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Canada (Minister of National Revenue) v. Redeemer Foundation

# Federal Court of Appeal Decisions

Canada (Minister of National Revenue) v. Redeemer Foundation

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**Date: 20061010**

**Docket: A-551-05**

**Citation: 2006 FCA 325**

**CORAM:** RICHARD C.J.  
SHARLOW J.A.  
PELLETIER J.A.

**BETWEEN:**

**THE MINISTER OF NATIONAL REVENUE**

**Appellant/  
Respondent by Cross-Appeal  
(Respondent)**

and

**REDEEMER FOUNDATION**

**Respondent/  
Appellant by Cross-Appeal  
(Applicant)**

Heard at Ottawa, Ontario, on September 13, 2006.

Judgment delivered at Ottawa, Ontario, on October 10, 2006.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

RICHARD C.J.  
SHARLOW J.A.

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**Respondent by Cross-Appeal**  
**(Respondent)**

**and**

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**Respondent**  
**Appellant by Cross-Appeal**  
**(Applicant)**

### **REASONS FOR JUDGMENT**

**PELLETIER J.A.**

#### **INTRODUCTION**

[1] The issue in this appeal is the extent to which the Minister (or the Canada Revenue Agency (CRA) acting on his behalf) must resort to the procedure set out in subsection 231.2(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp) (the Act) when seeking information about unnamed persons from a taxpayer in the course of an audit. In this case, a CRA auditor asked an official of the Redeemer Foundation (the Foundation), for a list of donors. The Foundation complied with the request but subsequently brought an application in the Federal Court for judicial review of the auditor's decision to request the information on the ground that, since the information sought was with respect to unnamed persons, the Minister was bound to obtain prior judicial authorization pursuant to subsection 231.2(2) of the Act before making the request.

[2] The application for judicial review was allowed in a decision reported at 2005 FC 1361 (Reasons for Order). The application judge declared that the acquisition of the information by the CRA was unlawful and ordered the CRA to return the material obtained to the Foundation except to the extent that it was required for the purposes of the Minister's audit of the Foundation. In addition, the judge ordered the Minister to vacate any reassessments of the tax liability of any of the Foundation's donors resulting from the use of the unlawfully obtained information.

[3] The Minister appeals with respect to the lawfulness of the demand and the order to vacate the reassessments while the Foundation cross-appeals from the order permitting the Minister to retain what it considers to be unlawfully acquired information for purposes of conducting an audit of the Foundation.

[4] I have concluded that the application judge erred in his assessment of the scope of subsection 231.2(2) of the Act. For the reasons set out below, his order should be set aside and the respondent's application for judicial review should be dismissed. My conclusion with respect to the appeal effectively disposes of the cross-appeal. It too should be dismissed.

## **FACTS**

[5] The Foundation, a registered charity, is affiliated with Redeemer University College (the College). Since 1987, the Foundation has operated the Forgivable Loan Program (FLP) for students at the College. It is not necessary for the purposes of this appeal to adjudicate on the exact method of operation of the FLP, a question which may very well be the subject of future litigation in the Tax Court of Canada. For present purposes, all that need be said is that the Minister believes that, in many cases, donations to the Foundation do not qualify as "gifts" because they are made in the expectation that they will be used to fund a forgivable loan to a person related to the donor. If the Minister is right, such donations would not be eligible for a donation receipt nor for a deduction in the hands of the donor.

[6] In October 1998, the College and the Foundation were audited with respect to the 1997 taxation year. At the conclusion of that audit, CRA raised a number of concerns with the Foundation, one of which was the Foundation's practice of apparently providing donation receipts for donations which benefited the donor's

children. The audit also raised concerns about the Foundation's inability to produce the transmittal forms which recorded the identity of the donor and the name of the student who was to receive "acknowledgement" for the donation, which I take to mean, to receive credit for the donation. In its post-audit report to the College and to the Foundation, the CRA warned that it would consider disallowing parents' charitable deductions if these practices did not cease. (Appeal Book, Tab 11-C at p. 172)

[7] The Foundation was audited again in 2001, this time in respect of the 1998, 1999 and 2000 taxation years. In the course of that audit, the CRA was advised that the transmittal forms for those years had not been preserved. As a result, in August 2001, the CRA served the Foundation with a requirement under subsection 220(3) of the Act requiring it to maintain proper records, including the transmittal forms. However, in the absence of the transmittal forms, the CRA was unable to pursue its investigation into the links between donors and students for those taxation years.

