Federal Court  Cour fédérale

Date: 20150428

Docket: T-1958-14

Citation: 2015 FC 549

Ottawa, Ontario, April 28, 2015

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

MICHAEL ROSENBERG

Plaintiff

and

CANADA REVENUE AGENCY

Defendant

ORDER AND REASONS

[1] The Canada Revenue Agency (the defendant, the CRA) filed in Court a motion to strike the action initiated by the plaintiff, Michael Rosenberg, under rule 221 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. The motion was scheduled at the same time as another proceeding which stems from the same facts and involves, this time, the Minister of National Revenue (the Minister) as plaintiff, and Mr. Rosenberg as defendant (Docket T-2062-14). In that matter, the Minister filed a summary application under section 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th supp) [the ITA], seeking an order directing Mr. Rosenberg to provide certain

documents and information that were the subject of a request under section 231.1 of the ITA (the request for information). During the hearing of the motion to strike in this docket, I adjourned the application in Docket T-2062-14 until the Court could dispose of the proceedings in this docket.

I. **Background**

[2] Between 2008 and 2010, Mr. Rosenberg and other related legal entities were subject to an audit by the CRA for the 2006 and 2007 taxation years. The audit was primarily related to straddling transactions (or straddle loss) in connection with "Mazel Partnership". During the audit, Mr. Rosenberg provided several documents and information to the CRA. Following the audit, an agreement was reached between the CRA and Mr. Rosenberg dated February 19, 2010 (the Agreement).

[3] On January 7, 2013, as part of another audit, the CRA sent Mr. Rosenberg the request for information, pursuant to section 231.1 of the ITA. The documents and information sought concerned the transactions that were audited by the CRA between 2008 and 2010, i.e. the straddling transactions that Mr. Rosenberg participated in for the 2006 and 2007 taxation years. Mr. Rosenberg contends that the Agreement, which he calls a transaction, may be held against the Minister, that it put an end to any dispute regarding the tax that he had to pay for 2006 and 2007 taxation years, and that it prevents the Minister from availing herself of her powers under section 231.1 of the ITA for the purpose of conducting a new audit of the transactions covered by the Agreement, and which could result in a reassessment for these taxation years.

[4] First, Mr. Rosenberg applied to the Superior Court of Quebec to have the Agreement homologated and to obtain an order directing the Minister to withdraw the request for information and not to issue any notice of reassessment for the 2006 and 2007 taxation years. The CRA filed a motion raising a preliminary exception under articles 163 and 164 of the Quebec *Code of Civil Procedure* in which it argued that the Superior Court of Quebec lacked jurisdiction. In a judgment rendered on January 17, 2014, the Superior Court of Quebec allowed the CRA's preliminary argument and dismissed the motion to institute proceedings on the ground that the essential nature of the proceeding instituted fell under the Federal Court's jurisdiction (*Rosenberg c Agence du revenu du Canada*, 2014 QCCS 685, [2014] JQ No 1459). This judgment was affirmed by the Quebec Court of Appeal on September 12, 2014 (*Rosenberg c Agence du revenu du Québec*, 2014 QCCA 1651, [2014] JQ No 9750).

[5] On September 16, 2014, Mr. Rosenberg initiated this action. On October 6, 2014, the Minister filed her summary application under section 231.7 of the ITA so as to obtain an order that would require Mr. Rosenberg to provide the documents and information included in the request for information (Docket T-2062-14). On October 16, 2014, the CRA filed the motion to strike in this case.

II. **Motion to strike**

[6] The motion to strike was filed under paragraphs 221(1)(*a*), (*c*) and (*f*) of the Rules. The CRA argues that the action initiated by the plaintiff discloses no cause of action, that it is frivolous or vexatious, and that it constitutes an abuse of process. Subsection 221(1) of the Rules, which provides the grounds for a motion to strike, reads as follows:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	b) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	c) qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	e) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[7] There is no dispute between the parties with respect to the parameters applicable to a motion to strike. The burden of persuading the Court that the proceeding should have been struck for one of the reasons set out in rule 221 is on the party seeking to strike, and it is a strict burden. With respect to the ground dealing with the absence of cause of action, it is well recognized that the Court will not allow a motion to strike unless it is plain and obvious that the action cannot succeed.

