

Supreme Court expands CRA's investigative powers over charities

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The Supreme Court of Canada has expanded the CRA's investigative powers over charities and their donors, and reduced the privacy protections provided to donors under the *Income Tax Act* (the "Act"). *Redeemer Foundation v. M.N.R.* involved a dispute concerned with whether the Canada Revenue Agency ("CRA") is entitled to request information about unnamed donors from a charity under audit without first obtaining judicial authorization for the request. In a 4-3 decision, released in July 2008, a majority of the Court held that the CRA was entitled to request this information without prior judicial oversight.

The Redeemer Foundation ("Foundation") operated a forgivable loan program for the students of Redeemer University College. The CRA took the position that contributions to the program were not valid charitable donations because they were made by parents of students attending the College. The CRA sought additional information about the transactions, and in particular the names of the donors and students whose loans were forgiven. The CRA audited the Foundation for taxation years 1997 to 2000.

During those audits, the CRA made requests for donor lists. The Foundation initially complied with these requests, and the CRA sent notices of reassessment to several donors.

In a follow up meeting in 2004, the CRA requested additional donor lists for the 2002 and 2003 taxation years. The Foundation, on the advice of counsel, refused to comply, relying on subsection 231.2(2) of the Act, which states that the CRA must obtain judicial authorization before requiring the production of information relating to unnamed persons. The CRA had not obtained judicial authorization for either of its requests.

In 2005, the Foundation brought an application for judicial review of the legitimacy of the CRA's requests, seeking to vacate the reassessments sent to the donors by the CRA. Speaking for the Federal Court, Judge Robert Hughes held that the CRA had exceeded its authority in requesting the donor lists without first obtaining judicial authorization. However, the Federal Court of Appeal overturned this decision, stating that since the Foundation, as a



registered charity, was required to maintain the names of its donors in its records, the CRA was entitled in the course of an audit of the Foundation to request this information without prior judicial approval. The Foundation appealed to the Supreme Court of Canada.

A majority of the Court dismissed the Foundation's appeal. Chief Justice Beverly McLachlin and Justice Louis LeBel followed the reasoning of the Federal Court of Appeal, noting that the Foundation was required to collect donor information under subsection 230(2)(a). The majority held that the broad audit powers under section 231.1 entitled the CRA to request information required to be kept by the charity, and rejected the argument that judicial authorization would be required where the purpose of the request is to reassess the donors, rather than to verify the Foundation's compliance.

It held that subsection 231.2(2) applies where the CRA seeks information on unnamed persons outside of the audit context. Although McLachlin and LeBel acknowledged there was

a risk that the CRA would abuse its audit powers to obtain information on unnamed persons, they dismissed this risk as "minimal." They stated that taxpayers have a low expectation of privacy in their business records.

Justice Marshall Rothstein, Justice Ian Binnie and Justice Marie Deschamps disagreed with the majority. Rothstein stated that subsection 231.2(2) was enacted to provide some measure of protection against the CRA's broad powers. He stated that if the CRA could simply request information on unnamed taxpayers using its audit powers, the protection afforded in subsection 231.2(2) would be rendered "at best, a feeble requirement and, at worst, totally ineffective." He noted that this was not a case in which the CRA sought the information solely to verify the Foundation's compliance, but rather also for the dual purpose of reassessing the donors. He stated that taxpayer protection provisions should be rigorously followed by the CRA, and that it exceeded its authority in requesting the

donor lists from the Foundation without judicial authorization.

As a result of this decision, charities may now be expected to disclose information about their donors in response to the CRA requests without knowing the reason for the request, which may have a chilling effect in philanthropic circles. It's possible that this decision will be confined to its own facts, due to the nature of the CRA's concerns over connections between donors and students, the names of the donors were deemed necessary for the audit of the Foundation.

Where the donor names are not necessary to verify the charity's compliance, and CRA's sole purpose in requesting the names of donors is to reassess them, it could be argued that the CRA should not rely on this decision to support the proposition that judicial authorization is not required. Finally, this decision would not apply where the CRA seeks information on unnamed persons from true third parties not under audit. In that circumstance, the CRA would still need to obtain judicial authorization. ■