Date: 20081107

Docket: A-105-08

Citation: 2008 FCA 348

CORAM: **LINDEN J.A.**
EVANS J.A.
TRUDEL J.A.

BETWEEN:

eBAY CANADA LIMITED AND
eBAY CS VANCOUVER INC.

Appellants

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on October 8, 2008.

Judgment delivered at Ottawa, Ontario, on November 7, 2008.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: LINDEN J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal by eBay Canada Ltd. and eBay CS Vancouver Inc. (collectively, "eBay Canada" or "the appellants") from a decision of the Federal Court (2008 FC 180). In that decision, Justice Hughes affirmed his *ex parte* order authorizing the Minister of National Revenue to impose a requirement on the appellants to produce information identifying "PowerSellers" in Canada who have sold more than a certain volume of items on eBay, the world's largest global online marketplace. The Minister wants this information, as well their gross sales, in order to determine

whether the PowerSellers have complied with their obligation under the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1 ("Act") to report their income.

[2] The requirement to produce information in this case was imposed under section 231.2 of the Act which confers broad and general powers on the Minister to require any person to produce information for any purpose related to the administration or enforcement of the Act. The appellants say that this section does not apply to the facts of this case because the information sought is "foreign-based information", which is the subject of a comprehensive code in section 231.6. It is important in this case, they argue, to determine which section the Minister may use because section 231.6 does not provide for the imposition of a requirement to produce foreign-based information relating to unnamed persons. In contrast, section 231.2 expressly empowers the Minister, with judicial authorization, to require the production of information relating to unnamed persons.

[3] The information identifying Canadian eBay sellers is stored as electronic records on servers in the United States owned by eBay Inc. ("eBay US"). The records are compiled and maintained by eBay International AG ("eBay International"), a Swiss corporation which is a wholly owned subsidiary of eBay US. The principal question to be decided in this appeal is whether the information sought by the Minister is "foreign-based" because it is "available or located outside Canada" for the purpose of subsection 231.6, despite the fact that the appellants, Canadian corporations, have been authorized to access it in Canada for use in their business, but do not download it to their computers.

[4] In my view, Justice Hughes made no reversible error in concluding on the facts before him that the information sought was not “foreign-based information”; even though stored on servers outside Canada, it was also located in Canada because of its ready accessibility to and use by the appellants. Consequently, it was open to the Minister to seek its production by a requirement imposed on the appellants under section 231.2, without regard to any possible limitations on those powers flowing from the presence of section 231.6. Since the Judge properly authorized the imposition of the requirement under section 231.2, I would dismiss the appeal.

B. FACTUAL BACKGROUND

[5] eBay US operates an online marketplace (“eBay”) in conjunction with its subsidiaries around the world. Registered users of eBay offer goods and services for sale on one of eBay’s websites for purchase by the highest bidder. Sellers pay a fee for use of the eBay marketplace. Neither eBay US nor any of its subsidiaries is a party to the contracts of sale made by buyers and sellers on eBay.

[6] The appellant, eBay CS Vancouver Inc., is wholly owned by eBay US. The other appellant, eBay Canada Limited, is wholly owned by eBay International, the wholly owned subsidiary of eBay US.

[7] eBay International conducts most eBay activities outside the United States, including billing eBay users for fees and banking, the provision of a website platform directed at the eBay market in Canada, and a website with the domain name of eBay.ca, which is situated on servers

outside Canada. eBay Canada uses the eBay.ca domain name and provides market assistance and research, and other administrative services, to eBay International, but has nothing to do with billing customers, receiving payments, or collecting fees.

[8] eBay US and eBay International grant eBay Canada secure online access to confidential information about Canadian users of eBay, which is stored on eBay US's servers in California. Under provisions in agreements with eBay US and eBay International, eBay Canada is required to keep confidential information provided to it "concerning the eBay system", except to the extent that its disclosure is ordered by law. eBay Canada says that these provisions include information concerning PowerSellers in Canada.

[9] The information sought from eBay Canada by the Minister comprises the names, addresses and other identifying information, and the gross sales for 2004 and 2005, of eBay PowerSellers who are registered as having a Canadian address. Registered eBay users earn the PowerSeller designation on the basis of the value of their eBay sales, the length of time that they have been selling, their financial record, and whether they have been the subject of complaints from other eBay users.

[10] PowerSellers' sales records vary widely. They may include, on the one hand, individuals who, on a casual basis, have sold goods or services for US$3,000 in one year and, on the other, corporations that have sold items for as much as US$450,000 in a similar period.

[11] Designation as a PowerSeller carries significant benefits. For instance, PowerSellers receive an enhanced level of eBay services, and potential purchasers are likely to have more confidence in the reliability and integrity of a seller with this designation. The PowerSellers program is an important part of the promotion of eBay and exists in many countries. Registered eBay users may join a program in their own country; residents of Canada may become PowerSellers on eBay.ca. The precise number of PowerSellers in the Canadian program is not known, but is estimated to be in the region of 10,000.

