Federal Court  Cour fédérale

Date: 20160919

Docket: T-2161-15

Citation: 2016 FC 1056

Ottawa, Ontario, September 19, 2016

PRESENT: Madam Prothonotary Mandy Aylen

BETWEEN:

BRADWICK PROPERTY MANAGEMENT SERVICES INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

[1] On May 30, 2016, the Respondent, the Minister of National Revenue, moved pursuant to Rule 369 of the *Federal Courts Rules* [*Rules*], for an order of confidentiality pursuant to Rule 151 of the *Rules* to permit the Respondent to file with the Court a copy of the unredacted records at issue in this application for judicial review and restricting counsel for the Applicant from accessing the unredacted records, even upon execution of a written undertaking pursuant to Rule 152(2)(b).

[2] The Applicant does not oppose the issuance of a confidentiality order in relation to the unredacted records. However, the Applicant opposes any relief that seeks to limit counsel for the Applicant's access to the unredacted records. The Applicant seeks an order pursuant to Rule 152(2)(b) that would permit Applicant's counsel to have access to the unredacted records for the sole purpose of arguing the underlying application upon execution of a written undertaking that counsel will not disclose the information at issue to anyone except the Court in the course of arguing the underlying application.

[3] The underlying application involves eleven consolidated applications for judicial review brought pursuant to section 41 of the *Access to Information Act*, RSC, 1985, c. A-1 [*ATIA*] in relation to requests made by the Applicant to the Canada Revenue Agency [CRA] for information and documentation provided by third parties to the CRA in the course of the CRA's audit of the Applicant under the *Income Tax Act*, RSC, 1985, c. 1 (5th Supp.) [*ITA*] and the *Excise Tax Act*, RSC, 1985, c. E-15 [*ETA*]. The Applicant disputes various redactions made by the CRA to the records pursuant to sections 16(1)(b) and (c), 19(1), 20(1)(b) and 24 of the *ATIA*.

Background

[4] In 2013, the Applicant filed a number of notices of objection with the CRA in relation to notices of reassessment it had received, in which the CRA found that certain expenses it had claimed were excessive or based on services not performed. The notices of reassessment were issued by the CRA following an audit of the Applicant that appears to have commenced in 2010.

[5] During the course of CRA's audit of the Applicant, Elliot Fromstein, who was the Applicant's former accountant, provided information and documentation to the CRA for the purpose of the Applicant's audit pursuant to two Orders obtained by the CRA from the Federal Court dated September 22, 2010 in Court file numbers T-1436-10 and T-1440-10 [Orders]. The Orders required Mr. Fromstein to provide information and documentation on his own behalf and on behalf of certain corporations and entities owned, managed or directed by Mr. Fromstein, including Candlelight International Real Estate Ltd., Marketing Tools Inc., Celebration Enterprises Inc., Knowble Property Services Inc., 1711832 Ontario Inc., Oaken Appraisal Services Inc., C, D, E & F Enterprises Inc., Sunkist Enterprises Inc., Cortina Property Management Services Ltd., Mike Tyler Consulting Ltd., and 318226 Ontario Limited.

[6] The Orders included as appendices two Requirements to Provide Information and Documents issued by the CRA to Mr. Fromstein on April 20, 2010 detailing information and documentation sought in relation to specific invoices billed to the Applicant and for services provided by the Applicant, including copies of bank account statements for deposits of payments received in satisfaction of the invoices and copies of disbursements (such as cheques and money drafts) relating to the payments received in satisfaction of the invoices.

[7] In March of 2014, the Applicant delivered to the CRA fifteen requests for records under the *ATIA* in relation to the CRA's audit of the Applicant. In the requests, the Applicant sought information, answers and documents provided to the CRA by various individuals and entities during the course of the CRA's audit of the Applicant, including those provided by Mr. Fromstein.

[8] The Court understands that the Applicant made the requests for records in order to gain an understanding of the basis for the CRA's reassessments of the Applicant and to support its position in the notice of objection process and any future tax appeal proceedings.

[9] In response to the Applicant's *ATIA* requests, the CRA provided the Applicant with 1,568 pages of records, with various redactions made pursuant to the following exemption provisions of the *ATIA*:

A. Section 19(1);

B. Sections 16(1)(b) and 16(1)(c) jointly;

C. Section 24(1);

D. Sections 19(1) and 24(1) jointly;

E. Sections 20(1)(b) and 24(1) jointly; and

F. Sections 19(1), 20(1)(b) and 24(1) jointly.

[10] Of the 1,568 pages of records, 444 pages were fully disclosed to the Applicant. The balance of the records contained varying quantities of redactions, but a significant portion of the pages had their entire contents redacted. The majority of the redactions to the records were made, in whole or in part, pursuant to section 24(1) of the *ATIA*.

