

FC's Surprise Rejection of CRA Data Request

In *Canada (National Revenue) v. Hydro-Québec* (2018 FC 622), the FC rejected a request (pursuant to ITA section 231.2 and ETA subsection 289(3)) from the minister to obtain information about a majority of the business customers of Hydro-Québec (HQ)—including their names, addresses, and late-payment history—within the previous 24 months. The court denied the request, even though HQ had not objected to it, and despite the contrary result in *Canada v. PayPal Canada Co.* ([2017] GSTC 93 (FC)), rendered a few months earlier, in which the minister had obtained the names of all persons that held corporate accounts with PayPal Canada. The fact situations of the two cases appear to be similar, although the request in *PayPal* included financial data and was aimed at verifying the activities of the targeted persons in order to "combat the underground economy."

The ITA and ETA provisions prevent the minister from issuing a requirement to provide information relating to unnamed persons without first obtaining judicial authorization, which can be granted only if (1) the persons targeted by the request form an ascertainable group and (2) the requirement is made in order to verify compliance by the unnamed persons with any duty or obligation under the statute. The minister argued that the application should be granted because it targeted an ascertainable group of persons—namely, a specific subset of HQ's business customers—and was being made as part of a "tax audit conducted in good faith in order to verify a duty or an obligation."

The FC noted that the minister had never raised any suspicions about HQ's business customers, nor did she explain which customers were HQ's "business customers" or how many of HQ's 4.3 million customers were targeted. In addition, the information sought was not of a financial nature, and it appeared that it would only be used for cross-referencing with databases already available to the CRA.

The court's analysis emphasized the judicial discretion contemplated by ITA section 231.2. In particular, this discretion, the role of which is to prevent abusive inquiries by tax authorities, applies even when both conditions set out in the legislation are met, and notwithstanding any consent given by the respondent (in this case, HQ).

The FC concluded that its intervention was necessary in order to avoid the unjustified invasion of privacy of a large number of Quebecers. First, the group described was not ascertainable: "Indiscriminately, the applicant is creating a group with no genuine factual basis in terms of the application or enforcement of the ITA for this group." Second, the information sought would not allow the CRA to verify compliance with a duty or obligation under the statute, since the information was being collected merely in anticipation of an eventual tax audit. For the minister to seek to obtain judicial authorization on the sole basis that she has the authority to request the same information from named persons is tantamount to a fishing expedition.

At a time when personal data are typically stored in digital format, the *PayPal* decision appeared to pave the way for placing an exponentially increased amount of information within the grasp of the tax authorities. Practitioners should therefore welcome both the conclusion in *Hydro-Québec* and the legal analysis applicable to requirements for information. The contrast between the two decisions reminds us of the possible drawbacks of the digital age and of the inherent limitations on the tax authorities' audit powers.

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