

Date: 20080417

Docket: A-105-08

Citation: 2008 FCA 141

Present: SHARLOW J.A.

BETWEEN:

eBAY CANADA LIMITED AND eBAY CS VANCOUVER INC.

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on April 14, 2008.

Order delivered at Toronto, Ontario, on April 17, 2008.

REASONS FOR ORDER BY:

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REASONS FOR ORDER

SHARLOW J.A.

[1] The appellants eBay Canada Limited and eBay Cs Vancouver Inc. (collectively, “eBay Canada”) have appealed the judgment of Justice Hughes dated February 13, 2008 (2008 FC 180).

That judgment authorizes the Minister of National Revenue to require eBay Canada, under subsection 231.2(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), to provide information to the Minister about PowerSellers whose eBay registration indicates a Canadian address. The required information includes the names of the PowerSellers, their contact information, and the amount of their gross annual eBay sales. Before me is a motion by eBay Canada to stay the execution of the

judgment until the disposition of the appeal. For the reasons that follow, the motion will be dismissed.

Statutory framework

[2] The Canadian income tax system is a self-reporting and self-assessing system. It depends largely upon the honesty and integrity of taxpayers, who are required to file annual returns in which they estimate their income tax liability (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627). At the same time the Minister, who is responsible for the administration and enforcement of the *Income Tax Act*, is given significant statutory powers to enable him to identify incidents of non-compliance and to take corrective action.

[3] The powers of the Minister include a number of tools that permit the Minister to compel the production of information the Minister considers necessary to fulfil his mandate. One of those tools is found in subsection 231.2(1) of the *Income Tax Act*. It reads in relevant part as follows:

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), [...] by notice served personally or by registered or certified mail, 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

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), [...] 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 fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de

(b) any document.

revenu ou une déclaration
supplémentaire;
b) qu'elle produise des
documents.

[4] The statutory predecessor to subsection 231.2(1), former subsection 231(3) of the *Income Tax Act*, 1970-71-72, c. 63, was considered in *James Richardson & Sons Limited v. M.N.R.*, [1984] 1 S.C.R. 614. In that case Justice Wilson, writing for the Court, held that former subsection 231(3), properly interpreted, did not permit the Minister to require a broker to identify its clients so that the Minister could determine whether further examination of the clients' tax affairs was warranted.

[5] A number of changes were made to the *Income Tax Act* in response to the *James Richardson* case. One of those changes was the enactment of subsection 231.2(2). It permits the Minister, in certain circumstances, to compel the production of information about unnamed persons if the Minister first obtains the approval of a judge (defined in section 231 to mean a judge of the Federal Court or a judge of the superior court of the relevant province or territory).

[6] Typically, the Minister has recourse to subsection 231.2(2) when he wishes to verify whether an ascertainable class of persons has complied with the *Income Tax Act*, and information relevant to that question is accessible by someone who has no statutory obligation to provide it to the Minister in the form of an information return or in the course of the Minister's examination of the person's own tax affairs. Subsection 231.2(2) reads as follows:

231.2 (2) The Minister shall not

231.2 (2) Le ministre ne peut exiger de

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).

quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production 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).

[7] Under subsection 231.2(2), the target of the *ex parte* application – the person who will have a legal obligation to comply with the requirement if judicial authorization is granted – is referred to as the “third party”. The “unnamed persons” are those whose tax affairs may be examined by the Minister if and when the unnamed persons are identified.

[8] The procedure to be followed where the Minister wishes to seek judicial authorization to compel the production of information about unnamed persons is set out in subsections 231.2(3) to (6). If the application is successful and the Minister acts on the authorization, the third party has an opportunity to apply to the same judge, or a judge of the same court, for a review of the authorization. That review may result in the authorization being cancelled, confirmed or varied.

Subsections 231.2(3) to (6) read as follows:

231.2 (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

231.2 (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 fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une personne non désignée nommément ou plus d’une personne non désignée nommément — appelée « groupe » au

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.

(4) Where an authorization is granted under subsection 231.2(3), it shall be served together with the notice referred to in subsection 231.2(1).

(5) Where an authorization is granted under subsection 231.2(3), a third party on whom a notice is served under subsection 231.2(1) may, within 15 days after the service of the notice, apply to the judge who granted the authorization or, where the judge is unable to act, to another judge of the same court for a review of the authorization.

(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs 231.2(3)(a) and 231.2(3)(b) have been met and the judge may confirm or vary the authorization if the judge is satisfied that those conditions have been met.

présent article —, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :

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

(4) L'autorisation accordée en vertu du paragraphe (3) doit être jointe à l'avis visé au paragraphe (1).

(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.

(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.

[9] Where an *ex parte* application under subsection 231.2(3) is made to a judge of the Federal Court and granted, the judicial authorization takes the form of a judgment. If the third party seeks a

review of the authorization, there will be a further judgment that either cancels, confirms or varies the authorization. A judgment cancelling, confirming or varying the authorization may be appealed to this Court pursuant to section 27 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[10] Pursuant to subsection 238(1) of the *Income Tax Act*, it is an offence to fail to comply with a section 231.2 requirement. A conviction for that offence may result in a fine or imprisonment or both. Also, section 231.7 provides that if a person fails to comply with a section 231.2 requirement, the Minister may seek a compliance order. Failure to obey a compliance order may result in a penalty for contempt of court.

Facts

[11] The appellant eBay Canada Limited is a Canadian corporation based in Toronto, Ontario. It is wholly owned by a Swiss corporation, eBay International AG, which is a wholly owned subsidiary of eBay Inc., a United States corporation with a head office in San Jose, California.

[12] The appellant eBay CS Vancouver Inc. is a Canadian corporation based in Burnaby, British Columbia. It is a wholly owned subsidiary of eBay Inc.

[13] The eBay group of corporations operates an online platform that enables persons to buy and sell items via the internet. It also operates a system known as “PayPal” which facilitates payments from buyers to sellers. None of the eBay corporations are parties to sales made through eBay. They

merely provide the marketplace, the means by which buyers and sellers can get together and complete sales transactions.

[14] The eBay marketplace operates internationally. The operation of the eBay marketplace outside the United States is run through eBay International AG. Certain aspects of the operation of the eBay marketplace in Canada are run through eBay Canada. It is not necessary at this point to describe how the work involved in operating the eBay marketplace is divided between eBay Inc., eBay International AG, eBay Canada Limited, and eBay CS Vancouver Inc. It is sufficient to say that the information the Minister wishes to obtain from eBay Canada can be found in electronic form in servers located in the United States, in the offices of eBay Inc. It is also undisputed that the information in question is accessible by eBay Canada.

[15] A person who makes a certain volume of monthly sales through eBay, and who meets certain other conditions, may qualify as a “PowerSeller”. A PowerSeller is entitled to receive certain advantages from eBay, such as prioritized support services and access to special promotions. There are five levels of PowerSeller status, ranging from monthly sales of US \$1,000 to monthly sales of US \$150,000.

[16] On October 25, 2006, the Minister made an *ex parte* application to the Federal Court (T-1868-06) under subsection 231.2(3) of the *Income Tax Act*, seeking an order authorizing the Minister to require eBay Canada to provide:

. . . the following information and documents for any person (including individual,

corporation and joint venture) who qualified for the PowerSeller status under eBay's PowerSeller program in Canada at any time during the two calendar years 2004 and 2005:

- (a) account information – full name, userid, mailing address, billing address, telephone number, fax number and email address, and
- (b) merchandise sales information – gross annual sales.

Using the terminology of subsection 231.2(3), eBay Canada is the “third party” and the persons who qualified for PowerSeller status under the PowerSeller program in Canada in 2004 and 2005 are the “unnamed persons”.

[17] The Minister's *ex parte* application was supported by the affidavit of a tax official stating that the information was being sought in order to enable the Minister to determine whether the specified PowerSellers had complied with their obligations under the *Income Tax Act*. On November 6, 2006, Justice Hughes granted the order requested by the Minister except that he added the words “having a Canadian address according to your records”. Thus, the Minister was authorized to require eBay Canada to provide:

. . . the following information and documents for any person having a Canadian address according to your records (including individual, corporation and joint venture) who qualified for the PowerSeller status under eBay's PowerSeller program in Canada at any time during the two calendar years 2004 and 2005:

- (c) account information – full name, userid, mailing address, billing address, telephone number, fax number and email address, and
- (d) merchandise sales information – gross annual sales.

[18] On November 15, 2006, the Minister served eBay Canada with the requirements and, pursuant to subsection 231.2(4), a copy of the authorization granted by Justice Hughes. That gave eBay Canada the right to apply to Justice Hughes under subsection 231.2(5) for a review of the authorization.

[19] On November 30, 2006, eBay Canada exercised that right by filing an originating application (T-2124-06). Justice Hughes heard oral evidence on that application on September 13, 2007. On September 18, 2007, he issued reasons and a partial judgment in which he amended his November 6, 2006 judgment to replace the words “having a Canadian address according to your records” with the words “registered as having a Canadian address”. That change was based on the evidence of eBay that the information sought by the Minister was not contained in records belonging to eBay Canada, but in records belonging to eBay Inc.

[20] The September 18, 2007 partial judgment also required the parties to make further submissions on a point of law that was then under consideration in this Court in *Le Ministre du Revenu National c. Chambre Immobilière du Grand Montréal*, (A-435-06). Judgment was rendered in that case on November 2, 2007 (2007 FCA 346). Leave to appeal to the Supreme Court of Canada has been sought (Supreme Court of Canada File 32404).

[21] In due course the parties made their submissions to Justice Hughes on the *Chambre Immobilière du Grand Montréal* case. On February 13, 2008, Justice Hughes determined that nothing in that decision required any change to his previous judgment. Therefore, he confirmed his

November 6, 2006 authorization, subject to the change ordered on September 18, 2007. Thus, by virtue of the judgment of Justice Hughes dated February 13, 2008, the Minister is authorized to require eBay Canada to provide:

... the following information and documents for any person registered as having a Canadian address (including individual, corporation and joint venture) who qualified for the PowerSeller status under eBay's PowerSeller program in Canada at any time during the two calendar years 2004 and 2005:

- (e) account information – full name, userid, mailing address, billing address, telephone number, fax number and email address, and
- (f) merchandise sales information – gross annual sales.

[22] On February 22, 2008, the Minister served eBay Canada with a letter stating that eBay Canada was required, within 45 days, to provide the information referred to in the judgment.

[23] On March 7, 2008, eBay Canada appealed the February 13, 2008 judgment. Before me is a motion by eBay Canada for an order staying the execution of that judgment pending the disposition of the appeal.

[24] The judgment under appeal was executed on February 22, 2008 when the Minister served eBay Canada with the requirement. It follows that it is now too late to make an order staying the execution of the judgment. What eBay Canada is actually seeking is an order staying the judgment itself. That would suspend the legal obligation of eBay Canada to comply with the Minister's requirement. As a consequence, the Minister would be precluded from relying on the judgment as a

basis for taking enforcement action against eBay Canada in relation to the section 231.2 requirement until the disposition of the appeal. I have dealt with the motion on that basis.

[25] The requirement letter states that eBay Canada was to provide the required information within 45 days (that is, within 45 days of February 22, 2008). Although both parties took reasonable steps to have this motion dealt with quickly, the 45 day period had expired by the time eBay Canada's motion was heard. However, I was informed at the hearing that the Minister had consented to a postponement of the deadline pending the disposition of this motion.