[8] A further audit followed in 2003 in relation to the 2001 and 2002 taxation years. In the course of that audit, in May 2003, the CRA's representative made an oral request of the Foundation's Executive Director for certain information including a list of donors. The information was provided as requested one week later.

[9] At the conclusion of the audit, the CRA advised the Foundation of its findings:

In our review of the Transmittal Forms, a list of donors and the list of students receiving the forgivable loans, we found that in the majority of cases the students solicited funds for the FLP from their own parents. The students then received 90% of the parents' gifts under the FLP to pay for their tuition and related costs. The parents receive a charitable donation receipt for income tax purposes for 100% of the gift amount and their child-student receives a tuition receipt for the applicable portion of their loan....

For the reasons listed above, there may be grounds to revoke the organization's status as a registered charity .

[Appeal Book, Tab 12-A at p. 8-9]

[10] At a meeting held in June 2004 with officials of the Foundation to discuss the audit results, a CRA representative requested donor lists for the 2002 and 2003 taxation years. This time, the Foundation refused to provide the information, alleging that it had been advised that it would be inappropriate for it to release that information without a court order requiring it to do so.

[11] In November 2004, CRA began advising certain donors of its intention to disallow their deduction in respect of their donation to the Foundation. Discussions between representatives of the donors and the CRA followed but when the donors' representative advised that the donors would not waive the normal reassessment period, the Minister issued notices of reassessment to donors within the normal reassessment period for the taxation years in question.

[12] On September 28, 2005, the Foundation made an application for judicial review of the decision "to request third party donor information and documentation from the applicant... purportedly pursuant to subsections 231.1(1) and 231.2(1) of the *Income Tax Act...*". (Reasons for Order at para. 1)

[13] Subsections 231.2(1) and (2) provide as follows:

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.

(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).

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.

(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).

## THE DECISION UNDER APPEAL

[14] After setting out the facts, the relevant legislation and the parties' submissions, the application judge referred to the decision of this Court in *Artistic Ideas Inc. v. Canada (Customs and Revenue Agency)*, 2005 FCA 68, (2005), 330 N.R. 378. In that case, the CCRA (as it then was) invoked subsection 231.2(1) when serving an art brokerage with a requirement to produce a list of its customers. The CCRA was investigating a scheme in which the brokerage's clients purchased art from artists represented by the brokerage and donated it to public institutions in return for a donation receipt. The brokerage provided the institutions with an appraisal of the value of the art for purposes of the donation receipt in which the paintings were valued at an amount far in excess of the price paid to the artist. The CCRA did not obtain the prior judicial authorization required by subsection 231.2(2) before serving the requirement on the art brokerage. This Court decided that since the brokerage's customers were the subject of the investigation, the CCRA was required to obtain prior judicial authorization before serving the requirement.

[15] The application judge noted that the CRA used the information provided by the Foundation to contact and to reassess donors with respect to their claim for a deduction. The relevance of this observation is in its implicit conclusion that the donors were themselves the subject of an investigation and that prior judicial authorization was required, as though a demand had been made in writing pursuant to subsection 231.2(1).

[16] The application judge then asked himself whether the result should be different because the request for information was made orally rather than in writing. He answered his rhetorical question by referring to *M.N.R. v. Sand Exploration Ltd. (T.D.)*, [1995] 3 F.C. 44 (*Sand Exploration Ltd.*) at paragraph 18 where it was observed that "intrusion into the privacy of individuals is always a sensitive matter, especially when the third parties, who themselves may have valid reasons for not wanting to disclose, are required to provide the information."

[17] The application judge concluded that while section 231.2 of the Act provides that the Minister may require a third party to provide information about unnamed persons by serving a requirement on the third party, the need for prior authorization cannot be limited to the case of written requirements: "...To [hold] otherwise would encourage the Minister's officials and agents to attempt by other means to secure the information whether by friendly means, subterfuge or guile and prey upon the innocence, inadvertence or mistake of one taxpayer in order to secure otherwise unavailable information about another..." (Reasons for Order at para. 14)

[18] The application judge concluded that it was wrong for the CRA to use information obtained from the audit of one taxpayer for the purpose of reassessing other taxpayers.

