power or perform a duty of the Minister under this Act is deemed to have been signed, made and issued by the Minister, the Deputy Minister, the Commissioner of Customs and Revenue, the Commissioner of Revenue or the officer unless it has been called in question by the Minister or by a person acting for the Minister or Her Majesty.	**244.** (13) Tout document paraissant avoir été établi en vertu de la présente loi, ou dans le cadre de son application ou de sa mise à exécution, au nom ou sous l'autorité du ministre, du sous-ministre du Revenu national, du commissaire des douanes et du revenu, du commissaire du revenu ou d'un fonctionnaire autorisé à exercer des pouvoirs ou fonctions conférés au ministre par la présente loi est réputé avoir été signé, fait et délivré par le ministre, le sous-ministre, le commissaire des douanes et du revenu, le commissaire du revenu ou le fonctionnaire, à moins qu'il n'ait été contesté par le ministre ou par une personne agissant pour lui ou pour Sa Majesté.

[50] Section 244(13) is not as sweeping an exemption from challenge and judicial scrutiny as the Respondent contends. The Respondent's position would seriously call into question the Rule of Law and the right to judicial review of actions and decisions of CRA officials. It would cloak those officials with an unpalatable immunity. Therefore, the provision must be narrowly read and applied.

[51] It is important to bear in mind that one of the issues in the challenge to the RFIs is not simply the signing of a document on behalf of someone else, but rather the very determination to initiate RFIs.

[52] In *Swyryda v. Her Majesty the Queen* (1981), 81 D.T.C. 5109 (Sask. Q.B.), a seminal case with respect to s. 244(13), the court dealt with the ability of another employee/officer to sign on behalf of the authorized officer. At no point does the decision address any issue of whether the sub-delegate exercised the authorized officer's decision making power.

[53] In subsequent decisions which rely on *Swyryda*, above, the courts dealt with the authority to sign a document or the authority to issue notices of assessment which are matters involving little or no discretion and are documents which must by law be issued. The determination to issue a RFI is considerably different from these other documents and is a highly discretionary matter involving elements of government compulsion against a taxpayer (generally a citizen).

[54] In addition to removing the public's recourse for unauthorized use of Ministerial powers and giving such unauthorized use an element of immunity from judicial scouting, the Respondent's reliance on s. 244(13) would render the delegation power in s. 220 redundant except as an internal organizational tool. The Respondent's interpretation of s. 244(13) cannot be sustained.

[55] Section 244(13) is not a provision which renders irrelevant an explicit scheme of delegation of Ministerial powers. Section 244(13) does not grant the power to exercise any and all of the Minister's powers to whomever in government unless challenged by the Minister herself.

[56] In my view, the provision operates to facilitate proof of documents in court proceedings and operates to ease the evidentiary burden of authenticity of documents. It also operates to prevent collateral attacks on the RFIs in enforcement proceedings and other civil and criminal proceedings by awaiting a challenge to the documents until the Crown takes steps to ensure compliance.

[57] Therefore, the Court concludes that the RFIs were issued without proper legal authority, that Fjoser did not have the authority to initiate, issue or sign the RFIs. As a consequence, the RFIs are invalid.

[58] However, the Applicants' position and attack on the RFIs is more broadly based on allegations of improper purpose, improper and illegal actions and disclosures and of what is tantamount to a conspiracy between the Respondent (Fjoser in particular) and the police authorities to use the *Income Tax Act* powers for purposes other than the purpose of the Act - essentially to secure evidence for use in criminal prosecutions.

[59] For completeness and assuming (having decided differently) that Fjoser did have the proper delegated authority, the Court will address the other grounds of judicial review.

B. *Improper Purpose*

[60] The Applicants' central theory of the case is that CRA, Fjoser in particular, entered into some form of agreement or arrangement with police forces to use income tax powers to secure information/evidence to be used in prosecution of organized crime gangs such as the UN Gang. It was the Applicants' contention that this is an improper use of the *Income Tax Act* powers, particularly the issuance of the RFIs at issue here.

[61] The issue of the alleged improper purpose behind the RFIs has been clouded by discussion and the mixing of the "genuine and serious inquiry" test, conditions precedent to the exercise of powers and the predominant purpose test, to name but a few principles thrown about. *Charter* issues have been raised for good measure.

