

Federal Court



Cour fédérale

Date: 20121017

Docket: T-1623-09

Citation: 2012 FC 1207

Ottawa, Ontario, October 17, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

JEAN BREAU

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

AND BETWEEN:

Docket: T-1625-09

**JOHN STEPHAN, SANDRA DELAHAYE,
KENNETH MCGOWAN, WILLIAM HAVER,
SCOTT COVERT, DAVID PRENTICE,
ANDREW LLOYD, ANDREPA HOLDINGS
LTD., CANAVISTA FINANCIAL CENTER
INC., AND WINBIG SPORTS INC.**

Applicants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The applicants ask me to set aside several requirements for information [RFIs] issued by the Minister of National Revenue in 2009. The RFIs ask the applicants to provide information about their financial and tax history. The applicants claim that the RFIs were improperly issued for the purpose of gathering information for a criminal investigation against them. Accordingly, they contend that the RFIs violated their right to remain silent protected under s 7 of the *Canadian Charter of Rights and Freedoms*.

[2] The applicants were allegedly involved in a tax plan operated by the Independent Business Consultants Association [IBCA], in which business losses could be sold to other taxpayers. Investors in the plan paid \$1 for every \$4 or \$5 of business losses. They claimed the losses on their tax returns, offsetting their income from other sources and reducing their overall tax liability.

[3] The principal applicant, Mr Jean Breau, and others, told investors that IBCA provided management advice to struggling companies. These companies then became partners in IBCA and provided the losses that were subsequently sold in units to purchasers. The management advice was provided by a company called Synergy Group (2000) Inc [Synergy], of which Mr Breau was the officer, director and agent. The other applicants include Mr Scott Covert, a consultant to Synergy, and a number of individual and corporate agents who sold IBCA partnership units (Mr David Prentice, Mr William Haver, Mr John Stephan, Mr Andrew Lloyd, Mr Kenneth McGowan, and Ms

Sandra Delahaye; Winbig Sports Inc, Andrepa Holdings Ltd and Canavista Financial Centre Inc).

Some of the agents were also unit purchasers.

[4] The Canada Revenue Agency [CRA] explored this arrangement in three ways. First, it conducted audits of unit purchasers beginning in 2005.

[5] Second, the CRA began a criminal investigation of the promoters of the plan. The CRA's Criminal Investigation Program [CIP] investigated the 2004 and 2005 tax years, and later included the 2006 tax year. In 2008, an investigator, Mr Andrew Suga, swore an information to obtain production orders in respect of a number of banks. The information mentioned Mr Breau as a promoter of the tax plan, and Mr Covert and Mr Lloyd as individuals receiving sales commissions. Later, in 2010, Mr Suga obtained a warrant to search for and seize records to support the criminal investigation.

[6] Third, the CRA carried out civil audits on the applicants in respect of the 2004 to 2007 tax years and asked them to provide relevant information and documents. However, none of them responded. As a result, they received the RFIs referred to above. None of them responded to those, either. Rather, they began these proceedings seeking to overturn the RFIs, arguing that the RFIs were issued in furtherance of the criminal investigation and, therefore, are not valid.

[7] In my view, the RFIs were properly issued to the applicants in furtherance of a mainly civil purpose – audits of the 2004 to 2007 tax years. Their predominant purpose was not to support the

parallel criminal investigation. Accordingly, the RFIs do not infringe on the applicants' *Charter* rights to remain silent. I must, therefore, dismiss this application for judicial review.

II. The Legal Framework

[8] The Minister has the power to require a taxpayer to provide information for any purpose related to the administration or enforcement of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [Act] (s 231.2(1); all enactments cited are set out in an Annex). The Minister may also obtain a search warrant from a judge by showing reasonable grounds to believe that a person has committed an offence under the Act, that a document or other thing may provide evidence of that offence, and that the place identified in the warrant is where that evidence is likely to be found (s 231.3(3)). In addition, a judge can order a person (other than a person under investigation) to produce or prepare documents relevant to an offence against any Act of Parliament (s 487.012, *Criminal Code*, RSC 1985, c C-46).

