

Federal Court



Cour fédérale

Date: 20091020

Docket: T-1224-07

Citation: 2009 FC 956

Ottawa, Ontario, this 20th day of October 2009

Present: The Honourable Mr. Justice Pinard

BETWEEN:

**LONDON LIFE – COMPAGNIE D’ASSURANCE-VIE
630 Boulevard René-Lévesque West, suite 1900
Montreal, Quebec
H3B 4J5**

Applicant

and

**ATTORNEY GENERAL OF CANADA
and
THE MINISTER OF NATIONAL REVENUE**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, under subsection 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7, and subsection 231.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), (the “ITA”) of a Requirement to provide information, dated June 5, 2007, addressed by the Canada

Revenue Agency (“CRA”) to the applicant, London Life-Compagnie d’assurance-vie (“London Life”).

* * * * *

[2] London Life is a federally incorporated life insurance company that carries on business in the areas of life insurance, investment and retirement savings in all of Canada’s provinces and territories.

[3] In July 2005, the CRA commenced an audit of taxpayer Lofti Ghattas (or, the “taxpayer”), an insurance broker, for taxation years 2002 and 2003. The audit targeted *inter alia* expenses claimed by him under a budget item describing “prime d’assurance payée et supportée par moi-même pour générer un revenu”.

[4] Mr. Ghattas received commission from London Life based on his volume of annual sales, provided that policies sold were maintained for at least twelve months. If an important client wished to cancel its policy before twelve months had expired, Mr. Ghattas would continue to pay the client’s premiums for the remainder of the 12-month period, in order to retain his full commission. The policies in question would remain in the possession of London Life, and not Mr. Ghattas.

[5] According to the CRA, in order to determine whether the expenses claimed by the taxpayer regarding this practice were legitimate under the ITA, it had to identify the nature of the “reimbursement” made by Mr. Ghattas under the conditions of the associated policies. In particular,

the CRA states that it is essential to obtain information that will assist in determining whether the reimbursements in question were in relation to insurance-related or investment-related products.

[6] On December 15, 2006, the Minister of National Revenue (the “Minister”) issued a Requirement to the applicant requesting information and documents in its possession pertaining to clients to whom Mr. Ghattas had sold insurance policies. These clients’ names, along with other identifying information obtained from the taxpayer, were listed in a table annexed to the Requirement. This first Requirement was, however, cancelled because not all policyholders were mentioned and health information was captured in the request.

[7] On June 5, 2007, the applicant was served with a second Requirement by the Minister, pursuant to paragraph 231.2(1)(a) of the ITA, requesting information and documents within 30 days of its receipt by the applicant.

[8] On June 29, 2007, the applicant filed an application for judicial review seeking an order quashing the second Requirement because of the Minister’s failure to seek prior judicial authorization.

* * * * *

[9] The content of the Requirement currently under review is as follows:

Aux fins de l’application ou de l’exécution de la *Loi de l’impôt sur le revenu*, concernant M. Lotfi Ghattas, j’exige que, dans les trente jours suivant la date de réception de la présente demande

péremptoire, vous fournissiez les renseignements et produisiez en vertu des dispositions de l'alinéa 231.2(1)(a)(b) [sic] de ladite Loi :

- i) Une copie des polices d'assurance-vie dont vous trouverez le numéro de contrat de police, le nom des payeurs ainsi que le nom des assurés en annexe ci-jointe :

Pour les contrats d'assurance-vie, vous n'avez pas à inclure les informations portant sur l'état de santé des assurés.

- ii) La liste de tous les paiements reçus et remboursements faits pour ces mêmes polices en précisant le nom du bénéficiaire, la date ainsi que le montant payé avec toutes les pièces justificatives à l'appui.

[10] Particularly significant to this proceeding is the fact that the Minister did not seek judicial authorization, pursuant to paragraph 231.2(2) of the ITA, before issuing the Requirement.

* * * * *

[11] The following provisions of the ITA are relevant to this proceeding:

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

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

certified 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.

(2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection (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 (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 (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 obligation under this Act;

(c) and (d) [Repealed, 1996, c. 21, s. 58(1)]

...

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.

(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 respecté quelque devoir ou obligation prévu par la présente loi;

c) et d) [Abrogés, 1996, ch. 21, art. 58(1)]

...

* * * * *

[12] Paragraph 231.2(1) of the ITA grants the Minister broad power to require any person to provide any information or document for “any purpose related to the administration or enforcement of this Act”. This power is, however, restrained by paragraph (2) which, on its face, imposes a duty on the Minister to first obtain a court order, pursuant to paragraph (3), before imposing on any “third party” a requirement under 231.2(1) to provide information or documents relating to one or more “unnamed persons”.

[13] The applicant’s central claim is that the Requirement issued by the Minister on June 5, 2007 is invalid because the Minister, contrary to paragraph 231.2(2), did not seek prior authorization from this Court to access information pertaining to unnamed persons in the possession of London Life, the third party. The Minister counters that he had no such obligation: once the criteria set out in subsection 231.2(1) are met, disclosure was mandatory, without a court order.

[14] The applicant finds support for its position in this Court’s ruling in *Minister of National Revenue v. Toronto Dominion Bank*, 2004 FC 169, 253 F.T.R. 90. There, the Toronto Dominion Bank refused to respond, absent a court order, to a request from the Minister to provide information about an unnamed person to whom a TD bank account belonged, into which funds had been deposited by a tax debtor. Madam Justice Danièle Tremblay-Lamer wrote:

[20] Although the [Minister] maintained that he only wanted to ascertain whether his debtor Jonathan Myette, who is under investigation, had tried to reduce his property at the expense of his creditors, it cannot be argued without risk of absurdity that this is a situation covered by subsection 231.2(1), since the Minister is trying

to obtain information on the name of the holder of bank account No. 4152-291062 and the names and account numbers of persons whom the Bank knows have acted as nominees for Jonathan Myette. How can it be argued that these persons have been named?

[21] The fact that the information sought could potentially prove relevant in the investigation being conducted regarding the tax debtor Jonathan Myette is of no importance. Subsection 231.2(2) is clear: prior authorization is necessary.

The Federal Court of Appeal upheld her decision (2004 FCA 359). Justice Robert Décary, writing for the Court, explained:

[7] . . . The purpose of subsection 231.2(2) is to protect both the third party with the information and the person concerned. The third party naturally wants to be sure, before it gives information to the Minister (which moreover here is confidential under paragraph 244(d) of the *Bank Act*) that it has a legal duty to do so. The person concerned is entitled to have his or her privacy respected to the extent provided by law. It is specifically to achieve this twofold objective that Parliament has limited the Minister's power and required him to obtain prior judicial authorization, once the conditions mentioned in paragraphs 231.2(3)(a) and (b) are met.

[8] The Minister is seeking to do this here although subsection 231.2(2) does not intend him to do so. Additionally, the effect of accepting his interpretation of section 231.2 would be to invalidate subsections 231.2(2) and (3) and the protection they provide, since the Minister would be obtaining under subsection 231.2(1), without prior judicial consent, information concerning unidentified persons once he is not investigating or says he is not investigating those persons. The very purpose of subsections 231.2(2) and (3) is to protect unidentified persons who are not being investigated while making it possible in the interests of justice, and subject to judicial review, for information to be obtained on persons who are in fact under investigation.

[My emphasis.]

[15] For their part, the respondents in the present case first submit, based on *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, the following:

It is now trite law that to ensure the integrity of a self-reporting and self-assessing fiscal regime which depends on the honesty of its taxpayers, the MNR “must be given broad powers [...] to audit taxpayers’ returns and inspect all records which may be relevant for the preparation of these returns”, whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. 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. The scope of documents and information that may be sought by the MNR is much wider than those which must be statutorily recorded, kept or made, and includes those a taxpayer would expect to be protected under s.8 of the *Canadian Charter of Rights and Freedoms*.

[16] Referring specifically to subsections 231.2(1) to (3) of the ITA, the respondents further submit:

Inter alia, the MNR may request any person to provide information or communicate documents concerning him- or herself or a third party, irrespective of their relationship, whether the information or documents concerns known or unknown persons. . . .

Disclosure to the MNR is mandatory from the moment the criteria set out in subs. 231.2(1) is met. . . .

[17] I agree. Indeed, section 231.2 covers two situations: the Minister requests information about (1) a known taxpayer; or (2) unknown persons. In the former situation, the Minister clearly is not required to first obtain judicial authorization prior to serving a request for information upon any person (see *Redeemer Foundation v. Minister of National Revenue*, 2008 SCC 46, at paragraph 15; *eBay Canada Ltd. v. Minister of National Revenue*, 2008 FCA 348, at paragraph 23; *Canada (Minister of National Revenue) v. Great Montréal Real Estate Board*, [2008] 3 F.C.R. 366 (C.A.), at paragraph 13; *Canada (Customs & Revenue Agency) v. Artistic Ideas Inc.*, 2005 D.T.C. 5165, 2005

FCA 68, at paragraphs 10 to 12; *Minister of National Revenue v. Toronto Dominion Bank, supra*, at paragraph 18).

[18] In this case, CRA is auditing Mr. Ghattas' tax returns. The taxpayer is known and of course identified. The request for information served upon the applicant who is also known, mentions his name in the first paragraph. The policy holders, about whom information is sought, are also known, as they are listed in an annex to the request for information.

[19] In the circumstances, I conclude that the request for information served upon the applicant by the CRA complies with the requirements of section 231.2 of the ITA and that the Minister was not subjected to prior judicial authorization.

[20] Furthermore, if one accepted the applicant's view that the Requirement, in this case, is related to "unnamed persons", because its annex does not necessarily indicate the names of the insured persons and does not mention the names of the beneficiaries of the insurance policies, judicial authorization would not be required, as those "unnamed persons" are not under audit. As the affidavit of Mrs. Danielle Asselin, an auditor for the CRA, shows, at paragraphs 16 to 19 (Respondents' Record, at page 5), the information and documents sought will not be used to conduct an audit on another taxpayer, known or unknown.

[21] In *Canada (Customs and Revenue Agency) v. Artistic Ideas Inc., supra*, issued a few months after *Toronto Dominion Bank, supra*, Rothstein J.A. (as he then was) wrote:

[8] As I understand the scheme of section 231.2, the Minister may require a third party to provide information and documents pertaining to the third party's compliance with the Act. However, the Minister may not impose a Requirement on the third party to provide information or documents relating to unnamed persons whom he wishes to investigate, unless he first obtains the authorization of a judge. The judge may authorize the Minister to require such information only if the unnamed persons are ascertainable and only if satisfied that information or documents relating to them is required to verify compliance by them with the Act.

[My emphasis.]

Justice Rothstein went on to say:

[11] . . . [W]here unnamed persons are not themselves under investigation, subsections 231.2(2) and (3) do not apply. Presumably, in such cases the names of unnamed persons are necessary solely for the Minister's investigation of the third party. In such cases a third party served with a Requirement to provide information and documents under subsection 231.2(1) must provide all the relevant information and documents including the names of unnamed persons. That is because subsection 231.2(2) only pertains to those unnamed persons in respect of whom the Minister may obtain an authorization of a judge under subsection 231.2(3).

[My emphasis.]

[22] Faced with the apparently contradictory rulings of different panels of the Federal Court of Appeal in *Toronto Dominion Bank* and *Artistic Ideas Inc.*, decisions of this Court since then have tended to follow the latter. In *Minister of National Revenue v. Morton*, 2007 FC 503, Deputy Judge Barry Strayer concluded at paragraph 11, albeit with limited explanation, that *Artistic Ideas* “indicates more clearly the intention of subsection 231.2(2)”. Justice Leonard Mandamin, in *Minister of National Revenue v. Advantage Credit Union*, [2009] 2 F.C.R. 185, agreed with Deputy Judge Strayer:

[17] . . . Subsection 231.2(2) clearly relates “one or more unnamed persons” to the authorization required in subsection 231.2(3). Those

“one or more unnamed persons” in subsection 232.1(2) are individuals in subsection 232.2(3) for whom “the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.” I conclude that the interpretation of subsection 231.2(2) given by the Federal Court of Appeal in *Artistic Ideas*, above, governs this matter.