[12] There is no evidence that eBay Canada has either printed, or downloaded onto its computers in Canada, the information about PowerSellers sought by the Minister. However, it is conceded that eBay Canada has been granted access to and regularly uses this information as an integral part of its business: see 2007 FC 930 at para. 12.

[13] The Minister did not know the names and contact information of Canadian PowerSellers or the value of the goods and services that they had sold on eBay. Accordingly, he applied *ex parte* to the Federal Court under subsection 231.2(3) for an order authorizing him to impose a requirement on eBay Canada to produce information and documents that would enable him to audit them. Justice Hughes granted the *ex parte* application on November 6, 2006, requiring the appellants to provide to the Minister

> … the following information and documents for any person having a Canadian address according to your records (including individual, corporation and joint venture) who qualified for the PowerSeller status under eBay's PowerSeller program in Canada at any time during the two calendar years 2004 and 2005:

> a) account information – full name, user id, mailing address, billing address, telephone number, fax number and email address; and
>
> b) merchandise sales information – gross annual sales
>
> Original documents in their original forms are required. Photocopies of information or documents will not be sufficient. Where these records exist in electronic format, I require that the records be provided in electronically readable format.

[14] After receiving notice of the *ex parte* order, the appellants made an application to Justice Hughes under subsection 231.2(5) to review it.

C. DECISION OF THE FEDERAL COURT

[15] Before issuing his final judgment, which is the subject of this appeal, Justice Hughes issued reasons and a partial judgment on September 18, 2007 (2007 FC 930), in which he rejected the appellants' principal argument. They had argued that the information and documents sought could not be the subject of a requirement under the Minister's general power in section 231.2, because they were stored on servers in California and therefore constituted "foreign-based information" for the purpose of section 231.6. Further, they said, section 231.6 does not authorize a requirement to be imposed for the production of foreign-based information relating to unnamed persons. The appellants alleged that, by resorting to section 231.2, the Minister had improperly tried to escape this and other limitations imposed by section 231.6 on requirements to produce records located outside Canada.

[16] The Judge noted the breadth of the power conferred on the Minister by subsection 231.2 to require the production of information, including the power to require a person to produce

information relating to another person whose tax affairs the Minister wished to examine. Justice Hughes concluded that the scope of the power exercisable under section 231.2 in this case cannot be affected by section 231.6, because section 231.6 applies only to "foreign-based information", which, he found, did not include the information sought by the Minister from eBay Canada.

[17] In reaching this conclusion, Justice Hughes observed that, since electronically stored information relating to PowerSellers was readily, lawfully, and instantaneously available in a variety of places to eBay entities, including to the appellants in Canada, the location of the servers on which it was stored was irrelevant (2007 FC 930 at para. 23). He relied on judicial descriptions of telecommunications from a foreign state to Canada, and *vice versa*, as being "both here and there" (see *Society of Composers, Authors and Music Publishers in Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427 at para. 59 ("*SOCAN*")), and on the particular facts of this case concerning eBay Canada's permitted and actual use of the information.

[18] Justice Hughes delayed deciding the remaining issue (namely, whether there was sufficient evidence that the Minister required the information to audit Canadian PowerSellers for compliance with the *Income Tax Act*) until this Court released its decision in *Canada (Minister of National Revenue) v. Greater Montreal Real Estate Board*, 2007 FCA 346, 2007 D.T.C. 5740, leave to appeal to S.C.C. refused, 32404 (April 24, 2008) ("*GMREB*"), and the parties had had an opportunity to make written submissions on it. In further reasons and final judgment, dated February 13, 2008 (2008 FC 180), Justice Hughes held that he was bound by *GMREB* on the applicable test (the "good faith audit" test) and concluded that on the basis of the evidence before

him, the Minister had met it. He also said that, even if the more demanding test relied on by the appellants were applicable (the "genuine and serious inquiry" test), the evidence was sufficient to meet it too.

[19] Having also satisfied himself that the Minister had met the statutory preconditions in paragraphs 231.2(3)(*a*) and (*b*) to the imposition of a requirement under this section, Justice Hughes affirmed his *ex parte* order authorizing the requirement, but amended it to cover information concerning the identity of PowerSellers "registered as having a Canadian address", rather than those "having a Canadian address according to your records".

[20] This appeal is from the final judgment of Justice Hughes. However, since the issues raised are considered in both sets of the Judge's reasons, it will be necessary to refer to the reasons for the partial and the final judgments.