[9] On its face, because it refers to "enforcement" of the Act, s 231.2(1) appears to permit the use of civil powers in aid of a criminal investigation or prosecution. However, in the criminal law, persons suspected of committing crimes have a right to silence and the right not to incriminate themselves. These rights fall within the *Charter's* protection of the right to liberty and the principles of fundamental justice (s 7). These rights cannot be circumvented by using civil powers for a criminal purpose.

[10] The Supreme Court of Canada has explicitly recognized that s 7 of the *Charter* protects taxpayers against the use of RFIs to further a criminal investigation (*R v Jarvis*, 2002 SCC 73). In circumstances where “the predominant purpose of a particular inquiry is the determination of penal liability,” the Minister cannot, despite its broad language, use the requirement power in s 231.2(1) (at para 88). In a given case, to decide whether the predominant purpose for issuing an RFI was to determine a taxpayer’s penal liability, the court must look at “the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual” (at para 93). The relevant factors include:

1. Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
2. Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
3. Had the auditor transferred his or her files and materials to the investigators?
4. Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
5. Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
6. Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer’s *mens rea*, is the evidence relevant only to the taxpayer’s penal liability?
7. Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation? (At para 94.)

[11] RFIs can be challenged on judicial review on the basis that they were improperly issued to serve penal purposes (*Kligman v Canada (Minister of National Revenue)*, 2004 FCA 152; *Stanfield v Minister of National Revenue*, 2005 DTC 5454).

[12] Therefore, the essential question before me is whether the predominant purpose of the RFIs in this case was to collect information from the applicants to support a criminal investigation or prosecution against them. If so, the RFIs are invalid. If not, the applicants must comply with them.

[13] To determine whether the predominant purpose of the RFIs was to obtain information for a criminal investigation, I must look at all of the surrounding circumstances and consider the factors outlined above. I begin by reviewing the RFIs themselves.

III. The Requirements for Information [RFIs]

[14] The RFIs were signed by Mr Jack Meggetto, Assistant Director of the Enforcement Division in the Toronto North Tax Services Office, on August 4, 2009. Each RFI stated that the information was being sought pursuant to s 231.2(1) for the administration and enforcement of the Act and required delivery of the requested information within 60 days.

[15] The RFIs requested financial information about the time period from January 1, 2004 to December 31, 2007, including:

- All documentation to support business income and expenses;
- Personal bank statements;
- All documents and information in the applicants' possession or control related to IBCA and other entities, including Synergy Group (2000) Inc;
- Any legal opinions or advice, research, correspondence, promotional materials, literature and documents that were involved in the tax plan and the sale of the units;

- A description of the applicants' educational background and experience in tax matters; and
- The minutes of any meeting in which the tax plan was discussed.

[16] The RFIs also asked the applicants to reply to a number of questions, including:

- How did you learn of the IBCA alternative tax strategy?
- Please explain your understanding of how the IBCA tax strategy worked.
- What types of business revenue do you have? How do you earn your income?
- What agreements/contracts do you have?
- What products do you promote?
- What are your qualifications and training?
- What due diligence have you performed to ensure the validity of the products?
- What, if any, dealings do you have with Synergy Group (2000) Inc and IBCA?
- What type of taxable sales do you have for GST purposes?
- Do you have any employees, agents or subcontractors? What are their responsibilities?
- How is the remuneration of the employees, agents or subcontractors determined?
- Do you reimburse any of the employees or subcontractors' expenses? Please explain.

[17] The RFIs informed the applicants that they had to provide original documents or certified copies and, if they did not comply within the 60-day time frame, they could be prosecuted.

IV. Were the RFIs issued for the predominant purpose of a criminal investigation?

[18] The applicants submit that the predominant purpose of the RFIs was to further a criminal investigation. They suggest that the Criminal Investigation Program [CIP] referred their files back to the civil auditors in order to obtain evidence for a possible criminal prosecution.