[11] Following the CRA's release of the redacted records to the Applicant, the Applicant filed complaints with the Office of the Information Commissioner regarding the exemptions applied

by the CRA and in relation to records that had not been disclosed by the CRA. The Information Commissioner determined that the complaints made in relation to the exemptions claimed by the CRA were not well-founded.

[12] From December 2015 through January 2016, the Applicant commenced eleven applications for judicial review of the CRA's refusal to give access to unredacted copies of the requested records. Each notice of application corresponded to a distinct request made by the Applicant pursuant to the *ATIA*, which requests were assigned unique CRA file numbers. The corresponding Federal Court and CRA file numbers, together with the number of pages of records at issue as well as a description of the *ATIA* request made by the Applicant, are as follows:

A. T-2161-15 – CRA file no. A-069445 (90 pages) – "all information, answers and documents provided by Celebration Enterprises Inc. to CRA regarding CRA audit of the Applicant".

B. T-2162-15 – CRA file no. A-069444 (129 pages) – "all information, answers and documents provided by Elliot Fromstein to the CRA regarding CRA audit of the Applicant".

C. T-2163-15 – CRA file no. A-069443 (21 pages) – "all information, answers and documents provided by Elliot Fromstein to the CRA at a meeting on March 6, 2009 at CRA office in North Bay, Ontario relating to the CRA audit of the Applicant".

D. T-2164-15 – CRA file no. A-069439 (238 pages) – "all information, answers and documents provided by Candlelight International Real Estate Inc. to the CRA regarding CRA audit of the Applicant".

E. T-2165-15 – CRA file no. A-069440 (125 pages) – "all information, answers and documents provided by Marketing Tools Inc. to the CRA regarding CRA audit of the Applicant".

F. T-148-16 – CRA file no. A-069446 (276 pages) – "all audit reports, all assessment or reassessment records for the period January 2008 to February 2014".

G. T-149-16 – CRA file no. A-69441 (227 pages) – "all information, answers and documents provided by Knowble Property Services Inc. to the CRA regarding CRA audit of the Applicant".

H. T-150-16 – CRA file no. A-069447 (15 pages) – "all information, answers and documents provided by 318226 Ontario Limited and Edward Fromm to the CRA regarding CRA audit of the Applicant".

I. T-187-16 – CRA file no. A-069452 (194 pages) – "all information, answers and documents provided by Elliot Fromstein to the CRA regarding 2 requirements to provide information dated April 20, 2010".

J. T-222-16 – CRA file no. A-069449 (98 pages) – "all information, answers and documents provided by C, D, E & F Enterprises Inc. to CRA regarding CRA audit of Bradwick".

K. T-223-16 – CRA file no. A-069451 (65 pages) – "all information, answers and documents provided by 1711832 Ontario Ltd. and Malcolm Fraser to CRA regarding CRA audit of Bradwick".

[13] On February 19, 2016, the Applicant's eleven applications were consolidated under T-2161-15 by Order of Prothonotary Martha Milczynski.

[14] On May 30, 2016, the Respondent filed this motion. On July 20, 2016, Prothonotary Kevin Aalto directed the Respondent to provide the Court with an unredacted copy of the records at issue, with all redactions highlighted, for review by the Court in determining this motion.

[15] On August 11, 2016, based on my review of the unredacted records and given the complexity of the issues raised by the parties in their respective written submissions, I ordered that an oral hearing be held.

[16] On September 1, 2016, I issued a Direction to the parties requiring that counsel be prepared to speak at the hearing to the minimum standard of disclosure that could be made to counsel for the Applicant in relation to the redacted records in the event that the Court were to determine that counsel for the Applicant should not be given access to the unredacted records.

[17] At the commencement of the hearing, counsel for the Respondent provided the Court with eleven charts – one in relation to each CRA file number – detailing the general nature of the bundle of records and the overall rationale for the redactions made, and for each page of the records, a brief description of the record and any additional rationale for the particular redactions made to that page [Charts].

[18] At the request of the Respondent, I ordered that the Charts be treated as confidential material and filed under seal.

[19] The Respondent provided counsel for the Applicant with a copy of the Charts on his verbal undertaking that he would not disclose the Charts or their content to the Applicant and not permit the Charts to be reproduced.