D. LEGISLATIVE FRAMEWORK

[21] It is important to situate the particular issues raised in this appeal within the wider context of the statutory powers from which they arise. The following general provision confers broad powers on the Minister to require the provision of information and documents.

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 by notice served personally or by registered or certified	**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, par avis signifié à personne ou envoyé par courrier recommandé ou

mail, require that any person provide, within such reasonable time as stipulated in the notice,

(*a*) any information or additional information, including a return of income or a supplementary return; or

(*b*) any document.

certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :

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

b) qu'elle produise des documents.

[22] While subsection 231.2(1) is stated to operate "Notwithstanding any other provision of this Act", it is expressly made subject to subsection (2), which provides that prior judicial authorization is needed when, as in the present case, the requirement relates to information respecting unnamed persons.

231.2(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

(3) On *ex parte* application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") where the judge is satisfied by information on oath that

(*a*) the person or group is ascertainable; and

(*b*) the requirement is made to verify compliance by the person or persons in the group with any duty or

231.2(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

(3) Sur requête *ex parte* du ministre, un juge peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément — appelée « groupe » au présent article —, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :

a) cette personne ou ce groupe est identifiable;

b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont

obligation under this Act.	respecté quelque devoir ou obligation prévu par la présente loi.

[23] It is evident from paragraph 231.2(3)(*b*) that subsection 231.2(2) is intended to be used when the Minister wishes to verify whether the unnamed persons, not the person on whom the requirement is served, are in compliance with their obligations under the Act. See, for example, *Bernick v. Canada (Minster of National Revenue)*, 2002 D.T.C. 7167 at para. 10 (Ont. SCJ).

[24] A person on whom an *ex parte* order is served under subsection 231.2(3) must be served with notice of both it and the notice referred to in subsection 231.2(1) (see subsection 231.2(4)), and may request a review of the order by a judge, normally the judge who issued it.

(5) Where an authorization is granted under subsection 231.2(3), a third party on whom a notice is served under subsection 231.2(1) may, within 15 days after the service of the notice, apply to the judge who granted the authorization or, where the judge is unable to act, to another judge of the same court for a review of the authorization.	**(5)** Le tiers à qui un avis est signifié ou envoyé conformément au paragraphe (1) peut, dans les 15 jours suivant la date de signification ou d'envoi, demander au juge qui a accordé l'autorisation prévue au paragraphe (3) ou, en cas d'incapacité de ce juge, à un autre juge du même tribunal de réviser l'autorisation.

[25] In conducting the review, the judge must consider whether she or he is satisfied that the conditions in paragraphs 231.2(3)(*a*) and (*b*) are met. If the judge is not so satisfied, the *ex parte* order may be cancelled, otherwise the order may be confirmed or varied: subsection 231.2(6).

[26] The sanctions for non-compliance with an order issued under section 231.2 are criminal prosecution (section 238) and contempt proceedings (subsection 231.7(4)).

[27] Section 231.6 was added to the Act in 1988 by S.C. 1988, c. 55, section 175, and deals with requirements for the production of “foreign-based information”, which is defined as follows.

231.6 (1) For the purposes of this section, "foreign-based information or document" means any information or document that is available or located outside Canada and that may be relevant to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person.	**231.6 (1)** Pour l’application du présent article, un renseignement ou document étranger s’entend d’un renseignement accessible, ou d’un document situé, à l’étranger, qui peut être pris en compte 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.

[28] The scope of the power to require the production of any foreign-based information or document is defined as follows.

231.6 (2) Notwithstanding any other provision of this Act, the Minister may, by notice served personally or by registered or certified mail, require that a person resident in Canada or a non-resident person carrying on business in Canada provide any foreign-based information or document.	**231.6 (2)** Malgré les autres dispositions de la présente loi, le ministre peut, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d’une personne résidant au Canada ou d’une personne n’y résidant pas mais y exploitant une entreprise de fournir des renseignements ou documents étrangers.

[29] A person served with a notice of a requirement under subsection 231.6(2) may request a judge to review the requirement, including on the ground that it is unreasonable.

231.6 (4) The person on whom a notice of a requirement is served under subsection 231.6(2) may, within 90 days after the service of the notice, apply to a judge for a review of the requirement.	**231.6 (4)** La personne à qui l’avis est signifié ou envoyé peut, dans les 90 jours suivant la date de signification ou d’envoi, contester, par requête à un juge, la mise en demeure du ministre.
(5) On hearing an application under subsection 231.6(4) in respect of a requirement, a judge may (*a*) confirm the requirement;	**(5)** À l’audition de la requête, le juge peut: *a*) confirmer la mise en demeure; *b*) modifier la mise en demeure de la

(*b*) vary the requirement as the judge considers appropriate in the circumstances; or

(*c*) set aside the requirement if the judge is satisfied that the requirement is unreasonable.