[19] The applicants also maintain that the circumstances surrounding the issuance of the RFIs support a finding that their predominant purpose was to determine their penal liability, not to further a civil audit. They point to the following circumstances:

- In July 2006, the auditors referred the audit of the 2004-05 taxation years to the Enforcement Division for purposes of a criminal investigation. Therefore, when the RFIs were issued in 2009, a criminal investigation was already ongoing. Indeed, there is no dispute that Mr Jean Breau was under criminal investigation when the RFIs were issued. As for the others, the informations sworn by Mr Suga in 2008 and 2010 stated that the “promoters” of the tax plan were under criminal investigation and, in the CRA’s Case Profiles, all of the applicants were called “promoters”. In addition, Mr Breau and two other applicants were specifically identified in both the 2008 and 2010 Suga informations.
- The RFIs did not disclose the existence of the ongoing criminal investigation, did not tell the applicants whether they were subjects of a criminal investigation, and did not advise the applicants of their right to remain silent.

- The RFIs were prepared with the input of Mr Meggetto, a senior official in the Enforcement Division, which confirms that the information sought in the RFIs would be used in a criminal investigation. Indeed, many of the requests for information and the questions contained in the RFIs appear to relate to the applicants' *mens rea*, an issue relevant only to their criminal liability;
- Ms Kim Campbell, the lead auditor on the civil audit, exchanged information and communications with the criminal investigators throughout 2007. The investigators never instructed Ms Campbell not to reveal any information she learned after July 2006 (the date of the referral of the 2004-05 audit to the criminal investigators). Moreover, the ongoing meetings, communications and exchanges of information between Mr Suga and the civil auditors were also consistent with cross-fertilization between the civil and criminal domains.
- For at least three out of the four taxation years 2004-2007, the applicants' tax returns were charged out to the Enforcement Division of the CRA. The applicants submit that their returns were in the possession of criminal investigators when the RFIs were issued. Further, correspondence between the civil auditors and Ms Sandra Delahaye (one of the applicants) took place after the date when information was forwarded to the criminal investigators. The civil auditors continued to transfer files and materials to the criminal investigators, including "new leads" obtained from other sources in 2007. Finally, Mr Suga met with the civil auditors after December 2007 to examine their work and discuss their findings.

- Ms Campbell met with the investigators in November 2006 and, from December 2006 to December 2007, the rate of communication between them increased. Ms Campbell was the contact person for the criminal investigators, and she sent them documents, taxpayer information, correspondence relating to the 2005-2006 taxation years, as well as “new leads” up until December 2008. This information was sent at the encouragement of the criminal investigators, who also instructed Ms Campbell on how to deal with phone calls from investors. Ms Campbell admitted sending Mr Suga information she had obtained subsequent to the date when the referral had been made to the criminal investigators.

[20] Despite the applicants’ characterization of the circumstances surrounding the issuance of the RFIs, I am not satisfied that they have shown that the predominant purpose of the RFIs was to further a criminal investigation or support a prosecution. I will address each of the factors from *Jarvis* separately:

- (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

[21] Clearly, Mr Breau was the subject of a criminal investigation at the time the RFIs were issued. The fact that he was the main subject of the 2008 Suga information suggests that the authorities felt they had reasonable grounds to believe that he had committed offences.

[22] As for the other applicants, there is little evidence to suggest that a criminal investigation was underway. Some of the applicants subjectively believed that they were under criminal investigation, based on the following:

- The letters sent to the unit purchasers in 2009, including some of the applicants, stated that the “scheme and the promoters of the scheme” were subject to a criminal investigation. However, there is little evidence to suggest that the applicants, other than Mr Breau, were considered “promoters”.
- Before the RFIs were issued, two auditors, Mr Dino Martino and Mr Ken Nitsotolis, prepared a series of Case Profiles on each of the applicants which described them as “promoters”. However, these memoranda do not distinguish “promoters” from “agents”, unlike the 2008 Suga information which differentiates between “promoters” and “representatives of the promoters”. There is no other evidence that the applicants (other than Mr Breau) were considered “promoters” for the purposes of a criminal investigation.
- The 2008 Suga information named Mr Breau and mentioned Mr Covert and Mr Lloyd. However, Mr Covert and Mr Lloyd are identified only as recipients of commission payments in connection with the scheme, not as subjects of the investigation. Further, several applicants did not see the information until after this application for judicial review was filed in September 2009, so it could not have provided grounds for their

belief that a criminal investigation against them was underway when the RFIs were issued.

- The civil auditors sent letters to the applicants in 2009 stating that the scope of the audit included their involvement with the IBCA and Synergy, both of which were under criminal investigation at the time. However, there was no indication that the applicants themselves were under criminal investigation.
- The RFIs were signed by Mr Meggetto, a senior official in Enforcement. However, there is no indication that Mr Meggetto had any significant role in the criminal investigation. He was not included in the list of criminal investigators in the Suga informations. It appears that Mr Meggetto signed the RFIs simply because he happened to be the only Assistant Director in the office on August 4, 2009.
- The civil audit of the applicants and the related criminal investigation were both conducted out of the Toronto North Tax Services Office. However, the fact that two divisions occupy one office does not, in itself, prove that they are acting on each other's behalf or even sharing information. In addition, the applicants seem to have assumed that because the full name of the audit division was "Tax Avoidance Section, Verification and Enforcement," it also had responsibility for criminal investigations. That is not the case.

[23] Some of the applicants conceded that they did not believe they were under criminal investigation at the time the RFIs were issued, or that they had no actual evidence to support their subjective belief that they were under criminal investigation. Others had planned to comply with the RFIs until they were informed that Synergy was going to file an application for judicial review to overturn them. Accordingly, in light of the evidence on this issue, I cannot conclude that the applicants, other than Mr Breau, have shown that they were the subjects of a criminal investigation at the time the RFIs were issued, or that the authorities had reasonable grounds to lay criminal charges.

(b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?

[24] While Mr Breau was the subject of a criminal investigation at the time the RFIs were issued, there is no evidence that the authorities treated the other applicants as subjects of a criminal investigation.

(c) Had the auditor transferred files and materials to the investigators?

[25] There is little evidence of any transfer of files or materials from the civil auditors to investigators. However, there is some evidence that some information relating to a number of the applicants was in the possession of investigators at certain points in time.

[26] For example, all of Mr Breau's tax returns for 2004-2007 had been charged out to Enforcement at the time the RFIs were issued. The same is true for Mr Covert's 2006 return and Mr Prentice's 2004 return.

[27] At the time the RFIs were issued, Mr McGowan's 2006 tax return had been charged out to Enforcement. It was later transferred back to the Audit Division. Similarly, Mr Haver's 2004 and 2005 tax returns had been charged out to Enforcement, but both returns were later transferred to Appeals (a separate division from both Audits and Investigations) by the time the RFIs were issued.

[28] None of Mr Lloyd's, Mr Stephan's or Ms Delahaye's tax returns had been charged out to Enforcement at the time the RFIs were issued.

(d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?

[29] In September 2006, the Enforcement Division accepted a referral from the Audit Division and began a criminal investigation of the IBCA promoters, including Mr Breau, for the 2004-2005 taxation years. Although all audit work on the 2004-2005 taxation years ceased after the Enforcement Division accepted the referral, Ms Campbell continued to communicate with and pass information to Enforcement.

[30] In November 2006, Ms Campbell was coordinating all the files, including receiving new material from taxpayers, until Enforcement physically took possession of them.

[31] In February 2007, Ms Campbell was receiving information, such as tax returns and other “leads”, and passing it to Enforcement at their request. In May 2007, Ms Campbell received further instructions from Enforcement regarding the treatment of the files. In April 2008, she and another civil auditor were interviewed by Mr Suga. Ms Campbell then sent Mr Suga all the documentation relating to the tax scheme that was still in her possession.

