Date: 20050512

Docket: T-657-05

Citation: 2005 FC 668

Ottawa, Ontario, May 12, 2005

Present: THE HONOURABLE MR. JUSTICE BEAUDRY

BETWEEN:

REDEEMER FOUNDATION

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion for an interlocutory injunction introduced under section 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, by the applicant to prevent the respondent from using any of the information and documentation obtained pursuant to subsections 231.1(1) and 231.1(2) of the*Income Tax Act*, R.S.C. 1985 (5th suppl.), c.1 (the Act), and from issuing further reassessment notices until the final disposition of the application for judicial review filed by the applicant.

ISSUE

[2] Should an interlocutory injunction be granted restraining the Minister from using information provided by the Foundation with respect to its donors, thereby preventing the Minister from issuing reassessments for tax purposes?

[3] For the following reasons, I must answer this question negatively. Therefore, this motion for an interlocutory injunction should be dismissed.

BACKGROUND

[4] The Redeemer Foundation (the "Foundation" or the "applicant") has been a registered charity since 1987. It operates a Forgivable Loan Program (the "FLP") for students of the Redeemer University College (the "College"). The FLP is a loan program in which qualifying students at the College receive an interest-free loan to pay for part or all of their tuition and related costs for the academic year. This interest-free loan is forgiven for students who have completed their academic year. Prior to 2003, parents, friends and relatives of students were permitted to contribute to the Foundation.

[5] In October 1998, Canada Customs and Revenue Agency (CCRA) conducted an audit of the applicant's 1997 taxation year. By letter dated November 26, 1999, it expressed a number of concerns. One of those concerns was with respect to the FLP. The relevant portion of the above-mentioned letter reads as follows:

The forgivable loans program of an associated charity, Redeemer Foundation, and loans granted by the Charity itself allow the parents of students of the Charity's college to pay for their tuition fees in return for an official donation receipt. The Charity must cease this practice immediately. We will consider disallowing the deductions to parents on their individual income tax returns if the Charity fails to cease this practice.

[6] By letter dated August 22, 2001, CCRA advised the applicant of its intention to conduct another audit of the Foundation's books and records. In doing so, it referred to subsection 231.1(1) of the Act as the authority to conduct their inspection.

[7] Upon request, the applicant voluntarily provided to CCRA a list of all donors who contributed to the Foundation's FLP, a list of all the students using the FLP during the 2000-2001 academic year and a list of all Redeemer students receiving a T2202A for the same academic year. Similar lists were also provided for 2001-2002.

[8] At the end of March 2004, the applicant was advised by CCRA that, after a complete review of the FLP program, it had concluded that a valid charitable donation arrangement did not exist. CCRA came to this conclusion because parents of students who were making donations to the Foundation were receiving a receipt that permitted them to obtain a credit for the amount of their donation on their income tax return and, at the same time, their children, who were already benefiting from the FLP program, were able to deduct their tuition fees on their income tax report. In other words, parents were making donations to FLP instead of giving the money directly to their children. This type of arrangement created a double benefit; parents and children were both able to benefit from credits on their income tax.

[9] CCRA sent out notices of reassessment to some of the donors to inform them that portions of their donation were ineligible charitable donations and should not be allowed as credits on their tax return.

[10] In June 2004, Mr. Bill van Staalduinen, the Executive Director of the applicant, met with CCRA representatives. At this meeting, a request for additional information regarding the 2002-2003 taxation years was made by CCRA. As a result of this meeting, Mr. Staalduinen asked Mr. Ronald Knechtel of the Canadian Council of Christian Charities for his view on CCRA's request.

[11] Mr. Knechtel provided the applicant with a memorandum dated June 17, 2004 and advised that, as per subsection 231.2(2) of the Act, the Minister must obtain judicial authorization prior to requesting the release of any donor names or donor information in order to protect third party information.

[12] The relevant provisions are found in Annex 1 at the end of these reasons.

ANALYSIS

The test for an interlocutory injunction

[13] The granting of an interlocutory injunction is a rare and exceptional remedy. It is well established that in order to obtain such a relief, the applicant must demonstrate urgency, in addition to the tripartite test: (1) it has a serious issue to be tried; (2) it will suffer irreparable harm if the interlocutory injunction is not granted; and (3) the balance of convenience - which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merit (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43 and *Pfizer Ireland Pharmaceuticals v. Lilly Icos LLC*, [2003] F.C.J. No. 1603 (T.D.) (QL) at paragraph 11).

1. Serious issue to be tried

[14] The applicant alleges that the Minister is required to obtain the authorization of the Court before requesting a party to provide information with respect to third parties. It argues that by failing to obtain this authorization, the Minister unlawfully obtained the information and should be prevented from using it.

