

TAX COURT OF CANADA

IN RE: the Income Tax Act

BETWEEN:

SANTOKH SINGH

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

**HEARD BEFORE MR. JUSTICE MILLER
in the Courts Administration Service, Courtroom Number B,
180 Queen Street West, 6th Floor,
Toronto, Ontario
on Tuesday, January 30, 2007 at 10:15 a.m.**

APPEARANCES:

Mr. Howard J. Alpert

for the Appellant

Ms. Eleanor H. Thorn

for the Respondent

Also Present:

Mr. William O'Brien

Court Registrar

Ms. Sheila Finlay

Court Reporter

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Toronto, Ontario

--- Upon commencing on Tuesday, January 30, 2007
at 10:15 a.m.

...

THE COURT: Ms. Thorn, why
wouldn't your department consent to a section 86
order if the RCMP are prepared to release these
documents with a court order, rather than taking no
position? Why don't you just consent to an order
so we can get the documents back?

MS. THORN: Because we have to be
here anyway for the other motion, so I thought
since we are hearing this --

THE COURT: Do you think there's
going to be another motion? All he wants to do is
get his documents back. It strikes me if the RCMP
gives him the documents --

MS. THORN: I have stated our
position to him in letters already, and he still
insists that the CRA has the documents. I don't
know any other way to get through to Mr. Albert
that there are ways to get those documents.

THE COURT: One of the ways is a
court order.

Okay. Before you even address
Rule 82, Mr. Alpert, correct me if I'm wrong, but

1 you don't need an order under both of these, do
2 you?

3 MR. ALPERT: No.

4 THE COURT: If I give you a court
5 order that you can trot off to the RCMP and they
6 give you all of these boxes of documents so you can
7 properly prepare a list of documents and ultimately
8 prepare your client's trial, you're not,
9 presumably, turning around and seeking full
10 disclosure of documents that you now have anyway,
11 are you?

12 If I give you a Rule 86 order, are
13 you still looking for a Rule 82 order?

14 MR. ALPERT: Well, I think the
15 order is that the documents are, I mean, I think
16 we're entitled to both orders.

17 THE COURT: I don't get it.
18 Practically, you want the documents.

19 MR. ALPERT: We do want the
20 documents.

21 THE COURT: So you get the
22 documents, they're your documents. They're not the
23 Crown's documents, they're your documents seized
24 from your client. You get a court order, the RCMP
25 gives you the documents, what now are you seeking

1 full disclosure from the government for?

2 MR. ALPERT: No, I'm not, that
3 would be quite clear.

4 I do want to set one matter of the
5 record straight, and obviously I'm quite content to
6 get that order under Rule 86 that the RCMP deliver
7 the documents to the client.

8 When my friend was making her
9 submission here, my friend stated that certain
10 statements were made by the RCMP to the appellant
11 to the effect that he could come pick up his
12 documents and there was a six-month period. There's
13 nothing in the record about that. My friend was
14 giving evidence here of her own. There's nothing in
15 the record.

16 MS. THORN: I already said it's
17 over the phone, and I'm not certain about the six
18 months, anyway.

19 MR. ALPERT: There's nothing in
20 the record, and there's nothing in the record about
21 the appellant waiving his rights.

22 THE COURT: As far as I'm
23 concerned, that's water under the bridge. It
24 doesn't impact on what my order should be.

25 MR. ALPERT: I understand that,

1 but I just wanted to get the matter clear because I
2 think there's an inference here, and it will go to
3 the costs submissions, that the appellant somehow
4 is the author of his own misfortune here, and
5 there's evidence like that in the material. I was
6 never told anything like that.

7 THE COURT: That's fine. I have
8 your point, Mr. Alpert.

9 MR. ALPERT: Thank you.

10 THE COURT: Before I get to Rule
11 82, my view is I'm quite prepared, and I don't
12 think the Crown has any objection, that I give a
13 Rule 86 order and order the RCMP to return these
14 documents to your client, Mr. Alpert.

15 Frankly, I'm just going to adjourn
16 the Rule 82 motion, hopefully never to have it see
17 the light of day again.

18 MS. THORN: Your Honour, we've
19 just heard from Mr. Alpert. He's quite insistent,
20 so we might as well go ahead and I make my
21 argument.

22 THE COURT: He wasn't insistent.

23 MS. THORN: He said I still have
24 to --

25 THE COURT: Excuse me. I heard

1 him say that if he gets the Rule 86 order that he
2 would be content with that.

3 I believe that's what I heard you
4 say, Mr. Alpert?

5 MR. ALPERT: That would be fine.

6 I like Your Honour's suggestion of
7 adjourning the Rule 82 application until we can see
8 that I do get compliance from the RCMP. So I like
9 that suggestion.

10 THE COURT: That's the only reason
11 I would adjourn this. I can't imagine that the
12 RCMP wouldn't give him all of the documents. If
13 there are some documents that they believe they
14 have passed on to Canada Revenue and the agency
15 doesn't have them anymore and you still have them,
16 I can't imagine that would be the case.

17 MR. ALPERT: But it's extra
18 protection, it's just a safeguard here and would
19 leave the material before the Court. On that
20 basis, I think that that's a prudent way to go.

21 I agree with the line of reasoning
22 that Your Honour has adopted.

23 THE COURT: But I want to be very
24 clear, Mr. Alpert. If the RCMP releases all the
25 seized documents to you, I do not anticipate

1 hearing a Rule 82 application.

2 MR. ALPERT: I can assure you that
3 that won't be any problem, in that regard.

4 THE COURT: Ms. Thorn, if you're
5 not happy with that route, tell me what you would
6 prefer.

7 MS. THORN: I'm quite happy with
8 that. The only thing is that I'd like to clear up
9 the basis of Mr. Alpert's request on the 82 matter.
10 But since Your Honour is reluctant to hear that --

11 THE COURT: Ms. Thorn, I don't
12 ever want to be accused of cutting somebody off
13 from telling me something that they want to tell
14 me. If you want to make some representations on
15 that, notwithstanding you heard my preference is
16 that it simply be adjourned, by all means.

17 MS. THORN: I don't want to unduly
18 take up Your Honour's time.

19 THE COURT: I have nothing else on
20 today.

21 MS. THORN: It was also stated by
22 Mr. Alpert that the respondent, in this matter, has
23 possession of the appellant's documents and records
24 seized by the RCMP in the immigration matter. He
25 cited no source or grounds for that information.

1 No evidence of fact or law has been produced or
2 referred to by Mr. Alpert as to the basis of the
3 belief, other than the fact that the respondent is
4 Her Majesty the Queen, sworn by the auditor in Her
5 affidavit.

6 Other than photocopying, in June,
7 some of the appellant's records held by the RCMP
8 for the purpose of reassessing the appellant's 2000
9 taxation year, none of the things seized from the
10 appellant by the RCMP was, at any time, past or
11 present, in Her's or anyone else's at CRA's
12 possession, control or power. This is in full
13 compliance with the Income Act and Privacy Act.

14 THE COURT: Just address, for a
15 moment, Ms. Thorn, now that you've gone down this
16 path, who is the respondent?

17 MS. THORN: The respondent is Her
18 Majesty the Queen.

19 THE COURT: Does that not include
20 the RCMP?

21 MS. THORN: Yes, but the RCMP is
22 not a party to this tax matter.

23 THE COURT: No, but Her Majesty
24 the Queen is a party. If the Department of Revenue
25 Canada had some documents, or the Department of

1 Finance had some documents, you're telling me that
2 because it's two different departments of the same
3 litigant, Her Majesty the Queen, that Her Majesty
4 the Queen cannot be said to have control over those
5 documents; that's your argument?

6 MS. THORN: Her Majesty the Queen,
7 in this tax matter, cannot have access to any other
8 documents, any other documents held by anybody
9 else, unless it is legislated and provided for in
10 an act of parliament.

11 THE COURT: Where do you draw that
12 principle from?

13 MS. THORN: From the Privacy Act
14 and also the Income Tax Act.

15 Under the Privacy Act, one of the
16 government departments can have access to
17 information regarding an individual, information
18 that's being held by another department, provided
19 it is authorized under some act of parliament.

20 In fact, if the respondent had,
21 indeed, went to the RCMP, took all of the
22 appellant's things away, then I would say the
23 appellant would have a legitimate complaint. That
24 is not the case here.

25 All the auditor did was to act

1 under section 231.1 and go to the RCMP and say,
2 "hey, we need to reassess this person. I
3 understand you have some documents. We need access
4 to the information and we will take copies of
5 documents in order to reassess."

6 That is exactly what the auditor
7 did. She did not violate the Income Tax Act or the
8 Privacy Act.

9 THE COURT: Doesn't that strike
10 you, though, because the expression is "a party
11 having possession, control or power". Now, if
12 Revenue Canada has the right to go to the RCMP and
13 say, "I want to see these documents", and the RCMP
14 shows them those documents and Revenue Canada can
15 copy whatever documents it wants, isn't there some
16 argument that it's within Revenue Canada's power to
17 access those documents and therefore they are
18 available for full discovery?