(6) For the purposes of paragraph 231.6(5)(*c*), the requirement to provide the information or document shall not be considered to be unreasonable because the information or document is under the control of or available to a non-resident person that is not controlled by the person served with the notice of the requirement under subsection 231.6(2) if that person is related to the non-resident person.

façon qu'il estime indiquée dans les circonstances;

c) déclarer sans effet la mise en demeure s'il est convaincu que celle-ci est déraisonnable.

(6) Pour l'application de l'alinéa (5)*c*), le fait que des renseignements ou documents étrangers soient accessibles ou situés chez une personne non-résidente qui n'est pas contrôlée par la personne à qui l'avis est signifié ou envoyé, ou soient sous la garde de cette personne non-résidente, ne rend pas déraisonnable la mise en demeure de fournir ces renseignements ou documents, si ces deux personnes sont liées.

[30] Unlike section 231.2, section 231.6 contains no provisions specifically dealing with requirements for information relating to unnamed persons to enable the Minister to determine if they are in compliance with their obligations under the Act. However, under subsection 231.2(2) such a requirement may only be imposed with a judicial authorization, which itself is subject to judicial review. In contrast, *all* requirements under section 231.6 are subject to judicial review.

[31] On the other hand, section 231.6 contains its own sanction for non-compliance, in addition to the possibility of prosecution under section 238. However, the sanction of contempt proceedings, provided by section 231.7 when a person does not comply with a requirement imposed under section 231.2, is not available for a failure to comply with a section 231.6 requirement.

231.6 (8) If a person fails to comply substantially with a notice served under subsection 231.6(2) and if the notice is not set aside by a judge pursuant to subsection 231.6(5), any court having jurisdiction in a

231.6 (8) Si une personne ne fournit pas la totalité, ou presque, des renseignements ou documents étrangers visés par la mise en demeure signifiée conformément au paragraphe (2) et si la mise en demeure

civil proceeding relating to the administration or enforcement of this Act shall, on motion of the Minister, prohibit the introduction by that person of any foreign-based information or document covered by that notice.	n'est pas déclarée sans effet par un juge en application du paragraphe (5), tout tribunal saisi d'une affaire civile portant sur l'application ou l'exécution de la présente loi doit, sur requête du ministre, refuser le dépôt en preuve par cette personne de tout renseignement ou document étranger visé par la mise en demeure.

E. ISSUES AND ANALYSIS

Two preliminary matters

(i) *statutory interpretation*

[32] In order to interpret statutes consistently with legislative intent, courts must determine their meaning by reference to their text, context and purpose. Thus, while the ordinary and grammatical meaning of a statutory text is the point of departure for any interpretative exercise, it is rarely the end of the journey. The meaning of the text must also be found in the purpose of both the provision in question and the statute as a whole. Whenever possible, the text of the statute should be interpreted in a manner which furthers that purpose.

[33] As for context, a court should interpret a disputed provision in light of related statutory provisions in an attempt to give a coherent meaning to the group: *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46 at para. 15. In addition, a court should take into consideration external context when interpreting legislation. Thus, for example, Justice Binnie said in *SOCAN* (at para. 43) that courts had to "transpose" the provisions of a *Copyright Act* designed to cover works protected by the Berne Convention of 1886, as revised in 1908, " to the information age, and to technologies undreamt of by those early legislators."

[34] This “modern approach” to interpretation which takes account of statutory text, context and purpose also applies to the *Income Tax Act*, although particular weight may be given to the ordinary meaning of the text: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601 at paras. 10-11; *Imperial Oil Ltd. v. Canada*, [2006] 2 S.C.R. 447 at para. 26. The Supreme Court of Canada has provided additional guidance which is relevant to the interpretation of the Act’s enforcement powers. Thus, in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, a case involving a challenge under section 8 of the *Canadian Charter of Rights and Freedoms* to the Minister’s power to require the production of documents, Justice Wilson noted (at 648) that the major drawback of a self-reporting tax system such as ours is that some taxpayers will attempt to evade tax, by failing to report income, for example. Accordingly, she said:

> [T]he Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers’ returns and inspect all books and records which may be relevant to the preparation of these returns. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. … A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained.

(ii) *standards of review*

[35] On an *ex parte* application by the Minister under subsection 231.2(3), the judge has discretion to authorize the imposition of a requirement, subject to such conditions as the judge considers appropriate, if satisfied that paragraphs (*a*) and (*b*) are met. On a request under 231.2(5) for a review of an authorization granted under subsection 231.2(3), the judge reviews a judicial order which, in most cases, will have been granted by that judge. In these circumstances, the standards of review to be applied by this Court on an appeal from a judge’s decision under subsection 231.2(5) are those prescribed in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[36] Thus, questions of law, including questions of statutory interpretation and procedural fairness decided by Justice Hughes in this case, are subject to review on appeal on a standard of correctness. On the other hand, findings of fact are reviewable only for palpable and overriding error, as are applications of the law to the facts, unless the question is more legal than factual or a general question of law can readily be extrapolated, in which case correctness is the standard of review.