[32] As I see it, Ms Campbell was simply passing along to investigators information that came into her hands. She was not seeking out information or using any of her authority as an auditor to supplement the evidence supporting the criminal investigation. I would not characterize this as an agency relationship between the investigators and the auditor.

(e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?

[33] It is clear that Enforcement did not intend to use Ms Campbell (or any other auditor) as its agent in the collection of evidence. In his 2008 information, Mr Suga acknowledged that a CRA audit was under way “for fiscal period(s) subsequent to 2004 and 2005”, but that:

[T]his Information to Obtain does not contain any information obtained by the CRA Auditor(s) in the course of this current CRA audit, nor any information obtained by them subsequent to the original referral which gave rise to the investigation disclosed in this Information to Obtain.

[34] Mr Suga seems to have been aware that using civil auditors for the collection of evidence for a criminal investigation would violate the taxpayers’ *Charter* rights.

[35] However, other investigators asked Ms Campbell to forward T1s and other information that appeared to be part of the IBCA investigation. For example, in May 2007, Mr Lonnie Nichols in Enforcement gave Ms Campbell instructions regarding the treatment of the relevant files. To a limited degree, therefore, it appears that Ms Campbell may have been regarded as an agent for some of the investigators, though not for the principal investigator, Mr Suga.

- (f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

[36] While some of the documents requested in the RFIs are conventional ones for audit purposes (documentation to support business income and expenses, personal bank statements, etc.), many of the questions asked of the applicants seem relevant to their *mens rea*. For example, the applicants were asked about any dealings they had with Synergy or the IBCA, their understanding of how the IBCA tax strategy worked, the products they promoted, the due diligence they had performed to ensure the validity of those products, and their qualifications and training, which would reflect on their understanding of the tax scheme.

[37] These questions seem to be directed at the extent of the applicants' knowledge about the legality of the tax scheme: *Stanfield*, above, at para 65. This obviously goes to the applicants' *mens rea* and their penal liability. However, these questions were also directed at issues relevant to civil penalties under the *Income Tax Act*, particularly penalties for "culpable conduct" under s 163.2. Therefore, the evidence sought was relevant not only to the applicants' penal liability, but their civil liability as well.

- (g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?

[38] There are five additional questions to be asked regarding “other circumstances or factors” suggesting the existence of an ongoing criminal investigation (*Stanfield*, above, at paras 66-70):

- (i) *Were the criminal investigation and audits being conducted simultaneously or otherwise interconnecting and, if so, for what purpose?*

[39] The civil audit of the unit purchasers and the promoters of the tax plan for the 2004 taxation year began in September 2005. In 2006, the audit expanded to include the 2005 taxation year. In July 2006, the audit for taxation years 2004-2005 was referred to Enforcement. When Enforcement accepted the investigation in September that year, the Audit department ceased all work on the 2004-2005 taxation years. In July 2008, Mr Suga swore an information relating to the criminal investigation of the 2004-2005 taxation years.

[40] In early 2007, the Enforcement team began to receive tax returns for 2006, and expanded its investigation to that year. Toward the end of 2007, Enforcement returned the 2006 files to the Audit team, which began an audit for the 2006 taxation year. In early 2009, the Audit team began issuing Notices of Reassessment regarding the 2006 taxation year.

[41] In late 2008, the Audit team began an audit of all the applicants for the 2004-2007 taxation years. Initial contact letters were sent to the applicants in March 2009, and the RFIs were sent in August 2009. In April 2009, the Audit team began auditing all 2007-2008 tax returns relating to the scheme.

[42] It appears, therefore, that the criminal investigation and audits were somewhat interconnected. The 2004-2005 audit was begun by the Audit team and then passed to Enforcement. The 2006 audit began in Enforcement, but was then passed to the Audit team. Throughout this time period, members of the Audit and Enforcement teams were interacting with and passing information to each other.