[62] The critical question to be asked is whether the Minister's powers were truly and materially used for the administration and enforcement of the Act. Put another way, were the powers used as part of a genuine and serious inquiry into the tax liability of the named person? This is a threshold jurisdictional question because use of these powers for an ulterior purpose vitiates the legitimacy of the Minister's actions.

[63] The determination of purpose must be an objective test when taken into account all the relevant circumstances. Generally no one factor will be determinative of the issue. The Court is mindful of self serving testimony of subjective intent and the credibility such statements raise.

[64] There is no requirement under this "purpose" test that RFIs be issued only where an audit has been commenced. RFIs may be issued at any time to aid in a legitimate inquiry into tax liabilities.

[65] The real issue before the Court is whether these RFIs were materially related to the administration and enforcement of the Act or whether they were initiated for some other purpose.

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), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,	**231.2** (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord général d'échange de renseignements fiscaux entre le Canada et un autre pays ou territoire qui est en vigueur et s'applique ou d'un traité fiscal conclu avec un autre pays, 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*) any information or additional information, including a return of income or a supplementary return; or	*a*) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

(*b*) any document.	*b*) qu'elle produise des documents.

[Emphasis added]

[66] While the limitations placed on the Minister's powers to initiate RFIs were discussed in *James Richardson & Sons, Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1984] 1 S.C.R. 614, and subsequent decisions, the key principle is that, absent evidence to the contrary, the Minister is presumed to be validly issuing the RFIs. If evidence demonstrates that the Minister may have purposes other than a genuine and serious inquiry into the tax liability of the named person, the Minister must counter that evidence or the RFI will be quashed.

[67] In a decision which has been followed consistently, Justice Girgulis, deciding *R. v. Dakus* (1988), 87 A.R. 374 (Q.B.), set out the basic principles for a challenge to RFIs:

> If the tax liability of an accused person is not the subject of a genuine and serious inquiry by the Minister, then it cannot be said that the Minister is acting for a purpose relating to the administration or enforcement of the act when he asks that accused for information relevant to that accused's tax liability. But that does not mean to say that the Crown must establish as an essential element of its case affirmative evidence of genuine and serious inquiry regarding the information requested relating to the tax liability of a specific person. If evidence raises an issue as to whether or not the inquiry is a genuine or serious one, then the Crown must satisfy the trier of fact, beyond a reasonable doubt, that the purpose of the Requirement or demand is not a subterfuge or a frivolous one, but is a proper demand for information relating to tax liability of the accused, that is, it is a genuine and serious inquiry.

[Emphasis added]

[68] There was discussion before this Court as to the standard of proof applicable. It must be remembered that the *Dakus* decision arose in a criminal context with criminal standards of proof.

[69] There is some efficacy in holding the Minister to the highest standard of proof because failure to comply with RFIs engages potential criminal liability. A civil standard imposed on the Minister would encourage collateral attacks on the RFIs rather than the direct attack (and the proper way to proceed) engaged by the Applicants. It is unnecessary to resolve that issue of the standard of proof because the civil standard of proof is sufficient to resolve the issue of "proper purpose". The Applicants have met the burden of establishing their case on the balance of probabilities.

[70] In *N.M. Skalbania Ltd. and Nelson M. Skalbania v. Her Majesty the Queen* (1989), 89 D.T.C. 5495 (B.C. Co. Ct.) (QL), County Court Judge van der Hoop also dealt with the failure of a taxpayer to respond to a RFI for tax returns from the Minister. However, as County Court Judge van der Hoop wrote in *Skalbania*, above, at 5496:

> At trial, in the court below, the Crown admitted as a fact that the … demands that were made of the company by the tax department were made not as a result of any ongoing investigation into the affairs of Mr. Skalbania or the corporate defendant, but merely because no return in question had been filed when it was due and owing.

County Court Judge van der Hoop held that, given the admission that the tax liability of the taxpayer was not in question, the Minister should have used s. 150(2) of the Act, rather than s. 231.2(1). Subsection 150(2) requires every person, whether or not they are liable to pay taxes or have already filed a return, to file a return upon demand by the Minister. Accordingly, the RFIs

were set aside as they had been improperly made. The admissions before County Court Judge Van der Hoop were determinative of his finding.

[71] Evidence which points to a lack of serious and genuine inquiry need not be as direct as an admission of alternate purpose by the Minister. In *Her Majesty the Queen v. Darrell Gordon Schacher* (1986), 86 D.T.C. 6580 (Alta. Prov. Ct.), Judge Ketchum found that RFIs issued by the Minister were invalid, based on the history of the defendant's Revenue Canada file. Specifically, Judge Ketchum found that Mr. Schacher's file was dormant for approximately four years, and no attempts were being made by Revenue Canada to seek tax information or to collect taxes owing from Mr. Schacher. Judge Ketchum found that the file was reactivated for no other reason than the RCMP's requests and inquiries to Revenue Canada concerning Mr. Schacher. As such, Judge Ketchum found that, while the RFIs related to the defendant's tax liability, they were not the result of serious and genuine inquiry by Revenue Canada. It is of note that Judge Ketchum specifically remarked that the RCMP had not provided any information that would lead Revenue Canada to believe that the defendant had taxable income for the years in question, but was asking for information pertaining to Mr. Schacher. This is the opposite of what happened in the current matter.

[72] The difficulty posed in this case is the directly contradictory evidence as to what led to the initiation of the RFIs. As indicated earlier, the Court accepts Inspector Ryan's evidence that he initiated the referral process rather than Fjoser's statement that he approached Inspector Ryan and asked for the names of UN Gang members. Fjoser had no notes of his meetings whereas Ryan's notes indicate that it was the RCMP that referred the matter, not a response to a CRA request.

[73] As a basic matter, there is nothing improper in CRA initiating steps including RFIs on the basis of a referral from police or other authorities or even based on tips. Likewise, there is nothing improper in initiating matters based on media and other reports. The troublesome feature of this case is the inconsistency of Fjoser's evidence and his non-reliance on the RCMP referral. His evidence that he relied on was newspaper articles, when examined in depth, is precariously thin. He was unable to substantiate the material on which he relied. The absence of a proper file history is a further disturbing feature of CRA's conduct.

[74] The issue of what caused the RFIs to be issued is only one factor in the analysis of "proper purpose". Other evidence to be discussed points away from a genuine and serious inquiry and points to Fjoser's real purpose of assisting the police investigation of this gang's criminal activities.

[75] In that regard, I reject the notion that there was something of a conspiracy, arrangement or "*quid pro quo*" between SEP and the police. I accept Inspector Ryan's disavowal of the premise and there is virtually no convincing evidence of that state of affairs. In my view, the analysis of a legitimate inquiry starts and stops at SEP. The personal motives of the individuals to provide that assistance is speculative but objectively the evidence shows little interest in an inquiry into the Applicants' tax liability.

[76] The Applicants placed considered emphasis upon Fjoser's powerpoint presentation which he gave to various police forces from time to time. The Applicants contend that it was the beginning

of the “information loop” arrangement whereby CRA would provide information to the police. The critical point relied on is a statement to the effect that the purpose of the CRA Enforcement Division is attacking the proceeds of organized crime. This statement of purpose is equivocal and can equally mean attacking by taxation which is a legitimate purpose under the Act.

[77] The Applicants confuse the purpose of the various CRA organizations including the SEP with the purpose behind the issue of these RFIs. There is nothing improper or conspiratorial in taxing the proceedings of crime. The purpose of the SEP does not in itself raise questions as to the appropriateness of the RFIs. There is other and better evidence which does.

[78] The Court has already referred to the contradictory basis upon which Fjoser relies to support initiating the RFIs – the unnecessary denial that a police request triggered the RFI process.

[79] Having initiated the RFIs, there was no real urgency or even expeditiousness to obtain the tax information required by the RFIs. Approximately nine months passed from the signing of the RFIs to their service. The sole explanation for this delay is the time necessary to coordinate matters with police so that there was police presence at the time the RFIs were served. That in itself is a remarkably long time to organize police assistance.

[80] While courts will not usually question the method of service of RFIs, in this case it is necessary to subject the method of service to some scrutiny. The use of heavy police presence was

based on the need to effect personal service. There is no sensible explanation for using personal service.