[37] With these considerations in mind, I turn to the issues in this appeal. The appellants' grounds of appeal can be reduced to four propositions: (i) the Application Judge erred by holding that the requirement does not relate to "foreign-based information"; (ii) since the information in this case is "foreign-based" it can only be obtained in accordance with section 231.6, which does not extend to information relating to unnamed persons; (iii) if, contrary to the above, section 231.2 is applicable, a requirement may only be confirmed under subsection 231.2(3) if there is evidence that the Minister is conducting a "genuine and serious inquiry" as to whether specific members of the class of unnamed persons are in compliance with the Act; and (iv) the Application Judge breached the duty of fairness by failing to give notice to eBay US and eBay International before varying the terms of the requirement in a manner that adversely affected them.

Issue 1: Is the information which eBay Canada was required to produce "foreign-based information" for the purpose of section 231.6?

[38] Counsel for eBay Canada says that the Minister's general power to issue requirements under section 231.2 must be read in light of section 231.6, which specifically prescribes the circumstances

in which the Minister may impose a requirement for the production of “foreign-based information”. Counsel relies on the presumption that a general statutory provision should not be interpreted as derogating from a specific provision. However, this argument only comes into play if the information sought by the Minister in this case is indeed “foreign-based” for the purpose of section 231.6. In my view, it is not.

[39] Subsection 231.6 defines “foreign-based information or document” as “any information or document that is available or located outside Canada”. What the Minister requires to be produced in this case is “information”, not a “document”. However, for the purposes of sections 231.1 to 231.7, section 231 defines “document” as including “a record”. “Record”, in turn, is defined by subsection 248(1) to include “any other thing containing information, whether in writing or in any other form”, a definition broad enough to include information in electronic form stored on a server.

[40] Counsel for the appellants says that, as a matter of law, information in electronic form stored on a server is “located” where the server is situated and, until downloaded or printed, is not located anywhere else. He argues that the fact that information is “available” in another country to those who have access to the server through their computers is not sufficient to make it “located” in that other country for the purpose of section 231.6.

[41] Counsel could not relate the interpretation of “located” that he advanced to a statutory purpose served by section 231.6. He pointed out, however, that cases in which telecommunications had been described as being “here and there” (see especially, *SOCAN* at paras. 58 and 59) do not

support a conclusion that information stored on a server is "located" both at the site of the server and wherever it is accessed. Counsel noted that, by their very nature, telecommunications have two end points: the location of the communicator and the location of the recipient of the communication. This is not true of information.

[42] I agree that neither *SOCAN* nor *Libman v. The Queen*, [1985] 2 S.C.R. 178, another telecommunications case, is directly analogous to the question in issue here. More important, however, *SOCAN* instructs courts to interpret legislation in light of contemporary technology and, if necessary, to "transpose" its terms to take into account the changed technological environment in which it is to be applied.

[43] Section 231.6 was enacted in 1988, when information technology was much less developed, and less widely used, than it is today. I can well understand that a written document may be "located" where it is physically situated, and nowhere else. Of course, a copy of the document may be located elsewhere, but that is a separate document with its own location. In order to determine the parameters of the concept of "location" on the present facts, it is helpful to consider whether the rationale for a separate statutory regime governing requirements to produce "foreign-based information or document" applies to information in electronic form which is accessible through computers situated far from the servers on which the information is stored.

[44] Section 231.6 was enacted following the publication of the Department of Finance's *White Paper on Tax Reform* (Ottawa: Canadian CCH Limited, 1987), which recommended changes in the

law to make it easier for the Minister to obtain information about cross-border transfer pricing: Annex 2, pp. 223 and 224. However, the language of section 231.6 deals with foreign-based information more generally and is not in terms limited to requiring the production of information concerning international transfer pricing. Because a requirement to produce documents cannot be served extraterritorially on the person in possession of them, subsection 231.6(2) enables the Minister to serve a notice on a person resident in Canada requiring the production of documents located outside Canada.

[45] The person on whom a notice is served under subsection 231.6(2) may apply for a review of the requirement on the ground, among others, that it is unreasonable: subsection 231.6(5). Subsection 231.6(6) provides that a requirement is not "unreasonable" for this purpose on the ground that the information or document in question is under the control of a non-resident person who is not controlled by, but is related to, the person to whom the requirement was issued.

[46] In order to induce compliance with a requirement, subsection 231.6(8) provides that a judge may prohibit a person who has failed to comply substantially with the requirement from relying on foreign-based information covered by it in a civil proceeding relating to the enforcement or administration of the Act.