[15] The respondent agrees that it cannot force a party to provide information with respect to a third party without first obtaining an order from the Court. However, the respondent further submits that if upon request, the party voluntarily provides the information, then there is no

further obligation on CCRA's part to obtain an authorization from the Court. It also underlines that it requested and obtained the information and documents from the Foundation for the purposes of conducting an audit of the Foundation records, a power allowed to CCRA under paragraph 231.1(1)(a) of the *Act* which provides that it may examine the books, records and any documents of the Foundation "or of any other person that relates or may relate to the information that is or should be in the books and records" of the Foundation.

[16] In *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, Lord Diplock states that an applicant no longer needs to demonstrate a strong *prima facie* case. Rather it is sufficient if he or she can satisfy the Court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". As mentioned in *RJR-MacDonald, supra*, at paragraph 43, the American Cyanamid standard is a low threshold generally accepted by the Canadian courts.

[17] After a careful review of all arguments in this regard, there is no doubt that the reviewing Court has to analyse the scope of section 231.2 and the Minister's obligation in situations where a party under audit voluntarily provided the impugned information. I believe that this question is neither frivolous nor vexatious.

2. Irreparable Harm

[18] The applicant alleges that it will suffer irreparable harm if the Minister continues to issue notices of reassessment to donors using the unlawfully obtained information. It states that donors have expressed anger at the Foundation for providing their information to CCRA, that some have requested compensation, that some have informed the applicant that they will no longer provide support to the Foundation, and that others are threatening to withhold financial support until the outcome of this matter is determined. Not only has the Foundation's reputation been adversely affected but, as the reassessment notices continue to be issued to donors, the number of donors withdrawing their support has increased. The applicant argues that it depends on the support of its donors and that without this support, the Foundation will cease to exist.

[19] The respondent argues that the applicant has failed to demonstrate that the notices of reassessment are causing irreparable harm. It alleges, on the contrary, that the cross-examination of Mr. van Staalduinen on April 19, 2005, revealed that the Foundation has a very supportive donor base, and that the majority of these donors continue to support the Foundation even though they are concerned about the situation. Mr. van Staalduinen mentioned that only five to ten donors have currently indicated that they were incertain whether they would continue to support the Foundation (p. 193 of the Respondent's Record). Based on this cross-examination, the Respondent submits that the alleged irreparable harm is speculative and fails to establish an irreparable harm not compensable by damages.

[20] With regard to the second component of the test, the Supreme Court in *RJR-MacDonald, supra*, stated at paragraph 58 that "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application". At paragraph 59, it defined the term "irreparable" as follows:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)). [emphasis added]

[21] In the case at hand, I agree with the respondent that the applicant has not demonstrated that it would suffer either irreparable harm or at least harm not compensable by damages should the judicial review was to be decided in favour of the applicant. The director of the Foundation did clearly emphasize that the damage the Foundation is suffering is due to donors' reticence in making donations because of the precarious status of the Foundation. However, he also made it clear during his cross-examination, that the Foundation has very supportive donors who, for the most part, continue to be supportive:

A. We have a very supportive donor base, and the bulk of them continue to be supportive, they want to be supportive. They are expressing concerns about what is happening, and why it is happening.

And some of them, maybe five-ten so far, have said to me, you know, "We don't know if we can continue to support the foundation if this is going to keep on happening".

3. Balance of Convenience

[22] The applicant urges that if the Minister is not enjoined from issuing further notices of reassessment, it will have succeeded in using information unlawfully obtained, contrary to the intent of the legislators, and to the detriment and potential demise of the Foundation. Therefore, it argues that the balance of convenience weighs in its favour.

[23] The respondent indicates that if it is prevented from carrying out his statutory duty, the administration and enforcement of the Act and the public interest will suffer irreparable harm and that consequently, the balance of convenience is in its favour.

[24] In *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at page 129, Beetz J. explained that when considering the balance of convenience, the Court must determine "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". The factors to be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid, supra,* Lord Diplock cautioned, at page 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

[25] In the present case, the public interest has to be taken into consideration as this case deals with the enforcement of public legislation. On the other hand, the protection of personal information is also important. When it comes to the balance of convenience, I think that these two principles are of equal value. I therefore conclude that it is neither in favour of the Foundation nor of the Minister.

CONCLUSION

[26] Since the applicant has not successfully met the tripartite test, the application for an interlocutory injunction must be dismissed.

ORDER

THIS COURT ORDERS that the application for an interlocutory injunction is dismissed with costs.

"Michel Beaudry"

Judge

ANNEX 1

RELEVANT PROVISIONS

Federal Courts Rules

Interim and interlocutory injunctions

Availibility

373. (1) On motion, a judge may grant an interlocutory injunction.