Issues

[20] The issues for determination on this motion are as follows:

(a) Whether the Respondent's request for a confidentiality order allowing for the unredacted records to be filed with the Court should be granted; and

(b) If so, whether the Court should restrict access to the confidential material such that counsel for the Applicant would not be permitted access to the unredacted records even upon execution of a written undertaking as contemplated by Rule 152(2) of the *Rules*.

A. Order of Confidentiality

[21] Rule 151 of the *Rules* provides:

Motion for order of confidentiality	Requête en confidentialité
151 (1) On motion, the Court may order that material to be filed shall be treated as confidential.	151 (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.
Demonstrated need for confidentiality	Circonstances justifiant la confidentialité
(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.	(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

[22] The parties agree that a confidentiality order should be issued in order to permit an unredacted copy of the records to be placed before the Court to assist it in the determination of the underlying application for judicial review. However, the consent of the parties is not a sufficient basis upon which the Court will grant such relief. Rather, pursuant to subsection 151(2) of the *Rules*, the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings (see *Bah v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 693 (CanLII)).

[23] It is a common practice in applications brought under the *ATIA*, in which the confidentiality of a document or portions of a document is the very issue before the Court, for confidentiality orders to be issued to protect the integrity of the information pending the final determination of the underlying application (see *A v. Canada (Attorney General)*, 2008 FC 1115

at para. 16 (CanLII)). Section 47 of the *ATIA* specifically provides that the Court is to take every reasonable precaution to prevent the disclosure by the Court of the information which is the very subject matter of an application under section 41 of the *ATIA* until the Court can make a substantive ruling on the question of confidentiality. Indeed, the Respondent has the right to put the documents and information which are the subject matter of the application before the Court in order to assist the Court in determining whether the Respondent's refusal to disclose the records was justified or not. A confidentiality order allows the Respondent to do so without having to disclose that very information to the Applicant or the public, which would render moot any hearing of the application on the merits.

[24] Accordingly, a confidentiality order shall be issued to permit the Respondent to file a copy of the unredacted records as part of the Respondent's record in the underlying application.

B. Restriction on Counsel for the Applicant's Access to the Unredacted Records

[25] Where a confidentiality order is issued in proceedings under the *ATIA*, Rule 152 of the *Rules* is available to the Court to ensure that the proper balance is struck between openness and confidentiality. One of the mechanisms aimed at ensuring that the proper balance is struck is to permit counsel for the Applicant to have access to the information protected by the confidentiality order.

[26] In such proceedings, the Federal Court of Appeal has confirmed that section 47 of *ATIA* empowers the Court to grant conditional access to counsel for the purpose of arguing an application for disclosure on counsel's undertaking of confidentiality.

[27] In *Hunter v. Canada (Consumer and Corporate Affairs)*, [1991] 3 F.C. 186 [*Hunter*], Justice Décary held that the wording of section 47 of the *ATIA* was ambiguous and therefore must be interpreted in the context of the *ATIA* as a whole, which generally encourages "a right of access to information in records under the control of a government institution" and that any ambiguity ought to be decided:

> …in such a way as to encourage adversarial proceedings, as to favour the party seeking disclosure, as to give a real meaning to the burden of proof imposed on the government institution, and as to best ensure that the judicial review is really made "independently of government". I have great difficulty in giving any weight to that burden of proof and to that independent review if, in all judicial proceedings commenced under s.41, the Court is given no discretion whatsoever to grant to counsel, in appropriate circumstances, some form of access to the record at issue in order to enable him/her to argue the merit of the application. The Act might well prove to be unworkable if the Court is systematically at the mercy of those from whom it is declared to be independent and on whom the burden of proof rests.

[28] Justice Décary went on to note that the *ATIA* does not go so far as to grant systematic access to counsel and that there are circumstances where counsel should be denied access, such as where the application for disclosure is "prima facie so frivolous or so extravagant or so tantamount to an endless fishing expedition that the Court will be in a position to dismiss it summarily" or where the application deals with international affairs, defence and subversive activities where the head of the government institution can invoke section 52 of the *ATIA*. However, Justice Décary clearly stated that, in most cases, the Court should "tend to give counsel, if not access, at least enough relevant information to enable him/her to argue the application" (see paras. 44-45).