[81] The parties' locations were known, and there was no evidence of any previous attempts to evade service. Yet the Respondent chose the one method of service for which they could ostensibly justify use of the police. There was no explanation as to why service by registered mail would not be effective.

[82] This Court is well aware of the use of RFIs, and the obtaining of orders by this Court to enforce compliance. Yet there is no evidence that the use of normal civil and administrative procedures was ever contemplated.

[83] Having chosen the most obtrusive method of service, the Respondent surrendered control of the process to the police and actively engaged in breaches of the confidentiality requirements of the Act. Under the guise of service of the RFIs, the police were able to engage in activities of information gathering not otherwise available except by search warrant.

[84] Many of the incidents of service of the RFIs occurred late at night, at homes with spouses/partners and children present. The scene has been described as one with several police cars, flashing lights and police walking about on the premises taking notes of things observed such as licence plates and names of persons (not just the Applicants) in and on the premises.

[85] It must be borne in mind that all of this heavy police presence was to effect service of a document which simply required production, at a later date, of financial/tax information. It was a document which the law stipulated could simply be sent by registered mail.

[86] Having chosen to use the police to assist with service, SEP personnel were cavalier with respect to the confidentiality rights of these taxpayers. Those confidentiality provisions are comprehensive and strict. They are a key component of a self-reporting tax system.

[87] Subsections 241(1) and (2) of the Act establish the general rule that information collected pursuant to the Act cannot be divulged or shared except for the purposes of administering the Act within the CRA. Although the Act has been amended so as to apply to both officials and "other representative(s) of a government entity", the text quoted below was in force at the relevant time and the subsequent changes are inconsequential to the case at bar:

241. (1) Except as authorized by this section, no official shall	**241.** (1) Sauf autorisation prévue au présent article, il est interdit à un fonctionnaire :
(*a*) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;	*a*) de fournir sciemment à quiconque un renseignement confidentiel ou d'en permettre sciemment la prestation;
(*b*) knowingly allow any person to have access to any taxpayer information; or	*b*) de permettre sciemment à quiconque d'avoir accès à un renseignement confidentiel;
(*c*) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the	*c*) d'utiliser sciemment un renseignement confidentiel en dehors du cadre de l'application ou de l'exécution de la présente loi, du *Régime de pensions du*

Unemployment Insurance Act or the *Employment Insurance Act* or for the purpose for which it was provided under this section.

Canada, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi*, ou à une autre fin que celle pour laquelle il a été fourni en application du présent article.

(2) Notwithstanding any other Act of Parliament or other law, no official shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.

(2) Malgré toute autre loi ou règle de droit, nul fonctionnaire ne peut être requis, dans le cadre d'une procédure judiciaire, de témoigner, ou de produire quoi que ce soit, relativement à un renseignement confidentiel.

[88] "Taxpayer information" is defined in section 241 of the Act itself, at subsection 241(10):

"taxpayer information" «*renseignement confidentiel* »

«renseignement confidentiel » "*taxpayer information*"

"taxpayer information" means information of any kind and in any form relating to one or more taxpayers that is

«renseignement confidentiel » Renseignement de toute nature et sous toute forme concernant un ou plusieurs contribuables et qui, selon le cas :

(*a*) obtained by or on behalf of the Minister for the purposes of this Act, or

a) est obtenu par le ministre ou en son nom pour l'application de la présente loi;

(*b*) prepared from information referred to in paragraph (*a*),

b) est tiré d'un renseignement visé à l'alinéa *a*).

but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates.

N'est pas un renseignement confidentiel le renseignement qui ne révèle pas, même indirectement, l'identité du contribuable en cause.