Discussion

[26] The parties agree that a motion to stay a judgment pending appeal should be determined on the basis of the principles in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Therefore, it is necessary to consider whether eBay Canada has an arguable case on appeal, whether eBay Canada would suffer irreparable harm if the stay is not granted and its appeal succeeds, and whether the balance of convenience lies with eBay Canada or the Minister.

Arguable case

[27] The Minister concedes that eBay Canada has an arguable case on appeal. In my view, that concession is appropriate given the low bar for the first branch of the *RJR – MacDonald* test.

Irreparable Harm

[28] The motion of eBay Canada for a stay of the judgment pending appeal rests primarily on the irreparable harm branch of the *RJR – MacDonald* test. According to *RJR – MacDonald*, irreparable harm is harm that cannot be quantified in monetary terms or that cannot be cured.

[29] It is argued for eBay Canada that the disclosure of the information in issue would necessarily result in irreparable harm to eBay Canada because the disclosure would render eBay Canada's appeal moot or futile. In support of its argument, eBay Canada cites *Bisaillon v. Canada*, (1999) 251 N.R. 225, [2000] 1 C.T.C. 179, 99 D.T.C. 5517 (F.C.A.), *Bining v. Canada*, 2003 FCA 286, and *Rousseau v. Wyndowe*, 2006 FCA 422.

[30] I summarize the *Bisaillon* case as follows. A corporation, Hypnat Ltée, owed taxes of \$230,000. Another corporation, Hypnat Ltée, Courtier, owed Hypnat Ltée a debt of approximately \$1.6 million, which the Minister had attached to secure the tax debt of Hypnat Ltée. The Minister wished to determine whether Hypnat Ltée, Courtier had paid its debt to Hypnat Ltée in contravention of the attachment. Hypnat Ltée was a customer of Laurentian Bank. The Minister served Laurentian Bank with a requirement under subsection 231.2(1) to provide information about Hypnat Ltée, Courtier. Mr. Bisaillon, Hypnat Ltée, and Hypnat Ltée, Courtier (not Laurentian Bank) commenced an application in the Federal Court challenging the validity of the requirement, and sought an interlocutory order staying the requirement pending the determination of its application for judicial review. That motion was dismissed. The applicants appealed to this Court, and moved for an order staying the requirement pending the determination of the appeal. On the

question of irreparable harm, the Court concluded that if the stay were not granted and the information was disclosed, the appeal would be rendered moot or futile, causing irreparable harm to the applicants. However, the irreparable harm to the applicants was the result of the disclosure of information relating to their own affairs. The Court did not decide, and was not required to consider, whether the target of the requirement, Laurentian Bank, would suffer irreparable harm by being compelled to produce information about the applicants.

[31] In *Bining*, the Minister had served Mr. Bining with a requirement under subsection 232.2 (1) to provide information about his own tax affairs. Mr. Bining commenced an application in the Federal Court for judicial review of that requirement, and moved for a staying pending the determination of that application. The Federal Court dismissed his motion for a stay. Mr. Bining appealed that decision to this Court, and moved for a stay of the requirement pending appeal. Again, irreparable harm was found because the disclosure of the information would render the appeal moot, but in the context of information related to Mr. Bining's own affairs, not the affairs of some other person.

[32] *Rousseau v. Wyndowe* involves an analogous situation. Dr. Wyndowe had been ordered by the Federal Court to disclose to Mr. Rousseau certain notes he made while conducting a medical examination of Mr. Rousseau for insurance purposes. Dr. Wyndowe's application for a stay of the judgment pending appeal was granted because the disclosure of his notes would render his appeal moot. However, that conclusion was made in the context of a situation where, if Dr. Wyndowe's appeal were well founded, his own legal rights would be irreparably infringed by the disclosure.