[43] Clearly, there was simultaneous activity on both the criminal and civil fronts. However, the evidence does not indicate a clear purpose for this interconnectedness. It does indicate that:

- Ms Campbell passed information regarding the 2006 taxation year to Enforcement while the criminal investigation of the promoters (including Mr Breau) for that year was taking place; and
- Enforcement had possession of the files of Mr Breau, Mr Covert and Mr Prentice while the civil audits were in progress and when the RFIs were issued.

[44] While neither Mr Covert nor Mr Prentice was under criminal investigation at the time, Mr Breau was.

(ii) *What was the nature of the flow of information between Audit and Enforcement, both during and after the criminal investigation?*

[45] Information flowed between Audit and Enforcement after September 2006, when Enforcement began the criminal investigation of the promoters for the 2004-2005 taxation years. The flow of information between the two divisions was fairly regular, especially in 2007.

(iii) *What was the level of importance of the contact between Audit and Enforcement while the criminal investigation was ongoing, as well as after it apparently ended?*

[46] Communications between Audit and Enforcement (particularly between Ms Campbell and the investigators) were not particularly significant, relating mainly to administrative contact and the transmission of information falling into the hands of auditors, not sought out by them.

(iv) *Considering the complexity of the factual and fiscal situations in the present case, how does this impact on the predominant purpose to be assessed?*

[47] The investigation of the tax plan was broad in scope, involving 1,307 unit purchasers and \$196,249,505 in IBCA losses. Numerous taxpayers, promoters, agents and corporate entities have been involved, as well as several CRA departments. However, there is no evidence that any of the applicants other than Mr Breau were under criminal investigation at the time the RFIs were issued. The complexity of the plan does not suggest, in itself, that the investigators resorted to the RFIs as a means of gathering information to support a criminal investigation.

(v) *Without obtaining the documents and information requested, will the Minister be put in a position in which the audit functions under the Act cannot be met?*

[48] In respect of Mr Breau, the Enforcement Division had already obtained production orders pursuant to Mr Suga's 2008 information. It later obtained a search warrant. To my mind this casts doubt on whether the RFIs were meant to supplement the criminal investigation; Enforcement seems to have been on a different track, relying on different means. This suggests that the RFI's predominant purpose was not to determine Mr Breau's penal liability. That was the predominant purpose of the information, not the RFI.

[49] At the same time, the RFI may well be necessary to determine Mr Breau's civil liability.

[50] As for the other applicants, they have not responded to the RFIs, and some of them have not provided any information to the CRA at all. If their RFIs were quashed, it is doubtful that the Minister could meet his audit functions under the Act.

V. Conclusion and Disposition

[51] Mr Breau was the only applicant under criminal investigation at the time the RFIs were issued. There is no objective evidence indicating that the other applicants were under criminal investigation. It is, therefore, only Mr Breau's s 7 liberty interests that are engaged in this case. The mere fact that Mr Breau was under criminal investigation is not enough to defeat the RFI. Auditors can continue to assess civil liability while a criminal investigation unfolds. If auditors were forced to cease work after an investigation commenced, taxpayers could avoid civil liability when their conduct raised concerns of criminal conduct.

[52] In addition, if civil auditors were prevented from asking questions whose answers were potentially relevant to taxpayers' penal liability, they could obtain little information at all.

[53] Clearly, whether a matter has been sent for a criminal investigation is a significant factor in determining whether an adversarial relationship exists between the state and the taxpayer. Further, when civil auditors remain involved, their conduct must be scrutinized closely to

determine whether the criminal investigators are relying on civil auditors to use their authority under s 231.2(1) to obtain evidence for a prosecution: *Jarvis*, above, at para 92.

[54] However, taking all of the circumstances of this case into account, I find that the predominant purpose of the RFIs issued against the applicants, including Mr Jean Breau, was civil. Therefore, their s 7 *Charter* rights – specifically, the right to remain silent and to avoid self-incrimination – were not triggered.

[55] I would, therefore, dismiss this application with costs.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is dismissed with costs.

