

Federal Court



Cour fédérale

Date: 20120731

**Docket: T-1872-11
T-1852-11
T-1853-11**

Citation: 2012 FC 950

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

**KENNETH A. CLARK
ISLAND BUSINESS INITIATIVES INC.
100530 P.E.I. INC.**

Respondents

REASONS FOR ORDER

SNIDER J.

I. INTRODUCTION

[1] The Minister of National Revenue (the Minister) is asking this Court to issue an Order (Compliance Order), under s. 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], that would require three separate parties to provide certain documents and information to the Minister. A separate application was brought by the Minister for each of the named parties; specifically, the Minister is asking for a Compliance Order against Mr. Kenneth A. Clark (Court

File No. T-1872-11) (Clark), Island Business Initiatives Inc. (Court File No. T-1852-11) (IBI) , and 100530 P.E.I. Inc. (Court File No. T-1853-11) (100530).

[2] Each of Mr. Clark, IBI and 100530 (collectively referred to as the Respondents) acknowledge that they have not provided all of the information sought by the Minister. Accordingly, the only issue raised in these applications is whether some or all of the information and documents sought by the Minister is subject to solicitor-client privilege as contemplated by s. 232(1) of the *ITA*.

[3] For the reasons that follow, I have determined that the information and documents are not subject to solicitor-client privilege and that a Compliance Order should issue.

II. Background

[4] IBI facilitates investments between potential immigrants and businesses located on Prince Edward Island in relation to a provincial government program called the Prince Edward Island Provincial Nominee Immigrant Partners Program (the PNP). As an investment intermediary under the PNP, IBI contracts with Prince Edward Island companies (Investee Companies) interested in receiving investments from immigrant investor applicants (PNP Applicants). In addition, IBI contracted with professional immigration consultants (PICs) to promote such investment.

[5] 100530 is the sole shareholder of IBI and, during the relevant period of 2007 to 2009, Mr. Clark was the sole director of both IBI and 100530. Mr. Clark is a lawyer whose practice, since 2005, has been restricted to “acting as in-house legal counsel to IBI”.

[6] In 2010, the Minister began an audit of the income tax returns of Mr. Clark, IBI and 100530 for the 2007 to 2009 period in the case of Mr. Clark, and 2006-2009 in the case of the corporations (the Audit Period). In connection with the audit, the Minister sought information from the three parties. In four Requirements for Information served July 21, 2010 pursuant to s. 231.2 of the *ITA* (the Information Requests), the Minister requested information and documents consisting mainly of banking and accounting information related to transactions involving the PNP. As result of subsequent discussions, some of the requested information was provided. In addition, a sealed package marked “privileged” that purports to contain electronic accounting records was delivered to an auditor with Canada Revenue Agency (CRA); this package has not been opened.

[7] As of the hearing of these applications, the Minister is still seeking the information that is now set out in each of the three Orders that will be issued.

III. Statutory Framework

[8] I begin with a brief overview of the statutory scheme.

[9] Section 231.2(1) of the *ITA* allows the Minister to require any person to provide any requested information or documents, upon notice. This authority is not restricted to taxpayers; third parties may also be served with requests for information, so long as the Minister's purpose is related to the administration or enforcement of the *ITA*, a comprehensive tax information exchange agreement between Canada and another country or jurisdiction, or a tax treaty with another country.

[10] Where a person fails to comply with such a request for information, s. 231.7 provides the Minister with a means to enforce compliance. Specifically, s. 231.7(1) allows the Minister to seek, by way of "summary application", a court order requiring the person to provide the information or document sought under s. 231.2. To issue the order – commonly referred to as a compliance order – the judge must be satisfied that (a) the person was required under s. 231.2 to provide the information or document and failed to do so; and (b) "in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1))".

[11] Section 232(1) defines solicitor-client privilege as follows:

"solicitor-client privilege" means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

[12] Under s. 231.7(2), the person must be given notice of the application at least five clear days before it is heard. Subsection 231.7(3) gives the judge hearing the application the discretion to impose such conditions on the order as the judge considers appropriate.

IV. Analysis

A. Principles

[13] The jurisprudence provides much assistance in dealing with the question before this Court. While recognizing that the Minister must have powerful tools to carry out income tax audits, Parliament has also signalled its respect of the solicitor-client relationship and privilege.