[33] It is argued for eBay Canada that these cases stand for the principle that a person who is required by a court order to disclose information about another person, and seeks a stay of that judgment pending appeal, will always suffer irreparable harm if the stay is not granted. I do not accept that argument. I read these cases as examples of situations in which persons may suffer irreparable harm if they are denied a stay pending appeal of a judgment requiring them to disclose or submit to the disclosure of information about their own affairs to someone whose interest in the information is adverse to their own. In this case, the relevant question is whether eBay Canada would suffer irreparable harm if it is now compelled to provide the Minister with the information the Minister seeks about PowerSellers, and it is later determined that the Minister was not entitled to require eBay Canada to provide that information.

[34] It is argued for eBay Canada that once information about PowerSellers is disclosed to the Minister, it cannot be undisclosed. I agree that the disclosure of information is an act that cannot be reversed. In response to that point, the Minister argues that it is open to eBay Canada to seek, as one of the remedies on appeal, an order that would prevent the Minister from using the disclosed information. The difficulty with that submission is that it is not certain that such an order would be granted if the appeal is successful. And even if such an order is granted, it would be ineffective to the extent that the Minister uses the disclosed information before the disposition of the appeal.

[35] However, the relevant question is whether eBay Canada would suffer irreparable harm from the disclosure, which first requires a determination that there will be some harm. The answer to that

question depends on what the Minister is likely to do with the information if it is disclosed. It would appear that the Minister intends to use the information to retrieve and review the 2004 and 2005 income tax returns of the PowerSellers whose identities are disclosed. I anticipate that the Minister would then make whatever enquiries may be required to determine whether the PowerSellers have unreported income from their eBay sales, and if so he would reassess them accordingly (putting aside for the moment the question that some of the tax returns might be statute barred by the time the Minister is in a position to reassess).

[36] The record contains no evidence that any steps the Minister may take to verify the PowerSellers' compliance with the *Income Tax Act* , or to assess any PowerSellers who may not have complied, will cause any harm to eBay Canada, much less harm that is irreparable.

[37] The record contains some material from which it could be inferred that eBay Canada has contractual obligations to eBay Inc. not to disclose certain confidential information without the consent of eBay Inc. It is not clear that the information sought by the Minister about PowerSellers is confidential information as contemplated in those contracts. Even if the information about PowerSellers is confidential information under those contracts, it is not clear that eBay Canada's obligation not to disclose confidential information would or could be breached by the disclosure of information pursuant to a court order (even a court order that is under appeal). And, even if such a breach would or could result from such a disclosure, there is no evidence that any harm would come to eBay Canada as a result.

[38] I conclude that the eBay Canada has not established that it will suffer any harm from being compelled to disclose the information the Minister is seeking about PowerSellers. That is a sufficient basis for dismissing the motion of eBay Canada for a stay.

Balance of Convenience

[39] On the question of the third branch of the *RJR – MacDonald* test, the Minister argues that the balance of convenience favours the Minister because some of the information sought relates to the 2004 taxation year, and it may be assumed that most tax returns for that year will become statute barred in 2008 under s. 152(4) of the *Income Tax Act*.. Some of those returns may already be statute barred, and with each day there is a risk that others will become statute barred. I agree with the Minister that this is a relevant consideration in cases such as this. I would also note that the Minister's interest in fulfilling his mandate to determine whether PowerSellers have met their statutory obligations coincides with the public interest in the integrity of the Canadian income tax system. In the circumstances of this case, that is a consideration that outweighs any interest eBay Canada may have in not disclosing information about PowerSellers.

Indemnity if the stay is granted

[40] The Minister has submitted that if the stay is granted, it should be subject to the condition that eBay Canada indemnify the Minister for any tax revenue lost to the Crown because of the delay in disclosing the information in issue. I am aware of no case in which such a condition has been imposed in the context of a dispute as to the scope of the Minister's statutory authority to compel a third party to produce information about unnamed persons. I find it difficult to imagine a situation in

which it would be reasonable to impose that burden on a third party. In this case, if I had decided to grant the stay, I would not have imposed such a condition on eBay Canada.

Conclusion

[41] The motion will be dismissed. Costs of the motion will be costs in the cause.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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