[29] In terms of what constitutes adequate relevant information, which the Federal Court of Appeal referred to as the "minimum standard of disclosure", Justice Décary stated at para. 46:

> What constitutes the "minimum standard of disclosure" will be a question of fact in each case. The Court has the power to control access to counsel, the extent of that access and the conditions of that access. It can refuse access to the actual information and be satisfied, as it should have in this case, with the communication to counsel of a summary or a general description of the actual information. It can grant counsel access to the actual information, in whole or in part. It can impose conditions of access that vary according to the nature or sensitivity of information, ranging from allowing counsel to examine the documents in his/her office and keep them in a safe, to allowing counsel to examine the documents under surveillance in the court house. In cases where access is given to the actual information at issue, counsel would be expected to provide an undertaking that he/she will not disclose it to his/her client…The objective in each case is to protect the confidentiality of the information while allowing an intelligent debate on the question of its disclosure.

[30] Accordingly, in determining whether an Applicant's counsel should be permitted access to the confidential information at issue in a section 41 application, the general question to ask is what information is needed by counsel for the Applicant to permit an intelligent debate on the question of its disclosure – specifically, does counsel for the Applicant need the unredacted records themselves or would a summary or general description of the nature of the confidential information be sufficient?

[31] However, in this case, the Respondent argues that the Court should not determine this question as the *ITA*, in conjunction with section 24 of the *ATIA*, prohibits the disclosure of the unredacted records to counsel for the Applicant under any and all circumstances.

[32] Section 24 of the *ATIA* provides:

Statutory prohibitions against disclosure	Interdictions fondées sur d'autres lois
24 (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.	24 (1) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.

[33] Schedule II of the *ATIA* includes section 241 of the *ITA*. Section 241 of the *ITA* imposes restrictions on the disclosure of taxpayer information by officials or other representatives of government institutions:

Provision of information	Communication de renseignements
241 (1) Except as authorized by this section, no official or other representative of a government entity shall	241 (1) Sauf autorisation prévue au présent article, il est interdit à un fonctionnaire ou autre représentant d'une entité gouvernementale :
(a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;	a) de fournir sciemment à quiconque un renseignement confidentiel ou d'en permettre sciemment la prestation;
(b) knowingly allow any person to have access to any taxpayer information; or	b) de permettre sciemment à quiconque d'avoir accès à un renseignement confidentiel;
(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the Canada Pension Plan, the *Unemployment Insurance Act* or the *Employment Insurance*	c) d'utiliser sciemment un renseignement confidentiel en dehors du cadre de l'application ou de l'exécution de la présente loi, du Régime de pensions du Canada, de la Loi sur l'assurance-chômage ou de la Loi sur l'assurance-

Act or for the purpose for which it was provided under this section.	emploi, ou à une autre fin que celle pour laquelle il a été fourni en application du présent article.

[34] However, subsection 241(4) of the *ITA* provides a number of exceptions to the prohibition on the disclosure of taxpayer information, including the following exception in paragraph 241(4)(e)(i):

Where taxpayer information may be disclosed	Divulgation d'un renseignement confidentiel
(4) An official may	(4) Un fonctionnaire peut :
…	[…]
(e) provide taxpayer information, or allow the inspection of or access to taxpayer information, as the case may be, under, and solely for the purposes of,	e) fournir un renseignement confidentiel, ou en permettre l'examen ou l'accès, en conformité avec les dispositions ou documents suivants, mais uniquement pour leur application :
(i) subsection 36(2) or section 46 of the *Access to Information Act*,	(i) le paragraphe 36(2) ou l'article 46 de la *Loi sur l'accès à l'information*,

[35] Section 46 of the *ATIA*, which is referred to in subparagraph 241(4)(e)(i) of the *ITA*, provides as follows:

Access to records	Accès aux documents
46 Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section	46 Nonobstant toute autre loi fédérale et toute immunité reconnue par le droit de la preuve, la Cour a, pour les recours prévus aux articles 41, 42 et 44, accès à tous les documents qui relèvent d'une

41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.	institution fédérale et auxquels la présente loi s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

[36] Section 47 of the *ATIA* addresses the precautions to be taken by the Court in handling confidential information on an application and provides:

Court to take precautions against disclosing	Précautions à prendre contre la divulgation
47 (1) In any proceedings before the Court arising from an application under section 41, 42 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of	47 (1) À l'occasion des procédures relatives aux recours prévus aux articles 41, 42 et 44, la Cour prend toutes les précautions possibles, notamment, si c'est indiqué, par la tenue d'audiences à huis clos et l'audition d'arguments en l'absence d'une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :
(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or	a) des renseignements qui, par leur nature, justifient, en vertu de la présente loi, un refus de communication totale ou partielle d'un document;
(b) any information as to whether a record exists where the head of a government institution, in refusing to disclose the record under this Act, does not indicate whether it exists.	b) des renseignements faisant état de l'existence d'un document que le responsable d'une institution fédérale a refusé de communiquer sans indiquer s'il existait ou non.