[47] The scheme of section 231.6 suggests that Parliament was concerned that it could be unduly onerous for a person to be required to produce material located outside Canada and in the possession of another person, and that the section may operate in an unduly extraterritorial manner.

While these concerns may be taken into account on a review by a judge for unreasonableness, they are largely irrelevant to the information (bulky as it may be) that is the subject of the requirement in the present case.

[48] This is because, with the click of a mouse, the appellants make the information appear on the screens on their desks in Toronto and Vancouver, or anywhere else in Canada. It is as easily accessible as documents in their filing cabinets in their Canadian offices. Hence, it makes no sense in my view to insist that information stored on servers outside Canada is as a matter of law located outside Canada for the purpose of section 231.6 because it has not been downloaded. Who, after all, goes to the site of servers in order to read the information stored on them?

[49] Nor is the extraterritorial application of the Act a significant issue on the present facts. For example, the agreements with eBay Canada expressly provide that they may disclose confidential "eBay System Information" (which the appellants say includes information about PowerSellers) which "is required to be disclosed by order of any court": Appeal Book, vol. II, pp. 295-96. Nor does the requirement oblige a person outside Canada to do anything.

[50] Counsel concedes that the information identifying PowerSellers registered as having an address in Canada would be located in Canada if the appellants had downloaded it to their computers. In my view, it is formalistic in the extreme for the appellants to say that, until this simple operation is performed, the information which they lawfully retrieve in Canada from the servers, and read on their computer screens in Canada, is not located in Canada.

[51] I would only add that, although Justice Hughes does not frame his reasons by reference to the statutory definition of “foreign-based information” in subsection 231.6(1), he clearly meant that the information in question could be “located” at places other than the site of the servers where it is stored. For example, he stated (2007 FC 930 at para. 23) that information stored electronically outside Canada “cannot truly be said to ‘reside’ only in one place”, and (*supra* at para. 25) the information required by the Minister “is not foreign but within Canada” for present purposes.

[52] Having concluded that information in electronic form stored on servers outside Canada is in law capable of being located in Canada for the purpose of section 231.6, I now consider whether Justice Hughes’s application of the law to the particular facts of this case was vitiated by palpable and overriding error. In my view, it was not. In finding that the information in question was located in Canada within the meaning of section 231.6, Justice Hughes properly took into consideration the fact that eBay US and eBay International had granted the appellants access to information about Canadian PowerSellers for the purpose of their business, and that they indeed used it for this purpose. The facts support the following conclusion by Justice Hughes (*supra* at para. 25):

> For perhaps corporate efficiency the information is stored elsewhere, but its purpose is in respect of Canadian business. The information is not foreign but within Canada for the purposes of section 231.2 of the *Income Tax Act*.

[53] Since the facts of this case do not engage section 231.6, it is not necessary to consider whether the presence of that section in the statutory scheme reduces the Minister’s powers under section 231.2 when the requirement relates to “foreign-based information”.

Issue 2: **Before authorizing the Minister to impose a requirement for information concerning unnamed persons pursuant to subsection 231.2(3), must a judge be satisfied that the Minister is conducting "a genuine and serious inquiry" into whether specific members of the group of persons identified are in compliance with the Act?**

[54] The appellants first raised this issue before Justice Hughes in the course of oral argument. He delayed issuing final judgment until this Court had rendered its decision in *GMREB*, where the issue also was whether the Minister had to satisfy the judge that he was engaged in a "serious and genuine inquiry" of specific members of the group of persons to whom the information relates before a requirement could be imposed under subsection 231.2(3).

[55] In reasons written by Justice Trudel, the Court held that subsection 231.2(3) does not oblige the Minister to adduce evidence that he is conducting a "serious and genuine inquiry" into one or more specific individuals in the group of unnamed persons to whom a requirement relates. The Court concluded (at para. 21) that the judge authorizing the requirement had only to be satisfied that the information in question "was required to verify compliance with the Act by one or more of the unnamed persons in the group" or that "the information is required for a tax audit conducted in good faith" (at para. 48).

[56] Justice Hughes correctly regarded himself as bound by *GMREB*. Before this Court, counsel for the appellants argued that we should not follow *GMREB*. He argued that it was wrongly decided because it was inconsistent with an earlier decision of the Supreme Court of Canada, *James Richardson & Sons, Limited*, [1984] 1 S.C.R. 614 ("*James Richardson*"). Following its previous

decision in *Canadian Bank of Commerce v. Attorney General of Canada*, [1962] S.C.R. 729, the Court in *James Richardson* applied the "serious and genuine inquiry" test to the provision of the Act in force at that time which was analogous to section 231.2.