19 MS. THORN: Yes, to the
20 photocopied documents.

21 THE COURT: But she could
22 photocopy the whole works.

23 MS. THORN: No, we did not.

24 THE COURT: I know you didn't, but
25 the Act talks in terms of the power. If she had

1 the power to copy some documents, why wouldn't she
2 have the power to copy all the documents?

3 MS. THORN: Because under the Act
4 it says only for the purpose of reassessment.

5 For example, if there's a document
6 with respect to the appellant's personal life, et
7 cetera, the auditor would not have the power to
8 photocopy those.

9 THE COURT: But this is a tax
10 matter dealing with alleged income from immigration
11 clients, and the seized documents dealt with
12 immigration fraud with immigration clients. I
13 think there would be a pretty strong argument that
14 every one of those documents might well bear on the
15 tax matter. Whose call would it be?

16 MS. THORN: Maybe it has to do
17 with his medical condition, et cetera, and it is
18 not related to the particular reassessment, then
19 the auditor would be wrong to have photocopied
20 those documents.

21 The authorities referred to by my
22 friend are with respect to identified documents
23 within the opposing party's control and power.
24 That's not the case here. The respondent has no
25 control or power over any of the other things.

1 As far as the copies made from the
2 appellant's documents are concerned, everything has
3 been produced on demand by the appellant.

4 Of course, I still have argument
5 with respect to 82, but this is what I want to
6 clarify at the outset.

7 THE COURT: Thank you very much.

8 MS. THORN: Thank you, Your
9 Honour.

10 THE COURT: Two things: Firstly,
11 if I am making a Rule 86 order ordering the RCMP to
12 release documents, Mr. Alpert, how should I
13 describe that, documents seized from Mr. Singh on
14 such and such a date, or can you give me some help
15 in making it absolutely clear as to what it is
16 we're seeking from the RCMP?

17 MR. ALPERT: The documents that
18 were seized by the RCMP, it was a Criminal Code
19 procedure, I believe, under section 367 of the
20 Criminal Code, that the appellant had acted
21 contrary to paragraph 94(1)(i) of the Immigration
22 Act of Canada. I think that's set out in paragraph
23 F. At paragraph R and S, actually, of the reply of
24 the respondent, it says Exhibit B of the
25 proceeding.

1 I had put up a book that has page
2 numbers. It's actually at page 24, these two
3 paragraphs at page 24. They're at the top of page
4 6 of the reply. These are the admissions by the
5 respondent of what actually happened, that in
6 January of 2006 the Royal Canadian Mounted Police
7 conducted a legal search and seize of the --

8 MS. THORN: 2001.

9 MR. ALPERT: 2001. I'm sorry,
10 January 2001, I apologize. That the RCMP conducted
11 a legal search and seizure at the appellant's
12 premises pursuant to a properly obtained search
13 warrant.

14 Then at paragraph 5, that the
15 arrest was on indictment of 13 counts under section
16 367 of the Criminal Code. I believe that the
17 documents were seized pursuant to the provisions of
18 the Immigration Act of Canada.

19 THE COURT: I think I have enough
20 information to properly describe what it is we're
21 looking to get back.

22 MR. ALPERT: The materials there,
23 they're in the possession of, the care, custody and
24 control of, the RCMP.

25 THE COURT: Did you want to make

1 any submissions on costs, Mr. Alpert?

2 MR. ALPERT: Yes. I would submit,
3 and I think Your Honour has tuned to the argument
4 that I have submitted, that these were two
5 different departments of the same respondent. The
6 CRA has, at all times, had access to the
7 information held by the RCMP. They could have
8 photocopied all of these documents, all of them, at
9 any time, and has the power to consent to this
10 order.

11 The appellant has been put to
12 unnecessary costs and expense as a result of the
13 respondent's conduct. I would ask for costs on a
14 solicitor-client basis in this case because the
15 respondent was given ample opportunity to return
16 the materials. There were numerous letters that
17 were written to the respondent's counsel asking for
18 the respondent's consent to cooperate with the
19 police. It's evidenced, from the position taken
20 today, that that consent was not forthcoming.

21 THE COURT: Did you ever actually
22 put it directly to Ms. Thorn: "Look, if you help
23 me get this Rule 86 order, if you consent to that,
24 I'll go to the RCMP and get the seized documents
25 and there will be no need to seek full disclosure

1 from the Crown?" Was that ever put in front of the
2 Crown?

3 MR. ALPERT: Yes, it was. It was
4 in my materials. I have letters that I wrote. They
5 are in the materials here. That, repeatedly, was
6 the gist of it. I was asking for cooperation.

7 THE COURT: I don't want just the
8 "gist" of it, I want it clear that the government
9 would not give you a consent under Rule 86 on the
10 understanding that there would be no need for Rule
11 82.

12 MR. ALPERT: This is at Exhibit K.

13 THE COURT: Yes.

14 MR. ALPERT: If we come to my
15 letter of October the 3rd, I set out the things
16 here.

17 The original motion was adjourned
18 on consent sine die to permit the parties to
19 attempt to cooperate. I said to her in that letter
20 there, to the Department of Justice there, that I
21 confirm that I was served with the respondent's
22 motion materials herein setting out the position
23 that they took. I confirm that on October the 3rd
24 I telephoned you again regarding this motion. I
25 pointed out to you that the RCMP is the Canada

1 national police service and an agency of the
2 Ministry of Public Safety and Emergency
3 Preparedness Canada:

4 "Accordingly, I advised you
5 that the Respondent herein is
6 Her Majesty the Queen and
7 that both the CRA and RCMP
8 are agencies of the
9 Respondent, Her Majesty the
10 Queen. Therefore, I
11 suggested to you that the
12 Respondent, Her Majesty the
13 Queen, is in fact in
14 possession of the documents
15 being requested for
16 production --"

17 Then I state at the second
18 paragraph on the second page of the letter:

19 "As a result, both of us are
20 hoping to resolve this matter
21 amicably. The proposed
22 adjournment will permit me
23 additional time to attempt to
24 obtain production of the
25 requested documents

1 voluntarily from the RCMP.
2 You have indicated to me you
3 will provide me with your
4 cooperation in obtaining the
5 requested documents
6 voluntarily from the RCMP."

7 THE COURT: Just slow down a
8 little bit, Mr. Alpert.

9 MR. ALPERT: Sorry?

10 THE COURT: Just slow down, it's
11 difficult to catch it all.

12 MR. ALPERT: I'm sorry. I'll just
13 go back:

14 "As a result, both of us are
15 hoping to resolve this matter
16 amicably. The proposed
17 adjournment will permit me
18 additional time to attempt to
19 obtain production of the
20 requested documents
21 voluntarily from the RCMP.
22 You have indicated to me you
23 will provide me with your
24 cooperation in obtaining the
25 requested documents

1 voluntarily from the RCMP."

2 It says:

3 "In the event that I am
4 successful in obtaining the
5 production of the requested
6 documents voluntarily from
7 the RCMP, I shall withdraw
8 my Motion on consent without
9 costs. However, in the
10 event that I am not
11 successful in obtaining
12 production of the requested
13 documents voluntarily from
14 the RCMP, I shall be forced
15 to serve and file amended
16 Motion materials under Rules
17 82 and 86 of Tax Court of
18 Canada Rules of Practice in
19 order to seek Orders
20 compelling the production of
21 the requested documents from
22 the Respondent and the
23 RCMP."

24 "As discussed, we are both
25 of the view that the

1 above-mentioned Motion, if
2 required, should be dealt
3 with prior to the Status
4 Hearing, which is now to be
5 scheduled on December 7th."

6 The status hearing has now been
7 adjourned sine die awaiting the outcome of this
8 motion. I say:

9 "Accordingly, I confirm that
10 I have advised you in
11 our telephone conversation
12 that in the event that my
13 request for an adjournment
14 of the Motion is not
15 granted, the Examination of
16 the Appellant previously
17 scheduled by you to take
18 place --will have to be
19 adjourned to a new date."

20 I was served with a notice they
21 wanted to cross-examine the appellant. That did
22 not take place, it was withdrawn.

23 " --will have to be
24 adjourned to a new date that
25 is mutually convenient to

1 both parties in order to
2 permit the Appellant to file
3 and serve amended Motion
4 materials under Rules 82 and
5 86 of the Tax Court of
6 Canada Rules and Practice in
7 order to seek Orders
8 compelling the production of
9 the requested documents from
10 the Respondent and/or the
11 RCMP. Please advise me that
12 you are willing to accept
13 service of the amended
14 Motion materials, if
15 required, on behalf of the
16 RCMP since it and the CRA
17 are both agencies of the
18 Respondent."

19 Again, this is the same letter
20 there. The response I got is that they wouldn't
21 cooperate and that I had to bring the motion.

22 That's the response I got from Ms.
23 Thorn ultimately at Exhibit O to her letter of
24 October 12th. It's at the last page of Tab 2:

25 "This is further to your

1 telephone calls last week
2 requesting assistance in
3 obtaining the Things seized
4 from the Appellant by the
5 RCMP in the criminal
6 immigration fraud matter.
7 The Respondent in this tax
8 matter has no right to any
9 of the Appellant's Things
10 other than is provided under
11 the Income Tax Act Audit
12 only, obtained from those
13 Things copies of documents
14 that are necessary to
15 support the tax assessment;
16 and copies thereof were
17 already provided to you.
18 I suggest that you
19 consulting the legislation/s
20 and regulation/s under which
21 the Appellant's Things were
22 seized. There would be
23 provisions setting out to
24 whom, and how, such Things
25 may be returned. Please

1 follow the procedures set
2 out therein."

3 That's why we're here today.

4 I spent at least ten hours on this
5 matter preparing the materials and the legal
6 research and the hearing today. My hourly rate is
7 480, I'm asking for \$4,800.00 costs to be fixed on
8 a solicitor-client basis. Those are my
9 submissions.

10 THE COURT: Thank you.

11 Ms. Thorn?

12 MS. THORN: Well, Your Honour,
13 they asked for costs on a solicitor and client
14 basis and that cannot be taken lightly. Nowhere,
15 and to answer your question directly, nowhere and
16 at no time did Mr. Alpert indicate that if we
17 consented to the section 86 motion then the 82
18 motion would be withdrawn. The letter he referred
19 you to is prior to amending his Notice of Motion.

20 THE COURT: Certainly the tenor of
21 the correspondence is we want to get these
22 documents from the RCMP, can you help. He
23 acknowledges that you have been cooperative.

24 I would have thought that someone
25 would have suggested, "let's get a Rule 86 order by

1 consent" and away you go.

2 MS. THORN: All through he's
3 insisted on this 82 matter. Since we're coming
4 here, what's the purpose of consenting to that and
5 ultimately have to do a very costly Affidavit of
6 Documents? There's really no ground for the 82
7 request, anyway.

8 Presumably the whole tenor of the
9 thing, and also as stated in the appellant's
10 affidavit, is that we refuse to provide any
11 assistance. Well, as opposing counsel, and I've
12 told Mr. Alpert that I will help within limits, and
13 that's exactly what I did.

14 Mr. Alpert was told all along that
15 once our list of documents was prepared, he may
16 inspect and take copies in accordance with the
17 Rules. If he can identify and produce a list of
18 documents not listed on our list, we would provide
19 him with a copy if that document is relevant to the
20 issue.

21 To help things along, Mr. Alpert
22 was provided with the respondent's audit report and
23 the appeals report as well.

24 You can also tell from Tab 2,
25 Nancy Pasterelli's affidavit, Exhibit I, that it

1 was only after my suggestion on September 28, 2006
2 when Mr. Alpert called me to assist him, I said:
3 "Why don't you ask the RCMP directly for the return
4 of the things?" I even provided him with the
5 RCMP's number.

6 I also said: "Why don't you
7 contact the criminal lawyer in this matter, he
8 might have documents?" And, also, "contact the
9 financial institutions that the appellant worked
10 with." Of course, he could also have contacted the
11 appellant's accountant where the auditor obtained
12 leads to prepare those demands for information from
13 the bank.

14 Well, on the same day Mr. Alpert
15 called me back and said, "I've spoken with the
16 RCMP" and he wants to adjourn the motion. There's
17 been many telephone calls from Mr. Alpert along the
18 same line insisting that we have the appellant's
19 things, which resulted in my October 12th letter
20 that was previously referred to you. I said, "look,
21 there are legislations and provisions that provide
22 for the return of the seized things." I don't know
23 what Mr. Alpert did with that.

24 Based on the foregoing, I said
25 that "as opposing counsel I've done all I could". I

1 can't very well do Mr. Alpert's job for him
2 representing the appellant.

3 I would ask that the third party
4 motion application, if allowed, I would rely on the
5 Bawolin case under Tab 8 of the appellant's book of
6 authorities, to similarly ask for costs from the
7 appellant. In that particular case, it was
8 \$300.00.

9 THE COURT: Thank you.
10 Anything further, Mr. Alpert?

11 MR. ALPERT: No.

12 THE COURT: Solicitor-client costs
13 are quite an exception, and my handling of them is,
14 I would only order them in some very egregious
15 circumstances where I am satisfied that one side or
16 the other has acted outrageously that would justify
17 solicitor-client costs. I don't see that type of
18 behaviour in this case, Mr. Alpert.

19 You are successful on your
20 application with respect to Rule 86. I do make an
21 order that the RCMP are to return the seized
22 documents seized in January 2001 from Mr. Singh. On
23 that motion I will also order costs at \$500.00.

24 The motion with respect to Rule 82
25 is adjourned sine die.

1

Thank you all very much.

2

--- Whereupon proceedings adjourned at 11:20 a.m.