2. These reasons relate to Court File Numbers T-1623-09 and T-1625-09. The original of the reasons will be filed in T-1623-09, and a copy will be placed in file T-1625-09.

“James W. O’Reilly”

Judge

Annex

Criminal Code, RSC 1985, c C-46Production order

487.012 (1) A justice or judge may order a person, other than a person under investigation for an offence referred to in paragraph (3)(a),

(a) to produce documents, or copies of them certified by affidavit to be true copies, or to produce data; or

(b) to prepare a document based on documents or data already in existence and produce it.

Production to peace officer

(2) The order shall require the documents or data to be produced within the time, at the place and in the form specified and given

(a) to a peace officer named in the order; or

(b) to a public officer named in the order, who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament.

Conditions for issuance of order

(3) Before making an order, the justice or judge must be satisfied, on the basis of an ex parte application containing information on oath in writing, that there are reasonable grounds to believe that

(a) an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;

(b) the documents or data will afford evidence respecting the commission of the offence; and

Code criminel, LRC 1985, ch C-46Ordonnance de communication

487.012 (1) Sauf si elle fait l'objet d'une enquête relative à l'infraction visée à l'alinéa (3)a), un juge de paix ou un juge peut ordonner à une personne :

a) de communiquer des documents — originaux ou copies certifiées conformes par affidavit — ou des données;

b) de préparer un document à partir de documents ou données existants et de le communiquer.

Communication à un agent de la paix

(2) L'ordonnance précise le moment, le lieu et la forme de la communication ainsi que la personne à qui elle est faite — agent de la paix ou fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale.

Conditions à remplir

(3) Le juge de paix ou le juge ne rend l'ordonnance que s'il est convaincu, à la suite d'une dénonciation par écrit faite sous serment et présentée ex parte, qu'il existe des motifs raisonnables de croire que les conditions suivantes sont réunies :

a) une infraction à la présente loi ou à toute autre loi fédérale a été ou est présumée avoir été commise;

b) les documents ou données fourniront une preuve touchant la perpétration de

(c) the person who is subject to the order has possession or control of the documents or data.

Terms and conditions

(4) The order may contain any terms and conditions that the justice or judge considers advisable in the circumstances, including terms and conditions to protect a privileged communication between a lawyer and their client or, in the province of Quebec, between a lawyer or a notary and their client.

Power to revoke, renew or vary order

(5) The justice or judge who made the order, or a judge of the same territorial division, may revoke, renew or vary the order on an ex parte application made by the peace officer or public officer named in the order.

Application

(6) Sections 489.1 and 490 apply, with any modifications that the circumstances require, in respect of documents or data produced under this section.

Probative force of copies

(7) Every copy of a document produced under this section, on proof by affidavit that it is a true copy, is admissible in evidence in proceedings under this or any other Act of Parliament and has the same probative force as the original document would have if it had been proved in the ordinary way.

Return of copies

(8) Copies of documents produced under this section need not be returned.

l'infraction;

c) les documents ou données sont en la possession de la personne en cause ou à sa disposition.

Conditions

(4) L'ordonnance peut être assortie des conditions que le juge de paix ou le juge estime indiquées, notamment pour protéger les communications privilégiées entre l'avocat — et, dans la province de Québec, le notaire — et son client.

Modification, renouvellement et révocation

(5) Le juge de paix ou le juge qui a rendu l'ordonnance — ou un juge de la même circonscription territoriale — peut, sur demande présentée ex parte par l'agent de la paix ou le fonctionnaire public nommé dans l'ordonnance, la modifier, la renouveler ou la révoquer.

Application

(6) Les articles 489.1 et 490 s'appliquent, avec les adaptations nécessaires, aux documents ou données communiqués sous le régime du présent article.

Valeur probante

(7) La copie d'un document communiquée sous le régime du présent article est, à la condition d'être certifiée conforme à l'original par affidavit, admissible en preuve dans toute procédure sous le régime de la présente loi ou de toute autre loi fédérale et a la même valeur probante que l'original aurait eue s'il avait été déposé en preuve de la façon normale.