[57] However, this Court has decided in *Miller v. Canada (Attorney General)*, 2002 FCA 270, 220 D.LR. (4th) 149, that only in unusual and limited circumstances should one panel of the Court decline to follow a decision of another panel. In particular, Justice Rothstein (then of this Court) stated that, in order to ensure a degree of certainty and stability in the law, a panel should not depart from a prior decision of another panel "merely because it considers that the first case was wrongly decided" (at para. 8). However, the Court in *Miller* also said (at para. 10) that a panel was not bound to follow a prior decision which was "manifestly wrong" in one or more specified senses, which do not include inconsistency with a prior Supreme Court of Canada decision.

[58] Nonetheless, counsel for the appellants argued that it is fundamental to the due administration of justice in Canada that lower courts are bound by decisions of the Supreme Court of Canada. Hence, he said, it must always be open to this Court to decline to follow one of its previous decisions if that decision was inconsistent with previous Supreme Court jurisprudence.

[59] I do not agree. In my opinion, a determination by this Court of the legal effect of a Supreme Court decision is as subject to the general principle set out in *Miller* as a decision by this Court on any other question of law. It is clear that that general principle does not depend on the importance of the particular legal rule at issue, because it was applied in *Miller* to a prior decision of the Court on a

question of constitutional law and the Constitution is the supreme law of the land. On the other hand, as *Miller* makes clear (at para. 20), it is open to counsel to argue that a decision of this Court should not be followed on the ground that it has been overruled, expressly or impliedly, by a subsequent decision of the Supreme Court.

[60] Parenthetically, in *Phoenix Bulk Carriers Ltd. v. Kremikovski Trade*, [2007] 1 S.C.R. 588, 2007 SCC 13, the Supreme Court of Canada noted (at para. 3) that the Federal Court of Appeal had allowed the appeal from the Federal Court in that case because the Federal Court of Appeal considered itself bound by one of its previous decisions, even though it would have reached a different result if it had not been for that previous decision. In allowing the appeal, the Supreme Court expressly left open "the merits of the practice that led the Federal Court of Appeal to allow the appeal".

[61] Even if Judges of this Court are not bound to follow colleagues' decisions which they are satisfied are manifestly wrong on grounds not listed in *Miller*, I am not persuaded that *GMREB* is such a case, even though, in the view of one commentator, "it may have come as a surprise to many tax practitioners" (see Margaret Nixon, "The Minister's Power to Issue Requirements: *Minister of National Revenue v. Greater Montreal Real Estate Board*" (2008), 15 *Tax Litigation*, 954).

[62] Section 231.2 was enacted in response to the problems created for the Minister by the decision in *James Richardson*: see the comments of Justice Rothstein in *Minister of National Revenue v. Sand Exploration Ltd.*, [1995] 3 F.C. 44 (T.D.) at 51-2. Of particular importance in this

context is the fact that subsections 231.2(2) and (3) introduced the need for *ex parte* judicial authorization before the Minister can impose a requirement on a taxpayer to produce information relating to persons unnamed, and subsection 231.2(5) conferred a right of review of the judge's *ex parte* order. In addition, the repeal of the restrictions in paragraphs 231.2(3)(*c*) and (*d*) on the Minister's power to impose requirements lightened the Minister's burden: see 1996 S.C., c. 21, subsection 58(1).

[63] To oblige the Minister to prove that a genuine and serious inquiry was being conducted with respect to specific persons within the ascertained group of taxpayers would, in a case such as the present, rob subsections 231.2(2) and (3) of much of their efficacy. Moreover, the Supreme Court of Canada's refusal of leave to appeal the decision in *GMREB* does nothing to strengthen the appellants' argument that it was wrongly decided.

[64] In further support of his argument that we are not constrained by *GMREB* to relieve the Minister from having to show the existence of a serious and genuine inquiry before a judge may authorize a requirement under subsection 231.2(3), counsel brought to our attention the pre-*GMREB* decision of our Court in *AGT Ltd. v. Canada (Attorney General)*, [1997] 2 F.C. 878 (F.C.A.). In that case, which was apparently not put before the panel which decided *GMREB*, Justice Desjardins, writing for the Court, said (at para. 27):

> Subsection 231.2(1) is drafted in broad language, but its scope has been reduced through the rules of interpretation to situations where the information sought by the Minister is relevant to the tax liability of some specific person or persons, and when the tax liability of such person or persons is the subject of a genuine and serious inquiry. Given these criteria, I find that no error was committed by the motions judge. (Emphasis added.)

[65] However, unlike *GMREB*, the issue of the appropriate test seems not to have been thoroughly canvassed before the Court in *AGT*, and the effects of the amendments to the *Income Tax Act* in response to the decision in *James Richardson* were not the subject of detailed analysis by the Court. Moreover, *AGT* concerned a requirement issued under subsection 231.2(1) in circumstances where judicial authorization was not required, because the information sought did not relate to unnamed persons, but to documents in the possession of a federal agency. Moreover, unlike the present case, the Minister was interested in auditing the person on whom the requirement was imposed.