Undertaking to abide by order

(2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.

Expedited hearing

(3) Where it appears to a judge that the issues in a motion for an interlocutory injunction should be decided by an expedited hearing of the proceeding, the judge may make an order under rule 385.

Evidence at hearing

(4) A judge may order that any evidence submitted at the hearing of a motion for an interlocutory injunction shall be considered as evidence submitted at the hearing of the proceeding.

Injonctions interlocutoires et provisoires

Injonction interlocutoire

373. (1) Un juge peut accorder une injonction interlocutoire sur requête.

Engagement

(2) Sauf ordonnance contraire du juge, la partie qui présente une requête pour l'obtention d'une injonction interlocutoire s'engage à se conformer à toute ordonnance concernant les dommages-intérêts découlant de la délivrance ou de la prolongation de l'injonction.

Instruction accélérée

(3) Si le juge est d'avis que les questions en litige dans la requête devraient être tranchées par une instruction accélérée de l'instance, il peut rendre une ordonnance aux termes de la règle 385.

Preuve à l'audition

(4) Le juge peut ordonner que la preuve présentée à l'audition de la requête soit considérée comme une preuve présentée à l'instruction de l'instance.

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

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;

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.

Prior authorization

(2) Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3).

Application

(3) Where, on ex parte application by the Minister, a judge is satisfied by information on oath that

(a) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph 231.1(1)(c),

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.

Autorisation préalable

(2) Lorsque le lieu mentionné à l'alinéa (1)c) est une maison d'habitation, une personne autorisée ne peut y pénétrer sans la permission de l'occupant, à moins d'y être autorisée par un mandat décerné en vertu du paragraphe (3).

Mandat d'entrée

(3) Sur requête ex parte du ministre, le juge saisi peut décerner un mandat qui autorise une personne autorisée à pénétrer dans une

(b) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

(c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,

the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are specified in the warrant but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, the judge may

(d) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and

(e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,

to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

maison d'habitation aux conditions précisées dans le mandat, s'il est convaincu, sur dénonciation sous serment, de ce qui suit:

a) il existe des motifs raisonnables de croire que la maison d'habitation est un lieu mentionné à l'alinéa (1)c);

b) il est nécessaire d'y pénétrer pour l'application ou l'exécution de la présente loi;

c) un refus d'y pénétrer a été opposé, ou il existe des motifs raisonnables de croire qu'un tel refus sera opposé.

Dans la mesure où un refus de pénétrer dans la maison d'habitation a été opposé ou pourrait l'être et où des documents ou biens sont gardés dans la maison d'habitation ou pourraient l'être, le juge qui n'est pas convaincu qu'il est nécessaire de pénétrer dans la maison d'habitation pour l'application ou l'exécution de la présente loi peut ordonner à l'occupant de la maison d'habitation de permettre à une personne autorisée d'avoir raisonnablement accès à tous documents ou biens qui sont gardés dans la maison d'habitation ou devraient y être gardés et rendre tout autre ordonnance indiquée en l'espèce pour l'application de la présente loi.

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, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

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

(b) any document.

Unnamed persons

(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).

Judicial authorization

(3) On ex parte application by the Minister, a judge may,

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 et 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 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.

Personnes non désignées nommément

(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).

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 obligation under this Act.

Service of authorization

(4) Where an authorization is granted under subsection 231.2(3), it shall be served together with the notice referred to in subsection 231.2(1).

Review of authorization

(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

Autorisation judiciaire

(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;

Signification ou envoi de l'autorisation

(4) L'autorisation accordée en vertu du paragraphe (3) doit être jointe à l'avis visé au paragraphe (1).

Révision de l'autorisation

(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,

court for a review of the authorization.

Powers on review

(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs 231.2(3)(a) and 231.2(3)(b) have been met and the judge may confirm or vary the authorization if the judge is satisfied that those conditions have been met.

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.

Pouvoir de révision

(6) À l'audition de la requête prévue au paragraphe (5), le juge peut annuler l'autorisation accordée antérieurement s'il n'est pas convaincu de l'existence des conditions prévues aux alinéas (3)a) et b). Il peut la confirmer ou la modifier s'il est convaincu de leur existence.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-657-05
STYLE OF CAUSE:	**REDEEMER FOUNDATION v.**
THE MINISTER OF NATIONAL	
REVENUE	
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 4, 2005
REASONS FOR ORDER	
AND ORDER:	**BEAUDRY, J.**

DATED: May 12, 2005

APPEARANCES:

Jacqueline King	FOR THE APPLICANT
Peter Vita	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Miller Thompson LLP Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT