

Federal Court



Cour fédérale

Date: 20240322

Docket: T-582-23

Citation: 2024 FC 460

Ottawa, Ontario, March 22, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

S. ROBERT CHAD

Respondent

ORDER AND REASONS

I. Overview

[1] The Minister of National Revenue [Applicant] has filed a summary application pursuant to section 231.7 of the *Income Tax Act*, RSC 1985 c 1 (5th Supp) [Act] for a compliance order requiring S. Robert Chad [Respondent] to provide information to the Applicant pursuant to sections 231.1 and 231.2 of the *Act*. The Respondent is associated with the following non-resident corporations or trusts, which the sought after information relates to: the Chodakowski

Family Trust [CF Trust], Stanley Chad Ralphie Estate Planning Family Trust [Ralphie Trust], Czech International Business Group Ltd. [Czech International], Pedigree Papers Corp. [Pedigree], BKR Purpose Trust [BKR Trust], and Oz Management Inc. [Oz Management] [collectively, Non-Resident Entities].

[2] The Applicant submits that the Respondent is disingenuous, and wrong in law, when he claims that he does not have the ability to produce documents and information relating to the Non-Resident Entities.

[3] The summary application for a compliance order is dismissed with respect to the CF Trust, Ralphie Trust, Pedigree, Czech International, Oz Management and BKR Trust.

II. Background

[4] The Canada Revenue Agency [CRA] has been auditing the Respondent under the Related Party Audit [RPA], formerly the Related Party Initiative [RPI], for an examination of the Respondent's tax affairs since 2015. For the purposes of this Order, I will refer to the term RPA, even if certain of the requests were referred to as RPI. The RPA is a CRA program that examines the tax compliance of high net-worth individuals and their related entities.

[5] The Respondent's roles in the Non-Resident Entities are:

1. CF Trust – protector and beneficiary;
2. Ralphie Trust – protector;
3. Czech International – president;

4. Pedigree – former director and secretary;
5. BKR Trust – protector; and
6. Oz Management – former director.

[6] Since December 2015, the Applicant has been seeking information, including financial statements, about the Non-Resident Entities. The Respondent's lawyers, OL Private Counsel, LLC [OLPC], had provided some details of the Respondent's involvement in entities within and outside Canada. The parties had also engaged in discussions concerning the sought after information and documents, including about his association with Bruce Lemon of OLPC. OLPC did provide CRA with trust and incorporation documents concerning the CF Trust, Ralphie Trust, and the BKR Trust.

[7] In a letter dated April 20, 2017, the CRA sent the Respondent a Notice of Requirement to Provide Documents and Answer Questions [First Requirement] pursuant to section 231.1 of the *Act* notifying the Respondent that he had to produce certain records, documentation and information within 30 days concerning the Non-Resident Entities and another entity, Chaka Holdings II Incorporation. The First Requirement also requested information about the asset protection plans [Asset Protection Documents] established as a result of the foreign trusts and any documents over which the Respondent claims solicitor-client privilege relating to the CF Trust, Ralphie Trust, Pedigree and Czech International. The Respondent made inquiries to CF Trust and Ralphie Trust regarding the First Requirement in November 2018 but these entities did not provide the requested information and documents. The Respondent provided a November 21, 2018 email from Antony Will of Cook Islands Trust Corporation Ltd. advising that the CF

Trust would not be providing the requested information. No reason was given. The Respondent also states that Ralphie Trust and Czech International declined to provide the requested documents. The Respondent also tried to contact Oz Management but it was struck from the Bahamas' corporate registry.

[8] In the intervening period, the Respondent commenced an application for judicial review to challenge the First Requirement. Ultimately, on November 19, 2019, this Court dismissed the application for judicial review. There was no appeal.

[9] On April 8, 2021, the Minister sent the Respondent a Requirement to Provide Information and Documents [Second Requirement] concerning the Non-Resident Entities pursuant to section 231.2 of the *Act*. After the parties agreed to a deadline extension, on July 14, 2021, the Respondent provided a preliminary response to the CRA [First Requirement Response] but requested an extension to comply with the Second Requirement. Counsel for the Minister granted the extension request and set a new deadline of November 12, 2021. On November 12, 2021, the Respondent provided further information [Second Requirement Response].

[10] After examinations and responses to undertakings, the Applicant states that the CRA has not received all of the outstanding information and documents set out in the First Requirement and Second Requirement [collectively, Requirements]. The Respondent states that he has made an effort to answer the Requirements but the recipients for the Non-Resident Entities have refused to provide the requested documents. On August 13, 2021, the Respondent requested documents from Cook Islands Trust, trustee of the CF and Ralphie Trusts. On October 30, 2021,

the Respondent made similar inquiries to Pedigree and Czech and on November 9, 2021, he made a similar request to Oz Management and BKR Trust.

[11] The October 20, 2021 refusals from the trustee of the CF and Ralphie Trusts state that “[t]he Trustee of the above named trust will not be providing the information requested in your August 13th correspondence.”

[12] The undated refusal from Czech International, written by Bruce Lemons states “[y]ou may be the President of the Company, but you are not its director. I have a duty to represent the best interests of the shareholder. I cannot see how compliance with your request is in the best interests of the shareholder. As the director of the Company, I refuse your request.” The shareholder is the Ralphie Trust.

[13] On November 7 and 9, 2021, OLPC refused the requests on behalf of Pedigree, Oz Management and BKR Trust. The refusal from Pedigree stated that it was struck and that “[d]irectors are required to act in the best interests of the shareholders. We understand that requests similar to the CRA requests described above were received by Pedigree’s shareholder and that the shareholder refused to answer such requests.” Pedigree’s shareholder is the CF Trust. In the cases of Oz Management and BKR Trust, the responses from OLPC are essentially identical, stating that the entities were struck from the corporate registry and that the applicable Bahamian law provides that directors cannot act with respect to a struck company and that the request cannot not be honoured.

[14] The affidavit of Devon Daschko, a Related Party Case Manager with the CRA, extensively sets out the relationship of the Respondent to the Non-Resident Entities, including summaries of meeting minutes of the various entities, corporate searches and CRA's understanding of the most recent information relating to the Non-Resident Entities. Schedule A to Mr. Daschko's affidavit sets out the outstanding information and documents that the Respondent has not provided. To summarize, the Applicant seeks financial statements, tax returns, trust resolutions and meeting minutes, notices, amendments to trust agreements, and banking records from the trusts and the Asset Protection Documents for the CF Trust and Ralphie Trust specifically, which the Respondent referred to at a meeting with CRA in 2016. Generally, depending on the corporation, the Applicant seeks some or all financial statements, share acquisition agreements, information about officers and directors, shareholder and director resolutions and meeting minutes, any agreements between the corporation an entity that the Respondent has an economic relationship with, promissory notes related to the trusts, foreign Income Tax Returns, and banking records.

[15] The Applicant's draft order sets out the same required information respecting the Non-Resident Entities and the Asset Protection Documents as set out in Mr. Daschko's affidavit.

[16] The Applicant's summary application is supported by the affidavits of Mr. Daschko. The Respondent has provided his own affidavit and affidavits from Kristina Ilogon dated July 10 and August 14, 2023. The Respondent was cross-examined.

III. Issues

[17] It is uncontested that section 231.7 of the *Act* sets out the requirements for a compliance order. Accordingly, this matter raises the following issues:

1. Was the Respondent required to provide the information or documents set out in the Requirements under section 231.1 or 231.2 of the *Act*?
2. Did the Respondent not provide the information or documents sought by the Minister according to the Requirements?
3. Are the documents or information sought by the Minister in the Requirements not protected from disclosure by solicitor-client privilege as defined in the *Act*?

IV. Relevant Provisions

[18] Section 231.7 of the *Act* states:

231.7 (1) 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

(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)).