[89] “Official” is defined in the same subsection:

“official” *« fonctionnaire*	« fonctionnaire » "official"
official” means any person who is employed in the service of, who occupies a position of responsibility in the service of, or who is engaged by or on behalf of,	« fonctionnaire » Personne qui est ou a été employée par la personne ou l’administration suivante, qui occupe ou a occupé une fonction de responsabilité au service d’une telle personne ou administration ou qui est ou a été engagée par une telle personne ou administration ou en son nom :
(*a*) Her Majesty in right of Canada or a province, or	a) Sa Majesté du chef du Canada ou d’une province;
(*b*) an authority engaged in administering a law of a province similar to the *Pension Benefits Standards Act*, 1985,	b) une administration chargée de l’application d’une loi provinciale semblable à la Loi de 1985 sur les normes de prestation de pension.
or any person who was formerly so employed, who formerly occupied such a position or who was formerly so engaged and, for the purposes of subsection 239(2.21), subsections 241(1) and 241(2), the portion of subsection 241(4) before paragraph (*a*), and subsections 241(5) and 241(6), includes a designated person;	Pour l’application du paragraphe 239(2.21), des paragraphes (1) et (2), du passage du paragraphe (4) précédant l’alinéa a) et des paragraphes (5) et (6), une personne déterminée est assimilée à un fonctionnaire.

[90] While there are certain statutory exceptions to the privacy requirement (see, for example, s. 462.48 of the *Criminal Code*, R.S.C. 1985, c. C-46, s. 462.48; and the *Income Tax* Act, above,

s. 241(3)), none have been argued to apply here, and no evidence has been adduced which would raise any suspicion that they applied. Despite this, taxpayer information was clearly communicated from the SEP to the police.

[91] This flagrant contravention of the privacy provision of the Act seriously calls into question the goal of the issuance of the RFIs. There was no need to effect service in the manner carried out and therefore any disclosures of this information was not for the administration and enforcement of the Act.

[92] The SEP not only communicated to the police exactly from whom they were requesting information, but also gave the police the names, addresses, and birthdates of the persons being served with the RFIs, in addition to the names of their spouses or common-law partners where applicable. This information specifically came from the CRA "tombstones" data. Even if the police had access to some of this information through other channels, the manner in which this information was communicated was a violation of s. 241(1) of the Act.

[93] Furthermore, Ms. Gomez stated, in the cross-examination on her affidavit, that she informed the police officers who assisted her in serving the RFIs of her precise role in the CRA, that she worked with the SEP, and that she was serving demands under the Act. She could not state with any certainty that the police accompanying her in the service of the RFIs did not hear the details of her conversations with the Applicants, given that they were often only a couple of feet away.

[94] These breaches are by no means minor. While neither the Applicants nor the Respondent drew on the provision, subsection 239(2.2) sets out consequences for an individual officer who breaches the privacy provisions of the Act.

239(2.2) Every person who	**239**(2.2) Commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de 12 mois, ou l'une de ces peines, toute personne :
(a) contravenes subsection 241(1), or	a) soit qui contrevient au paragraphe 241(1);
(b) knowingly contravenes an order made under subsection 241(4.1)	b) soit qui, sciemment, contrevient à une ordonnance rendue en application du paragraphe 241(4.1).
is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months, or to both.	
…	…
(2.22) In subsection 239(2.21), "official" and "taxpayer information" have the meanings assigned by subsection 241(10).	(2.22) Pour l'application du paragraphe (2.21), les expressions « fonctionnaire » et « renseignement confidentiel » s'entendent au sens du paragraphe 241(10).

In addition, the Act specifies similar penal consequences for the breach of privacy concerning a social insurance number (SIN), at subsection 239(2.3).

239(2.3) Every person to whom the Social Insurance Number of	**239**(2.3) Toute personne à qui le numéro d'assurance sociale

an individual or to whom the business number of a taxpayer or partnership has been provided under this Act or a regulation, and every officer, employee and agent of such a person, who without written consent of the individual, taxpayer or partnership, as the case may be, knowingly uses, communicates or allows to be communicated the number (otherwise than as required or authorized by law, in the course of duties in connection with the administration or enforcement of this Act or for a purpose for which it was provided by the individual, taxpayer or partnership, as the case may be) is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months, or to both.	d'un particulier ou le numéro d'entreprise d'un contribuable ou d'une société de personnes est fourni en application de la présente loi ou d'une disposition réglementaire, ainsi que tout cadre, employé ou mandataire d'une telle personne, qui, sciemment, utilise le numéro, le communique ou permet qu'il soit communiqué (autrement que conformément à la loi ou à l'autorisation donnée par le particulier, le contribuable ou la société de personnes, selon le cas, ou autrement que dans le cadre de fonctions liées à l'application ou à l'exécution de la présente loi) sans le consentement du particulier, du contribuable ou de la société de personnes, selon le cas, commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de 12 mois, ou l'une de ces peines.

