Date: 20071218

Docket: T-1188-06

Citation: 2007 FC 1334

Ottawa, Ontario, December 18, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

BRIAN AIRTH et al

Applicants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER
(Motion to Amend)

PHELAN J.

[1] The Applicants have moved to amend their Notice of Application to include a number of new remedies and grounds. This is the second amendment to the Notice of Application. Time is also running under the *Income Tax Act* for re-assessment of the tax years in question.

[2] The hearing of this judicial review was set peremptorily on July 19, 2007 to commence February 18, 2008. The Applicants applied to amend the application on November 16, 2007 after concluding cross-examinations of several of the Respondent's witnesses.

[3] The basic principles related to amendments was set out in *Canderel Ltd. v. Canada (C.A.)*, [1994] 1 F.C. 3 at para. 9:

> With respect to amendments, it may be stated, …, that while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

The principles were even more succinctly put in *Canderel* at para. 12 quoting from the Tax Court:

> … Ultimately it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

[4] The Court has approached the proposed amendments with these principles in mind; particularly fairness, common sense and that justice ought to be done.

[5] I have made my determination on the basis of the proposed relief since that was the manner in which the parties addressed the Court.

Re Paragraph 1

[6] This is not essentially new relief and is allowed.

Re Paragraph 2

[7] This is new relief and is to some extent related to paragraph 5(e). However, this relief is so open-ended, lacking in specifics as to time, place and individuals, as to be a declaration in respect to past conduct not related to the Request for Information (RFIs). As such, it is a form of relief that could be the basis of a separate matter. It has the potential to involve conduct going well beyond the period relevant to the RFIs or in any way related to the purpose of the investigation giving rise to the RFIs.

[8] The facts underlying this relief may be relevant to the essential aspect of this matter – an attack on the RFIs being issued for an improper purpose – but I cannot see how the relief itself has sufficient nexus to the basic relief being sought. This is not a case of a challenge to all tax dealings in respect of members of the Hell's Angels.

[9] On the other hand, the Applicants say that the facts underlying this relief are those contained in paragraph 20 and say that the evidence in support of paragraph 20 comes from the record in this matter.

[10] Therefore, paragraph 2 will be allowed subject to it being based on the allegations in paragraph 20 of the Grounds and the Applicants providing to the Respondent particulars of the allegations from the existing record. In this way, there will be some scope and definition to the relief and the allegations on which it is based. Since the narrower relief is based on the record, there should be no need for new evidence. The Applicants will have leave to amend this proposed paragraph to be consistent with Grounds and the particulars.

[11] The Respondent has suggested that this relief must be addressed to specific officials. However, the specific breaches were pleaded originally and there has been no need to name the officials. I fail to see why it is necessary now.

Re Paragraph 3

[12] This is an entirely new relief and allegation. The facts may be relevant to the *bona fides* and legality of the Respondent's actions but the relief based upon discretion and bias is so remote from the principal relief and the prejudice to the Respondent sufficiently serious that this amendment will not be allowed.

Re Paragraph 4

[13] This amendment is not really new and will be allowed.

Re Paragraph 5

[14] Subparagraphs (a), (c) and (d) are not truly new and are in line with the core relief at issue.

[15] The Respondent says that subparagraph (b) is new and requires further evidence. The relief is new but the evidence in support comes from the cross-examinations of the Respondent's witnesses. To the extent that the Respondent needs to submit evidence to address this issue, it would necessarily be limited.

[16] To assist the Respondent, this subparagraph will be allowed subject to the Applicants providing particulars upon which this relief is based. Any issues of further evidence can be addressed by way of case management conference.

[17] While the Respondent says that this grounds of relief is new, it is only so by virtue of being tied directly to s. 241(1). Any infirmities in this pleading will be rectified by the order in respect to paragraph 2 which will narrow the scope of the grounds and relief. Therefore, it is allowed on those onditions.

Re Paragraph 6

[18] It is unclear what a "writ" means in this context; however, as recognized by the Respondent, this relief is a matter of argument. Therefore, the amendment will be allowed.

Re Paragraph 7

[19] This is entirely new relief. It is likely to be amended further and clarified in the revised Constitutional Question.

[20] The Applicants argue that this relief is designed to address issues related to the *Criminal Code*, s. 462.48, and to a regime for control between the operation of the relevant provisions of the *Criminal Code* and the *Income Tax Act*. It is claimed to be an alternative to the striking down of the statutory provision or "reading down".

[21] The Respondent argues that, among other things, the proposed regime cannot succeed, that there are issues of court's power to make such an order and that some evidence will be needed.

[22] Since the constitutional issues will not be addressed until April, there is sufficient time to adduce evidence, if it is needed.

[23] While the merits of the regime do not immediately "jump out" and there may be substance in the Respondent's arguments on the legality and practicality of the relief, it is not for the Court, at this stage, to deny the Applicants the opportunity to advance this position. The relief is largely a matter of legal argument and will be allowed.

Conclusion

[24] The proposed amendments will be allowed in part and subject to conditions described. Costs shall be in the cause.

[25] A formal order will issue in due course.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1188-06
STYLE OF CAUSE:	BRIAN AIRTH et al and THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 13, 2007
REASONS FOR ORDER:	Phelan J.
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