[14] There is, however, no presumption of solicitor-client privilege; the burden is clearly on the person claiming such privilege to establish that the privilege applies (*B v Canada*, [1995] 5 WWR 374 at para 33 (BCSC), 3 BCLR (3d) 363).

[15] As set out in *Canada (Minister of National Revenue - MNR) v Reddy*, 2006 FC 277 at para 12, [2006] 3 CTC 17, [Reddy], solicitor-client privilege only applies where four conditions are established:

- (a) there must be a communication, whether oral or written;
- (b) the communication must be of a confidential character;
- (c) the communication must be between a client or his agent and a legal advisor; and

- (d) the communication must be directly related to the seeking, formulating or giving of legal advice.

[16] It is also established law that solicitor-client privilege does not attach to records of financial transactions directed through a solicitor's trust account, such as cheques or a statement of adjustments (see e.g. *Reddy*, above at para 14; *Canada (Minister of National Revenue - MNR) v Singh Lyn Ragonetti Bindal LLP*, 2005 FC 1538 at para 18, [2006] 1 CTC 113 [*Singh*]; and *Canada (Minister of National Revenue - MNR) v Cornfield*, 2007 FC 436 at paras 19-20, 312 FTR 81). In *Singh*, above at paragraph 18, Justice Mosley explained that this is so because "such records are evidence of an act or transaction rather than communications".

[17] Moreover, the fact that a person involved in a transaction is a lawyer is not determinative of a solicitor-client relationship. As observed by Justice Farley in *Confederation Treasury Services Ltd (Re)*, [1997] OJ No 3598 (QL) at para 13 (Ont Ct J (Gen Div)), 49 CBR (3d) 275:

I would also note that privilege does not automatically come into play merely because a lawyer is engaged by a client. The privilege attaches to the request for and obtaining of legal advice. It does not attach to communications between a client and his retained counsel when that counsel is either not acting as a lawyer or where it is not legal advice but rather some other form of advice or other assistance being obtained.

[18] Finally, I note that an obligation of confidentiality does not equate to solicitor-client privilege (*Solosky v The Queen*, [1980] 1 SCR 821).

B. *Respondents' Position*

[19] The Respondents assert that the following documents sought by the Minister may be subject to either client confidentiality or solicitor-client privilege:

- a. IBI operated bank accounts, which contain party names;
- b. IBI "petty cash" account, which contains Applicant names;
- c. Kenneth A. Clark regular law office trust account, which contains party names;
- d. Kenneth A. Clark PEI PNP Interest Bearing Trust Account, which contains party names;
- e. Cancelled cheques containing party names;
- f. 2007-2009 Simply Accounting records for IBI and Kenneth A. Clark Law Office containing party names; and
- g. All immigrant investor files, which contain confidential and personal information and names.

[20] According to the Respondents, Mr. Clark provided “certain legal information and guidance to PNP Applicants, Investee Companies and PICs throughout the course of their applications under the PNP”, and “certain PNP Applicants, Investee Companies and/or PICs ... could possibly contend their personal information is subject to solicitor-client privilege and confidentiality in respect of the materials in their respective PNP files and any trust account records relating to them respectively”. In particular, the Respondents say that “the communications between the Respondents and PNP Applicants (including their names) *may* be potentially covered by solicitor-client privilege and/or subject to confidentiality”. In addition, the Respondents submit that privilege and/or confidentiality potentially attach to their communications with Investee Companies and PICs with respect to PNP Applicants’ files.

[21] While acknowledging that s. 232(1) deems that an “accounting record” of a lawyer is not subject to solicitor-client privilege, the Respondents submit that, following the decision in *Organic Research Inc v MNR* (1990), 111 AR 336 (QB), [1991] 1 CTC 417 [*Organic*], the documents sought by the Minister are nonetheless subject to privilege, as they are accounting records of clients who are not themselves under investigation.

C. *Application of the Principles to the Facts*

[22] One of the key concerns of Mr. Clark is with respect to his obligation of confidentiality imposed by the Model Code of Professional Conduct adopted by the Prince Edward Island Law Society. This is a justifiable and serious concern. However, as acknowledged by the Respondents, the duty of confidentiality does not exempt a lawyer from the operation of a

s. 231.7 compliance order. Moreover, that duty does not necessarily give rise to privilege. The Compliance Orders will provide Mr. Clark with a complete answer to any concerns of the Law Society.