[37] The Respondent argues that the *ITA* is a complete code regarding any potential disclosure of taxpayer information and the provisions of the *ITA* alone inform whether disclosure can be made to counsel for the Applicant, notwithstanding the language of section 47 of the *ATIA* or Rule 152 of the *Rules*. Accordingly, the approach articulated by the Federal Court of Appeal in *Hunter* is inapplicable to this or any other case where the confidential information relates to taxpayer information protected by section 241 of the *ITA*.

[38] In that regard, the Respondent argues that for the purpose of a section 41 application, the only permissible disclosure of taxpayer information that may be made by a government institution is to the Court. As subparagraph 241(4)(e)(i) does not contain any language that would permit a further disclosure by the Court to counsel for the Applicant, the Respondent argues that the Court is prohibited from providing counsel for the Applicant with access to the unredacted records through the Court's Registry.

[39] In support of this position, the Respondent stresses the need to protect taxpayer information, which it states is at the heart of section 241 of the ITA. The Respondent relies on the Supreme Court of Canada's decision in *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430, in which the Supreme Court of Canada confirmed the purpose or policy underlying section 241 of the *ITA* as follows:

> In my view, s. 241 involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the *Income Tax Act* and other federal statutes referred to in s. 241(4).

> Section 241 reflects the importance of ensuring respect for a taxpayer's privacy interests, particularly as that interest relates to a taxpayer's finances. Therefore, access to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in those exceptional situations does the privacy interest give way to the interest of the state.

[40] The Respondent also relies on this Court's decision in *British Columbia Lottery Corp. v. Canada (Attorney General)*, 2013 FC 307 (CanLII) [*Lottery Corp.*], in support of its position that the Court should not engage in an analysis of the type conducted in *Hunter* to determine whether the circumstances warrant counsel for the Applicant having access to the unredacted records. The Respondent argues that as this application raises no constitutional challenge to section 241 of the *ITA* or Schedule II of the *ATIA*, the rationale enunciated in *Lottery Corp.* applies given what the Respondent asserts is the clear and unambiguous prohibition on disclosure of taxpayer information articulated in section 241 of the *ITA*.

[41] In *Lottery Corp.*, the Court reviewed the decision of Prothonotary Milczynski, who had issued a confidentiality order over information protected by section 55 of the *Proceeds of Crime and Money Laundering Act*. In issuing the confidentiality order, Prothonotary Milczynski did not apply the test enunciated by the Supreme Court of Canada in *Atomic Energy of Canada Limited v. Sierra Club of Canada*, 2002 SCC 41 [*Sierra Club*], but rather held that a confidentiality order had to be issued as a result of the application of the clear and unambiguous provisions of the *Proceeds of Crime and Money Laundering Act*, which required that the Court take every reasonable precaution to avoid the disclosure of information protected pursuant to section 55 of that Act. Prothonotary Milczynski's order was upheld by the Court.

[42] I find that the decision in *Lottery Corp.* is only relevant to the first issue raised on this motion – namely, whether a confidentiality order should be issued. Like the *Proceeds of Crime and Money Laundering Act*, the *ATIA* also requires that the Court safeguard the confidentiality of information protected by the various provisions of the *ATIA*. On that basis, there is no need to engage in a *Sierra Club* analysis to determine whether a confidentiality order should be issued. However, I find that the decision in *Lottery Corp*. has no bearing on the question of whether, following the issuance of a confidentiality order, counsel for the Applicant should have access to the unredacted records pursuant to Rule 152 of the *Rules*. That issue, or an issue analogous thereto, was not canvassed by the Court in *Lottery Corp*.

[43] Leave aside the applicability of the *Lottery Corp*. decision, I find that, contrary to the assertion of the Respondent, the language in section 241 of the *ITA* does not clearly and unambiguously provide that disclosure of taxpayer information may not be made by the Court to counsel for the Applicant.

[44] I agree with the Respondent that there is no exception in subsection 241(3) or (4) of the *ITA* that would permit a government institution to disclose taxpayer information to counsel for the Applicant in the context of an *ATIA* proceeding, absent the consent of the taxpayer. However, Rule 152(2) speaks to counsel for the Applicant's access to material protected by a confidentiality order from the Registry, not from the government institution. Upon execution of the undertaking contemplated in Rule 152(2) and the filing of same with the Court, counsel for the Applicant would normally be granted access to confidential information filed under seal by the Registry. There is no express language in section 241 of the *ITA* that constrains the Court's

ability to disclose taxpayer information to counsel for the Applicant through the Registry upon the execution of an undertaking of confidentiality.

[45] Moreover, section 47 of the *ATIA* imposes no similar restriction on the Court in relation to information protected pursuant to section 24 of the *ATIA*. Had Parliament intended that information subject to exemption pursuant to section 24 of the *ATIA* be treated any differently for the purposes of section 47 of the *ATIA*, it certainly could have included a provision to that effect. Moreover, in *Hunter*, the Federal Court of Appeal recognized no such restriction or limitation so as to automatically preclude the Court from disclosing information exempted from disclosure under section 24 of the *ATIA* to counsel for the Applicant.

[46] I note that the Respondent was unable to provide this Court with any authorities directly in support of its assertion that section 241 of the *ITA* prohibits the Court from granting counsel for the Applicant access to the unredacted records, nor any authorities to support the Respondent's assertion that section 241 of the *ITA* precludes the Court from assessing whether counsel for the Applicant should even be given a minimum level of disclosure regarding the nature of the redacted records.

[47] Accordingly, I find that section 241 of the *ITA* does not constitute a complete prohibition on disclosure of the unredacted records to counsel for the Applicant. As a result, the Court is obligated to engage in the exercise articulated in *Hunter* to determine what information is needed by counsel for the Applicant to permit an intelligent debate on the question of its disclosure.

[48] In reaching this conclusion, I am mindful that even if I am wrong and the *ITA* is a complete code that prevents the Court from giving counsel for the Applicant access to the unredacted records, there are no provisions in the *ITA* that would prevent this Court from compelling the Respondent to disclose a description of the nature of the records to counsel for the Applicant in order to permit him to argue the underlying application, as a description of the nature of the records would not result in the disclosure of taxpayer information. I therefore reject the approach advocated by the Respondent, as it would foreclose any and all forms of minimal disclosure to counsel for the Applicant.

[49] The focus of the inquiry now turns to whether counsel for the Applicant requires access to the unredacted records in order to argue the underlying application. In making this assessment, it is critical to keep in mind the nature of the underlying application as pleaded by the Applicant in the eleven Notices of Application.

[50] The Applicant seeks review of the decisions made by the Respondent which "denied Bradwick Property Management Services Inc. …access to most of the information, answers and documents requested by the Applicant in the request for information addressed to the Canada Revenue Agency…, Access to Information and Privacy… Directorate". The Applicant seeks various orders pursuant to section 49 of the *ATIA* requiring the Respondent to disclose to the Applicant all of the information, answers and documents requested in the Applicant's requests for information. In the grounds for review, the Applicant takes issue with the Respondent's application of various exemptions pursuant to which the Respondent made redactions to the records sought by the Applicant.

[51] Notwithstanding that the records that were produced by the Respondent were heavily redacted, it is apparent from the records that were produced to the Applicant in unredacted or partially redacted form, and from the publicly available information regarding the nature of the information and documentation sought by the CRA from Mr. Fromstein and the various corporate entities, that the redacted information at issue in the underlying application contains such categories of information as bank statements and cheques. This was confirmed by the parties during the hearing.

[52] The Respondent further confirmed at the hearing that to the extent that any of the records requested by the Applicant contained any taxpayer information about the Applicant (such as a cheque to or from the Applicant or an invoice to or from the Applicant), the information related to the Applicant was disclosed.

[53] Therefore, the majority of the redactions made by the Respondent to the records were to remove information that the Respondent asserts constitutes third party taxpayer information. There were also a small number of stand-alone redactions made by the Respondent pursuant to sections 16 and 19 of the *ATIA*.

[54] It is not for the Court on this motion to comment on whether the redacted information constitutes third party taxpayer information – that will be a determination for the Judge hearing the underlying application. Rather, this Court needs to determine whether counsel for the Applicant needs access to the unredacted records or a summary or description thereof in order to effectively argue whether the redactions applied by the Respondent were proper.