[66] Finally, counsel relied on the public policy embodied in privacy legislation to buttress his argument that the "serious and genuine inquiry" test should be applied to requirements imposed under section 231.2. It was important, he said, to protect individuals from large scale and indiscriminate "fishing expeditions" of the kind being launched by the Minister to obtain personal details of Canadian PowerSellers, when he had not a shred of evidence that any of them were failing to report income.

[67] Given the purpose and terms of the statutory scheme, this line of argument does not, in my opinion, warrant our revisiting *GMREB*. In a self-reporting system of taxation, "[t]axpayers have a very low expectation of privacy in their business records relevant to the determination of their tax liability" (*Redeemer Foundation v. Canada (Minister of National Revenue*) 2008 SCC 46 at para. 25) and a requirement "provides the least intrusive means by which effective monitoring of compliance with the *Income Tax Act* can be effected" (*R. v. McKinlay Transport Ltd., supra* at 649).

[68] In short, even if more than one view may reasonably be held on the issue decided by *GMREB*, this is an insufficient basis for the Court to re-examine it. Considerations of both judicial economy, and certainty and stability in the law indicate that we should depart from our previous decisions only when they are manifestly in error.

[69] Having properly rejected the "serious and genuine inquiry" test on the ground that he was bound by the decision of this Court in *GMREB*, Justice Hughes concluded, largely on the basis of an affidavit, that the information sought in the requirement was needed by the Minister to conduct a good faith audit of PowerSellers resident in Canada to ensure that they were complying with their obligations under Canada's tax laws: 2008 FC 180 at para. 7. There was ample evidence to support this conclusion; his application of the correct law to the facts did not constitute palpable and overriding error.

Issue 3: Did Justice Hughes breach the duty of procedural fairness when he amended the terms of his *ex parte* order without notice to eBay US and eBay International?

[70] The *ex parte* order issued by Justice Hughes confined the scope of the requirement which the Minister proposed to impose on eBay Canada to information relating to PowerSellers "having a Canadian address according to your records". (Emphasis added.) As counsel explained it, the appellants found this limitation to their liking because it enabled them to argue that since they (as opposed to eBay US or eBay International) owned no records relating to Canadian PowerSellers, the requirement did not oblige them to produce anything.

[71] At the *inter partes* hearing, Justice Hughes removed the reference to "your records" in these limiting words and substituted, "registered as having a Canadian address". In the appellants' view, this amendment broadened the scope of the requirement by bringing within it records belonging to eBay International stored on servers owned by eBay US. If this amendment did not strictly make the requirement binding on these non-parties, the appellants maintain, it adversely affected them by exposing their records to disclosure. Consequently, they argue, Justice Hughes should have given notice to eBay US and eBay International that he proposed to amend his *ex parte* order in this respect, and afforded them an opportunity to make representations on the appropriate wording to define this aspect of the scope of the order.

[72] I do not agree. First, one person may not generally impugn a decision on the ground that it was made without giving a fair hearing to some other person. For the most part, a breach of the duty of procedural fairness may be relied on as a ground of review only by persons to whom the duty is owed. However, eBay US and eBay International, which counsel for the appellants was at pains to insist are separate legal entities from the appellants, have not sought intervener status in this appeal in order to raise the procedural fairness issue.

[73] Second, I am not persuaded that eBay US and eBay International were adversely affected by the amendment to the order. It seems to me fanciful to argue, as the appellants do, that the original limitation on the *ex parte* order meant that eBay Canada would not have to produce any information because the appellants "owned" no "records".

[74] I see little to commend an interpretation of a judge's order that would render it nugatory. A more plausible view of the restriction, in my view, is that it was intended to ensure that, regardless of who "owned" the information to which the appellants had access, they only had to produce information relating to PowerSellers in Canada. The further amendment made by Justice Hughes at the *inter partes* hearing, without objection by eBay Canada (see 2007 FC 930 at para. 14), does not seem to me materially different from the corresponding provision in the *ex parte* order which it replaced. Rather, it was probably intended by Justice Hughes simply to clarify his previous order.

F. CONCLUSIONS

[75] For these reasons, I would dismiss the appeal with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-105-08
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE HUGHES, DATED FEBRUARY 13, 2008, DOCKET NO. T-2124-06)	
STYLE OF CAUSE:	EBAY CANADA LIMITED and EBAY CS VANCOUVER INC. v. MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 8, 2008
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	LINDEN J.A. TRUDEL J.A.
DATED:	NOVEMBER 7, 2008

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