

Date: 20080827

Docket: T-2208-07

Citation: 2008 FC 972

Ottawa, Ontario, August 27, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

and

AMEX BANK OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

I. The Relief

[1] This is an application by Her Majesty The Queen (the “Applicant”) for an Order requiring that the Respondents provide the Applicant the information and documents set out in the requirement dated May 8, 2007 (Requirement) as issued to Amex Bank of Canada (Amex or Respondent) pursuant to subsection 289.1 (1) of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (*ETA* or *Act*). Specifically, the Applicant is requesting the production of the following information and documents relating to American Express credit card number 3733-202207-31 (Card):

- a. the name of the individual that holds the primary card for the supplementary card, number 3733-202207-31013, that is held by Mohamad Nizam;
- b. the name of the business associated with the primary cardholder;
- c. the mailing address of the primary cardholder;
- d. a copy of the original application for this membership and any documents relating to requests for supplementary cards;
- e. the names of all supplementary cardholders tied to the primary card.

[2] Of these, only Mohamad Nizam is named. The primary cardholder, the business associated with the primary cardholder, and the possible supplementary cardholders are not named.

II. The Background

[3] At the heart of this matter is the Applicant's assertion that the production of the requested documentation and information is necessary to determine the obligations of 893134 Ontario Limited, operating as Mega Distributors (Mega) under the *ETA*, as well as any rebate or refund they may be entitled to.

[4] In relating these facts, it must not be forgotten that the Respondent in this matter is Amex, a Schedule II Bank pursuant to the *Bank Act*, S.C. 1991, c.46 (*Bank Act*), which is not under investigation in this matter. Amex is, in this application, the third party for the purposes of the relevant subsection of the *ETA*.

A. *Events Leading to Mega's GST Assessment*

[5] The Canada Revenue Agency (CRA) has alleged that Mega failed to collect GST with respect to cigarettes purportedly sold from its Windsor, Ontario warehouse and purportedly delivered to Zelda McNaughton, a status Indian operating as Zee's Restaurant on the Six Nations Reserve of Grand River near Brantford.

[6] The gist of the allegations are that Mega purchased cigarettes from a wholesaler, sold them at discounted prices to Windsor area retailers and did not collect the GST. Mega then allegedly declared tax free cigarette sales to Ms. McNaughton, filed GST credit returns calculating input tax credits on GST paid to its wholesaler, and claimed a refund of net tax.

[7] Mega was investigated in 2000, and upon the termination of the investigation a GST audit was commenced. Ultimately, the CRA concluded that the alleged sales and deliveries to McNaughton could not have occurred. With the audit completed in or about February 2001, Mega was informed that it would be assessed with respect to uncollected GST on all tobacco sales during the audit and disallowed some input tax credits claimed by Mega.

[8] For goods, such as cigarettes, not to be subject to GST, a vendor must provide evidence of the sale to a status Indian residing on a reserve (which have been delivered to a reserve by the vendor or the vendor's agent) by producing a copy of the invoice or sales document indicating the band number and family number of the purchaser together with a copy of the purchaser's certificate of Indian status.

[9] In this case, Mohamad Nizam was allegedly one of the Mega employees who delivered the cigarettes.

B. Mega's Tax Court Appeal

[10] Mega filed a Notice of Appeal from the reassessment of GST to the Tax Court on March 13, 2003.

[11] Mega eventually undertook to provide copies of American Express statements for Costco purchases between 1999 and 2001. Subsequently, Mega produced a Supplementary Book of Documents which included some, but not all, American Express statements for Amex cards held by Mega owner Francois Francis and other Mega employees that had been used for Costco purchases during the audit period (apparently Mega purchased the cigarettes from Costco).

[12] Mega asserted that it was only through the discovery process that it became aware of the basis for the GST reassessment and further learned that it was being defrauded by at least one, or perhaps two, of its employees whose actions were an important basis for the reassessment. Mega then filed an Amended Notice of Appeal dated June 30, 2006 that alleged that Mohamad Nizam and his brother engaged in cigarette purchases and sales that were not authorized by Mega.

[13] In a letter dated November 23, 2006, counsel for the Department of Justice challenged the completeness of Mega's Supplementary Book of Documents of American Express statements, questioning whether there was a Mega American Express card for Mr. Nizam. Mr. Nizam had

apparently claimed to have had such a card, and further Costco had apparently produced an invoice to the CRA showing Mr. Nizam using an American Express Card to pay for a Mega cigarette order.

[14] The completeness of the Supplementary Book of Documents remained an issue, and in late December 2006, counsel for Mega produced more American Express statements. Department of Justice counsel reviewed those and sent another request to Mega, dated January 5, 2007, asking for American Express statements relating to cigarette purchases made by Mohamad Nizam.

[15] The Applicant then, once it became convinced no more statements would be forthcoming, sent 17 requirements to Amex on January 30, 2007 to provide information and documents relating to Mega's American Express credit cards, including one related to Mr. Nizam, Membership No. 3722-202207-31013.

[16] Discussions took place between Amex and the CRA, and the CRA provided a further letter on February 5, 2007, that outlined in a schedule the names of individuals on the primary and supplementary cards mentioned in those requirements. The exception was the primary cardholder of the Card at issue in the present matter. The Card is apparently the only card one where an individual being investigated was the supplementary cardholder on an account while the primary cardholder was not an individual being investigated.

[17] On March 1, 2007, Amex replied to the document request by sending statements and records for the investigated parties to CRA Officer Pamela Howick. However, Amex did produce a number of statements of Lasalle Petroleum showing Costco purchases.

C. The Requirement at Issue

[18] The Requirement, dated May 8, 2007, was issued by Ms. Howick and requested that Amex produce information and documents relating to the Card. This was in addition to the requirements that had been sent earlier. The Requirement requested all of the information being requested in this application.

[19] According to the affidavit of Pamela Howick, the CRA has been able to trace a number of the payments recorded on the Lasalle Petroleum American Express statements back to Costco's records of cigarette sales to Mega and to GST input tax credits claimed by Mega for those purchases.

[20] By letter dated May 9, 2007, Amex declined to process the requirement, and stated that it believes that the request was for documents and information relating to unnamed persons and that judicial authorization pursuant to subsections 289 (2) and 289 (3) of the *ETA* were required before it could make such a production. The unnamed person in this case is the holder of the primary card of which Mr. Nizam's card is the supplementary card. It is that individual who is unnamed, and it is that individual's identity – along with information and documents about the primary card and that individual's business - that are being sought. Mr. Nizam is not unnamed, and much of the

information being sought here does not seem to relate to him (other than possibly the initial application and requests for supplementary cards). No mention has been made of any further unnamed supplementary cardholders on the primary card.

D. Supplementary Cardholder Statements

[21] By way of the affidavit of Pamela Howick, the Applicant asserts its understanding of how supplementary cardholders receive statements. Specifically, based on alleged discussions with employees of AMEX, supplementary cardholders do not receive separate statements from that of the primary cardholder; transactions made by the supplementary cardholder appear as separate line items on the statement of the primary cardholder.

[22] They also rely on Ms. Howick's assertion in her affidavit that this credit card information is required for the Tax Court appeal of Mega from the assessment of GST. I must admit that I could not find any precise explanation in the affidavit material or the Applicant's submissions explaining exactly why the requested information was required. It has simply been asserted that it is necessary.

II. Issues

[23] The sole issue is whether the Applicant is entitled to an order under section 289.1 of the *ETA* compelling Amex to provide the CRA with information and documents about the primary cardholder of the Card pursuant to paragraphs 289 (1) (a) and 289 (1) (b) of the *ETA*, or whether the

CRA must first obtain judicial authorization for the production of such information and documents pursuant to subsections 289 (2) and 289 (3) of the *ETA*.

III. Legislation

[24] The relevant statutory provisions of the *ETA* are as follows:

Requirement to provide documents or information

289. (1) Despite any other provision of this Part, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of a listed international agreement or this Part, including the collection of any amount payable or remittable under this Part by any person, by notice served personally or by registered or certified mail, require that any person provide the Minister, within any reasonable time that is stipulated in the notice, with

- (a) any information or additional information, including a return under this Part; or
- (b) any document.

Unnamed persons

(2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection (1) to provide

Présentation de documents ou de renseignements

289. (1) Malgré les autres dispositions de la présente partie, le ministre peut, sous réserve du paragraphe (2) et, pour l’application ou l’exécution d’un accord international désigné ou de la présente partie, notamment la perception d’un montant à payer ou à verser par une personne en vertu de la présente partie, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d’une personne, dans le délai raisonnable que précise l’avis :

- a) qu’elle lui livre tout renseignement ou tout renseignement supplémentaire, y compris une déclaration selon la présente partie;
- b) qu’elle lui livre des documents.

Personnes non désignées nommément

information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection (3).

Judicial authorization

(3) On ex parte application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) where the judge is satisfied by information on oath that

- (a) the person or group is ascertainable; and
- (b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Part.

Service of authorization

(4) Where an authorization is granted under subsection (3), the authorization shall be served together with the notice referred to in subsection (1).

Review of authorization

(5) Where an authorization is granted under subsection (3), a third party on whom a notice is served under subsection (1)

(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la livraison de renseignements ou de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

Autorisation judiciaire

(3) Sur requête ex parte du ministre, un juge peut, aux conditions qu’il estime indiquées, autoriser le ministre à exiger d’un tiers la livraison de renseignements ou de documents prévue au paragraphe (1) concernant une personne non désignée nommément ou plus d’une personne non désignée nommément — appelée « groupe » au présent article —, s’il est convaincu, sur dénonciation sous serment, de ce qui suit :

- a) cette personne ou ce groupe est identifiable;
- b) la livraison est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente partie.

Signification ou envoi de l’autorisation

(4) L’autorisation accordée en application du paragraphe (3)

may, within fifteen days after the service of the notice, apply to the judge who granted the authorization or, where that judge is unable to act, to another judge of the same court for a review of the authorization.

Powers on review

(6) On hearing an application under subsection (5), a judge may

- (a) cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs (3)(a) and (b) have been met; or
- (b) confirm or vary the authorization if the judge is satisfied that those conditions have been met.

Compliance order

289.1 (1) On summary application by the Minister, a judge may, despite subsection 326(2), order a person to provide any access, assistance, information or document sought by the Minister under section 288 or 289 if the judge is satisfied that

- (a) the person was required under section 288 or 289 to provide the access, assistance, information or document and did not do so; and
- (b) in the case of information or a document, the

doit être jointe à l'avis visé au paragraphe (1).

Révision de l'autorisation

(5) Le tiers à qui un avis est signifié ou envoyé conformément au paragraphe (1) peut, dans les 15 jours suivant la date de signification ou d'envoi, demander au juge qui a accordé l'autorisation prévue au paragraphe (3), ou, en cas d'incapacité de ce juge, à un autre juge du même tribunal de réviser l'autorisation.

Pouvoir de révision

(6) À l'audition de la requête prévue au paragraphe (5), le juge peut annuler l'autorisation accordée antérieurement s'il n'est pas convaincu de l'existence des conditions prévues aux alinéas (3)a) et b). Il peut la confirmer ou la modifier s'il est convaincu de leur existence.

Ordonnance

289.1 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 326(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 288 ou 289 s'il est convaincu de ce qui suit :

- a) la personne n'a pas fourni l'accès, l'aide, les

information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 293(1)).

Notice required

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

Judge may impose conditions
(3) The judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

Contempt of court

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

Appeal

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by

renseignements ou les documents bien qu'elle en soit tenue par les articles 288 ou 289;
b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 293(1), ne peut être invoqué à leur égard.

Avis

(2) La demande n'est entendue qu'une fois écoulés cinq jours francs après signification d'un avis de la demande à la personne à l'égard de laquelle l'ordonnance est demandée.

Conditions

(3) Le juge peut imposer, à l'égard de l'ordonnance, les conditions qu'il estime indiquées.

Outrage

(4) Quiconque refuse ou fait défaut de se conformer à l'ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.

Appel

(5) L'ordonnance visée au paragraphe (1) est susceptible d'appel devant le tribunal ayant compétence pour entendre les

a judge of the court to which the appeal is made.

appels des décisions du tribunal ayant rendu l'ordonnance. Toutefois, l'appel n'a pas pour effet de suspendre l'exécution de l'ordonnance, sauf ordonnance contraire d'un juge du tribunal saisi de l'appel.

[25] The relevant statutory provisions of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (*ITA*) are as follows:

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 comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,

- (a) any information or additional information, including a return of income or a supplementary return; or
- (b) any document.