[19] The application judge then rejected the appellant's argument that the Foundation lacked standing to bring its application for judicial review. It is clear that the Foundation, as the entity which was required to provide the information, has an interest in, and is affected by, the decision or act under review. Nothing further need be said about this issue.

[20] The last matter considered by the application judge was the question of remedies, specifically whether the Federal Court had the jurisdiction to set aside an assessment or reassessment as to the tax liability of a taxpayer under the *Income Tax Act*, a power which appears to be reserved to the Tax Court of Canada. The application judge concluded that the power to set aside an unlawful act or decision, which is conferred upon the Federal Court by subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. 7, includes the power to set aside acts consequent upon the unlawful act. Having found that the request for the information as to the donors was itself unlawful, the application judge held that the Federal Court had the power to set aside assessments founded upon that unlawful act.

[21] As a result, the application judge allowed the application for judicial review, declared that the request for information as to donors other than for purposes of auditing the Foundation was unlawful and ordered the Minister to return (or to destroy) all documents and other information provided as a result of the unlawful request. The judge made an order restraining the Minister from using the information obtained pursuant to the unlawful request for any purpose relating to parties other than the Foundation. Finally, the judge ordered the Minister to vacate all reassessments and proposals to reassess in respect of any donor whose identity became known to the Minister as a result of the unlawful request.

## **ARGUMENTS AND ANALYSIS**

### **Standard of Review**

[22] The Foundation argues that the standard of review to be applied to the decision of the application judge

is that applicable to a question of mixed fact and law. Relying on the decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*), the Foundation says that this Court is not entitled to intervene except in the case of a palpable and overriding error, unless it is dealing with an extricable error of law.

[23] This is an appeal from a judicial review of an executive action. The posture which this Court is to adopt is set out in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, in which the Supreme Court held that the role of a court of appeal in these circumstances is to ensure that the application judge identified the right standard and applied it correctly. In this case, the application judge briefly touched upon the question of standard of review and effectively concluded that the appropriate standard was correctness.

[24] I agree that the standard of review is correctness. The question in issue here is one of statutory interpretation, a matter in which the CRA has no relative expertise vis-à-vis the courts.

### **The scheme of the Act**

[25] The Foundation's argument is based upon its view of the intent of subsection 231.2(2) of the Act. The difficulty is that section 231.2 is but one of several provisions which authorize the Minister to demand and to obtain information "for any purpose related to the administration or enforcement of this Act." The Foundation, as did the application judge, assumes that subsection 231.2 is the appropriate disposition because of its reference to unnamed persons. It must be said, in fairness to the application judge, that the respondent did not put before him all of the relevant provisions. In any event, the Foundation has not explored whether other provisions of the Act could justify the CRA's request for information.

[26] There are a series of provisions which touch upon the Minister's power to ensure compliance with the terms of the Act. As was noted by the Supreme Court of Canada in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at para. 35 (*McKinlay Transport Ltd.*), a self-reporting system of taxation requires a system of verification, including the possibility of random verification.

[27] In reading the various provisions which follow, it must be kept in mind that the Foundation, while not liable to pay tax, is nonetheless a taxpayer as per section 248(1) of the Act:

"taxpayer" includes any person whether or not liable to pay tax;

« contribuables » Sont comprises parmi les contribuables toutes les personnes, même si elles ne sont pas tenues de payer l'impôt.

[28] The foundation of the Minister's power to verify compliance is the obligation to maintain adequate books and records:

230. (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

230. (1) Quiconque exploite une entreprise et quiconque est obligé, par ou selon la présente loi, de payer ou de percevoir des impôts ou autres montants doit tenir des registres et des livres de comptes (y compris un inventaire annuel, selon les modalités réglementaires) à son lieu d'affaires ou de résidence au Canada ou à tout autre lieu que le ministre peut désigner, dans la forme et renfermant les renseignements qui permettent d'établir le montant des impôts payables en vertu de la présente loi, ou des impôts ou autres sommes qui auraient dû être déduites, retenues ou perçues.

[29] In the case of registered charities, there are specific requirements which flow directly from their status as receipt issuing agencies:

230.2 (2) Every registered charity and registered Canadian amateur athletic association shall keep records and books of account at an address in Canada recorded with the Minister or designated by the Minister containing

230.2(2) Chaque organisme de bienfaisance enregistré et chaque association canadienne enregistrée de sport amateur doit tenir des registres et des livres de comptes à une adresse au Canada, enregistrée auprès du ministre ou désignée par lui, qui contiennent ce qui suit:

(a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under this Act;

a) des renseignements sous une forme qui permet au ministre de déterminer s'il existe des motifs d'annulation de l'enregistrement de l'organisme ou de l'association en vertu de la présente loi;

(b) a duplicate of each receipt containing prescribed information for a donation received by it; and

b) un double de chaque reçu, renfermant les renseignements prescrits, visant les dons reçus par l'organisme ou l'association;

(c) other information in such form as will enable the Minister to verify the donations to it for which a deduction or tax credit is available under this Act.

c) d'autres renseignements sous une forme qui permet au ministre de vérifier les dons faits à l'organisme ou à l'association et qui donnent droit à une déduction ou à un crédit d'impôt aux termes de la présente loi.

[30] If a person does not maintain the books and records which the Act requires it to maintain, the Minister may issue a written requirement to maintain those records, as was done in this case:

230. (3) Where a person has failed to keep adequate records and books of account for the purposes of this Act, the Minister may require the person to keep such records and books of account as the Minister may specify and that person shall thereafter keep records and books of account as so required.

230. (3) Le ministre peut enjoindre à une personne qui n'a pas tenu les registres et livres de comptes voulus pour l'application de la présente loi de tenir ceux qu'il spécifie et cette personne doit, dès lors, les registres et livres de comptes qui sont ainsi exigés d'elle.

[31] The maintenance of books and records would not assist in monitoring compliance with the Act if the Minister was not able to consult those books and records. As one would expect, there are provisions which authorize the Minister to inspect the books and records maintained by the taxpayer.

[32] The Minister's general power to audit and conduct inspections is found in section 231.1 which provides as follows:

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

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

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.

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.

[33] Where the taxpayer does not provide the access or the documents which section 231.1 requires it to provide, the Minister may obtain a compliance order from a judge pursuant to section 231.7 of the Act:

231.7 On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

231.7 Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit:

a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

[34] A failure to comply with such an order may be the subject of contempt of court proceedings (subsection 231.7(4)) or of a summary conviction prosecution (subsection 238(1)).

[35] In my view, these provisions were sufficient to authorize the CRA auditor to make the request which he did, and imposed on the Foundation the obligation to comply. No recourse to section 231.2 was required.

[36] Section 231(2) requires the Foundation to maintain certain records to enable the Minister to ascertain if there are grounds for revoking the Foundation's registration as a charity, and to verify that the donations which are made to it are eligible for deduction. The Foundation is specifically required to maintain duplicates of all receipts which it issues to donors, including the name and address of the donor. (See *Income Tax Regulations*, C.R.C., c. 945 at para. 3501(1)(g)). In short, the Foundation was required by law to maintain the information which the CRA auditor asked it to produce. As for whether the information was maintained in the form in which it was requested, i.e., a list, the demand was not resisted on that basis, perhaps because it is inconceivable that a charity would not maintain a list of its donors for various purposes related to fundraising.

[37] It is not contested that, in the exercise of the audit power set out in section 231.1, the CRA auditor was entitled to examine all the books and records of the Foundation, including the duplicate receipts, and on the basis of that inspection, to prepare a list of the names and addresses of the donors to the Foundation in various taxation years. If the auditor is entitled to obtain information by means of his own examination of the Foundation's books and records, I can think of no principle which would require him to obtain a court order before asking for the Foundation's assistance in obtaining the very same information.

[38] Does the fact that subsection 231.2(2) makes specific reference to unnamed persons take the request which was made here outside the operation of sections 231 and 231.1? No convincing argument has been offered as to why it should. The argument advanced by the Foundation, that its privacy interest and that of its donors is infringed by such a demand, is simply not credible. The Foundation relies upon the dicta of Rothstein

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