

Federal Court



Cour fédérale

Date: 20130625

Docket: T-1040-13

Citation: 2013 FC 706

Toronto, Ontario, June 25, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

JOSEPH R. JAKABFY

Respondent

REASONS FOR ORDER AND ORDER

[1] The Minister of National Revenue is asking the Court to issue an Order under section 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) requiring Joseph R. Jakabfy, a barrister and solicitor, to provide certain documents and information to the Minister.

[2] The documents and information sought from the Respondent relate to the sale of a property by Donald Lavalée and his wife Nicole Lavalée. Donald Lavalée has unpaid personal income taxes and unpaid GST. The Minister wished to determine how Donald Lavalée distributed the

proceeds from the sale of the property in order to determine whether he transferred any or all of the proceeds to a non-arm's length person such that an assessment might be raised against the transferee pursuant to section 160 of the *Income Tax Act*, or section 325 of the *Excise Tax Act*, RSC 1985, c E-15.

[3] To that end, in November 2010, pursuant to section 231.2(1) of the *Income Tax Act*, a requirement for information and documents was delivered to the Respondent, who had acted for Donald Lavalée in respect of the sale of the property. The requirement required Mr. Jababfy to provide the Minister with the following:

- a. A copy of trust account ledger showing names and amounts for all transactions where disbursements were made to or on behalf of Nicole Lavalée, 920199 Ontario Ltd.[a corporation owned and controlled by Donald Lavalée and his family] or Donald Lavalée.
- b. A copy of trust account ledger or cheque journal showing names and amounts for all transactions where money was received and was paid on behalf of Nicole Lavalée, 920199 Ontario Ltd. Or Donald Lavalée.
- c. Copies of all cancelled cheques (front & back) for all transactions in which amounts were paid to or on behalf of Nicole Lavalée, 920199 Ontario Ltd. or Donald Lavalée.
- d. A copy of the statement of adjustments or disbursement statement for all transactions.
- e. Copies of all invoices/receipts for payment made on behalf of Nicole Lavalée, 920199 Ontario Ltd. or Donald Lavalée.

[4] Upon receipt of this requirement for information and documents, Mr. Jababfy wrote to his clients seeking their instructions:

I would request your Authorization to release documentation to Canada Revenue Agency (if we still have it), so that the Revenue

Canada will not be put to the expense of obtaining an Order of the Court for compliance.

On the other hand, if you want to oppose their Application you should indicate this to me.

[5] In an affidavit sworn in this matter, Mr. Jakabfy attests:

Shortly after sending this letter I was instructed by Mr. Lavallee, in very strong terms, not to produce the Documents to CRA and instead to claim privilege over them.

I advised CRA of the position that my Former Clients were taking in a letter dated November 16, 2010.... Since that time, I have received no contrary instructions from the Lavallees. ...I have advised CRA that I am not in a position to produce the documents in response to the Requirement without an Order from the Court.

[6] Mr. Jakabfy, in his affidavit, and through the representations of counsel he has retained, advises the Court that he takes no position on this application "other than that the Court should decide whether the Documents are privileged and that no costs should be awarded against me." He has provided a schedule to the Court listing the documents in his possession which conform to the request for information. Further, his counsel has filed with the Court, in a sealed envelope, those documents and has instructions from Mr. Jakabfy that if the Court determines that no privilege attaches to the documents, they are to be delivered by counsel to the Minister immediately.

[7] The Court observes that Mr. Jakabfy has acted appropriately in this matter in his dealings with his former clients, with the Minister, and with the Court. No costs will be ordered against him.

[8] This Court has held that three conditions must be satisfied under subsection 231.7(1) of the *Income Tax Act* before the Court can order a person to provide the information and documents

sought by the Minister under section 231.2 of that Act; See *Canada (Minister of National Revenue – MNR) v Currie*, 2008 FC 237, para 25:

- a) the Respondent was required under subsection 231.2(1) of the *Income Tax Act* to provide the Information and Documents sought by the Minister;
- b) the Respondent has failed to provide the Information and Documents sought by the Minister; and
- c) the Information and Documents sought by the Minister are not protected from disclosure by solicitor-client privilege.

[9] The Court is satisfied, based on the record before it that the first two conditions are satisfied.

The only question is whether the information sought is protected by solicitor-client privilege.

[10] Not all communication between a solicitor and his client is protected by the privilege.

Section 232 of the *Income Tax Act* defines solicitor-client privilege for the purposes of that Act, 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.

[11] This definition is in keeping with the law of solicitor-client privilege which has held that the protection applies to communications involving the seeking and providing of legal advice and does not apply to documents that are “evidence of an act or transaction rather than a communication.”

Canada (Minister of National Revenue – MNR) v Singh Lyn Ragonetti Bindal LLP, 2005 FC 1538, para 18.

[12] This Court has ordered the production of information and documents relating to financial transactions directed through a solicitor’s trust account, such as cheques, statements of adjustment, and account ledgers, on numerous occasions: See for example: *Canada (Minister of National Revenue – MNR) v Reddy*, 2006 FC 277; *Canada (Minister of National Revenue – MNR) v Singh Lyn Ragonetti Bindal LLP*, 2005 FC 1538; *Canada (Minister of National Revenue – MNR) v Cornfield*, 2007 FC 436; *Canada (Minister of National Revenue – MNR) v Currie*, 2008 FC 237.

[13] Counsel for the Minister, as an officer of the Court, brought to our attention the decision of the Québec Superior Court in *Chambre des notaires du Québec c Canada (Procureur général)*, 2010 QCCS 4215, [2010] JQ 8868 which held that sections 231.2 and 231.7 and the definition of “solicitor-client privilege” in subsection 232(1) of the *Income Tax Act* were contrary to sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* and are of no force and effect as against Quebec notaries and lawyers with respect to documents and information protected by “professional secrecy.” That decision is under appeal.

[14] The Court declines to follow that decision for three reasons. First, a decision of the Québec Superior Court is not binding on this Court. Second, the decision appears to rely heavily on the professional obligations of notaries and lawyers set out in their respective Codes of Professional Conduct, which is not applicable to the Respondent. Third, and most importantly, there is no

“professional secrecy” or privilege attaching to the requested documents and information in Ontario jurisprudence.

[15] For these reasons, the Court finds that the documents and information the Minister required the Respondent to produce are not subject to solicitor-client privilege.

ORDER

UPON the application of the Minister of National Revenue (the “Minister”), coming for hearing on June 24, 2013, at the Federal Court, 180 Queen Street West, Suite 200, Toronto, Ontario M5V 3L6;

AND UPON reviewing the materials filed by the parties and upon hearing the submissions of the parties;

AND UPON BEING SATISFIED THAT:

1. By requirement dated November 1, 2010 (and also bearing the date October 22, 2010), the Minister required Mr. Jakabfy, barrister and solicitor, pursuant to subsection 231.2(1) of the *Income Tax Act*, to provide information and documents relating to Mr. Donald Lavallee and Ms. Nicole Lavallee’s sale of real property in August 2003 to third party purchasers. The respondent acted as counsel for the Lavallees on the sale of the property.
2. Mr. Lavallee is indebted under the *Income Tax Act* with respect to his 2001 to 2003 taxation years; as at September 1, 2011, Mr. Lavallee owed the amount of approximately \$62,734.00. Mr. Lavallee also owes a GST debt under the *Excise Tax Act* with relating to the January 1, 2001 to December 31, 2003 reporting periods; as at April 10, 2013, Mr. Lavallee owed in the amount of approximately \$59,838.00.

3. The Minister requires the information and documents sought from the Respondent for purposes related to the administration and enforcement of the *Income Tax Act*. More specifically, the purpose is to determine how Mr. Lavallee distributed his share of the proceeds from the sale of the real property, in particular, to determine whether Mr. Lavallee has any assets that the Canada Revenue Agency may take action against to collect upon to satisfy Mr. Lavallee's outstanding income tax debt (and GST debt) and to determine if Mr. Lavallee transferred any or all of his share of the proceeds received from the sale of the property to a non-arm's person such that an assessment may be raised against the transferee(s) pursuant to section 160 of the *Income Tax Act* (and/or section 325 of the *Excise Tax Act*) and whether the transferee(s) have any assets or other sources of income that the Canada Revenue Agency can collect against.

4. To date, Mr. Jakabfy has not provided the information and documents required by the Minister;

5. The Minister does not seek information or documents that are protected by solicitor-client privilege within the meaning of subsection 232(1) of the *Income Tax Act* (or subsection 293(2) of the *Excise Tax Act*).

THIS COURT ORDERS that Mr. Jakabfy shall, within three weeks after being served with a copy of this Order, provide the information and documents required in the requirement dated November 01, 2010 (and also dated October 22, 2010) which is attached as Appendix "A" to this Order, to Ms. Carole Cameron of the Canada Revenue Agency, Sudbury Tax Services Office, 1050

Notre Dame Avenue, Sudbury, Ontario, P3A 5C1, or another officer who may be identified by the Applicant for that purpose.

AND THIS COURT FURTHER ORDERS that the Minister is authorized to effect service of this Order on Mr. Jakabfy by personal service under Rule 128 of the *Federal Courts Rules*.

AND THIS COURT FURTHER ORDERS that no costs are ordered on this application.

"Russel W. Zinn"

Judge

Appendix "A"



Canada Revenue Agency / Agence du revenu du Canada

Tax Services Office
Sudbury ON P3A 5C1

November 01, 2010

JOSEPH R. JAKABFY
BARRISTER & SOLICITOR
767 BARRYDOWNE ROAD
SUDBURY ON P3A 3T6

Dear Sir:

CONTACT: C. Cameron

Dated: October 22, 2010

The information sought under the Requirement for Information is in respect of Donald Lavallee, Nicole Lavallee and or 920199 Ontario Limited

Under Paragraphs 231.2.(1) (a) and (b) of the "Income Tax Act," for the purpose related to the administration or enforcement of the "Income Tax Act," you are required to provide the following information and/or documents within 30 days from the date shown above:

With respect to the transfer of land known as 2140 Bancroft Drive, Sudbury Ontario. Transferors: Donald & Nicole Lavallee, Transferees: Rodney & Nicole Bazinet, Registration # LT0956645, Date: August 29, 2003. Please provide the following information:

-A copy of trust account ledger showing names and amounts for all transactions where disbursements were made to or on behalf of Nicole Lavallee, 920199 Ontario Ltd or Donald Lavallee.

-A copy of trust account ledger or cheque journal showing names and amounts for all transactions where money was received and was paid on behalf of Nicole Lavallee, 920199 Ontario Ltd or Donald Lavallee.

-Copies of all cancelled cheques (front & back) for all

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Sudbury Tax Services Office
1050 Notre Dame Avenue
Sudbury ON P3A 5C1

Local : 705-671-8237
Toll Free : 1-800-461-3358
Fax : 705-671-0342
Web site : www.cra.gc.ca

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transactions in which amounts were paid to or on behalf of Nicole Lavallee, 920199 Ontario Ltd or Donald Lavallee.

-A copy of the statement of adjustments or disbursement statement for all transactions.

-Copies of all invoices/receipts for payments made on behalf of 920199 Ontario Ltd, Donald Lavallee or Nicole Lavallee.

The above information is to be certified by you as being true and correct in every respect to the best of your knowledge and belief, and is to be forwarded to the address indicated on the front of this letter within 30 days from the date of this letter.

If you do not comply with this Requirement within the time specified you will be liable to prosecution without further notice.

Subsection 238(1) of the "Income Tax Act," provides that a person who fails to comply with this Requirement is guilty of an offence and liable to a fine of not less than \$1,000.00 and not more than \$25,000.00 or both a fine and imprisonment not exceeding twelve months. In addition to the criminal penalties resulting from subsection 238(1) of the "Income Tax Act," for failure to comply with this notice of requirement, subsection 231.7(1) of the "Income Tax Act," allows the Canada Revenue Agency to request a specific compliance order from the Court, in the event of non compliance. Failure to comply with that specific compliance order could lead to a finding of Contempt of Court.

Yours sincerely,

Ed Levesque
Assistant Director
Revenue Collections Division

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1040-13

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v
JOSEPH R. JAKABFY

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 24, 2013

**REASONS FOR ORDER
AND ORDER BY:** ZINN, J.

DATED: June 25, 2013

APPEARANCES:

Margaret Nott
Angela Shen

FOR THE APPLICANT

Amy Ohler

FOR THE RESPONDENT

SOLICITORS OF RECORD:

WILLIAM F. PENTNEY
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE APPLICANT

FENTON, SMITH BARRISTERS
Toronto, Ontario

FOR THE RESPONDENT