Présentation de documents ou de renseignements

231(2). (1) Malgré les autres dispositions de la présente partie, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution d'un accord international désigné ou de la présente partie, notamment la perception d'un montant à payer ou à verser par une personne en vertu de la présente partie, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :

- a) qu'elle lui livre tout renseignement ou tout renseignement supplémentaire, y compris une déclaration selon la présente partie;
- b) qu'elle lui livre des documents.

Personnes non désignées nommément

Unnamed persons

(2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

Judicial authorization

(3) On ex parte application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) where the judge is satisfied by information on oath that

- (a) the person or group is ascertainable; and
- (b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

(c) and (d) [Repealed, 1996, c. 21, s. 58(1)]

Compliance

231.7 (1) On summary application by the Minister, a judge may, notwithstanding

(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la livraison de renseignements ou de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

Autorisation judiciaire

(3) Sur requête ex parte du ministre, un juge peut, aux conditions qu’il estime indiquées, autoriser le ministre à exiger d’un tiers la livraison de renseignements ou de documents prévue au paragraphe (1) concernant une personne non désignée nommément ou plus d’une personne non désignée nommément — appelée « groupe » au présent article — , s’il est convaincu, sur dénonciation sous serment, de ce qui suit :

- a) cette personne ou ce groupe est identifiable;
- b) la livraison est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente partie.

Signification ou envoi de l’autorisation

(4) L’autorisation accordée en

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)).

Notice required

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

Judge may impose conditions

(3) A judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

Contempt of court

(4) If a person fails or refuses to

application du paragraphe (3) doit être jointe à l'avis visé au paragraphe (1).

Révision de l'autorisation

(5) Le tiers à qui un avis est signifié ou envoyé conformément au paragraphe (1) peut, dans les 15 jours suivant la date de signification ou d'envoi, demander au juge qui a accordé l'autorisation prévue au paragraphe (3), ou, en cas d'incapacité de ce juge, à un autre juge du même tribunal de réviser l'autorisation.

Pouvoir de révision

(6) À l'audition de la requête prévue au paragraphe (5), le juge peut annuler l'autorisation accordée antérieurement s'il n'est pas convaincu de l'existence des conditions prévues aux alinéas (3)a) et b). Il peut la confirmer ou la modifier s'il est convaincu de leur existence.

Ordonnance

231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 326(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 288 ou 289 s'il est convaincu de ce qui suit :

- a) la personne n'a pas

comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

Appeal

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 288 ou 289;
b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 293(1), ne peut être invoqué à leur égard.

Avis

(2) La demande n'est entendue qu'une fois écoulés cinq jours francs après signification d'un avis de la demande à la personne à l'égard de laquelle l'ordonnance est demandée.

Conditions

(3) Le juge peut imposer, à l'égard de l'ordonnance, les conditions qu'il estime indiquées.

Outrage

(4) Quiconque refuse ou fait défaut de se conformer à l'ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.

Appel

(5) L'ordonnance visée au paragraphe (1) est susceptible d'appel devant le tribunal ayant

compétence pour entendre les appels des décisions du tribunal ayant rendu l'ordonnance. Toutefois, l'appel n'a pas pour effet de suspendre l'exécution de l'ordonnance, sauf ordonnance contraire d'un juge du tribunal saisi de l'appel.

IV. Arguments

A. Applicant's Arguments

[26] The Applicant took the position that a judge of this Court may order a person to provide any information and documents sought by the Minister under sections 288 or 289 of the *ETA* if the judge is satisfied that: (a) the person was required to provide the information under sections 288 or 289 and did not do so; and (b) the documents are not protected from disclosure by solicitor client privilege within the meaning of subsection 293 (1) of the *ETA*.

[27] The Applicant insists that pursuant to subsection 289 (1) of the *ETA*, any person who receives a notice by registered mail to provide the Minister with information or documents requested must do so if it appears that the Minister was acting for any purpose related to the administration or enforcement of the *Act* and the person was given a reasonable amount of time for production of the information or documents (*Canada (Minister of National Revenue) v. Marshall*, [2006] 3 C.T.C. 25 at para. 16 which deals with section 231 of the *ITA*). The Applicant insists that in interpreting “almost identical” provisions under the *ITA*, it has been determined that the Minister requires such broad powers to ensure the integrity of the self-assessing Canadian income tax system

(*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568 at paras. 18 and 35 - 38; *Redeemer Foundation v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 325, [2007] 3 F.C.R. 40 at paras. 38-39).

[28] The Applicant notes that the authority under subsection 289 (1) extends to third parties, and insists that the only stipulation under the *Act* is that the purpose of the requirement be “related to the administration or enforcement of this Part, including the collection of any amount payable or remittable under this Part” (*Canada (Minister of National Revenue) v. Cornfield*, 2007 FC 436).

[29] In this regard, the Applicant submits that Amex was personally served with the Requirement, had 30 days to provide the information, and that the Requirement was issued for a purpose related to the administration of the *ETA*.

[30] The CRA claims that it requires credit card information and documents from Amex for the Tax Court Appeal launched by Mega.

[31] The Applicant submits that no prior judicial authority pursuant to subsections 289 (2) or 289 (3) are required to compel Amex. The basis for this position is that in interpreting section 231.7 of the *ITA*, the Federal Court of Appeal concluded that where unnamed persons are not themselves under investigation – but where the names of unnamed persons are necessary for the investigation of a known party – then a third party served with a requirement must provide that

information (including the name of the unnamed person (*Artistic Ideas Inc. v. Canada (Customs and Revenue Agency)*), 2005 FCA 68, [2005] 2 C.T.C. 25 at para. 21 (*Artistic Ideas*); *Canada (Minister of National Revenue) v. Morton*, 2007 FC 503, [2007] 4 C.T.C. 108 at paras. 9 – 12 (F.C.) (*Morton*); *AGT Ltd. v. Canada (Attorney General)*, [1997] 2 F.C. 878, [1997] 2 C.T.C. 275 at para. 27 (F.C.A.); and in contrast see *Canada (Minister of National Revenue) v. Toronto Dominion Bank*, 2004 FCA 359, [2005] 2 C.T.C. 37 at paras. 7 – 8 (F.C.A.) (*Toronto Dominion*)).

[32] The Applicant also asserted that the information and documents are not protected by solicitor-client privilege. Amex insisted that it had not taken the position that this was an issue and had not asserted that the information and documents were so protected.

B. Respondents' Arguments

[33] The Respondent, Amex, asserts that the CRA is seeking information concerning the primary cardholder of the Card, and that the CRA has given no indication to Amex as to that identity of that individual. Therefore, that person is an unnamed person and, Amex insists, the CRA cannot impose on a third party like Amex the requirement to provide information or documents relating to that unnamed person without prior judicial authorization.

[34] Amex also insists that it has a statutory obligation not to disclose the records unless there is established legal authority to do so, and points to paragraph 244 (d) of the *Bank Act* and subsection 7 (3) of the *Personal Information Protection and Electronic Documents Act*, S.C.

2000, c. 5 (*PIPEDA*) to support this assertion. Additionally, Amex expresses concern about possible liability under *PIPEDA* if it is not diligent with respect to testing any “questionable authority” (Office of the Privacy Commissioner of Canada, *PIPEDA Case Summary #62*, p. 2).

[35] Amex takes the position that the Federal Court of Appeal’s decision in *Toronto Dominion* is entirely relevant to the matter at hand. In that case, a taxpayer who was being investigated deposited a cheque into an account at the Toronto Dominion Bank (TD) held by an individual who was not being investigated. The CRA sought to rely on subsection 231.2(1) of the *ITA* in issuing its requirement, a provision that also has the requirement of prior judicial authorization in related subsections. The Federal Court – Trial Division dismissed the CRA’s application and the Federal Court of Appeal dismissed the CRA’s appeal. Amex notes that, in doing so, the Federal Court of Appeal explained the purpose of subsection 231.2(2) as offering protection to both the third party with the information and the unnamed person about whom the information was being sought. Specifically, the Court wrote at para. 8:

The very purpose of subsections 231.2(2) and (3) is to protect unidentified persons who are not being investigated while making it possible in the interests of justice, and subject to judicial review, for information to be obtained on persons who are in fact under investigation.

[36] Amex insists that section 231.2 of the *ITA* is essentially identical to section 289 of the *ETA*. Amex further argues that it is in the same position as TD was, while the primary cardholder on the card is in the same position as the account holder was. Therefore, Amex’s position is that the CRA is obliged to obtain judicial authorization for requirements for information concerning unnamed third parties.

[37] Amex also submits that the Applicant has misinterpreted *Artistic Ideas* and suggests that it is “clearly” distinguishable from *Toronto Dominion*. In *Artistic Ideas*, the CRA was auditing a company – Artistic Ideas – that arranged the sale of art work to taxpayers, who would then donate that art to charities. The donors obtained tax deductions for the donations based on the appraised value of the work. The appraised value, however, exceeded the amount paid and thus a net financial benefit was obtained by the donors. The CRA required production of information and documents pursuant to subsection 231.2 (1) of the *ITA*, but Artistic Ideas would not provide the names of the donors or charities involved and challenged the matter in the Federal Court – Trial Division. The Trial Division found that the CRA was entitled to the names of the charities but not the names of the donors. This decision was appealed and the appeal was dismissed.

[38] Amex notes that the Court of Appeal determined that the evidence presented in the case indicated that the donors were intended to be subject of investigation by the CRA and therefore they were the type of person who were subject to subsections 231.2 (2) and (3) and thus judicial authorization was required. This was because the scheme of section 231.2 allows the Minister to require third parties to present information and documents pertaining to their compliance, but prevents the Minister from imposing a requirement on a third party to provide information or documents relating to unnamed persons whom he wishes to investigate, unless he first obtains the authorization of a judge.

[39] At the same time, Amex notes that the court reached a different decision regarding the charities, as subsections 231.2 (2) and (3) did not apply where the unnamed parties are not

themselves under investigation and there was no evidence that the Minister wished to have their names to verify their compliance.

[40] Given the above, Amex distinguished *Toronto Dominion* and *Artistic Ideas* on the basis that Amex is not under investigation by the CRA the way that *Artistic Ideas* was, and suggests that the comment from the Court of Appeal that “where unnamed persons are not themselves under investigation, subsections 231.2 (2) and (3) do not apply” was made in the context of the CRA investigating the third party itself. Amex notes that the court qualified its comment by stating that “in such cases the names of unnamed persons are necessary solely for the Minister’s investigation of the third party”.

[41] Amex suggests that the logic of the court appears to be that if unnamed persons are not subject to investigation themselves, the information concerning the unnamed persons was, by inference, necessary for the investigation of the third party itself (a finding made by the Trial Division regarding the charities in *Artistic Ideas*). Thus in an *Artistic Ideas*-like situation the unnamed party’s privacy is lawfully compromised as an incidental part of an authorized investigation, while in *Toronto Dominion*-like situation an unnamed party’s privacy would be violated without any express connection to any investigation.

[42] Amex notes that *Artistic Ideas* makes no mention of *Toronto Dominion*.

[43] Finally, Amex suggests that the summary of the CRA's position in *Capital Vision, Inc. v. Canada (Minister of National Revenue - M.N.R.)*, 2002 FCT 1317, 226 F.T.R. 159 at paras. 46-47, bolsters its position in that it suggests that the Minister has previously interpreted the section as being meant to avoid a "fishing expedition" where neither of the parties served with the requirement, nor any person at whom the requirement was targeted, were under investigation.

V. Analysis

[44] I accept that section 289 of the *ETA* is similar to section 231.2 of the *ITA*. Therefore, the result in this case is dependent on determining the applicability of *Toronto Dominion* and *Artistic Ideas*.

[45] Considering both *Toronto Dominion* and *Artistic Ideas*, I find that the present matter has a factual basis similar to what occurred in *Toronto Dominion*.

[46] In the present case, as it was in the case of *Toronto Dominion*, there is an unrelated third party who is not the subject of an investigation being asked to provide information about an unnamed party who is the subject of an investigation. Further, *Toronto Dominion* was also decided in the context of a third party bank being asked to provide information; information for the improper production of which it could be held liable. In *Artistic Ideas*, and in *Morton* where Deputy Justice Strayer asserted his preference for the approach taken in *Artistic Ideas*, the "third party" was the party being investigated. In those cases, the unnamed parties whose information

was found not to be covered by subsections 231.2 (2) and (3) were parties who were not being investigated and whose information was required for the investigation of the “third party”.

[47] As noted above, in *Morton* Deputy Justice Strayer preferred the approach to subsection 231.2 (2) taken in *Artistic Ideas*. He preferred it because he took the view that it better expressed the intention of subsection 231.2(2). Indeed, the approach taken in *Artistic Ideas* has some appeal.

[48] The idea that the purpose of the subsection is to prevent “fishing trips” by the Minister - without prior judicial authorization – only for information about individuals who will the subject of an investigation is reflected in the requirements in subsection 231.2(3). There, as in the section at issue in this case, in order to receive judicial authorization, the Minister must satisfy a judge that the requirement is made to verify the compliance by the person or persons in the group with any duty or obligation under the *Act*.

[49] Reading that in connection with 231.2 (2), it is easy to see how one could take the view that the unnamed person or group of persons being referred to must be the intended subject of an investigation. The alternative approach, whereby subsection 231.2 (2) is read such that it covers all unnamed persons or groups of persons, would mean that the Minister could never receive information about unnamed parties that is incidentally necessary for an investigation because the Minister could not meet the requirements of subsection 231.2 (3). Indeed, given the situation in *Artistic Ideas*, I can see why the Court followed the path that it did. In that case, a third party under investigation could have benefited from the protection being afforded to others who were

not the subject of investigation – and therefore unattainable under subsection 231.2 (3) - but whose information was necessary for the investigation of the third party.

[50] However, in *Toronto Dominion* this sort of problem was almost explicitly contemplated.

At para. 6 the court wrote:

As he does not know the holder of the account, the Minister clearly could not say on oath that he was certain the requirement of information was made to verify compliance by that individual with any duty or obligation under the Act, and if he appeared before a judge it would be impossible for him to meet the requirements of paragraph 231.2 (3)(b). Accordingly, as I understand the argument, subsection 231.2(2) could not be relied on by the Minister ...

[51] The Court then goes on to reject the argument that subsection 231.2 (1) could be used to act without judicial authorization on the basis that it would invalidate 231.2 (2) and (3) and the protection they provide to third parties (such as banks) that want to be sure that they have a legal duty to provide information and those individuals who provided the information who want to ensure their privacy is protected. Meeting those objectives through the requirement to obtain prior judicial authorization was the purpose of those provisions according to the Court. Indeed, at para. 8 the Court noted:

The very purpose of subsections 231.2(2) and (3) is to protect unidentified persons who are not being investigated while making it possible in the interests of justice, and subject to judicial review, for information to be obtained on persons who are in fact under investigation.

[52] Therefore, the question arises as to what kind of “fishing trip” were sections 231.2 of the ITA and 289 of the *ETA* aimed at? As noted above, *Toronto Dominion* and *Artistic Ideas* provide

completely different answers to that question, and it is difficult to reconcile these cases as to the applicability of subsection 231.2.

[53] In summary, both answers found in *Toronto Dominion* and *Artistic Ideas* are persuasive and both recognize the broad powers the Minister possesses to obtain information required to apply the provisions of these Acts.

[54] I believe, as my colleagues did, that *Artistic Ideas* governs the matter involved in this case (*Morton*, above; *Canada (Minister of National Revenue - M.N.R.) v. Advantage Credit*, 2008 FC 853, [2008] F.C.J. No. 1095 (QL) by Justice Mandamin). The principle of judicial comity should apply here, see: *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2007 FC 446, (2008) 1 F.C.R. 62 at paras. 684 to 691.

[55] Furthermore, the recent decision of the Supreme Court of Canada in *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, 2008 D.T.C. 6474, confirms that the Minister's broad powers to inspect, audit and examine tax payers' records authorize the obtaining of information about unidentified donors of a registered charitable association without judicial authorization under section 231.2 of the *ITA*. I believe this reinforces the positions my colleagues and I have taken on this subject.

[56] Therefore, the application must be granted.

ORDER

THIS COURT ORDERS that:

1. The application be granted;
2. The respondent shall comply with the requirement of information issued pursuant to section 289.1 of the *Excise Act*, 1985, c. E. 15, required by the applicant from the respondent on January 20, 2007, to provide in particular the “name of the individual that holds the primary card for the supplementary card number 3733-202207-31013 (Mohamad Nizam), within thirty (30) days after being served with this order.

"Orville Frenette"

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2208-07

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE
v.
AMEX BANK OF CANADA

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 9th 2008

**REASONS FOR ORDER
AND ORDER BY:** DEPUTY JUDGE FRENETTE

DATED: August 27th 2008

APPEARANCES:

Ronald MacPhee FOR THE APPLICANT

Graham Reynolds FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, FOR THE APPLICANT
Deputy Attorney General of Canada

OSLER, HOSKIN & HARCOURT LLP FOR THE RESPONDENT
Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8