Copies

(8) Il n'est pas nécessaire de retourner les copies de documents qui ont été communiquées sous le régime du présent article.

Income Tax Act, RSC 1985, c 1 (5th Supp)***Loi de l'impôt sur le revenu***, LRC 1985, ch 1 (5e suppl)Inspections

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act, and for those purposes the authorized person may

(c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

(d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

Enquêtes

231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois:

a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

b) examiner les biens à porter à l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi; à ces fins, la personne autorisée peut:

c) sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres;

d) requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin,

requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

Requirement to provide documents or information

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,

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

(b) any document.

Search warrant

231.3 (1) A judge may, on *ex parte* application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize the document or thing and, as soon as practicable, bring it before, or make a report in respect of it to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.

Production de documents ou fourniture de renseignements

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord général d'échange de renseignements fiscaux entre le Canada et un autre pays ou territoire qui est en vigueur et s'applique ou d'un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis:

a) 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.

Requête pour mandat de perquisition

231.3 (1) Sur requête *ex parte* du ministre, un juge peut décerner un mandat écrit qui autorise toute personne qui y est nommée à pénétrer dans tout bâtiment, contenant ou endroit et y perquisitionner pour y chercher des documents ou choses qui peuvent constituer des éléments de preuve de la perpétration d'une infraction à la présente loi, à saisir ces documents ou choses et, dès que matériellement possible, soit à les apporter au juge ou, en cas d'incapacité de celui-ci, à un autre juge du même tribunal, soit à lui en faire rapport, pour que le juge en dispose conformément au présent article.

(2) An application under subsection 231.3(1) shall be supported by information on oath establishing the facts on which the application is based.

(2) La requête visée au paragraphe (1) doit être appuyée par une dénonciation sous serment qui expose les faits au soutien de la requête.

(3) A judge may issue the warrant referred to in subsection 231.3(1) where the judge is satisfied that there are reasonable grounds to believe that

(3) Le juge saisi de la requête peut décerner le mandat mentionné au paragraphe (1) s'il est convaincu qu'il existe des motifs raisonnables de croire ce qui suit:

(a) an offence under this Act was committed;

a) une infraction prévue par la présente loi a été commise;

(b) a document or thing that may afford evidence of the commission of the offence is likely to be found; and

b) des documents ou choses qui peuvent constituer des éléments de preuve de la perpétration de l'infraction seront vraisemblablement trouvés;

(c) the building, receptacle or place specified in the application is likely to contain such a document or thing.

c) le bâtiment, contenant ou endroit précis dans la requête contient vraisemblablement de tels documents ou choses.

(4) A warrant issued under subsection 231.3(1) shall refer to the offence for which it is issued, identify the building, receptacle or place to be searched and the person alleged to have committed the offence and it shall be reasonably specific as to any document or thing to be searched for and seized.

(4) Un mandat décerné en vertu du paragraphe (1) doit indiquer l'infraction pour laquelle il est décerné, dans quel bâtiment, contenant ou endroit perquisitionner ainsi que la personne à qui l'infraction est imputée. Il doit donner suffisamment de précisions sur les documents ou choses à chercher et à saisir.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

Charte Canadienne des Droits et Libertés, Édictée comme l'annexe B de la *Loi de 1982 sur le Canada*, 1982, ch 11

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1623-09 and T-1625-09

STYLE OF CAUSE: JEAN BREAU
v
THE MINISTER OF NATIONAL REVENUE

and

JOHN STEPHEN, ET AL
v
THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 14-15, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: October 17, 2012

APPEARANCES:

Howard Alpert FOR THE APPLICANTS
Milton Verskin

Margaret Nott FOR THE RESPONDENT
Samantha Hurst

SOLICITORS OF RECORD:

Alpert Law Firm FOR THE APPLICANTS
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario