Federal Court Cour fédérale

Date: 20180320

Dockets: T-932-17
T-1330-17
T-735-17
T-1052-17

Citation: 2018 FC 319

Ottawa, Ontario, March 20, 2018

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

S. ROBERT CHAD

Respondent

JUDGMENT AND REASONS

I. FACTS

[1] The Minister of National Revenue ("the Applicant") is currently auditing Robert S. Chad ("the Respondent") for his 2011, 2012 and 2013 personal income tax returns under the Related Party Initiative program.

[2] The Respondent received two Requirement Letters, issued by Ms. Parmpal Sandhu, Auditor at the Canada Revenue Agency ("CRA"), requiring him to produce documents and information ("the Requirements"), respectively under sections 231.1 and 231.6 of the *Income Tax Act*, RSC, 1985, c-1 (5th Supp) ("*ITA*").

[3] The Respondent has filed two Notices of Application for judicial review for *certiorari* to set aside the decisions of the Minister, wherein the Requirements were issued, on the grounds that they were improperly issued, *ultra vires*, overly broad, invalid or non-compliant with the *ITA*.

[4] Pursuant to Rules 317 and 318 of the *Federal Courts Rules*, SOR/98-106 ("*Rules*"), the Respondent requested all material relied on to issue the Requirements. The Applicant served a redacted certified record signed by CRA auditor Ms. Sandhu ("the Certified Record").

[5] The Applicant made two applications under section 37 of the *Canada Evidence Act*, RSC, 1985, c C-5 ("section 37 applications"), which are ancillary to both judicial review applications. The section 37 applications are for orders prohibiting disclosure of the redacted information on the grounds that it would be injurious to the public interest. To support the objection to disclosure, the Crown only relies on the certificate of Ms. Sue Murray, the Director General of the International and Large Business Directorate of the CRA ("the Certificate"). The Certificate sets out broadly that the public interest protects: documented discussions and analysis between auditors and CRA specialists, and internal tools and audit methods used during ongoing investigations. The disclosure of these, it is argued, would prejudice ongoing audit operations

and facilitate taxpayers structuring responses to mislead audit requests. It is also submitted that the disclosure of audit methods and techniques has no connection to the issue raised in the application for judicial review.

[6] The Court has ordered that the section 37 applications proceed before the application for judicial review.

[7] The Respondent alleges that the Applicant's approach to disclosure has created procedural unfairness. The Respondent therefore seeks an Order directing the Applicant to produce Ms. Murray for cross-examination, which he argues is necessary and productive to test the opinions and conclusions laid out in the Certificate. The Applicant opposes the cross-examination of Ms. Murray.

II. ISSUES

[8] First, following a case management conference held on December 4, 2017, the parties were asked to provide written submissions on the legal basis for a proposed process to rely on in order to proceed in the section 37 applications.

[9] Second, considering that there are no affidavits filed by the Applicant in support of the objection to disclosure made pursuant to section 37, the issue before us is whether a party should be permitted to cross-examine the author of a Certificate.

III. ANALYSIS

A. *What is the appropriate process under section 37 of the Canada Evidence Act for determining the validity of objections to disclosure of information?*

[10] Both parties agree that there is no set procedure dictating a specific process to follow when adjudicating section 37 objections. The Court has full discretion to choose its own procedure based on the circumstances before it. When determining the form and breadth of the section 37 application process, the Court should consider the nature of the public interest at stake, the factual and statutory context within which the Applicant's objects to disclose information, as well as the sensitivity of the redacted material (See *R v Pilotte*, [2002] OJ No 866 at paras 52 and 60).

[11] The section 37 objection at issue arises in the factual and statutory context of a judicial review application challenging a request for information issued by the Minister to the Respondent, in the course of an ongoing audit of the Respondent under the *ITA*, for the purposes of that audit. Furthermore, the Court must be cognizant of the statutory context related to the *ITA*. The Canadian tax system is based on self-reporting, thus in order to perform her statutory duty, the Minister has been given broad powers to inspect and audit information and documents of taxpayers under audit, and to examine any matter relating to the taxpayer to ensure taxpayers pay the correct amount of tax; this is in the public interest (see *eBay Canada Ltd v MNR*, 2008 FCA 141 at para 39; *AGT Ltd v Canada (AG)*, [1996] 3 PC 505 (TD) at para 54). That said, the Court must be alert to fairness considerations in judicial review applications, to ensure that the tribunal record contains all possible elements not covered by the privilege that were in front of the decision-maker when the decision under review was taken.

[12] The Court has determined that in the present proceedings the following procedures should be followed:

1. The Court must determine whether the Crown has established the specified public interest as claimed;

2. If that determination cannot be made based on the certificate alone, further submissions such as a secret affidavit and un-redacted documents must be filed in support of the privilege claimed, which will be dealt with in an *ex parte* manner;

3. The Court must determine whether the Respondent has established an "apparent case" for disclosure of the redacted information (*Khan v R*, [1996] 2 FC 316 at paras 24-25);

4. Once an apparent case for disclosure has been established, the Court must consider reviewing the redacted information (*Khan v R*, [1996] 2 FC 316 at para 25);

5. If the Court finds that the disclosure of the redacted information would encroach on the specified public interest, it must conduct a balancing of interests. The interests to be balanced are the public interest in disclosure and the specified public interest advanced by the Applicant. The Court may review the original form of the Redacted Information at this stage (*Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 493 at paras 36-37);

6. Determine whether the redacted information should be disclosed.

[13] Although made in the context of a challenge to a publication ban at the time of trial, I find the comments of the Supreme Court of Canada in *Toronto Star Newspaper Ltd v Ontario*,

2005 SCC 41 extremely pertinent to objections to disclosure and their adjudication *in ex parte in camera* proceedings.

> 1. In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> 2. That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

[14] As Fish J explained so eloquently in *Toronto Star*, open and transparent judicial proceedings are fundamental principles of the Canadian legal system. However, limited exceptions to this principle are necessary for the proper functioning and integrity of our legal system:

> 3. The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> 4. Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration*.

[15] Derogations to the open court principle must be done in manner that is sensitive to how fundamental it is. Such limited exceptions must be carefully guarded to ensure that they are use

only used when the circumstances justify it. Thus, the Applicant must ground the section 37 application on specific and concrete assertions, rather than on vague and overly generalized statements. The Applicant must present sufficient evidence to convince the Court that the assertion of public interest privilege is legitimate in the circumstances.

[16] According to the Applicant, there is no legislative or common law requirement to tender evidence beyond the Certificate. I disagree. At this stage, the Certificate of Ms. Sue Murray as it stands without any other material filed with the Court, does not give me a sufficient evidentiary basis to conclude that the public interest claim is justified. The Certificate contains only vague and overly generalized statements, which claim the existence of a public interest privilege without substantiating it. My experience through the years as a judge has taught me that a section 37 public certificate or a section 38 notice is not sufficient in an application to make a determination on the validity of the claim.

[17] In the context of section 39 of the *Canada Evidence Act*, no direct evidence is required to support the absolute privilege that is the Confidence of the Queen's Privy Council for Canada. Thus, once validly certified, a section 39 objection is definitive and unassailable. However, in the case of sections 37 and 38 of the *Canada Evidence Act*, the objections are not absolute and are subject to verification and appreciation by the Court.

[18] Untested ministerial claims of confidentiality can create an atmosphere that breeds suspicion and cynicism. Justice O'Connor made the following comments on this matter in the *Arar Inquiry*:

> I raise this issue to highlight the fact that overclaiming exacerbates the transparency and procedural fairness problems that inevitably accompany any proceeding that can not be fully open because of [national security confidentiality] concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality. It is very important that, at the outset of proceedings of this kind, every possible effort be made to avoid overclaiming.
>
> (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006) at 302 cited in *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 63)

[19] In *Harkat*, McLachlin CJ dealt with the issue of claims of confidentiality in the context of a Security Certificate pursuant to the *Immigration and Refugee Protection Act*, SC 2001 c 27. The Chief Justice stated that role of the judge is one of gatekeeping to avoid over claiming on the part of the Minister. Furthermore, she explained that judges "must be vigilant and skeptical with respect to the Minister's claims of confidentiality. Courts have commented on the government's tendency to exaggerate claims of national security confidentiality" (See *Harkat*, above, at paras 63-65).

[20] Considering that at this stage in the proceeding, no one except for the Minister or the Applicant has viewed the substance of the information being protected, it would be "inconceivable" to render a decision of such importance without seeing the undisclosed information. As Mosley J explained in *Soltanizadeh v Minister of Citizenship and Immigration*, 2018 FC 114 at para 38:

> For example, designated judges at that time refrained from actually examining the classified documents to determine whether the Minister's claims were valid, preferring to rely on the confidential

> affidavits and submissions with which they were provided by the government: Henrie, above, at para 23 (page 240 in the original report). Today, it is inconceivable that designated judges assigned to consider s 38 of the CEA or s 87 of the IRPA applications would rely on the assertion of injury claims by the Minister without reading the information at issue.

[21] If I were to accept the Certificate as it stands without any further submissions, I would not be correctly assuming my role as a judge and would be disregarding the judicial functions that have been conferred upon me. My role in this exceptional type of proceeding is to ensure that the clouds of suspicion are dispersed, which in turn will allow fairness to come forward.

[22] Considering that the Certificate contains only generalized assertions, to be able to adequately assert its privilege, the Applicant should file with the Court on a confidential basis an un-redacted copy of the redacted documents that would relate to the public interest being claimed and any other documents or affidavits that may be appropriate to adequately support the validity of the alleged privilege. The Court will be obliged in this instance to conduct the hearing in an *in-camera* fashion in order to be able to deal with *ex parte* evidence and submissions.

B. *Considering there are no affidavits filed in support of the objection to disclosure made pursuant to section 37, the second issue before us is whether a party should be permitted to cross-examine the author of a Certificate?*

[23] The Respondent has filed a Motion to compel the Applicant to produce Ms. Sue Murray for cross-examination, in order to test her opinions and conclusions in the Certificate, upon which the Applicant relies to prove its claim for privilege. The Respondent's position is that cross-examination is necessary before this Court can rule on whether the Redacted Information

should remain undisclosed. He further argues that the opportunity to cross-examine a witness on their evidence is a fundamental rule of fairness.

[24] In response, the Applicant argues that the Respondent's position regarding cross-examination on the certificate is without merit and not based on common law principles or section 37 statutory proceedings. Furthermore, she argues that whether the Crown has sufficiently established the grounds for the public interest immunity will be determined by the Court not by the Respondent.

[25] Section 37 proceedings are not judicial review applications, as the Federal Court of Appeal in *Ribic* explained:

> "it is important to remind ourselves that proceedings initiated pursuant to s. 38.04 of the *Act* (…) are not judicial review proceedings. They are not proceedings aimed at reviewing a decision of the Crown not to disclose sensitive information. The prohibition to disclose sensitive information is a statutory one enacted by paragraph 38.02(l)(a) of the Act."
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> (*Ribic v Canada*, 2003 FCA 246 at para 15)

[26] An application under section 37 is a discrete proceeding, separate from and only ancillary to the applications for judicial review of the Requirement. Thus, the Respondent does not have standing or a right to attend the section 37 hearing (see *R v Basi*, [2009] 2009 SCC 52 at para 50; *R v Ames*, 2017 ABQB 651 at para 5). I agree with the Applicant that it is the ultimate role of the judge, not the Respondent of a section 37 application, to determine if the Certificate satisfies the Court on the proper scope of the objection or privilege.

[27] In the optic of fairness and transparency, the Court should consider the Respondent's submissions on the scope of the privileges when adjudicating the objection to disclosure. The Court should be attuned to the worries of the Respondent concerning the validity of the Certificate and the underlying role Ms. Murray played in the audit and redactions.

[28] Prior to and after the *in camera* hearing, the presiding judge will call a case management conference to inform the Respondent of the status of the proceedings. If need be and if the circumstances call for it, the presiding judge will ask counsel for the Respondent for any further submissions on anything else that could ensure fairness considerations in these circumstances.

[29] The Respondent may also submit a list of questions relating to the scope of the privilege that the section 37 application judge could consider posing to a potential witness in an *ex parte* hearing. However, it is important to remind the Respondent that it is the presiding judge's discretion to decide whether Ms. Murray or any other witness should be examined by the said judge. The judge also has discretion to determine what type of questions he or she will ask the witness.

[30] In the optic of fairness, the presiding judge must adopt all reasonable measures to permit the Respondent to understand to the fullest extent possible the issues at play in the *ex parte – in camera* hearing, without going as far as disclosing the redacted information. The Court must be careful, minutious, vigilant and demanding in *ex parte* proceedings in order to ensure that the Applicant's claim for privilege is fully tested. Considerations of fairness must radiate throughout every step of the section 37 proceedings.

[31] The Respondent has not submitted any statutory references or case law that would support his claim that his counsel should be able to test the opinions and conclusions in the certificate by cross-examination. In the context of section 38 of the *Canada Evidence Act*, this Court in *Kevork v Canada*, [1984] 2 FC 753 (TD) ruled on the opportunity for a respondent to cross-examine the author of a certificate. The Court determined there was no right to cross-examine the author of the certificate, absent “weighty and exceptional circumstances”.

[32] In *Harris v R*, 2001 FCT 498, applying the reasoning of *Kevork* to a section 37 objection in the context of a tax-related judicial review, the Court ruled that there is no common law or statutory right to cross-examine the author of a certificate. Second, questions of the sufficiency of the Certificate should be considered in the hearing of the section 37 application. Third, leave for cross-examination is a discretionary decision and absent “weighty and exceptional circumstances”, cross-examination should not be permitted.

[33] I would like first to state that a certificate is not an affidavit, which usually in the optics of fairness, affords the adverse party the opportunity to cross-examine a witness on their submitted evidence. In a section 37 proceeding, cross-examination by opposing counsel is not a prerequisite to ensure fairness. As mentioned above, the objection to disclosure and certification of a specified public interest creates an ancillary proceeding where the Respondent has no standing. Moreover, the cross-examination by the Respondent’s counsel is not necessary to the Court’s determination of whether the public interest for disclosure outweighs the specified public interest for precluding disclosure.

[34] The Respondent argues that cross-examination would be productive because it would allow Ms. Murray to justify her conclusions set out in the Certificate since it is unclear whether she believed that the redacted information is limited to the audit of the Respondent alone, or whether it would provide some kind of advantage to taxpayers more broadly. It is also argued that the cross-examination would help determine to what extent Ms. Murray was involved in the audit or the application prior to the Certificate. Furthermore, it is argued that it would provide the opportunity to ask Ms. Murray whether she considered the distinct underlying issues of the Applications when she signed the Certificate.

[35] After reviewing the type of questions and subjects on which counsel for the Respondent would like to cross-examine, I cannot help but conclude that these types of questions will automatically be impeded by a constant line of objections by the Applicant's counsel based on the section 37 public interest privilege, that has yet to be determined. As such cross-examination by the Respondent's counsel would render itself a useless and wasteful exercise, which would needlessly prolong the already complicated section 37 application. I take this opportunity to remind parties that the *Federal Court Rules* dictate that the *Rules* "be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits" (Rule 3 of the *Rules*).

C. *The "Apparent Case" for disclosure*

[36] As explained in by Mactavish J in *Wang v Canada (Public Safety and Emergency Preparedness),* 2016 FC 493:

> [39] When faced with an application under section 37 of the *Canada Evidence Act*, the Court must first decide whether the application can be dealt with based upon the affidavit material filed with the Court, or whether an "apparent case" for disclosure has been made out requiring that the Court to examine the evidence in question in order to determine the validity of the privilege claim: *Khan*, above, at para. 24.

[37] In assessing whether an apparent case for disclosure has been made out, Rothstein J as he then was, set out the following factors to be considered:

i. the nature of the public interest sought to be protected by confidentiality;
ii. whether the evidence in question will probably establish a fact crucial to the defence;
iii. the seriousness of the charge or issues involved;
iv. the admissibility of the documentation and the usefulness of it;
v. whether the respondent has established that there are no other reasonable ways of obtaining the information; and
vi. whether the disclosures sought amount to general discovery or a fishing expedition.

(*Khan v R*, (1996) 2 FC 316 at paras 24-25)

[38] As the case management judge, in order to expedite the proceedings, I consider that the reasons the Respondent provided for cross-examination establish an apparent case for disclosure of the redacted information. Specifically, the concerns expressed by the Respondent relate to the following factors: the nature of the public interest sought to be protected by confidentiality; whether the evidence in question will probably establish a fact crucial to the defence; and whether the respondent has established that there are no other reasonable ways of obtaining the information.

[39] As a final comment, I note that Rules 317 and 318 demonstrate, an Applicant in a judicial review application can request that a administrative decision maker certify that all relevant material relating to the administrative decision be disclosed. In the specific context of judicial review applications, it is vital and necessary for an applicant to receive the full disclosure Certified Tribunal Record.

Federal Courts Rules, SOR/98-106	*Règles des Cours fédérales*, DORS/98-106
Material in the Possession of a Tribunal **Material from tribunal**	**Obtention de documents en la possession d'un office fédéral** **Matériel en la possession de l'office fédéral**
317 (1)A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested. (…)	317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés. (…)
Material to be transmitted	**Documents à transmettre**
318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit	318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet:
(a) a certified copy of the requested material to the Registry and to the party making the request; or	a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause (…)

Basic considerations of fairness militate in favour of the most complete record possible, so that an Applicant may fully exercise their right to judicial review by understanding the reasons for which an administrative decision was taken. In judicial review applications, fairness requires

giving access to a complete certified tribunal record containing the “relevant material” to the application. This is sufficient to meet the “apparent case for disclosure” test.

[40] The Court thereby requests that the Applicant submit to the Court on a confidential basis un-redacted copies of all documents relied upon by the Minister in the Certified Tribunal Record, so that the Court may conduct the statutorily required balancing exercise to determine whether the disclosure of the redacted information would encroach on the specified public interest (see section 37(4.1) of the *Canada Evidence Act*).

JUDGMENT

THEREFORE, THIS COURT ORDERS AND ADJUDGES THAT:

1. The Respondent's motion to cross-examine Ms. Sue Murray is denied;

2. The Applicant is required on or before April 6, 2018 to file on a confidential basis with the Registry of the Court an un-redacted copy of the material being claimed under the public interest claim and any other documents, affidavit(s) that the Applicant may choose;

3. The Court reserves the right to examine Ms. Sue Murray on her certificates and on any other person if need be;

4. An *in camera* hearing will be scheduled following receipt of the confidential material;

5. In order to insure fairness, case management conferences will be scheduled prior and after the *ex parte* hearing;

6. The present reasons will be filed in all related files;

7. Costs in the cause.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-932-17, T-1330-17, T-735-17, T-1052-17
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