[55] There is some obligation on counsel for the Applicant to explain to the Court why disclosure of the unredacted records is necessary for the purposes of making effective argument [see *Steinhoff v. Canada (Minister of Communications)*, [1996] F.C.J. No. 756 at para. 7]. The Applicant asserts that it will be impossible for its counsel to argue the underlying application without complete access to the unredacted records. A review of the unredacted records will demonstrate the relevance of each document in the context of the Applicant's audit in terms of how they relate to the various intercorporate dealings orchestrated by Mr. Fromstein, which appear to have impacted the Applicant's reassessments. It is only with disclosure of the unredacted records that the Applicant can properly assert its rights in the notice of objection proceedings before the CRA. The Applicant asserts that the disclosure of minimal information, such as the nature of the redacted record, is of no assistance to the Applicant.

[56] While I appreciate that the unredacted records will undoubtedly shed light on the basis for the CRA's reassessments of the Applicant and could permit the Applicant to better assert its position in the notice of objection proceedings, the notice of objection proceedings are not the focus of the Court's inquiry on this motion. Rather, the question before the Court is whether counsel for the Applicant requires disclosure of the unredacted records to argue that the information redacted from the records does not fall within the various exemptions claimed by the Respondent. In the case of the section 24 *ATIA* exemptions, the Court will only consider whether the redacted information constitutes third party taxpayer information within the meaning of the *ITA*.

[57] I find that the Applicant is improperly conflating the arguments to be made to resist the CRA's reassessments of the Applicant in the notice of objection proceedings with the arguments to be made by the Applicant on this application for judicial review. In that regard, when asked why, for example, counsel for the Applicant needed to see a copy of a cheque between two third party entities in order to argue this application and why he could not effectively argue the application upon simply being advised that the redacted page was a cheque between two third parties, the Applicant was unable to provide a clear answer. In the circumstances, I am not satisfied that the Applicant has met its obligation to provide some explanation to the Court as to why disclosure of the unredacted records is necessary for the purposes of making effective argument on the issue of the propriety of the exemptions claimed by the Respondent.

[58] I also note that during the course of the hearing, counsel for the Applicant argued that the unredacted records could be released by the Respondent to counsel for the Applicant on the basis of paragraph 241(3)(b) of the *ITA*, which provides:

Subsection 241(1) and 241(2) do not apply in respect of…	(3) Les paragraphes (1) et (2) ne s'appliquent :
(b) any legal proceeding relating to the administration or enforcement of this Act, the *Canadian Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.	b) ni aux procédures judiciaires ayant trait à l'application ou à l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi* ou de toute autre loi fédérale ou provinciale qui prévoit l'imposition ou la perception d'un impôt, d'une taxe ou d'un droit.

[59] The Applicant asserted that the request for documents was made in the context of the notice of objection process, which relates to the administration or enforcement of the ITA. As the Applicant has disputed the documents provided by the CRA in this proceeding, it argues that the prohibition on disclosure of taxpayer information does not apply in relation to the underlying application.

[60] Moreover, the Applicant asserts that paragraphs 241(4)(a) and (b) of the *ITA* also permit a CRA official to disclose third party taxpayer information to the Applicant as it "can reasonably be regarded as necessary for the purposes of the administration and enforcement of this Act" or "for the purpose of determining any tax, interest, penalty or other amount that is or may become payable by the person…or any other amount that is relevant for the purpose of that determination".

[61] In support of this position, the Applicant relies upon section 4.2.8 of the CRA Appeals Manual, which provides that in the context of the objection process, taxpayers can request additional information, formally or informally, pursuant to the *ATIA*. The Applicant asserts that it made the requests at issue under the *ATIA* as part of the objection process, in compliance with the CRA Appeals Manual, and accordingly, this application should be viewed as a legal proceeding falling within paragraph 241(3)(b) of the *ITA*.

[62] The Applicant argues that this application is analogous to the application before the Court in *Scott Slipp Nissan Ltd. v. Canada (Attorney General)*, 2005 FC 1477 (CanLII) [*Scott Slipp*], as both requests for information were made in the notice of objection phase. In *Scott Slipp*, the

Applicant was seeking a complete copy of the CRA's audit file for purposes of filing its notice of objection. The CRA refused to make complete disclosure on the basis that the audit file contained third party confidential information under section 295 of the *ETA*, which is similar in nature to section 241 of the *ITA*. The Federal Court found that the CRA had failed to properly exercise its discretion, as the purpose of disclosure under the relevant provisions of section 295 of the *ETA* was to allow for the proper administration of the *ETA*, which included the notice of objection process.

[63] Paragraphs 241(3)(b) or 241(4)(a) or (b) of the *ITA*, if applicable to this application, would arguably permit the entirety of the records to be disclosed to the Applicant and not simply to its counsel. In the circumstances, the applicability of these provisions may be an issue for determination on the underlying application but I do not find that they are relevant to the issue of whether counsel for the Applicant should be granted access to the unredacted records for the purpose of arguing the underlying application. I make a similar finding vis-à-vis the relevance of this Court's decision in *Scott Slipp* for the purpose of this motion.

[64] Having reviewed the unredacted records, I find that counsel for the Applicant does not require access to the unredacted records in order to effectively argue the underlying application. Rather, a description of the nature of the records and the nature of the redacted information is sufficient in the circumstances. Having reviewed the Charts provided by the Respondent, I find that they provide the necessary descriptions.

[65] In addition to the redactions made solely or jointly pursuant to section 24 of the *ATIA*, a small number of redactions were made by the CRA pursuant only to sections 16(1)(b) and (c) or 19(1) of the *ATIA*. During the course of the hearing, counsel for the Applicant abandoned his request to be given access to an unredacted copy of the records containing exemptions made pursuant only to section 16(1)(b) and (c) of the *ATIA*. Accordingly, there is no need for me to consider this issue independently of my analysis above.

[66] In relation to the section 19(1) stand-alone exemptions, I have applied the approach articulated in *Hunter* to these exemptions and I find that counsel for the Applicant does not require access to the unredacted records for the purpose of effectively arguing the underlying application. The descriptions included by the Respondent in the Charts in relation to the stand-alone section 19(1) exemptions are sufficient in the circumstances.

Costs

[67] As neither party has requested an order for costs, there shall be no costs of this motion.

ORDER

THIS COURT ORDERS that:

1. Copies of the unredacted records at issue in this consolidated application and the eleven charts produced by the Respondent and provided to the Court and counsel for the Applicant during the hearing of this motion [the Confidential Information] may be filed and treated as confidential in accordance with this Order.

2. Counsel for the Applicant shall, within 10 days of the date of this Order, file with the Court a written undertaking consistent with Rule 152(2) of the *Federal Courts Rules* in relation to the eleven charts produced by Respondent and provided to him during the hearing of this motion.

3. Whenever a party seeks to file in this Court documents or portions thereof, including affidavits, exhibits, transcripts or motion materials which contain or discuss Confidential Information, as defined in paragraph 1 of this Order, in a manner that would reveal its content, the Confidential Information shall be segregated from other information and documentation being submitted for filing and shall be submitted to the Court in sealed envelopes identifying this proceedings and permanently marked with the following legend:

CONFIDENTIAL INFORMATION:

PURSUANT TO THE ORDER IN FEDERAL COURT
FILE NO. T-2161-15 DATED SEPTEMBER 19, 2016,
THIS ENVELOPE SHALL REMAIN SEALED IN
THE COURT FILES.

4. Where it is not reasonably practical to segregate Confidential Information from non-confidential information, the parties may file an entire document or volume thereof in a sealed envelope, provided that a public version of the document or volume, from which Confidential Information has been redacted or removed, is also filed on the public record.

5. The terms and conditions of use of Confidential Information and the maintenance of the confidentiality thereof during any hearing of this proceeding shall be matters in the discretion of the Court seized of this matter. In any event, the terms of this Order do not apply to the hearing of this application on its merits or to the manner in which the final judgment and reasons for judgment are to be written and treated, unless specifically ordered by the Court.

6. Where it appears to the Court or to a party that documents have been filed under seal pursuant to this Order which do not fall within the scope of this Order or that information designated by this Order as Confidential Information is available or has been obtained by the receiving party other than through disclosure in this proceeding, or is or has been made public and no longer should be treated as Confidential Information, the party may seek directions or the Court may unilaterally issue directions for the filing party to show cause why the documents should not be unsealed and placed on the public record.

7. Any Confidential Information filed with the Court in accordance with this Order shall be treated as confidential by the Registry of the Court and not be available to anyone other than the Respondent and appropriate Court personnel.

8. Notwithstanding the language of Rule 152(2), counsel for the Applicant shall not have access to that portion of the Confidential Information that contains the unredacted records at issue in this consolidated application.

"Mandy Aylen"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2161-15
STYLE OF CAUSE:	BRADWICK PROPERTY MANAGEMENT SERVICES INC. v MINISTER OF NATIONAL REVENUE

MOTION IN WRITING CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES* ON SEPTEMBER 8, 2016

ORDER AND REASONS:	AYLEN P.
DATED:	SEPTEMBER 19, 2016

WRITTEN REPRESENTATIONS BY:

HOWARD J. ALPERT	FOR THE APPLICANT
SADIAN CAMPBELL	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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