[23] The other key concern for the Respondents is the potential existence of solicitor-client privilege. As I understand their position, even the Respondents acknowledge that the claimed privilege is a remote possibility.

[24] I acknowledge that Mr. Clark, along with IBI staff, may have reviewed PNP Applicants' documents and provided information regarding PNP and Citizenship and Immigration Canada requirements to Investee Companies, PICs and PNP Applicants who were aware that he was a lawyer. However, Mr. Clark's evidence is that he "[u]sually" or "often" advised an Investee Company's representative that he was neither their lawyer nor the Immigrant Investor's lawyer and that he advised the PNP Applicants with whom he met that he was not their lawyer. The evidence satisfies me that these individuals would have concluded that Mr. Clark acted for IBI, and not for them. Thus any communication was not between a client and a legal advisor.

[25] Nor is it clear that the second requirement of solicitor-client privilege is present, as the evidence does not establish that Mr. Clark's communications to Investee Companies, PICs or PNP Applicants were of a confidential character.

[26] Even if I were to accept that Mr. Clark provided Investee Companies, PICs and PNP Applicants with "legal information and guidance" which constituted confidential legal advice,

none of the documents sought by the Minister contain such information. Of the classes of documents which the Respondents submit may be subject to solicitor-client privilege, the only category which appears likely to contain any form of legal advice is (g) – “All immigrant investor files, which contain confidential and personal information and names”. With respect to the other classes of documents, the only information which the Respondents suggest may be privileged is the names of individuals and entities. In my view, the information and documents sought by the Minister are merely evidence of an act or transaction, not of a “communication” that attracts solicitor-client privilege.

[27] The decision in *Organic*, above, is of little assistance to the Respondents, as the cited passage indicates only that a lawyer’s accounting records of clients are not “an accounting record of a lawyer” for the purposes of the statutory exception to solicitor-client privilege. That decision does not establish that such records are subject to privilege.

[28] I can also make only limited use of the case law and commentary which the Respondents cite regarding solicitor-client privilege in the context of lawyers who act in non-legal capacities, as those materials do not speak to the specific facts before the Court in this case.

[29] In sum, I am not persuaded that the Respondents have satisfied their burden to demonstrate that solicitor-client privilege applies to the information and documents requested by the Minister.

[30] The Respondents propose that, if this Court determines that the Compliance Orders should issue, that they be permitted to redact or number-code the names of the PNP Applicants and PICs. I agree with the Minister that such condition on the disclosure is not warranted.

V. Conclusion

[31] In conclusion, I am satisfied that:

- (a) each of the Respondents was served with the Information Requests as required under s. 231.2(1) of the *ITA*;
- (b) each of the Respondents was required under section 231.2 to provide the information and documents sought by the Minister and did not do so; and
- (c) the information and documents sought by the Minister are not protected from disclosure by solicitor-client privilege.

[32] At the close of the hearing of this application, I advised the parties that I would be allowing the Minister's application. However, I expressed concern that the draft Compliance Order provided by the Minister, as part of his application, should provide more detailed guidance. The parties agreed to work together to provide a draft Order to the Court. The parties, unable to agree on all terms of the draft Order, submitted two draft Orders for my consideration.

[33] Having reviewed the two draft Orders and the comments of counsel for both parties and given my reasons, I have concluded that the Compliance Order attached satisfies the requirements of the *ITA*.

[34] A single Compliance Order will issue; a copy is to be placed on each of the relevant files.

“Judith A. Snider”

Judge

Ottawa, Ontario
July 31, 2012

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1872-11, T-1852-11, T-1853-11

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE
v. KENNETH A. CLARK, ISLAND BUSINESS
INITIATIVES AND 100530 P.E.I. INC.

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: JULY 11, 2012

REASONS FOR ORDER: SNIDER J.

DATED: JULY 31, 2012

APPEARANCES:

Caitlin Ward FOR THE APPLICANT

David W. Hooley Q.C. FOR THE RESPONDENTS
Robin Aitken

SOLICITORS OF RECORD:

Myles J. Kirvan FOR THE APPLICANT
Deputy Attorney General of Canada
Halifax, Nova Scotia

Cox & Palmer FOR THE RESPONDENTS
Barristers and Solicitors
Charlottetown, Prince Edward Island