[8] In *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 47, [2014] 2 FCR 557 [*JP Morgan*], Justice Stratas, writing for the Court, reiterated the test applicable to the striking of an application for judicial review, but the same principles apply with respect to a proceeding initiated by way of an action:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a ""knockout punch"—an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[9] In principle, no evidence is admissible in the context of a motion to strike, but the facts alleged in the pleading are taken to be true (*JP Morgan* at para 52). Again, in *JP Morgan*, at paras 53-54, the Federal Court of Appeal further noted that some exceptions apply to the inadmissibility of affidavits in a motion to strike, in particular when they serve to file one or more documents noted in the pleading, in order to assist the Court.

[10] In this case, the dispute between the parties raises the issue of the binding nature of the Agreement and, as the case may be, of its interpretation and scope. The Agreement was not submitted by the parties in this case, but it was submitted in the related Docket T-2062-14. Moreover, during the hearing of this motion, both parties referenced the text of the Agreement filed in Docket T-2062-14 several times and I also read it. Therefore, I implicitly admitted into evidence the Agreement during the hearing by allowing the parties to refer to the text of the Agreement itself to support their respective positions. However, I wish to point out that I

consider that the allegations in the statement of claim are sufficient to deal with this motion to strike without being required to refer specifically to the terms of the Agreement.

III. **Review of the statement of claim**

[11] The facts alleged in the statement of claim may be summarized as follows:

- Between 2008 and the beginning of 2010, Mr. Rosenberg was subject to a tax audit for the 2006-2007 taxation years conducted by the CRA, which specifically concerned transactions characterized as straddling in relation to "Mazel Partnership";

- In the context of this audit, Mr. Rosenberg, his accountant and his lawyers had numerous discussions with the CRA, which requested several documents and information;

- On completing this audit, Mr. Rosenberg and the CRA entered into a transaction dated February19, 2010 (the Agreement);

- As part of this agreement, the CRA undertook to not issue a reassessment for the 2006 and 2007 taxation years (except with respect to one specific element) and Mr. Rosenberg (and the legal entities also concerned) undertook to "refrain, abstain and terminate their practice of engaging in any similar transactions of 'straddling' for Canadian Income Tax purposes";

- On January 7, 2013, the CRA sent the request for information to Mr. Rosenberg in which it informed him that it had undertaken an audit of his income tax returns for the 2006 and 2007 taxation years, and particularly with respect to the transactions in which he had participated over these years, and asked him to provide various information and documents for this audit. The request for information specifies that it is based on subsection 231.1(1) of the ITA and that it concerns transactions of Mazel Partners G.P.;

- On March 15, 2013, the CRA wrote to Mr. Rosenberg's lawyers informing them of the CRA's intention to institute a proceeding under section 231.7 of the ITA if Mr. Rosenberg refused to provide the information required in the request for information of January 7, 2013 and advising them that the Agreement Mr. Rosenberg was relying on was of no relevance to the request.

[12] Mr. Rosenberg argues that it is clear from the letter of March 15, 2013, that the CRA's position is that the Agreement does not prevent it from auditing the transactions covered by the said agreement again.

[13] In the statement of claim, Mr. Rosenberg alleges that the Agreement is a contract by which the parties prevented the challenge of the tax assessments for 2006 and 2007 through mutual concessions and undertakings and that this agreement ended all possible disputes regarding the taxes he had to pay for 2006 and 2007. Mr. Rosenberg contends that the Agreement must have the authority of *res judicata* between the parties and that the CRA did not

raise any reason that would call into question the undertakings that were made on either side in the Agreement.

[14] Mr. Rosenberg also submits that the Agreement does not authorize the CRA, which acts on behalf of the Minister, to use section 231.1 of the ITA to compel him to answer a series of questions that would call into question the very object of the Agreement. The reasons that pushed the plaintiff to seek the Court's intervention appear at paragraphs 13 and 14 of the statement, which read as follows:

> [TRANSLATION]
>
> 13. Considering that the plaintiff is ultimately at risk of contempt of court if he does not answer the questions posed in the letters of January 15, 2013 and March 15, 2013, and this honourable Court must determine and declare whether the Transaction prevents the defendant from availing itself of section 231.1 of the Act so as to force the plaintiff to send it answers to a series of questions seeking call into question the very object of the Transaction;
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> 14. It would be unfair to force the plaintiff to live under threat of a proceeding and/or to require him to make his arguments as part of an opposition to an expedited proceeding;

[15] Mr. Rosenberg seeks the following relief:

> [TRANSLATION]
>
> Declaratory relief sought:
>
> **DECLARE** that the plaintiff and the defendant entered into a transaction on or around February 19, 2010: HOMOLOGATE the transaction noted in the letter of February 19, 2010, signed by Ralph Amar, the representative of the defendant and 4341350 Canada Inc. and 4341376 Canada Inc. on behalf of the plaintiff, and ORDER that the parties comply with it;
>
> **DECLARE** that under the transaction documented by the letter of February 19, 2010, the defendant cannot require that the plaintiff,

> under section 231.1 of the *Income Tax Act*, answer questions or submit documents seeking to review the tax that he may have to pay for the 2006 and 2007 taxation years;
>
> Injunctions sought:
>
> **ORDER** the defendant to withdraw the request for information and documents of January 7, 2013 (Exhibit P-3) and to abstain from making any similar requests regarding the 2006 and 2007 taxation years so long as a court of competent jurisdiction has not cancelled the transaction of February 19, 2010;
>
> **ORDER** the defendant to abstain from filing any application under section 231.7 of the *Income Tax Act* to any other court of competent jurisdiction in relation to documents or information covering the taxes payable by the plaintiff for the 2006 and 2007 taxation years so long as a court of competent jurisdiction has not cancelled the transaction of February 19, 2010;
>
> **ORDER** the defendant to abstain from issuing any notice of reassessment to the plaintiff relating to the taxes payable by them for the 2006 and 2007 taxation years so long as a court of competent jurisdiction has not cancelled the transaction of February 19, 2010;
>
> [*sic* for the entire quotation].

IV. **Parties' positions**

A. ***The CRA's arguments***

[16] The CRA argues that it is plain and obvious that the action instituted by Mr. Rosenberg cannot succeed because it seeks to prevent the Minister from exercising the powers conferred on her by the ITA and specifically by section 231.1 and following of the ITA, which, in its view, this Court cannot do. Further, the CRA argues that the Agreement does not and could not have the scope to limit the Minister's audit and assessment powers.

[17] The CRA alleges that the commitment it made at the conclusion of the Agreement was limited to not reassessing Mr. Rosenberg for the 2006 and 2007 taxation years at the time that the Agreement was concluded. The CRA was satisfied, when the Agreement was made, with the information sent by Mr. Rosenberg relating to his straddling transactions, and it agreed to not reassess him. For the CRA, it was not a commitment to never reassess Mr. Rosenberg for the 2006 and 2007 taxation years, let alone a commitment to waive the Minister's audit powers.

[18] The CRA contends that even if the Agreement were interpreted as containing a commitment to not reassess Mr. Rosenberg, the scope of such a commitment would not cover the Minister's audit powers. The CRA emphasizes the distinction between the Minister's power to conduct audits of taxpayers and her power to assess taxpayers, and it stresses that the Agreement in no way deals with the Minister's audit powers. Therefore, the CRA argues that the Agreement does not contain a waiver of its audit powers provided in the ITA.

[19] The CRA also contends that even if it had committed to never exercising the Minister's audit powers against Mr. Rosenberg's transactions for the 2006 and 2007 taxation years again, such a commitment would be illegal because the Minister cannot waive the audit powers conferred on her by the ITA so as to ensure the administration and enforcement of the ITA. The CRA stresses the responsibility vested in the Minister under section 220 of the ITA of ensuring the administration and enforcement of the ITA. It argues that the Minister's audit powers are necessary to allow her to assume her responsibilities because they are essential tools in ensuring the integrity of the self-reporting tax system and that she cannot, by an agreement, waive the exercise of her responsibilities. The CRA maintains that the Minister is required, at all times, to apply the ITA in compliance with the facts and the law. The CRA also notes that the

jurisprudence has clearly established that any agreement in which the Minister would agree to assess in any other way than in accordance with the ITA for the purpose of a compromise would be illegal. It adds that any agreement in which the Minister would have waived the exercise of her audit powers would also be illegal.

[20] Therefore, the CRA argues that the action initiated by Mr. Rosenberg does not disclose any cause of action and that the Court could not order the Minister not to exercise the powers vested in her by the ITA.

[21] The CRA also argued that the action must be struck even if the Court finds there is a dispute between the parties that is not devoid of any merit on the ground that Mr. Rosenberg should have proceeded by way of an application for judicial review and not by way of an action. The CRA alleges that the action seeks declaratory relief and an injunction against the Minister who, for the purpose of exercising her audit powers and ultimately her powers of assessment, is a "federal board, commission or other tribunal" within the meaning of section 2 and paragraph 18(1)(*a*) of the *Federal Courts Act*, RSC 1985, c F-7 [the FCA]. Further, it is clear for the CRA that the essence of the proceeding initiated by the plaintiff is directed at the Minister's decision to exercise her audit powers, which came to light with the request for information sent to the plaintiff on January 7, 2013. The CRA notes that under subsection 18(3) of the FCA and the jurisprudence, any proceeding seeking declaratory relief or an injunction against a federal board, commission or other tribunal cannot be admissible unless it is instituted by way of an application for judicial review pursuant to section 18.1 of the FCA. Therefore, the CRA argues that the Court does not have the jurisdiction to entertain the action initiated by Mr. Rosenberg.

[22] The CRA refutes Mr. Rosenberg's argument that his action for declaratory relief is authorized by rule 64 of the Rules. The CRA claims that through his proceeding Mr. Rosenberg does not seek to have his rights declared within the meaning of rule 64 of the Rules. Rather his proceeding is based on an alleged violation by the Minister of the rights he claims to have under the terms of the Agreement and which he raises in reply to the request for information dated January 7, 2013. In such a context, the CRA maintains that it is clearly an application for declaratory relief against a "federal board, commission or other tribunal", that the injunction is at the heart of the relief sought by Mr. Rosenberg and that it is not simply an ancillary finding to an action for a declaration of rights.

[23] The CRA further contends that the action is either frivolous or vexatious, and constitutes an abuse of process. The CRA submits that Mr. Rosenberg proceeded by way of an action because an application for judicial review would have been filed beyond the 30-day limitation period provided in subsection 18.1(2) of the FCA. The CRA notes that the request for information is dated January 7, 2013, while the plaintiff's action was commenced on September 16, 2014. Thus, the CRA submits that the plaintiff brought an action to circumvent the requirement relating to the limitation period for filing an application for judicial review.

[24] The CRA acknowledges that despite subsection 18.4(2) of the FCA, the Court may rely on rule 57 of the Rules to convert an action into an application for judicial review. It further submits that Mr. Rosenberg did not file a motion to convert the action into an application for judicial review, and that, in any case, it would be inappropriate for the Court to authorize such a conversion. In this respect, the CRA submits that Mr. Rosenberg is represented by counsel and

that he should have known that he had to proceed, within the applicable time limit, by way of an application for judicial review.

[25] Last, the CRA contends that the conversion of the action into an application for judicial review would render the plaintiff's action frivolous or vexatious since the Minister has filed a summary application pursuant to section 231.7 of the ITA (Docket T-2062-14). The CRA submits that Mr. Rosenberg will have the opportunity to put forth his arguments in that proceeding, including his position regarding the binding nature of the Agreement and its scope. Thus, it would be futile and pointless to convert the action to allow for the continuation of two parallel proceedings.

B. ***Mr. Rosenberg's arguments***

[26] Mr. Rosenberg submits that the CRA's motion should be dismissed on the ground that it is far from being plain and obvious that his action cannot succeed and that it is neither frivolous nor vexatious. He also argues that it is not a case of abuse of process.

[27] Mr. Rosenberg argues that it is essential, in the context of the Minister's position with respect to the Agreement, that the Court rule on the merits of the dispute regarding the binding nature and scope of the Agreement.

[28] Mr. Rosenberg contends that under the Agreement, the CRA clearly undertook to not reassess him for the 2006 and 2007 taxation years, and he alleges that the commitment to not reassess him also includes the implicit commitment to not conduct another audit in order to

reassess him. He maintains that by conducting a new audit of the transactions that led to the Agreement, the Minister is changing her position and is repudiating the Agreement. Thus, he submits that there is a live issue between the parties and that his action discloses a genuine cause of action.

[29] Mr. Rosenberg acknowledges that, under the ITA, the Minister has broad audit powers and that she does not have the authority to conclude agreements with taxpayers that would not comply with the law and facts. However, the plaintiff submits that the jurisprudence recognizes the validity and binding nature of agreements concluded between the Minister and taxpayers in the context of disputes over assessments and reassessments when they comply with the law and facts. Mr. Rosenberg insists that there is nothing in the record that would imply that the Agreement that was reached in February 2010 did not comply with the law and facts. Given that context, Mr. Rosenberg submits that the Agreement binds both parties and it cannot be set aside for any reasons other than those set out in the Agreement itself. He contends that the CRA has in no way claimed that he did not respect the terms of the Agreement or that there has been a change in the "fact pattern" as contemplated by the Agreement.

[30] Mr. Rosenberg also contends that the audit powers granted to the Minister in the ITA are discretionary and that she may waive them in the context of an agreement that otherwise complies with the ITA. He submits that when the CRA concluded the Agreement, it was specifically exercising the Minister's delegated authority to ensure the administration and enforcement of the Act. The Agreement was concluded following a CRA audit pertaining to certain transactions during the 2006 and 2007 taxation years and following an assessment issued

for those years. The Agreement is binding on both parties who made respective undertakings in it.

[31] Mr. Rosenberg also submits that the proceeding is not irregular and that it was appropriate to proceed by way of an action for declaratory relief. In this regard he relies on rule 64 of the Rules which provides that no proceeding is subject to challenge on the ground that only a declaratory order is sought. Mr. Rosenberg argues that this rule is not limited to applications for judicial review since it mentions "proceedings", which also includes actions. He relies on *Ward v Samson Cree Nation*, [1999] FCJ No 1403, at paras 33 to 38, 247 NR 254 (FCA) [*Ward*] to support his position. Mr. Rosenberg submits that his action is a true action for declaratory relief because it aims to have clarified his rights and commitments, as well as those of the CRA, under the Agreement. Thus, he contends that the essential character of the proceeding is to obtain a declaration of the extent of his rights and that this is clearly in the nature of an action for declaratory relief which has been recognized for many years now. He relies on *Kourtessis v Canada (National Revenue)*, [1993] 2 SCR 53, [1993] SCJ No 45 [*Kourtessis*] and *Mohawks of the Bay of Quinte v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 669, [2013] FCJ No 741 [*Mohawks of the Bay of Quinte*]) to support his position, and he states that the injunction sought is ancillary to his application for a declaration of right.

[32] In the alternative, Mr. Rosenberg submits that if the Court determines that he should have proceeded by way of an application for judicial review, it is a procedural defect that should not lead to the striking of the action and he refers to rule 56 of the Rules. He also claims that the Court could authorize the conversion of his action into an application for judicial review under rule 57 of the Rules (*Sweet v Canada*, [1999] FCJ No 1539 at paras 14-16, 249 NR 17 [*Sweet*]).

[33] Furthermore, Mr. Rosenberg submits that the fact that the limitation period for filing an application for judicial review may be expired should not be used as a ground for granting a motion to strike (*Maroney v Canada*, 2002 FCT 801 at para 7, [2002] FCJ No 1068). He further contends that in this case, the 30-day limit should not apply because the dispute is not limited to the request for information that the CRA sent him, but includes the scope of the Agreement that continues to produce its effects. Consequently, he argues that the 30-day limit provided in subsection 18.1(2) of the FCA does not apply because the dispute involves a continuing course of conduct (*Apotex Inc v Canada*, 2010 FC 1310 at paras 10, 12, [2010] FCJ No 1310 [*Apotex*]; *Airth v Canada (Minister of National Revenue)*, 2006 FC 1442 at paras 10-11, [2006] FCJ No 1818 [*Airth*]).

[34] Mr. Rosenberg's last argument is that the summary application filed by the Minister in Docket T-2062-14 is not the appropriate proceeding for dealing with all of the issues raised in this case.

V. **Analysis**

[35] I believe that the proceeding brought by the plaintiff cannot succeed in its current form, but that there is nonetheless a live issue between the parties and in this respect it is not plain and obvious that the plaintiff's position cannot succeed in the context of an appropriate proceeding.

[36] I find that the real dispute between the parties stems from the Minister's decision to undertake a new audit of the straddling transactions that Mr. Rosenberg participated in during the 2006 and 2007 taxation years. It is not disputed that the audit commenced by the CRA covers, at

least in part, the straddling transactions that Mr. Rosenberg participated in during 2006 and 2007 that were already subject to the audit conducted from 2008 to 2010 and which led to the Agreement.

[37] Mr. Rosenberg contends that the Minister is bound by the Agreement and that this agreement restricts her power to conduct a new audit of the same transactions that led to the conclusion of the Agreement. The CRA, in contrast, claims that it did not commit to never reassessing the plaintiff for the 2006 and 2007 taxation years, and even less to restricting or waiving her audit powers. Moreover, she argues that an agreement that would limit her audit powers or in which she would waive the exercise of her audit powers would be null and invalid.

[38] I consider it to be neither plain nor obvious that Mr. Rosenberg's position, or the CRA's position for that matter, is entirely unfounded and has no chance of success.

[39] The dispute between the parties raises different issues including the binding nature of the Agreement and the impact it could, or could not, have on the extent of the audit powers that the Minister wants to exercise. The parties acknowledge that, with respect to assessments, the Minister may conclude an agreement as long as the agreement is justifiable on the facts and the law (*CIBC World Markets Inc v Canada*, 2012 FCA 3 at paras 22-24, [2012] FCJ No 30; *JP Morgan* at para 79). The issue in this instance consists, among others, in determining whether the Agreement concluded in February of 2010 constitutes such an agreement and whether the CRA undertook to never re-assess Mr. Rosenberg for 2006 and 2007.

[40] The parties have not submitted any decisions in which the courts have decided on the validity of agreements between the Minister and taxpayers that would involve a waiver or restriction on the Minister's auditing powers, but the question is raised in this case. The dispute involves determining whether the Agreement deals with the Minister's audit powers and if so, whether it restricts the Minister's power to proceed with a new audit of the straddling transactions in which Mr. Rosenberg was involved in 2006 and 2007, and whether the Agreement is valid.

[41] It is not up to the Court, at this stage in the proceedings, to interpret the Agreement, or to rule on the binding nature and, if applicable, the scope of the Agreement. However, I consider that these issues are important for the parties and for Mr. Rosenberg in particular who states that he made commitments that still bind him in consideration of those made by the CRA under the Agreement. In this context, I find that it is not plain and obvious that Mr. Rosenberg's position cannot succeed.

[42] Still, I am of the opinion that the action for declaratory relief brought by Mr. Rosenberg is not the appropriate proceeding in this case.

[43] The dispute arose when the Minister decided to conduct a new audit of the straddling transactions in which Mr. Rosenberg participated during the 2006 and 2007 taxation years, but it also stems from the position taken by the CRA, acting on behalf of the Minister, regarding the Agreement. Before he received the request for information in January 2013, nothing could have made Mr. Rosenberg suspect that the Minister believed that the Agreement did not limit her power to audit his straddling transactions for the 2006 and 2007 taxation years again and

eventually reassess him. The Minister's position regarding the non-binding nature of the Agreement was implicitly communicated to Mr. Rosenberg in the request for information and it was subsequently communicated clearly in the letter of March 15, 2013 addressed to his counsel.

[44] I share the CRA's opinion that the Minister, when acting under her audit powers, and particularly when acting under the powers conferred by sections 231.1 and following of the ITA, is acting as a "federal board, commission or other tribunal" as defined in section 2 of the FCA :

Definitions	Définitions
2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867;	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi constitutionnelle de 1867.

[45] I am also of the view that it is the Minister's decision to proceed with a new tax audit of Mr. Rosenberg for the 2006 and 2007 taxation years that is at issue here and that this is central to Mr. Rosenberg's action. Mr. Rosenberg claims that due to the Agreement, the Minister cannot proceed with a new audit of the transactions that led to the Agreement under whose terms she made a commitment not to reassess the 2006 and 2007 taxation years. Mr. Rosenberg relies on the Agreement to object to the Minister's decision to exercise her audit powers on the ground that this Agreement is binding and remains in effect.

[46] The remedies sought in this action are clear: Mr. Rosenberg is seeking declaratory and injunctive relief against the CRA, acting as the Minister's delegate. These remedies are clearly in the nature of the extraordinary remedies set out in subsection 18(1) of the FCA which, when directed at a federal board, may only, pursuant to subsection 18(3) of the FCA, be obtained on an application for judicial review made under section 18.1 of the FCA. It is clear from the statement of claim that the injunction does not constitute ancillary relief, but rather one of the main remedies sought. Mr. Rosenberg asks the Court to order the CRA not to conduct a new audit for the 2006 and 2007 taxation years.

[47] Mr. Rosenberg claims that rule 64 of the Rules allowed him to file an action for declaratory relief rather than an application for judicial review against a federal board, and he relies on *Ward*. I do not share this view and find that *Ward* cannot support such a position.

[48] First, the wording of subsection 18(3) of the FCA is clear and the case law has unambiguously recognized its application (*Assoc des Crabiers Acadiens Inc v Canada (Attorney General)*, 2009 FCA 357 at paras 27-29, [2009] FCJ No 1567; *Canada v Mid-Atlantic Minerals*

Inc, 2002 FCTD 569 at para 28, [2002] FCJ No 740; *Huzar v Canada*, [2000] FCJ No 873, 259 NR 246; *Williams v Lake Babine Band*, [1996] FCJ No 173, 194 NR 44).

[49] Furthermore, it is true that in *Ward*, at paras 34 to 43, Chief Justice Isaac refuted the appellants' contention that the Court had jurisdiction to grant declaratory relief solely under paragraph 18(1)(*a*) of the FCA, and he stated that rule 64 of the Rules opened the door to actions for declaratory relief. However, in concurring reasons, Justices Décary and Rothstein clearly indicated that they did not share Chief Justice Isaac's view in that regard:

> 47 DÉCARY and ROTHSTEIN JJ.A.:-- We are in general agreement with the reasons for judgment of the Chief Justice, except with respect to paragraphs 34 to 42 thereof.
>
> 48 We do not think it necessary in the circumstances of this case to decide whether declaratory relief may be sought otherwise than through judicial review. We would be particularly reluctant to accept, as seems to be suggested by the Chief Justice, that the Rules of the Court can be invoked to modify a statutory requirement which, *prima facie* at least, is imposed by subsection 18(3) of the *Federal Court Act* ("the Act").
>
> 49 In our view, if we accept that the relief claimed is of a declaratory nature and as such could only be sought through judicial review, the Court is expressly vested, by subsection 18.4(2) of the Act, with the authority to direct that an application for judicial review be treated and proceeded with as an action. It would be a futile exercise, in cases like the present one, to insist that one of the reliefs claimed be pursued in judicial review proceedings while the others are pursued in a parallel action. Clearly, in our view, the Motions Judge, had he been alerted to that possibility, would have directed that the so-called declaratory relief be treated as an action. Since the Appeal Division is entitled by subparagraph 52(*h*)(i) to give the judgment that the Trial Division should have given, we are prepared in the circumstances to allow that part of the claim which is for declaratory relief to continue as an action.

[50] Moreover, I agree that in certain circumstances, an action for declaratory relief is the most appropriate manner in which to proceed, but in this case, the situation is much different from that which existed, for example, in *Mohawks of the Bay of Quinte*, wherein there was no "decision" or "matter" decided by a federal board that could be subject to an application for judicial review.

[51] In this case, the issue clearly arises from the position taken by the Minister, as a federal board, with respect to the extent of her audit powers with regard to Mr. Rosenberg for the 2006 and 2007 taxation years. I therefore consider the proceeding brought by Mr. Rosenberg to be of the nature of an application for judicial review against a federal board, namely the CRA, acting on behalf of the Minister.

[52] The CRA contends that it would be pointless to consider the conversion of the action into an application for judicial review on the ground that Mr. Rosenberg will have the possibility of submitting all of his arguments within the proceeding filed by the Minister under section 231.7 (Docket T-2062-14). With respect, I am not convinced that a summary application under section 231.7 of the ITA, which was commenced after Mr. Rosenberg's action, would be the most appropriate forum to determine all facets of the dispute between the parties. The CRA has not provided me with any case law that would convince me that all of the arguments raised by Mr. Rosenberg, and more particularly those relating to the determination of the binding nature of the Agreement and, if applicable, the scope of the Agreement, could be examined and decided in a summary application under section 231.7 of the ITA. I wish to point out that this point of view in no way constitutes an opinion on the merits of the arguments put forth by Mr. Rosenberg.

[53] I will now turn to the matter of the limitation period.

[54] The CRA submits that it would be inappropriate to convert the action into an application for judicial review because such an application would clearly have been filed outside of the 30-day period provided for at subsection 18.1(2) of the FCA. I disagree.

[55] I am not convinced that, on a strictly technical level, the request for information dated January 7, 2013, in and of itself, would constitute a "decision" within the meaning of subsection 18.1(2) of the FCA, given that a request for information under section 231.1 of the ITA requires judicial authorization pursuant to section 231.7 of the ITA in order to become binding on the taxpayer or to give rise to legal consequences in the case of a failure to comply. Rather, I find that Mr. Rosenberg is challenging a broader conduct, namely, the CRA and the Minister's position regarding the Agreement and the decision of the CRA, acting on the Minister's behalf, to audit the transactions carried out by Mr. Rosenberg for the 2006 and 2007 taxation years and to request information from him in the context of that audit.

[56] In my opinion, the decision to undertake an audit and to request documents and information in the context of that audit constitutes a "matter" within the meaning of subsection 18.1(1) of the FCA, in respect of which an application for judicial review may be made. In *Krause v Canada*, [1999] 2 FCR 476 at para 21, [1999] FCJ No 179 (FCA), the Federal Court of Appeal held that "the word "matter" does embrace not only a "decision or order" but any matter in respect of which a remedy may be available under section 18 of the Federal Courts Act" (see also *Airth* at paras 5, 9-10; *Apotex* at paras 9-12; *Mikail v Canada (Attorney General)*, 2011 FC

674 at paras 35-36, [2011] FCJ No 1100; *Canadian Assn of the Deaf v Canada*, 2006 FC 971 at paras 71-72, [2006] FCJ No 1228 [*Assn of the Deaf*]).

[57] In this case, I find that the debate raises grounds for judicial review known to administrative law that involve the Minister's exercise of her audit powers and the scope of the discretion that was available to her to proceed with an audit of transactions carried out by Mr. Rosenberg that had already been subject to an audit following which an agreement was reached. Given that the application deals with the Minister's decision to conduct an audit as well as the binding nature and, if applicable, the scope of the Agreement, which may continue to produce effects, I am of the view that the application concerns a "matter" rather than a "decision".

[58] Given that the application does not strictly concern a "decision" within the meaning of subsection 18.1(2) of the FCA, the 30-day time limit set out in subsection 18.1(2) of the FCA does not apply (*Airth*, para 5; *Apotex*, at para 10; *Assn of the Deaf*, at para 72). Moreover, as there is no assessment in issue, there is no dispute as to possible jurisdiction of the Tax Court of Canada.

[59] I therefore consider it appropriate to use rule 57 of the Rules in this case and allow the conversion of the action into an application for judicial review (see *Sweet* at paras 14-17).

[60] If, however, I am wrong in this regard because the application does concern a "decision" made by the CRA on January 7, 2013, I am of the view that an extension of time should be granted to Mr. Rosenberg, without having to proceed by way of a motion (rule 55 of the Rules).

[61] The criteria for an extension of time are well known, and they were reiterated by the Federal Court of Appeal in *Canada v Larkman*, 2012 FCA 204 at paras 61-62, [2012] FCJ No 880:

> **(2) The test for an extension of time**
>
> [61] The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:
>
> (1) Did the moving party have a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?
>
> (*Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (C.A.); *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249, at paragraph 8).
>
> [62] These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice (*Grewal, supra*, at pages 277-278). The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay" (*Grewal*, at page 282). In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1.
>
> [Emphasis added]

[62] In my view, these factors favour an extension of time in the case at bar. First, Mr. Rosenberg clearly demonstrated that he had a continuing intention of contesting the request for

information sent to him by the CRA in January 2013. I further consider that he has a reasonable explanation for the delay, namely, because he originally brought the matter before Quebec courts to have the Agreement homologated. Mr. Rosenberg claims that the Agreement reached with the CRA concerns the Minister's contracting authority and that he turned to the Superior Court of Quebec first. In light of the concurrent jurisdiction the Federal Court has with provincial superior courts in contractual matters (section 17 of the FCA), it was not completely frivolous of Mr. Rosenberg to have initiated proceedings before the Superior Court of Quebec. The Superior Court of Quebec and the Quebec Court of Appeal both, correctly in my view, allowed the objection raised by the CRA, but this "error of forum" in the present case constitutes a valid explanation for the delay in bringing proceedings before this Court.

[63] In addition, as I mentioned previously, I find that there is a live issue between the parties and that Mr. Rosenberg's application is not entirely without merit. It is also evident that neither the CRA nor the Minister would be prejudiced because the CRA itself acknowledged that Mr. Rosenberg was entitled to raise the grounds he relied on in the context of the application filed under section 231.7 of the ITA. I also find that, given the circumstances of this matter, the granting of an extension of time serves the interests of justice.

[64] Given the nature of the issues raised in this case and because I adjourned the summary application filed by the Minister under section 231.7 of the ITA in Docket T-2062-14, I consider it important that the present matter proceed expeditiously and that a hearing on the merits be scheduled as soon as possible. Accordingly, and on the basis of rule 384 of the Rules, I would order that the matter be continued as a specially managed proceeding.

ORDER

THE COURT ORDERS that

1. The motion to strike be dismissed;

2. The action initiated by the plaintiff be converted into an application for judicial review;

3. The proceeding be continued as a specially managed proceeding and the matter be referred to the office of the Chief Justice in order for a case management judge to be appointed.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1958-14
STYLE OF CAUSE:	MICHAEL ROSENBERG v CANADA REVENUE AGENCY
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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ORDER AND REASONS:	BÉDARD J.
DATED:	APRIL 28, 2015

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