[23] In *Her Majesty the Queen v. Amex Bank of Canada*, 2008 FC 972, 333 F.T.R. 259, Deputy Judge Orville Frenette, confronted with the same dilemma, opted for reasons of comity to follow his colleagues’ lead. He offered this comment:

[49] Reading [231.2(3)] in connection with 231.2(2), it is easy to see how one could take the view that the unnamed person or group of persons being referred to must be the intended subject of an investigation. The alternative approach, whereby subsection 231.2(2) is read such that it covers all unnamed persons or groups of persons, would mean that the Minister could never receive information about unnamed parties that is incidentally necessary for an investigation because the Minister could not meet the requirements of subsection 231.2(3). Indeed, given the situation in *Artistic Ideas*, I can see why the Court followed the path that it did. In that case, a third party under investigation could have benefited from the protection being afforded to others who were not the subject of investigation – and therefore unattainable under subsection 231.2(3) – but whose information was necessary for the investigation of the third party.

[24] Ultimately, the matter appears to have been settled by the Federal Court of Appeal itself in *eBay Canada Ltd.*, *supra*, at paragraph 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. . . .

[25] In addition to the above, the applicant offers two remaining arguments: first, that the respondents have not established that the information and documents requested are relevant to the administration of the ITA, and second, that the respondents have not established that the issuance of the second Requirement was a reasonable exercise of the powers of investigation granted by the ITA.

[26] With respect to the first point, the respondents' affiant, auditor Danielle Asselin, sets out the following justification for the request, which I accept:

8. Le traitement fiscal des dépenses réclamées par M. Ghattas au titre de « Prime d'assurance payée et supportée par moi-même pour générer un revenu » dépendra de la nature du montant du remboursement effectué selon les conditions du contrat d'assurance, ce que je ne suis pas en mesure de déterminer pour l'instant;
9. Entre autres, il est essentiel d'obtenir les renseignements demandés afin de connaître de quoi est constitué le produit d'assurance acheté et les remboursements effectués (i.e. purement de l'assurance et/ou un investissement);
10. L'obtention d'une copie des contrats d'assurance demandés à la demanderesse, ainsi que la liste de tous les paiements reçus et remboursements faits pour lesdites polices d'assurance est essentielle afin de documenter le dossier de vérification relativement aux dépenses réclamées;
11. Sans les renseignements et documents requis de la demanderesse, l'ARC n'a pas les preuves documentaires pour statuer de manière éclairée sur l'admissibilité des dépenses réclamées par monsieur Ghattas;

[27] As noted above, the Minister's power under the ITA to access information is expansive and need only meet a very low bar in so far as it must pertain to "any purpose related to the administration or enforcement of this Act".

[28] With respect to the last point, I have found no basis for the applicant's claim that the Minister has an obligation to prove that the issuance of a Requirement is a reasonable exercise of its power under the ITA. Indeed, the Supreme Court in *Redeemer Foundation, supra*, repeatedly emphasizes the breadth of the Minister's authority under subsection 231.1 to request information in the course of an audit, including of third parties with respect to unnamed persons.

* * * * *

[29] For all the above reasons, the application for judicial review is dismissed, with costs.

JUDGMENT

The application for judicial review is dismissed, with costs.

“Yvon Pinard”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1224-07

STYLE OF CAUSE: LONDON LIFE – COMPAGNIE D’ASSURANCE-VIE v.
ATTORNEY GENERAL OF CANADA and THE
MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 16, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Pinard J.

DATED: October 20, 2009

APPEARANCES:

Mr. Denis A. Lapierre FOR THE APPLICANT

Mr. Ian Demers FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Sweibel Novek LLP FOR THE APPLICANT
Montréal, Quebec

John H. Sims, Q.C. FOR THE RESPONDENTS
Deputy Attorney General of Canada