

Date: 20021219

Docket: T-493-00

Neutral citation: 2002 FCT 1317

BETWEEN:

CAPITAL VISION, INC., CVI ART MANAGEMENT INC., CVI MANAGEMENT  
INC., THE CAPITAL VISION GROUP INC., BDO DUNWOODY LLP, 671514  
ONTARIO LTD., 1271724 ONTARIO INC., GREG COLEMAN, RALPH T.  
NEVILLE, GERRY JOHN HOGENHOUT and PAUL BAIN

Applicants

App

and

MINISTER OF NATIONAL REVENUE

Respondent

Resp

REASONS FOR ORDER

HENEGHAN J.

INTRODUCTION

[1] Capital Vision Inc., CVI Art Management Inc., CVI Management Inc., the Capital Vision Group Inc., BDO Dunwoody LLP, 671514 Ontario Ltd., 1271724 Ontario Inc., Greg Coleman, Ralph T. Neville, Gerry John Hogenhout and Paul Bain (the "Applicants") seek judicial review of a decision of the Minister of National Revenue (the "Minister") made pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1(5th Supp.) (the "Act"). The decision consisted of the service upon the Applicants of certain letters requiring them to provide information and documents to the Minister. The requirements letters ("new requirements") were issued pursuant to section 231.2 of the Act and were served on February 15, 2000.

[2] In this proceeding, the Applicants seek the following relief:

- (a) an Order declaring that the decision of the Minister to serve the requirements on the Applicants was invalid and unlawful;
- (b) an Order declaring that the Minister acted without jurisdiction or beyond his jurisdiction in serving the requirements on the Applicants;
- (c) an Order pursuant to the *Canadian Charter of Rights and Freedoms*, section 24(1), declaring that the decision of the Minister to serve the requirements on the Applicants violated their Charter rights protected by section 8 of the Charter; and
- (d) an Order quashing or setting aside the decision of the Minister to serve the requirements.

## FACTS

### i) The Parties

[3] Capital Vision Inc. ("CVI") is a limited market dealer with the Ontario Securities Commission. CVI Art Management Inc. and CVI Management Inc. are wholly owned subsidiaries of Capital Vision Inc. The Capital Vision Group Inc. is a private holding company which does not actively engage in any business. Mr. Greg Coleman is the President and CEO of Capital Vision Inc., CV Art Management Inc., CVI Management Inc. and of the Capital Vision Group Inc.

[4] BDO Dunwoody LLP is a firm of chartered accountants and consultants who provided accounting services to CVI Art Management Inc., CVI Management Inc., Capital Vision Inc. and Greg Coleman for the last two fiscal years preceding March 2000. BDO Dunwoody conducted an audit of the Capital Vision Group Inc. for the periods 1998 and 1999, and of Capital Vision Inc. during the 1998 fiscal year. It produced financial statements for Capital Vision Inc. for the 1998 and 1999 fiscal years. The Applicant Ralph T. Neville is a partner and senior tax accountant with BDO Dunwoody.

[5] 671514 Ontario Limited is a Financial Services Company whose clients purchased art pursuant to the charitable giving strategy. Mr. Gerry John Hogenhaut is a principal of 671514 Ontario Limited.

[6] 1271724 Ontario Inc. is a corporation which purchased art donated to a charitable institution pursuant to the charitable giving strategy. Mr. Paul Bain is a solicitor who acted as escrow agent for certain transactions carried out as part of the charitable giving strategy.

### ii) Background

[7] In October 1998, auditors for the Department of National Revenue, now Canada Customs and Revenue Agency ("CCRA"), commenced an audit of Capital Vision. The auditors requested documents and information from Capital Vision. Capital Vision provided certain documents and expurgated the names of its clients. It refused to provide certain names on the basis that it had to protect client confidentiality.

[8] This position was communicated to representatives of the Minister by a letter written by legal counsel for the Applicant, Capital Vision. In this letter of November 15, 1998, counsel advised that in the interests of protecting the confidentiality of clients of CVI, those names would be withheld, pending compliance with the relevant portions of the Act.

[9] At the time this letter was written, CVI had provided all other documents and information that had been requested by the auditors in connection with the audit of Capital Vision.

[10] According to the affidavit of Mr. Coleman filed in this proceeding, nothing more was heard from the CCRA after November 1998. It appeared that the agents of the Minister had the necessary material to proceed with the audit of Capital Vision. No further requests for material were made.

[11] Then nearly a year later, in November 1999, the Minister made an *ex parte* application to this Court for the issuance of requirements (the "old" requirements) pursuant to section 231.2(3) of the Act. The Minister filed the affidavit of Mark Ferguson, an auditor with Revenue Canada, the predecessor of the CCRA. In his affidavit, Mr. Ferguson deposed that the Minister sought the issuance of requirements to the Applicants for the production of information and documents relating to the compliance of certain unnamed persons with the ACV, that is, unnamed taxpayers. These unnamed taxpayers are described as clients of Mr. Greg Coleman, Capital Vision or CVI Art Management Inc., some of the Applicants in this proceeding.

[12] Justice Reed questioned the Minister's proposed requirements, making some adjustments in the scope of the authorization, before granting judicial authorization to serve the requirements pursuant to section 231.2(3) of the Act, by Order dated November 22, 1999.

[13] According to the requirement letters, the activity under review is the Applicants' "charitable giving strategy". The Applicants, Capital Vision Inc. and CVI, promoted transactions in works of art. The Minister claims that this strategy allowed purchasers to buy works of art at 28 to 33 per cent of their alleged fair market value, then donate these art works to charity, in return for charitable donation receipts based on 100 per cent of the alleged fair market value of the works. According to the Minister, the tax credits were based on an amount greater than the amount actually paid by the purchaser for the artwork.

[14] Subsequently, the Applicants filed a motion, pursuant to subsection 231.2(5) of the Act, seeking review of Justice Reed's authorization order. The motion was filed within the time limits prescribed by the Act but it did not proceed to a hearing within the statutory time limits because the parties agreed to enlarge the time for a hearing and agreed upon a schedule of pre-hearing steps, including the preparation, service and filing of affidavits. The parties agreed that,

subject to the availability of Justice Reed, a hearing date would be sought during the week of February 14, 2000. These agreements were reached in December, 1999.

[15] Then on February 9, 2000, counsel for the Minister summoned counsel for the Applicants to a meeting and advised that the Minister would not be attempting to enforce the old requirements but would, instead, issue new requirements.

[16] On February 15, 2000, a requirement for documents and information was served on Capital Vision Inc. and its President, Secretary, Treasurer, Chief Executive Officer and Director, Mr. Gregory Scott Coleman. On the same day, requirements for documents only were served on the other Applicants who are corporations, officers and directors of those corporations. These requirements were accompanied by a letter from counsel for the Minister. In part, that letter advised that the pending motion before Justice Reed was now moot, that new requirements were being issued without prior judicial authorization, and that in the event the Applicants sought to challenge these requirements, either by way of motion or an application, they would have no automatic right to cross-examine anyone from the CCRA.

[17] The new requirements demanded that Capital Vision provide the Minister with documents and information relating to unnamed persons. The other Applicants were to provide documents only. The Applicants submit that the Minister was required to obtain judicial authorization prior to serving these new requirements as the new requirements seek information or documents relating to one or more unnamed persons. Consequently, the Applicants say that the Minister acted without jurisdiction in issuing and serving the new requirements.

[18] On March 15, 2000, Madam Justice Dawson issued interim Orders extending the time for compliance with the new requirements until thirty days following the final disposition of what was then several applications for judicial review relating to the new requirements served on all the Applicants.

[19] Upon application of the Applicants, an order was issued by Associate Senior Prothonotary Giles on May 18, 2000, which directed that the hearing of all the related applications for judicial review be consolidated and heard in cause number T-493-00.

## ISSUES

[20] This application raises the following issues:

(1) Did the Minister act without jurisdiction or beyond his jurisdiction in serving the new requirements on Capital Vision, or the other Applicants, without having first obtained prior judicial authorization pursuant to subsections 231.2(2) and (3) of the Act?

(2) Whether the Minister abused the discretion granted to him under section 232.2 of the Act by exercising his statutory powers in bad faith.

(3) Whether the decision of the Minister to serve the new requirements on the Applicants violated their rights protected by section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 [hereinafter the "Charter"].

(4) In the event that the decision of the Minister to serve the new requirements violated the Applicants' rights pursuant to the Charter, whether such violation was justified by section 1 of the Charter.

### APPLICANTS' SUBMISSIONS

[21] The Applicants raise several arguments. First, they argue that the Minister was required to obtain judicial authorization prior to serving the new requirements on Capital Vision since the new requirements seek information relating to unnamed persons.

[22] Among other things, the new requirements seek the names and addresses of all the clients of Capital Vision relative to transactions in works of art over the period January 1, 1996 through January 31, 2000. As such, the new requirements clearly impose on Capital Vision a requirement to provide information relating to one or more unnamed persons. In failing to obtain prior judicial authorization to serve the new requirements, pursuant to section 231.2(2), the Minister acted without jurisdiction or beyond his jurisdiction, as discussed in *Andison v. Canada (Minister of National Revenue)* (1995), 95 D.T.C. 5058 (F.C.T.D.).

[23] Insofar as the Minister argues that the documents and information are being sought pursuant to an ongoing audit, the Applicants argue that he cannot seek information in respect of unnamed persons through the guise of an audit; in this regard they rely on *Minister of National Revenue v. Sand Exploration Limited*, [1995] 3 F.C. 44 (T.D.). Furthermore, the Minister has filed no evidence to show that the audit of Capital Vision is ongoing and that the information and documents now sought from the Applicants are necessary to complete an audit of Capital Vision.

[24] The Applicants further argue that the names of all the clients of Capital Vision are not required to conduct an audit of Capital Vision. In 1998, Capital Vision provided the Minister with all documents and information requested pursuant to an audit, except the names and addresses of its clients. Disclosure of the names and addresses of these individuals would not assist the Minister. The audit of Capital Vision, relative to the taxation years 1995 to 1998, had been dormant for more than one year when the Minister issued the old requirements.

[25] Furthermore, the new requirements request that Capital Vision provide the names and addresses of its clients relative to transactions of artwork between 1996 and 2000. The names and addresses of persons who purchased art subsequent to 1998 cannot be relevant to an audit

relating to the period 1995 to 1998. The Minister is now attempting to do indirectly what he had previously attempted to do directly, until challenged by the Applicants.

[26] When the Applicants instituted proceedings to set aside the order authorizing service of the old requirements, the solicitors for the Minister abandoned those old requirements and served new requirements. The new requirements purportedly seek information and documents in furtherance of an audit of an unidentified taxpayer. The nature of the documents requested under the new requirements are such that the names of the clients of Capital Vision or CVI Art Management would likely be disclosed in the Applicants' respective responses to the new requirements.

[27] The Applicants submit that the Minister served the new requirements to further his objective of obtaining the names of such individuals. Consequently, the Minister was required to obtain judicial authorization prior to serving the new requirements on the Applicants; see *Canadian Forest Products Limited et al v. The Minister of National Revenue* (1996), 96 D.T.C. 6506 (F.C.T.D.).

[28] Next, the Applicants argue that the new requirements served on the Applicants, other than Capital Vision, state that they are being served pursuant to an ongoing audit of an unidentified taxpayer. If the Minister was not prepared to name the taxpayer under investigation, he was required to obtain judicial authorization to serve these requirements.

[29] The third submission of the Applicants is that the new requirements contain a false or misleading statement of purpose. The old requirements state that the purpose for obtaining the documents was because they were necessary to verify compliance with the Act by persons who purchased pursuant to the charitable giving strategy. However, the new requirements served on the Applicants other than Capital Vision do not state that the documents are necessary to verify compliance with the Act by the individuals named in the new requirements. The new requirements refer solely to an audit of an unidentified taxpayer.

[30] The Applicants further argue that the Minister exercised his discretion in bad faith. The Minister's true objective in serving the new requirements is to obtain information relative to unnamed persons who purchased art pursuant to the charitable giving strategy. This is the very objective disclosed by the Minister in obtaining judicial authorization to issue the old requirements.

[31] By abandoning the old requirements, the Minister avoided a cross-examination of Mr. Mark Ferguson on his affidavit filed in support of the authorization application. The Minister is now attempting to prevent the Applicants from determining, through the proper court process, the true objective in seeking information and documents pertaining to the charitable giving strategy. In this regard, the Applicants rely on *Bunker Ramo Corp. v. TRW Inc.*, [1980] 2 F.C. 488 (T.D.) and *Toronto Board of Education Staff Credit Union v. Skinner et al* (1984), 47 O.R. (2d) 70 (Ont.H.C.J.)

[32] Finally, the Applicants argue that the Minister has violated their Charter rights, specifically the protection against unreasonable search and seizure under section 8 of the Charter. In *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, the Supreme Court of Canada held that requirements to produce documents and information pursuant to section 231(3) of the Act, the predecessor to section 231.2(1), constituted a seizure for the purposes of section 8 of the Charter. The Court went on to find that the seizures by section 231(3) of the Act were reasonable and that section 231(3) was constitutional.

[33] The Applicants argue that, while section 231.2 of the Act is itself constitutional, the Minister has exercised his statutory powers contrary to law and has violated their rights protected by section 8 of the Charter.

[34] The Applicants say that Parliament has recognized that, in order for such seizures to be reasonable, the safeguard of judicial authorization is mandatory to ensure that the Minister is seeking the documents and information for purposes related to the administration or enforcement of the Act; see *Sand Exploration, supra*. The Applicants submit that the seizure of the Applicants' documents contemplated by the new requirements is "unreasonable" pursuant to the purpose of section 8, and the Minister has purported to exercise statutory power in a manner not authorized by law; see *R. v. Caslake*, [1998] 1 S.C.R. 51.

[35] Furthermore, the Applicants submit that the decision of the Minister to serve the new requirements is not justified under section 1 of the Charter. The very basis of the Charter violation at issue is that the Minister authorized a seizure of the Applicants' property in the absence of legal authority to do so. Such a Charter violation cannot be justified as a reasonable limit prescribed by law on the Applicants' right to be free from unreasonable search and seizure.

## MINISTER'S SUBMISSIONS

[36] The Minister submits that he sought documents and information for two overlapping purposes: to investigate the tax liability of Capital Vision as well as the purchasers of artwork in transactions where Capital Vision and some of the other Applicants were involved. In these circumstances, the Minister did not exceed his jurisdiction in deciding to serve the new requirements. In each requirement, the Minister demanded documents directly related to the tax liabilities of named persons, either Capital Vision or named individuals. Pursuant to section 231.2 of the Act, the Minister properly served these requirements on the Applicants without requiring judicial authorization.

[37] The Minister did not act in bad faith. By abandoning the old requirements and serving the requirements here in issue, the Minister made it easier for most of the Applicants to comply with his demands. The allegation that the Minister intended to end the Applicants' involvement in the "strategy" is based on pure speculation and must be rejected.

[38] The Minister argues that new requirements were properly served without prior judicial authorization because the conditions for serving named-person requirements on the

Applicants were met and the Capital Vision requirement flows from the broad and necessary audit powers of the Minister under section 231.1 of the Act. None of the requirements constituted a fishing expedition of the type that section 231.2 of the Act is intended to prevent.

[39] The Minister argues that the new requirements are not unnamed person requirements. He relies on the decision of the Federal Court of Appeal in *A.G.T. Ltd. v. Canada (Attorney General)*, [1997] 2 F.C. 878 (CA.) where the Court described the conditions for serving named person requirements as follows at paragraph 27:

Subsection 231.2(1) is drafted in broad language, but its scope has been reduced through the rules of interpretation to situations where the information sought by the Minister is relevant to the tax liability of some specific person or persons, and when the tax liability of such person or persons is the subject of a genuine and serious inquiry. Given these criteria, I find that no error was committed by the motions judge. [Footnotes omitted]

[40] The Minister submits that he is seeking information relative to the liability of a specific person. The Capital Vision requirements demand documents and information relating to that entity's tax liability. The requirements served on the other Applicants demand documents relating to named persons who are listed in Schedule "A" attached to those requirements. The background section in these requirements does not convert these requirements into "unnamed person" requirements. The background section refers to the audit of an unidentified taxpayer but it does not indicate that such requirements were served pursuant to the audit of such unidentified taxpayer.

[41] The Minister argues that, contrary to the Applicants' submissions, the audit of Capital Vision was indeed ongoing. According to the Coleman Affidavit, the CCRA had stopped asking for documents in November 1998. However, the Minister submits that the record before Madam Justice Dawson shows that CCRA auditors were requesting additional documents from Capital Vision and its representatives. There was a delay of several months between the auditors conclusion that requirements under the Act were needed, and the decision to serve the old requirements and then the new requirements.

[42] As a matter of law, the period of time between the auditors' conclusion that requirements were necessary and the decision of Justice Dawson does not mean that the audit had ended before the old requirements were served. The Minister or the CCRA determine the degree of scrutiny that a taxpayer will undergo in the course of an audit. The length of the audit is also within the discretion of the Minister pursuant to section 231.1 of the Act.

[43] Given that the requirements at issue here have two overlapping purposes, to examine the tax liability of both the purchasers of art and Capital Vision, the Minister argues that the real question in these applications does not deal with the motives of the Minister but is whether the



Minister could, in the face of these overlapping purposes, serve the requirements without prior judicial authorization.

[44] The Minister argues that prior judicial authorization to serve the Capital Vision requirement is not necessary since that requirement flows logically from the broad and necessary audit powers provided to the Minister. Under the Act, only documents for which claims of solicitor-client privilege are proven may be protected from the scrutiny of the Minister or the CCRA.

[45] Accordingly, in the course of auditing Capital Vision and without serving requirements, the Minister requested information about Capital Vision's customers. This information is clearly found in the books and records for Capital Vision and relates to its liability in tax.

[46] In any case, all the requirements were issued pursuant to section 231.2(1) consistently with the purposes of that section as a whole. The Minister argues that section 231.2 is meant to address the concerns of the Supreme Court of Canada expressed in *James Richardson and Sons, Ltd. v. Canada (Minister of National Revenue)*, [1984] 1 S.C.R. 614 at 622. In that case, the predecessor of section 231.2, if broadly construed, could permit "an exploratory sortie into any taxpayer's affairs and require anyone having anything to contribute to the exploration to participate". This section of the Act then in issue did not oblige the Minister to seek judicial authorization for any type of requirement for documents or information.

[47] The Minister says that section 231.2 apparently seeks to address the concern raised in *James Richardson and Sons Ltd., supra*, that is, to avoid a fishing expedition where neither the parties served with the requirement, nor any person to whom the requirement related, were under investigation.

[48] In the present legislative scheme, the Minister must obtain judicial authorization if he seeks to impose a requirement, related to unnamed persons, on third parties. Two conditions must be met in order to receive such authorization: the unnamed persons must be ascertainable and the requirement must be made to verify the compliance of those unnamed persons with the Act. The second factor was clearly missing from the requirement at issue in *James Richardson and Sons Ltd., supra*.

[49] The Minister argues that the requirements here in issue do not conflict with the purposes of the section. They do not constitute a fishing expedition. The tax liabilities of both Capital Vision and the purchasers of art works are under investigation. Judicial authorization for the requirements is unnecessary.

[50] To interpret section 231.2(1) as permitting requirements that relate to the tax liabilities of both a named taxpayer who is under audit and unnamed taxpayers, would not

deprive the section of its meaning. The Minister would need to obtain judicial authorization where he seeks information about unnamed persons from a true third party, that is, a taxpayer that is not itself under investigation.

[51] The Minister denies that he acted in bad faith in abandoning the old requirements and in serving the new requirements. First, he argues that he was under no obligation to enforce the old requirements. The judicial authorization granted by Justice Reed did not compel the Minister to proceed with those requirements. Second, the Minister submits that he may serve a succession of requirements on the same person for the same information and documents. In order to ensure that a person does indeed provide this material, the Minister may consider it more appropriate to redraft the requirement and serve a revised requirement, as per *R. v. Grimwood*, [1987] 2 S.C.R. 755 at paragraphs 2 and 3.

[52] It cannot be bad faith for the Minister to issue fresh requirements that reduce the burden on the Applicants in complying with the demands. With the requirements here in issue, the Minister is in effect responding to the objections made by the Applicants to the old requirements, especially in terms of their scope.

#### LEGISLATION

[53] The relevant legislation for this application is the following:

<p>231.2. (1) Notwithstanding any other provision of the 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,</p> <p>(a) any information or additional information, including a return of income or a supplementary return; or</p> <p>(b) any document.</p> <p>(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</p>	<p>231.2. (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application et 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:</p> <p>a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;</p> <p>b) qu'elle produise des documents.</p> <p>(2) Le ministre ne peut exiger de quiconque - appelé "tiers" au présent article -- la fourniture</p>
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<p>more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3). (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</p> <p>(a) the person or group is ascertainable; and</p> <p>(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.</p> <p>(c) (Repealed by S.C. 1996, c. 21, s. 58(1).)</p> <p>(d) (Repealed by S.C. 1996, c. 21, s. 58(1).)</p> <p>(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).</p> <p>(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.</p> <p>(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not 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.</p>	<p>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).</p> <p>(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 présent article --, s'il est convaincu, sur dénonciation sous serment, de ce qui suit:</p> <p>a) cette personne ou ce groupe est identifiable;</p> <p>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;</p> <p>c) (Abrogé par L.C. 1996, ch. 21, art. 58(1).)</p> <p>d) (Abrogé par L.C. 1996, ch. 21, art. 58(1).)</p> <p>(4) L'autorisation accordée en vertu du paragraphe (3) doit être jointe à l'avis visé au paragraphe (1).</p> <p>(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.</p> <p>(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</p>
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confirmer ou la modifier s'il est convaincu de leur existence.

## ANALYSIS

[54] The real issue arising from this application is whether the Minister was required to seek judicial authorization for the new requirements. Second, what is the effect of proceeding in the manner he adopted.

### i) The Capital Vision Requirement

[55] The new requirements, dated February 11, 2000, were served on the Applicants on or about February 15, 2000. The requirement served on Capital Vision Inc. provides, in part, as follows:

#### REQUIREMENT TO PROVIDE DOCUMENTS AND INFORMATION

##### BACKGROUND

1. Under paragraph 231.1(1) of the Income Tax Act, R.S.C. 1985 (5th Supp.), c. 1 (the "Act"), for any purpose related to the administration and enforcement of the Act, a person authorized by the Minister of National Revenue, may inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer that relates or may relate to the information that is or should be in the books and records of the taxpayer or to any amount payable by the taxpayer under the Act.

2. Pursuant to paragraph 231.1(1) of the Act, in or around October, 1998, auditors of the Department of National Revenue (now the Canada Customs and Revenue Agency) (hereinafter referred to as the "Agency") **commenced an audit of Capital Vision Inc.** [Emphasis added]

3. **The audit is on-going.** [Emphasis added]

...

5. In the course of the audit, the Agency's auditors requested information and documents from Capital Vision Inc. and Gregory Scott Coleman.

6. Capital Vision Inc. and Gregory Scott Coleman did not provide all this information and these documents to the Agency's auditors.

7. Cliff Rand, counsel for Capital Vision Inc., advised the Applicant, by letter addressed to auditor Teg Mammo, dated November 17, 1998, that Capital Vision Inc. had an obligation to

protect the confidentiality of its clients and that therefore it would not disclose its clients' names unless compelled to do so by law. Accordingly, Capital Vision Inc. blacked out the names of its clients in the attachments to this letter, which included invoices. A copy of this letter is attached as Schedule "A" to this Requirement.

...

9. To date, neither Capital Vision Inc. nor Gregory Scott Coleman have provided the Agency with all the information and documents requested and, notably, they have not provided the names of Capital Vision Inc.'s or CVI Art Management Inc.'s clients.

...

#### INFORMATION REQUIRED

12. I require the following information: the names and addresses of all of Capital Vision Inc.'s clients in respect of transactions in works of art for the period January 1, 1996 through January 31, 2000.

#### DOCUMENTS REQUIRED

14. I require all documents, including, but not limited to, accounts, agreements, books, charts or tables, correspondence, diagrams, forms, images, invoices, letters, maps, memoranda, plans, returns, statements, telegrams, vouchers, and any other thing containing information, whether in writing or in any other form, relating to transactions in works of art, for the period January 1, 1996 through January 31, 2000.

15. Without limited the generality of the documentation set out above in paragraph 14, in respect of the period January 1, 1996 through January 31, 2000, I require specifically:

a) the documents described above in paragraph 14 in relation to the individuals listed in the attached Schedule "B" to this Requirement:

b) the documents listed in paragraph 14 that are related to the individuals who are not listed in Schedule "B" to this Requirement. **These individuals include the individuals whose names have been blacked out in Schedule "A" of this Requirement** [Emphasis added]

...

#### FAILURE TO COMPLY

18. If you fail to comply with this Requirement, Capital Vision Inc. and Gregory Scott Coleman may be subject to the provisions of sections 238 and 242 of the Act.

[56] The Applicant, Capital Vision, argues that this requirement directs that it provide information relative to unnamed persons and according to section 231.2(2) of the Act, prior judicial authorization was required before the Minister could lawfully issue and serve the requirement. Here the Minister refers to an audit of Capital Vision Inc. and states that he needs the names of clients in order to confirm the information already provided by Capital Vision Inc.

[57] As mentioned above, when the Minister sought judicial authorization for the old requirements, the Minister's representative, Mark Ferguson, testified, through a sworn affidavit, that the purpose of the requirements was to conduct an audit on the clients of Capital Vision. The new requirement for Capital Vision purports to seek information for the purposes of an audit which is allegedly being conducted on Capital Vision and the Minister claims that CCRA needs documents and information from unnamed persons in order to complete that audit.

[58] In my opinion, the Minister's allegation that he needs to know about unnamed persons in order to complete the allegedly ongoing audit of Capital Vision, triggers the operation of subsections 231.2(2) and (3) of the Act dealing with access to information regarding unnamed persons. By proceeding to demand information and documents from Capital Vision in the absence of judicial authorization, the Minister is attempting to do indirectly what he cannot do directly. I refer to *Sand Exploration Limited, supra* where the Court said at paragraph 28:

... To obtain the names of unnamed persons from third parties, the Minister must seek a court order. He cannot and should not circumvent that requirement by performing an audit without judicial authorization to obtain the names of such investors. That is what subsections (2) and (3) of section 231.2 are intended to cover.

[59] I am satisfied that the Minister did not proceed in a manner authorized by law when he issued the requirement to Capital Vision in February 2000.

[60] The Minister argues that if necessary, the portion of the Capital Vision requirement that refers to unnamed persons can be severed and that Capital Vision should respond to the remainder of the requirement. I do not agree.

[61] In *Paquette v. The Minister of National Revenue* (1992), 92 D.T.C. 6394 (F.C.T.D.), the Court found that an objectionable portion could be severed from a requirement when the basis of the objection was the failure of the Minister to seek section 231.2(2) authorization.

[62] In my opinion, *Paquette, supra* is distinguishable from the present case since here there is a reasonable apprehension that the Minister has intentionally tried to circumvent the right of Capital Vision to review the requirement, pursuant to subsections 231.2(5) and (6). This apparent intention colours the entire requirement and in my view, any part relating to named individuals, for which judicial authorization is not required as per section 231.2(1), cannot be declared valid.

[63] In my opinion, severance of an objectionable portion of the request does not answer the question about the Minister's true purpose in issuing the requirement to Capital Vision in February 2000. The Minister alleges that he needs the requested information in pursuit of a continuing audit of Capital Vision, but he has provided no evidence to support that allegation.

[64] I agree with the submission that an audit is a purpose of the Act. However, the subject of an audit is a proper consideration when there is a request for information and documents.

[65] When the Minister commenced the Capital Vision audit in 1998 and requested materials, Capital Vision objected to the production of information and documents about the names of its clients. One year later, the Minister sought judicial authorization for the issuance of requirements relating to unnamed persons. Capital Vision objected and invoked its rights pursuant to sections 231.2(5) and 231.2(6) of the Act to seek review of the judicial authorization.

[66] The Minister short-circuited that process by issuing the new requirement to Capital Vision in February 2000 and now says that he has a different purpose, that is the audit of Capital Vision rather than the audit of unnamed persons, for seeking the information and documents described in the February 2000 requirement, from Capital Vision.

[67] I do not accept this submission. In my opinion, the Minister is still seeking the same information and documents from Capital Vision that he sought in October 1998, as part of the Capital Vision audit. He remains subject to the requirements of the Act, pursuant to section 231.2 and cannot avoid them by merely making the assertion, in the absence of evidence, that the audit of Capital Vision is continuing.

ii) The Other Requirements

[68] The requirements served on the Applicants other than Capital Vision Inc. (the "other requirements") are, in the material part, in the following form:

**REQUIREMENT TO PROVIDE DOCUMENTS**

**BACKGROUND**

1. Under paragraph 231.1(1) of the Income Tax Act, R.S.C. 1985 (5th Supp.), c. 1 (the "Act"), for any purpose related to the administration and enforcement of the Act, a person authorized by the Minister of National Revenue, may inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer that relates or may relate to the information that is or should be in the books and records of the taxpayer or to any amount payable by the taxpayer under the Act.

2. Pursuant to paragraph 231.1(1) of the Act, in or around October, 1998, auditors of the Department of National Revenue (now the Canada Customs and Revenue Agency) (hereinafter referred to as the "Agency") **commenced an audit.** [Emphasis added]

3. **The audit is on-going.** [Emphasis added]

4. Accordingly, this Requirement for documents is served upon you in accordance with paragraph 231.2(1)(b) of the Act, for purposes related to the administration and enforcement of the Act.

### **DOCUMENTS REQUIRED**

6. I require all documents, including, but not limited to, accounts, agreements, books, charts or tables, correspondence, diagrams, forms, images, invoices, letters, maps, memoranda, plans, returns, statements, telegrams, vouchers, and any other thing containing information, whether in writing or in any other form, relating to transactions in works of art in which the individuals listed in the attached Schedule 'A' were involved, for the period January 1, 1996 through January 31, 2000.

7. The expression, "transactions in works of art", is defined below.

...

### **FAILURE TO COMPLY**

10. If you fail to comply with this Requirement, ...[you] may be subject to the provisions of sections 238 and 242 of the Act.

[69] The Applicants submit that this requirement is misleading as it misstates the real purpose of the Minister. While this requirement apparently seeks documents about an unnamed taxpayer, the Applicants argue that the Minister is attempting to compel the recipients of this requirement to disclose whether their purchases through the charitable giving strategy complied with the Act.

[70] In *Canadian Forest Products Ltd.*, *supra*, Associate Chief Justice Jerome found that a taxpayer to whom a request for information about another third party was made, should be provided greater protection against revealing potentially damaging information. At page 6508 he wrote as follows:

Counsel for the applicants also referred to a number of cases which indicate that the Court favours a formalistic adherence to the rule that the Minister must name those taxpayers under investigation or else proceed by way of subsection 231.2(2) (see e.g. *Paquette v. M.N.R.* (1992), 92 D.T.C. 6394 (F.C.T.D.); *Andison v. M.N.R.* (1995), 95 D.T.C. 5058 (F.C.T.D.)). The conditions set out at subsection 231.2(3) are designed to guard against abusive investigations by



the Department of National Revenue. If the respondent is not prepared to name those taxpayers under investigation, she must proceed by way of subsection 231.2(3).

Subsection 231.2(2) requires that the Minister obtain judicial authorization before issuing a requirement pursuant to subsection 231.2(1) with respect to unnamed persons. The respondent contends that the information sought is with respect to the applicants' own operations and that the provisions regarding unnamed persons are not applicable. However, the request for information was made in the context of an investigation into the tax liability of five other companies, not the applicants. As a result, the applicants should be afforded greater protection against revealing potentially damaging information.

[71] In *Montreal Aluminum Processing Limited et al v. Attorney General of Canada et al.* (1992), 92 D.T.C. 6567 (F.C.A.) the Federal Court of Appeal found that the recipient of a requirement was entitled to fair notice of the purpose for which the Minister claimed to exercise his powers. Justice Hugessen wrote at pages 6569-6570 as follows:

It is settled law that the test as to whether or not the Minister, when he exercises his powers under subsection 231.2(1), is acting for a purpose specified in the Act is an objective one. In my view, it is arguable that the recipient of a Requirement is entitled to a fair notice as to the purpose for which the Minister purports to exercise his powers under subsection 231.2(1). Accordingly, it is my opinion that a claim that a false or misleading statement of purpose invalidates a Requirement is not one that is obvious and beyond doubt will fail. [Footnotes omitted]

[72] In my opinion, the wording of the other requirements served on the Applicants other than Capital Vision, particularly in the "background" section, suggests that the Minister was seeking documents relative to an audit being conducted on an unnamed taxpayer.

[73] The affidavit of Mark Ferguson, an Auditor with Canada Customs and Revenue Agency, dated November 19, 1999, was relied upon by the Minister in obtaining the old requirements. In his affidavit, Mr. Ferguson states that the old requirements were served on the other Applicants to verify compliance of unnamed persons with the Act. On this basis an Order was granted by Justice Reed authorizing the Minister to issue requirements pursuant to section 231.2(3) of the Act. As noted above, upon receipt of the old requirements the Applicants took steps to set them aside and at that time, the Minister decided not to enforce the old requirements but to issue and serve new requirements.

[74] In my opinion, when the Minister chose to forego enforcement of the old requirements, he abandoned those requirements, and his actions in issuing and serving the new requirements must be regarded as a new proceeding.

[75] The Minister now admits, in this proceeding, that the purpose of the new requirements was twofold: first, to obtain information concerning Capital Vision and second, to determine whether the clients of Capital Vision had complied with the Act in terms of the transactions involving the art works.

[76] This admission is not clear in these requirements which were directed to Applicants other than Capital Vision. The Minister argued that the purpose of the requirements served on the Applicants other than Capital Vision Inc. was not a fishing expedition and that it was not an "unnamed" requirement as the Applicants could infer that the audits pertained to Capital Vision.

[77] I do not accept these submissions. In my opinion, it is not clear from the requirements served on the Applicants other than Capital Vision that the documents were being sought in relation to an audit of Capital Vision Inc. The Applicants, other than Capital Vision Inc., did not enjoy their right to fair notice as to the purpose of the requirements, as required by section 231.2(1). It can reasonably be inferred that the new requirements are for the same purpose as the old requirements, and the Minister has been less than forthright in stating the purpose for those requirements.

[78] Because the requirements relate to the provision of documents relative to an unnamed person, the Minister was required to obtain prior judicial authorization, pursuant to subsections 231.2(2) and (3) of the Act.

[79] I note, as well, that there is no statutory basis in the Act for the Minister to rely on an "inference" that may or may not be drawn by a third party to whom a requirement is served. The Minister, not the taxpayer, bears the burden of complying with section 231.2.

[80] The Minister argues that, having regard to section 241 of the Act, he is obliged to protect taxpayer confidentiality and withhold the identity of the taxpayer who is being audited. Section 241(1) provides, in part, as follows:

241. (1) Except as authorized by this section, no official shall	241. (1) Sauf autorisation prévue au présent article, il est interdit à un fonctionnaire:
(a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;	a) de fournir sciemment à quiconque un renseignement confidentiel ou d'en permettre sciemment la prestation;
(b) knowingly allow any person to have access to any taxpayer information; or	b) de permettre sciemment à quiconque d'avoir accès à un renseignement confidentiel;
(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or for the purpose for which it was provided under this section.	c) d'utiliser sciemment un renseignement confidentiel en dehors du cadre de l'application ou de l'exécution de la présente loi, du Régime de pensions du Canada, de la Loi sur l'assurance-chômage ou de la Loi sur l'assurance-emploi, ou à une autre fin que celle pour laquelle il a été fourni en application du présent article.

[81] It is undeniable that this section imposes a duty upon the Minister to protect taxpayer confidentiality. However, it is equally undeniable that section 241 is subject to other provisions of the Act, including section 231.2. Section 231.2 specifically provides the safeguard of judicial supervision when taxpayer confidentiality is involved.

[82] Furthermore, the opening words of section 231.2(1) indicate, in my view, that Parliament took the issue of intrusion into privacy as a very serious matter. Section 231.2(1) begins as follows:

**Notwithstanding any other provision of the Act**, the Minister may, subject to subsection (2) ...  
[Emphasis added]

**Malgré les autres dispositions de la présente loi**, le ministre peut, sous réserve du paragraphe (2) ... [je souligne]

[83] Justice Rothstein, as he then was, in *Sand Exploration, supra* stated the following at paragraph 18 regarding the role of subsection 231.2(3) in safeguarding taxpayer confidentiality:

Intrusion into the privacy of individuals is always a sensitive matter, especially when third parties, who themselves may have valid reasons for not wanting to disclose, are required to provide the information. Undoubtedly this is the reason Parliament saw fit to require the Minister to obtain court authorization for such intrusion upon satisfying the court of the matters specified in subsection 231.2(3). But provided the requirements of this subsection are met, such intrusion is authorized.

[84] Subsections 231.2(2) and (3) require the Minister to seek judicial authorization when he seeks access to information or documents concerning an unnamed person. Sections 231.2(5) and 231.2(6) protect the person who may be requested to provide such materials by providing a right of access to judicial scrutiny of any authorization granted upon the *ex parte* motion of the Minister and by authorizing a judge to cancel an authorization.

[85] In my opinion, the protection provided by section 241 co-exists with the rights and obligations granted by section 231.2 but reliance on section 241 does not relieve the Minister from compliance with section 231.2. The Minister's argument in relation to section 241 fails.

iii) Summary

[86] I accept the arguments of the Applicants that the Minister has misstated his true purposes in the issuance of these requirements, having regard to the total context. I view that context in the following terms.

[87] In 1998, the Minister commenced an audit of Capital Vision and in that regard, requests were made for the production of information and documents. Capital Vision complied

and provided documents and the like by November 1998. It resisted, however, the disclosure of the names of its clients and so advised the Minister, in writing.

[88] Then in November 1999, the Minister applied to the Court for requirements pursuant to the Act, to receive information about unnamed persons. In making this request, the Minister said that he was seeking information about the compliance of unnamed persons, not Capital Vision, with the Act. Nothing was said about an audit of Capital Vision.

[89] Following service of these requirements, the Applicants exercised their legal rights, pursuant to section 231.2(5) of the Act, to seek judicial review of the requirements. Part of that process involved the cross-examination of Mark Ferguson, the representative of the Minister.

[90] The Minister side-stepped this process by unilaterally advising the Applicants that he would not enforce the November 1999 requirements but would issue new ones, upon which he would proceed. This time he stated, in relation to Capital Vision, that there was an ongoing audit of that entity and documents and information related to the period 1996 to 2000 were required. The audit commenced in 1998 was for the taxation years 1995 to 1998. In respect of the other Applicants, he said there was an audit without identifying the taxpayer.

[91] If the audit was for an unnamed taxpayer, the Minister had a statutory obligation to seek judicial authorization before issuing the requirements for the other Applicants.

[92] As noted by the Court in *Montreal Aluminium Processing, supra*, the appropriate test for assessing the Minister's purpose in relation to section 231.2 is an objective one. In my opinion, the Minister here has failed to objectively establish that he had fairly stated his purpose in issuing the new requirements.

[93] The Minister was not forthcoming as to the true purpose of issuing the new requirements. At the same time, it appears that he wanted to foreclose recourse by the Applicants to the Court for review of the Order granted by Justice Reed upon the *ex parte* motion of the Minister. In light of the written advice from counsel for the Minister, in his letter of February 11, 2000, this conclusion regarding the Minister's disclosure of his true purpose is reasonably supported by the facts.

[94] The caution due from the Minister, when availing of the right to bring an *ex parte* motion pursuant to section 231.2(3) of the Act, was addressed by Justice Rothstein, as he then was, in *Sand Exploration, supra* at paragraph 16 as follows:

... Further I think the fact that the Minister may obtain a court authorization *ex parte* places an obligation on the Minister to act in the utmost good faith and ensure full and frank disclosure of information. See for example, *Canada v. Duncan*, [1992] 1 F.C. 713 (T.D.), at page 730. For all

these reasons, the standard to be met by the Minister in making an application for court authorization under subsection 231.2(3) is high.

## CONCLUSION

[95] In these circumstances, I find that the Minister improperly exercised his discretion pursuant to section 231.2 of the Act. An order will issue declaring that the decision of the Minister to serve the new requirements on the Applicants was invalid and unlawful. It is not necessary to address the other issues raised by the Applicants. The requirements are quashed.

[96] The Applicants shall have their costs of this application.

"E. Heneghan"

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J.F.C.C.

OTTAWA, Ontario

December 19, 2002

## **FEDERAL COURT OF CANADA**

### **TRIAL DIVISION**

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v.

MINISTER OF NATIONAL REVENUE

**PLACE OF HEARING:** TORONTO

**DATE OF HEARING:** JUNE 25, 2001

REASONS FOR ORDER AND

**ORDER:** THE HONOURABLE MADAM JUSTICE HENEGHAN

**DATED:** DECEMBER 19, 2002

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