[19] Subsections 231.1(1) and 231.2(1) provide as follows:

Information Gathering

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 any document, including books and records, of a taxpayer or any other person that may be relevant in determining the obligations or entitlements of the taxpayer or any other person under this Act;

(b) examine any property or process of, or matter relating to, a taxpayer or any other person, an examination of which may assist the authorized person in determining the obligations or entitlements of the taxpayer or any other person under this Act;

(c) enter 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, except that, if the premises or place is a dwelling-house, the authorized person may enter the dwelling-house without the consent of the occupant only under the authority of a warrant under subsection (3);

(d) require a taxpayer or any other person to give the authorized person all reasonable assistance, to answer all proper questions relating to the administration or enforcement of this Act and

(i) to attend with the authorized person, at a place designated by the authorized person, or by video-conference or by another form of electronic communication, and to answer the questions orally, and

(ii) to answer the questions in writing, in any form specified by the authorized person; and

(e) require a taxpayer or any other person to give the authorized person all reasonable assistance with anything the authorized person is authorized to do under this Act.

Requirement to provide documents or information

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice sent or served in accordance with subsection (1.1), 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.

V. Analysis

[20] In order to succeed in an application for a compliance order, the Minister is required to establish that: (1) the items had been sought under section 231.1 of the *Act*, and the Respondent was required to provide them under that provision; (2) the Respondent had not done so within a reasonable period of time; and (3) the requested items were not protected by solicitor-client privilege (*Miller v Canada (National Revenue)*, 2022 FCA 183 at para 15 [*Miller*]).

A. *Was the Respondent required to provide the information or documents set out in the Requirements under section 231.1 or 231.2 of the Act?*

(1) Applicant's Position

[21] This Court has authority to order compliance pursuant to section 231.7 of the *Act* requiring the Respondent to provide the requested documents and information under both sections 231.1 and 231.2 of the *Act*.

[22] The Supreme Court of Canada has provided guidance on the scope of section 231.1, stating that "...s. 231.1(1) is broadly worded. It allows access to 'information that is or should be in the books and records of the taxpayer'. It thus gives access to information about third parties that is required to be kept by the taxpayer, as well as information that may not be required to be kept but happens to be in the taxpayer's records" (*Redeemer Foundation v Canada (National*

Revenue), 2008 SCC 46 at para 24) [emphasis in original]. Furthermore, paragraph 231.1(1)(b) extends the scope of the Minister’s examination to any matter that would assist the authorized person in ascertaining the amount payable by the taxpayer under the *Act* (*Miller* at para 59).

[23] Section 231.2 also confers broad and general powers on the Minister, meaning that the Minister can “require any person to produce any information or any document for any purpose related to the administration of the Act” (*Canada (National Revenue) v Lee*, 2016 FCA 53 at para 5 [*Lee*]). As such, the Minister has powers to require disclosure of assets beneficially owned by the taxpayer even if not registered in the taxpayer’s name, as well as require any person to provide information about a third party, as long as the information sought is required for any purpose related to the administration of enforcement of the *Act* (*Lee* at paras 7-8).

[24] The Minister is properly seeking the documents. All of the outstanding information and documents from the Requirements are required for the Minister to administer and enforce the *Act*. The Respondent does or should have access to the information and documents sought due to his roles as a beneficiary and protector of the CF Trust and Ralphie Trust, the fact that shares in Pedigree and Czech are held by the CF Trust and Ralphie Trust respectively, and that the Respondent is the protector and authorized applicant of the BKR Trust (which owns all shares in Oz Management).

(2) Respondent’s Position

[25] The Respondent was not required under sections 231.1 and 231.2 of the *Act* to provide the documents sought by the Minister concerning the Non-Resident Entities because they are

“foreign-based documents” within the meaning of section 231.6(1) of the *Act*. The Minister can only request such documents pursuant to subsection 231.6(2) of the *Act*. Accordingly, the conditions set out in paragraph 231.7(1)(a) have not been met. The Requirements are *ultra vires*. For clarity, the Respondent objects to providing all documents in the Requirements concerning the Non-Resident Entities under this argument, except for the Asset Protection Documents. The Respondent only submits that the Asset Protection Documents are subject to solicitor-client privilege and consequently cannot be subject to a compliance order.

[26] Section 231.6(1) of the *Act* defines “foreign-based information or document” as “any information or document that is available or located outside Canada and that may be relevant to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person.” The documents subject to the Requirements are foreign-based documents because (1) they are not within the Respondent’s power, possession or control; and (2) the documents would be located outside of Canada and would likely be within the possession or control of other entities with whom the Respondent deals at arm’s length.

[27] The Requirements were issued by the Minister pursuant to sections 231.1 and 231.2 of the *Act*, and not subsection 231.6(2) concerning foreign-based documents. Nothing in the text of sections 231.1 and 231.2 of the *Act* makes those sections applicable to foreign-based documents. Also, the contextual statutory interpretation principle of *generalia specialibus non derogant* applies (i.e., the general does not derogate from the specific). The more general power to issue requirements under sections 231.1 and 231.2 should not be interpreted as applying to foreign-based documents because Parliament enacted section 231.6 to apply specifically to

circumstances in which the Minister wishes to require production of foreign-based material. Further, the purpose of enacting section 231.6 was to resolve difficulties of compliance when foreign-based documents were involved under sections 231.1 and 231.2 of the *Act*. Jurisprudence indicates that sections 231.1 and 231.2 of the *Act* do not enable the Minister to demand foreign-based documents (*Ghermezian v Canada (Attorney General)*, 2020 FC 1137 at paras 100, 107, 110 [*Ghermezian 2020*]; *Canada (National Revenue) v Ghermezian*, 2022 FC 236 at paras 175-189 [*Ghermezian 2022*]; *Frank C Smith Medicine Professional Corporation v Canada (National Revenue)*, 2022 FC 29 [*Frank C Smith*]).

(3) Conclusion

[28] There is no dispute that the Requirements requesting the information and documents were properly addressed to the Respondent. The parties also agree that the scope of the Minister's powers to request and require information or documents under sections 231.1 and 231.2 of the *Act* are broad. The parties disagree on whether the information and documents sought by CRA are foreign-based and can be subject to a section 231.7 compliance order.

[29] A compliance order under section 231.7 of the *Act* is only available where the Minister seeks information or documents under section 231.1 and 231.2 of the *Act*. However, the *Act* provides an alternative process to request and require information and documents under section 231.6 if there is foreign-based information or documents involved.

[30] I view the Applicant's submissions as similar to those made in *Ghermezian 2022* in that it is their position that the Requirements oblige the Respondent to provide the documents and

information in his power, possession and control if accessible from Canada (at para 180).

Accordingly, the Respondent bears the burden of proof of establishing the location or accessibility of the material sought in the Requirements (*Ghermezian 2022* at para 186).

[31] Courts have yet to definitively rule on whether sections 231.1 and 231.2 apply to foreign-based information or documents. Rather, Courts have only ruled that foreign information or documents which is *also* available in Canada can be compelled under section 231.2 (*Ghermezian 2022* at paras 177-178, citing *Ghermezian 2020* at paras 95-96, 99-100).

[32] As for the definition of “foreign-based information or document” as set forth in subsection 231.6(1), Courts have accepted that information in electronic form stores on servers outside Canada is in law capable of being located in Canada (*eBay Canada Ltd v MNR*, 2008 FCA 348 at paras 47-48, 52 [*eBay*]; *Frank C Smith* at para 43). If the Respondent can access the information and documents for the Requirements in Canada, then it is not foreign-based even if it originates outside of Canada. For example, the Court in *eBay* found that the information was not foreign-based because it was accessible to eBay on computers in Canada (at para 48). In *Frank C Smith*, a USB key originated from outside of Canada, was brought to Canada, then moved outside of Canada again and so the Court commented that domestic-based information cannot be transformed into foreign-based information by moving it outside of the country (although the decision did not turn on this point) (at paras 40, 43, 46).

[33] The evidentiary records before the Court in section 231.7 proceedings, rather than judicial reviews, has not led this Court to make a definitive finding on whether a section 231.7

order can compel an individual to produce information or documents that are only foreign-based and not accessible from within Canada. The Applicant submits that the information and documents should be in the control of the Respondent so he should be able to produce it even if they are outside Canada, whereas the Respondent submits that the documents are outside his legal access and the foreign entities have refused his request to receive them, as evidenced by the refusal letters.

[34] To clarify the scope of section 231.7 compliance orders, there needs to be a strong evidentiary record that the Respondent has not and continues to be unable to access the documents and information set out in the Requirements in Canada. The parties are required to adduce evidence to equip the Court in making this determination (*Ghermezian 2022* at para 179). The evidentiary record in this matter is a bit more robust than in *Ghermezian 2022* as the Respondent has filed affidavit evidence, including the refusal letters. The respondents in *Ghermezian 2022* did not file affidavits. The Respondent was also cross-examined on his affidavit. Nevertheless, it is my view that in the present matter, like in *Ghermezian 2022*, the evidentiary record is lacking to support a conclusion on whether the information is accessible from Canada (at para 181). In *Ghermezian 2022*, the Court found that “in the absence of evidence sufficient to meet the respondents’ burden, their arguments surrounding foreign-based information and documents raise no basis for resisting any of the applications” (*Ghermezian 2022* at para 189).

[35] The parties raise the issue of the availability and sufficiency of attempts to receive the information from outside Canada under the second issue of whether the Respondent provided the

information or documents sought by the Minister according to the Requirements. Assuming and without deciding that the requested documentation and information are not “foreign-based”, in my view, the matter can be disposed of on the second sub-issue.

B. *Did the Respondent not provide the information or documents sought by the Minister according to the Requirements?*

(1) Applicant’s Position

[36] Pursuant to subsection 231.5(2) of the *Act*, a person must do everything they are required to do by sections 231.1 and 231.2 of the *Act* “unless the person is unable to do so”. The Respondent disingenuously claims that the trustees of the trusts and corporations he created have refused to provide him with information and documents and, despite his control over the trusts, he simply accepted the refusals by the trustees to provide the information and documents without any additional efforts.

[37] As protector, the Respondent had control over the CF Trust, Ralphie Trust, and BKR Trust. The Respondent has created these trusts to retain control of his assets while using the trusts to hide control and protect the Respondent from third party liability. Pedigree and Czech International are owned by the CF Trust and Ralphie Trust respectively, so the Respondent is being disingenuous when he says he has “no legal or other control over” these trusts, Pedigree, or Czech International. While Canadian jurisprudence has not extensively considered the concept of a protector, Courts in other jurisdictions addressing similar matters have found that a protector did have control while stating that they had no such control (*JSC Mezhdunarodniy*

Promyshlenniy Bank v Pugachev, [2017] EWHC 2426 (Ch); *FTC v Affordable Media LLC*, 179

F (3d) 1228 (9th Cir 1999); *Nature Conservancy of Canada v Waterton Land Trust Ltd*, 2014 ABQB 303).

[38] The Respondent has the power to remove trustees, pay income or capital to beneficiaries, add or remove beneficiaries and amend the trust documents. Therefore, the Respondent also has the power to provide documents relating to the BKR Trust and Oz Management. Oz Management created and acted as a trustee for BKR Trust while the purpose of the BKR Trust was to subscribe for, hold and retain ownership or effective control of all shares of Oz Management. Oz Management was also a trustee of the CF Trust and the Ralphie Trust from November 2, 2012 to July 30, 2015, which overlapped with when the Respondent was a director of Czech International (owned by Ralphie Trust) and Pedigree (owned by CF Trust). The Respondent, as a director of Oz Management and protector of BKR Trust, could control BKR Trust, Oz Management, CF Trust, and Ralphie Trust.

(2) Respondent's Position

[39] The Respondent's obligations under sections 231.1 and 231.2 of the *Act* are subject to section 231.5 and effectively set aside when the Respondent is "unable" to comply. A taxpayer is only obligated to make "reasonable efforts" to comply with sections 231.1 and 231.2 of the *Act* (*Canada (National Revenue) v Dominelli*, 2022 FC 1418 at para 31 [*Dominelli*]; *Canada (National Revenue) v Amdocs Canadian Managed Services Inc*, 2015 FC 1234 at para 76 [*Amdocs*]). Examples of when an order should not be made include when a document has been destroyed, is beyond the taxpayer's possession and the taxpayer has no power to obtain it or does not exist, as well as when the order would be futile (*Dominelli* at paras 34, 48, 58).

[40] The Respondent, despite being a protector of the trusts, does not have a legal right of access to the outstanding documents from the Requirements. The Applicant's submissions referring to control over the trusts are irrelevant and misguided.

[41] For both the CF Trust and the Ralphie Trust, the specific trust deed terms identify that the Respondent did not have legal access to the requested documents. For Pedigree and Czech International, their ownership by the CF Trust and Ralphie Trust respectively does not enable legal access over its documents nor did the Respondent's roles as former director at Pedigree or officer at Czech International. Pedigree was struck off the Bahamas' corporate registry when the Minister issued the Second Requirement, so he no longer legally had access to the outstanding documents from the Requirements. Similarly, the Respondent did not have legal access over Oz Management's documents due to his status as a former director and because Oz Management was struck off the Bahamas' corporate registry prior to the Minister issuing the Requirements. The Respondent recognized that he did have a legal right of access to the outstanding documents due to his role as protector and authorized applicant of the BKR Trust. However, access is similarly frustrated due to Oz Management being struck off the Bahamas' corporate registry so the Respondent could no longer legally act in any way with respect to the affairs of the company. The Respondent noted that he nevertheless requested the documents from the respective entities and the entities all declined.

(3) Conclusion

[42] I am satisfied, on a balance of probabilities, that the Respondent has made reasonable efforts to satisfy this requirement. The Respondent has persuaded me that he does not possess

and cannot access the documents and information. In considering whether an individual is unable to comply with the requirements under section 231.5, courts have determined that the taxpayer must exercise “reasonable efforts” to acquire the information (*Dominelli* at para 31, citing *Canada (National Revenue) v Miller*, 2021 FC 851 at para 50). Reasonableness depends greatly on the context. However, the Court has denied section 231.7 orders where a document has been destroyed or where the information sought is beyond the taxpayer’s possession and they have no power to obtain it, even if the information may exist (*Dominelli* at para 34, citing *Amdocs* at paras 75-76 and *Canada (National Revenue) v Lin* at para 62).

[43] I find the Respondent’s submission persuasive about the distinction between control and access to the information as a limiting factor in being unable to provide the documents. While the Applicant provides informative background about the roles of trust protectors generally and the relevant corporate structures, the Applicant has not provided case law on protectors that would apply to the jurisdictions at issue here (the Bahamas and Cook Islands). The Applicant also does not delve into the powers and restrictions in the specific trust and corporate structures as the Respondent does.

[44] If the information and documents are not in the possession of the Respondent already, then I find it likely that the Respondent does not have the right to access the documents and information for the CF Trust and the Ralphie Trust due to the trust settlement terms (Article 13 and 14, respectively). The only trust that explicitly granted the Respondent access to the information is the BKR Trust (Article 25). The Respondent admits this right to access the

information but notes the Respondent's ability is frustrated by the trustee of BKR Trust being struck off the Bahamas' corporate registry. There is no evidence to contradict this.

[45] Similarly, I am persuaded by the Respondent's submission about lack of access for Pedigree and Oz Management due to the Respondent's former roles in the company at the time of the Requirements and that the companies have been struck off the corporate registry in the Bahamas. Finally, it seems that the Respondent may not have access to the documents through his role as president and officer of Czech International. Again, there is no evidence to contradict this.

[46] During cross-examination on the First Requirement, in relation to the CF Trust, the Respondent stated that he accepted the one-line refusal from Antony Will and did not recall making any further inquiries. As there was no refusal concerning Ralphie Trust, the Respondent understood Antony Will's refusal to apply to both trusts. As for Oz Management, because it was struck, the Respondent stated that he never inquired further. As for Czech International, the Respondent stated that he requested the information from its director, Bruce Lemons, but no documents were sent.

[47] On cross-examination on the Second Requirement, in relation to the CF Trust, the Respondent stated that the trustee did not provide the requested documents and the Respondent did not follow up. As for Pedigree, the Respondent acknowledged that it was struck from the Bahamas' corporate registry in 2020 and that OLPC responded confirming that. As for Ralphie Trust, while there was no letter confirming refusal, the Respondent stated that he understood that

it was refused because the documents did not show up and he also did not recall following up with anyone. For Czech International, there was an undated response from Bruce Lemons refusing the request and the Respondent did not recall asking why the documents would not be provided. For Oz Management, the refusal came from OLPC and the Respondent did not recall any follow-up with OLPC on this. For BKR Trust, OLPC responded and provided similar reasons as it did for Oz Management. The Respondent generally stated that he had no recollections about the structures of these various entities.

[48] I understand the Applicant's concerns about the strength of the Respondent's efforts to comply with the Requirements. However, this matter is similar to *Amdocs* where the Court found that the evidence demonstrated, on the balance of probabilities, an inability to produce the information because (1) the taxpayer did not possess the information; and (2) the information was not available to the taxpayer (*Dominelli* at para 36; *Amdocs* at para 75). Similarly, I am persuaded by the Respondent's submissions and evidence that he made reasonable efforts but the information was not available to him or accessible by him.

C. *Are the documents or information sought by the Minister in the Requirements not protected from disclosure by solicitor-client privilege as defined in the Act?*

(1) Applicant's Position

[49] In the Second Requirement Response, the Respondent relies on solicitor-client privilege as grounds for not providing the Asset Protection Documents. The Respondent has failed to discharge his burden on a balance of probabilities of showing how the Asset Protection Documents are in fact privileged communications. The Respondent has failed to provide a

privilege log and so the Applicant cannot assess the Respondent's privilege claims (*Minister of National Revenue v Thornton*, 2012 FC 1313 at para 33). However, jurisprudence has recognized that certain documents are not subject to privilege, such as tax planning documents and communications, facts which exist separately from privileged communications, operational implementation of legal advice, and communications with a trustee (*Canada (National Revenue) Revcon Oilfield Constructors Incorporated*, 2015 FC 524 at paras 20-21 [*Revcon*]; *Canada (National Revenue) v Moodys LLP*, 2011 FC 713 at paras 19-21, 22-24, 25-28 [*Moodys*]; *Canada (National Revenue) v BMO Nesbitt Burns Inc*, 2022 FC 157 at para 95). Many of the Respondent's privilege claims likely fall under this list of documents that are not subject to privilege, given the nature of the transactions.

[50] Communications with Bruce Lemons are not subject to solicitor-client privilege unless he was acting as a lawyer since he also played the role of a settlor, trustee, corporate director, lawyer, and friend in these entities.

(2) Respondent's Position

[51] The Court should determine that the Asset Protection Documents are privileged because they exist in the broad continuum of communications between a solicitor and client.

Alternatively, the Court should issue a direction that the Respondent file the Asset Protection Documents under seal with the Court within 10 days, to permit a determination on the privilege issue to be made. The communications fall under a principle whereby confidential solicitor-client communications may be subject to solicitor-client privilege even when they do not directly seek or record legal advice (*Balabel v Air-India*, [1988] Ch 317, [1988] 2 All ER 246 (CA)). The

Respondent cites several cases on the application of this continuum of legal advice principle in the Canadian context whereby a communication may be covered by privilege if it is in the continuum where a solicitor gives advice or exchanges information with the client so that the client understands their rights (*Samson Indian Nation and Band v Canada*, 1995 CanLII 3602 (FCA); *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104 at paras 26-28; *Currie v Symcor Inc*, 2008 CanLII 37901 (ON SCDC) at para 46).

(3) Conclusion

[52] The Respondent has not persuaded the Court that the documents or information in the Requirements are protected from disclosure by solicitor-client privilege.

[53] To grant a compliance order under section 231.7, the judge must be satisfied that the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)). Under subsection 232(1), solicitor client privilege means

the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

[54] As the party asserting solicitor-client privilege, the Respondent bears the evidentiary burden to establish the claim (*Ghermezian 2022* at paras 21, 190). In written submissions, the Respondent broadly states that all of the Asset Protection Documents “would be in the nature of

communications between Mr. Chad and his counsel in the context of seeking legal advice, and are therefore protected from disclosure by solicitor-client privilege”. In support, the Respondent points to case law concerning the continuum of communications between a solicitor and a client. However, the Respondent fails to identify specifically how the outstanding documents and information from the Requirements fall under the continuum of communications. Furthermore, as the Applicant discusses, the Court has emphasized the importance of a privilege log where a regulatory authority has made a request for information pursuant to validly enacted legislation (*Thornton* at para 33). A privilege log or some other similar document would be particularly beneficial to support the Respondent’s submissions. Unlike many other cases in this area of law, the written submissions provide no information about what documents exactly the Respondent is claiming privilege over.

[55] Given the importance of protecting solicitor-client privilege broadly, I agree with the Respondent that the appropriate procedure is to issue a direction that the Respondent file the Asset Protection Documents under seal with the Court to permit a determination on the privilege issue. While the Respondent has not shown that the Asset Protection Documents are privileged, there is similarly insufficient evidence to determine whether the Asset Protection Documents are not privileged given that the specific documents are unknown since the Requirements listed some broad categories of required documents. This Court has previously evaluated documents under seal in similar proceedings when solicitor-client privilege is asserted in section 231.7 applications (*Revcon; Moodys*). *Revcon* specifies that Courts should use this power sparingly (at para 12). For example, the Court refused to exercise the power where the record provides “sufficient evidence surrounding the circumstances under which the Report was requested and

generated, and sufficient evidence as to the nature of the information in the Report, that the Court can fairly decide the issues raised in this application without the necessity to review the Report” (*Canada (National Revenue) v Atlas Tube Canada ULC*, 2018 FC 1086 at para 13).

[56] Based on the above, I find that there is insufficient evidence at this time concerning the nature of the information in the Asset Protection Documents and the context of their creation to determine whether all Asset Protection Documents are privileged.

VI. Conclusions

[57] For the above reasons, the summary application with respect to the CF Trust, Ralphie Trust, Czech International, Pedigree, Oz Management, and the BKR Trust are dismissed. On a balance of probabilities, the Respondent does not and cannot possess the documents from these entities so a compliance order would be futile.

[58] With respect to the Asset Protection Documents, I will order that the Asset Protection Documents be filed with the Court under seal within 30 days for further evaluation of the solicitor-client privilege claims.

ORDER in T-582-23

THE COURT ORDERS that:

1. The summary application for a compliance order concerning CF Trust, Ralphie Trust, Pedigree, Czech International, Oz Management and BKR Trust is dismissed with costs in favour of the Respondent.
2. The Asset Protection Documents are to be filed with the Court under seal within 30 days for evaluation of solicitor-client privilege.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-582-23

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v S.
ROBERT CHAD

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: SEPTEMBER 12, 2023

ORDER AND REASONS: FAVEL J.

DATED: MARCH 22, 2024

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