[95] The Act does not contemplate specific consequences for a systemic, rather than individual, breach of the privacy provisions not because it is not a punishable offence, but because such an act is unthinkable given the functioning of the Act.

[96] Furthermore, it is notable that the SEP had alternative means of serving the RFIs that would not raise any safety concerns, and as such would not involve police in the service of the RFIs. The

SEP had the option of serving the RFIs through registered mail (s. 231.2(1)). While the Respondent submitted that there was a regular practice of serving RFIs in person, this does not justify or permit involving external personnel in the service in a manner which contravenes the privacy provisions of the Act. In addition, those very personnel had their own interests in the Applicants. This underscores the questions raised as to whether the Minister was indeed serving the RFIs as a result of a serious and genuine inquiry into the Applicants' tax liability.

[97] Counsel for the Respondent did not adduce evidence or present arguments which answered the questions raised by this obvious breach of the Act's privacy provisions. Not only did the Minister's official breach the privacy provisions of the Act, but did so when another course of action was clearly available which would have answered any potential security concerns surrounding service of the RFIs. In the absence of any explanation as to why this course of action was chosen, the only possible conclusion is that the RFIs were not issued as a result of a serious and genuine inquiry into the tax liability of the Applicants.

[98] Lastly, the absence of control and reporting by Fjoser to his superiors of these activities is a disturbing feature of this case. In these circumstances, SEP is involved in securing the assistance of several police forces to deal with suspected members of an alleged criminal organization and yet no reports, even post-incident reports, were ever passed on to Fjoser's superiors. The absence of management control may be an issue in some other place; it may have permitted superiors the cloak of "deniability". In any event, SEP, even assuming valid sub-delegation, was apparently free to engage in activities on their own with no accountability – to, in essence, run amuck.

[99] The evidence that SEP initiated the RFIs for purposes other than the administration and enforcement of the Act can be summarized as:

(a) a non-credible explanation of the basis for initiating the RFI process;

(b) an unhurried approach to the collection of this tax information;

(c) a choice of service which was obtrusive, invasive and unjustified;

(d) an uncontrolled use of police and the assistance given to police in collecting police information; and

(e) a cavalier disregard for the confidentiality provisions of the Act and the unjustified disclosure of "taxpayer information".

[100] Therefore, these RFIs must be quashed because there was no serious and genuine inquiry into the tax liabilities of these Applicants.

C. *Predominant Purpose Test*

[101] The Respondent has raised the "predominant purpose" test set out in *R. v. Jarvis*, 2002 SCC 73, as a basis for the legitimacy of the RFIs.

[102] The Respondent argued that the test must be applied in accordance with the Court of Appeal's decision in *Ellingson v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 202, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 313 (Q.L.). However, both parties move away from that test (Applicants' Memorandum, para. 60/Respondent's Memoranda, para. 80).

[103] In my view, the analytical framework of the predominant purpose test is not engaged in these circumstances. That test is applicable where the issue is the transition from civil audit inquiries to criminal tax investigations. It presupposes the existence of a genuine and serious inquiry. It is not applicable to the issue of whether such an inquiry exists.

[104] Therefore, the predominant purpose test is not applicable.

D. Charter *Issues*

[105] The Applicants raised the issue of whether s. 241(3)*(a)* of the Act is inconsistent with sections 7 and 8 of the *Charter*.

[106] As these RFIs have been found to be invalid on other grounds, it is not necessary to enter into an analysis of this issue. The Supreme Court has cautioned against making unnecessary pronouncements on *Charter* rights. The Applicants' concern about any exchange of information flowing from the RFIs is premature.

V. CONCLUSION

[107] For these reasons, this judicial review will be granted, these RFIs will be quashed and the Applicants shall have their costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, these RFIs are quashed and the Applicants are to have their costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Martin Peters Mr. Garth Barriere	FOR THE APPLICANTS
Mr. Robert Carvalho Mr. Ron Wilhem Ms. Kirat Khalsa	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MARTIN PETERS Barrister & Solicitor Vancouver, British Columbia	FOR THE APPLICANTS
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT