Federal Court Cour fédérale

Date: 20201209

Docket: T-1439-18
T-1440-18
T-1451-18
T-1452-18
T-1501-18

Citation: 2020 FC 1137

Ottawa, Ontario, December 9, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

T-1439-18

NADER GHERMEZIAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

T-1440-18

MARC VATURI

and

ATTORNEY GENERAL OF CANADA

AND BETWEEN:

T-1451-18

NADER GHERMEZIAN

and

ATTORNEY GENERAL OF CANADA

AND BETWEEN:

T-1452-18

MARC VATURI

and

ATTORNEY GENERAL OF CANADA

AND BETWEEN:

T-1501-18

GHERFAM EQUITIES INC

and

ATTORNEY GENERAL OF CANADA

JUDGMENT AND REASONS

I. **Overview**

[1] This decision relates to five applications for judicial review of Requirements for Information [RFIs] issued by John Harasymchuk, a delegate of the Minister of National Revenue [the Minister] under s 231.2(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA].

[2] The Applicants are two individuals, Nader Ghermezian and Marc Vaturi, and a corporation, Gherfam Equities Inc. [Gherfam]. Mr. Ghermezian is the Applicant in two of these matters (Court file numbers T-1439-18 and T-1451-18), Mr. Vaturi is the Applicant in two of these matters (Court file numbers T-1440-18 and T-1452-18), and Gherfam is the Applicant in the fifth matter (Court file number T-1501-18). Each of the five RFIs under review required the applicable Applicant to produce certain information for purposes described as related to the administration and enforcement of the ITA.

[3] These five applications for judicial review were heard together, by videoconference employing the Zoom platform, on November 12 and 13, 2020. As they raise common issues, these Reasons addresses all five applications.

[4] As explained in greater detail below, the applications in Court file numbers T-1439-18, T-1440-18, T-1451-18 and T-1452-18 are dismissed, because I find the decisions to issue the RFIs under review in those applications to be reasonable. The application in Court file number T-1501-18 is allowed, and the RFI under review in that application is quashed, because I find that RFI unreasonable, in that a particular paragraph of that RFI is not sufficiently precise for the

Applicant to understand what information and documentation it is required to provide in response.

II. **Background**

[5] The RFIs under review in T-1439-18 and T-1440-18, both dated June 27, 2018, are the same, other than the persons to whom they are addressed, as the RFI in T-1439-18 was issued to Mr. Ghermezian and the RFI in T-1440-18 was issued to Mr. Vaturi. As explained in the Respondent's Memorandum of Fact and Law, these RFIs request production of information and documents relating to certain corporations listed in the RFIs (which the Respondent refers to as the Triple Five Corporations), in particular banking information and documents relating to those corporations including a list of bank accounts, bank statements, and details concerning incoming and outgoing funds transfers. In these Reasons, I will refer to these two RFIs as the "Triple Five RFIs."

[6] The RFIs under review in Court file numbers T-1451-18 and T-1452-18, both dated June 28, 2018, are also the same, other than the persons to whom they are addressed, as the RFI in T-1451-18 was issued to Mr. Ghermezian and the RFI in T-1452-18 was issued to Mr. Vaturi. These RFIs request production of information and documents relating to certain foreign corporations that are listed in the RFIs, subsidiaries of such corporations and any other entities owned by the Ghermezian Family Trust. In particular, the RFIs request particular corporate records and bank statements related to these corporations. The corporations listed in the RFIs are described as managed by Mr. Ghermezian and Mr. Vaturi and registered in Gibraltar. In these Reasons, I will refer to these two RFIs as the "Gibraltar RFIs."

[7] The RFIs under review in Court file number T-1501-18 was issued to Gherfam on July 10, 2018 [the Gherfam RFI]. It requests production of information and documents relating to a restructuring and refinancing transaction related to the Mall of America that occurred in 2014, as well as information and documents relating a company named Triple Five of Minnesota, Inc. [T5MN], including the historical asset holdings of that company and related entities and that company's financial statements.

[8] The parties to these applications have not filed affidavit evidence in support of their respective positions. Rather, the evidentiary record before the Court consists of the Certified Tribunal Record [CTR] that has been filed in each matter. The original CTR applicable to Court file numbers T-1439-18, T-1440-18, T-1451-18 and T-1452-18 was filed August 16, 2018 and consists of: (a) the RFIs under review in those four matters; (b) a document entitled "Information Sheet for a Requirement to Provide Information" applicable to those four RFIs [the Ghermezian and Vaturi Information Sheet]; and (c) drafts of the four RFIs. The Ghermezian and Vaturi Information Sheet contains a number of redactions, described as being made pursuant to ss 37 and 38 of the *Canada Evidence Act*. The record also includes a revised version of the CTR, filed November 23, 2018, which includes the Ghermezian and Vaturi Information Sheet with fewer redactions.

[9] The CTR applicable to Court file number T-1501-18 was filed August 27, 2018 and consists of: (a) the RFI under review in that matter; (b) a document entitled "Information Sheet for a Requirement to Provide Information" applicable to that RFI and to an RFI under s 231.6(2)

of the ITA [the Gherfam Information Sheet]; (c) drafts of those RFIs; and (d) an Audit Information Request that had previously been issued to Gherfam.

III. **Issues**

[10] The Applicant in each of the five applications for judicial review raises the following three issues:

A. Whether the RFI is invalid because the Minister failed to obtain the judicial authorization required under s 231.2(2) of the ITA for an unnamed persons requirement; and

B. Whether the RFI is invalid because the Minister failed to comply with the criteria in s 231.6 of the ITA for foreign-based information; and

C. Whether the RFI is invalid because it was not issued for purposes related to the administration or enforcement of the ITA.

[11] The Respondent raises the following additional issues:

A. The applicable standard of review;

B. Which party bears the applicable burden of proof; and

C. Whether the relief sought by the Applicants is appropriate in the circumstances.

[12] I consider the combination of issues raised by the parties, starting with the standard of review and then the burden of proof, to represent a suitable framework for the adjudication of the parties' arguments in these applications.

IV. **Analysis**

A. *The applicable standard of review*

[13] The parties agree that the reasonableness standard of review applies to the issues under consideration in these applications. It is useful to canvass some of the principles explained by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] as governing the conduct of reasonableness review of administrative decisions.

[14] As a starting point, *Vavilov* explains that the reasonableness standard of review contemplates deference to administrative decision-makers (at paras 75 and 83):

> 75 Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus.
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> ….
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> 83 It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least

> as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) , that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[15] Where the administrative decision-maker has produced written reasons for the decision under review, the Court should begin its review with focus upon those reasons (see *Vavilov* at para 84). This focus considers not only the outcome of the decision but also whether that outcome is justified by the reasoning process employed by the decision-maker (see *Vavilov* at paras 86-87).

[16] For circumstances where the nature of the decision or decision-making process does not involve the production of formal reasons, *Vavilov* provides the following guidance (at paras 137-138):

> 137 Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst; Green; Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing

> so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.
>
> 138 There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

[17] The issues in the present applications raise, at least in part, disputes between the parties surrounding interpretation of certain provisions of the ITA. *Vavilov* emphasizes the application of the reasonableness standard of review to matters of statutory interpretation and how that standard should be applied (at paras 115-116).

> 115 Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.
>
> 116 Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory

> interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

[18] The administrative decision maker's task is to interpret the statutory provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue (see *Vavilov* at para 121). However, as with other aspects of administrative decision-making, there may be cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons. The reviewing court should then consider whether it is able to discern the interpretation adopted by the decision-maker from the record and determine whether that interpretation is reasonable (see *Vavilov* at para 123).

[19] I will return to these principles later in these Reasons.

B. *Which party bears the applicable burden of proof*

[20] The Applicants take the position that the Minister bears the burden of proving compliance with s 231.2 of the ITA. They note that the Minister has not filed any affidavit evidence in these applications for judicial review and argue that the Court should draw an adverse inference on that basis, as the facts surrounding the decisions to issue the RFIs are exclusively within the knowledge of the Minister.

[21] While the Applicants raise this argument principally in connection with the third issue raised in these applications (i.e., whether the RFIs were issued for purposes related to the administration or enforcement of the ITA), the point is also relevant to the other issues, in which the Applicants also submit that the Respondent has not advanced a sufficient evidentiary foundation to support the issuance of the RFIs under s 231.2(1) of the ITA.

[22] The Respondent disagrees with the Applicants' position on the applicable burden of proof. The Respondent submits that, as in all judicial review applications, the burden of proof is borne by the party challenging the decision under review, and it notes that the Applicants have also declined to file affidavit evidence in support of their applications.

[23] On this issue, I agree with the Respondent. The Supreme Court confirmed in *Vavilov* that the burden is on the party challenging an administrative decision to show that it is unreasonable (at para 100).

[24] In support of their position on the burden of proof, the Applicants rely on the Federal Court's decision in *Capital Vision Inc v Minister of National Revenue*, 2002 FCT 1317 [*Capital Vision*], in which Justice Heneghan stated as follows at paragraphs 79 and 92:

> 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.
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> ….
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> 92 As noted by the Court in *Montreal Aluminum 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.

[25] The Respondent submits that the statements in *Capital Vision* should not be interpreted as suggesting that the burden of proof, in an application for judicial review of a decision made under s 231.2 of the Act, shifts to the Minister. Rather, these statements identify that the Minister must comply with the Act, which the Minister does not dispute.

[26] I agree with the Respondent's analysis of *Capital Vision.* The outcome of that case turned on whether requirements served on the applicant were in support of an audit of the applicant or an audit of unnamed clients of the applicant. The Court found that the evidence supported the latter interpretation (at para 72) and that, inconsistent with his obligations under the ITA, the Minister had been less than forthright in stating the purpose for those requirements (at para 77). Justice Heneghan's comment about the "burden" does not represent a conclusion on the applicable burden of proof.

[27] I also find no basis for an adverse inference arising from the absence of an affidavit filed by the Minister. Subject to certain exceptions that have no application to the issues raised in the present matters, the general rule is that only the evidentiary record that was before the administrative decision-maker is admissible before the reviewing court (see, e.g., *Tseil-Waututh Nation v Canada (Attorney General),* 2017 FCA 128 at paras 97-98). The CTR fulfils the role of placing the material in the evidentiary record before the reviewing court (see, e.g., *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 at para 17).

C. *Whether the RFI is invalid because the Minister failed to obtain the judicial authorization required under s 231.2(2) of the ITA for an unnamed persons requirement*

(1) Statutory Provisions Relevant to Unnamed Persons

[28] To understand this first substantive issue raised by the Applicants, it is useful to review certain provisions of ss 231 to 231.8 of the ITA. The complete text of the sections referenced in these Reasons is set out in Appendix "A" hereto.

[29] Section 231.2(1), under which the RFIs were issued, entitles the Minister, for any purpose related to the administration or enforcement of the Act, to serve on any person a notice requiring that person to provide any information or document:

Requirement to provide documents or information	**Production de documents ou fourniture de renseignements**
231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such	**231.2 (1)** Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord international désigné ou d'un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :

reasonable time as is stipulated in the notice,	
(a) any information or additional information, including a return of income or a supplementary return; or	**a)** qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;
(b) any document.	**b)** qu'elle produise des documents.

[30] The Minister's entitlement under 231.2(1) is subject to subsection (2). Subsections (2) and (3), which relate to "unnamed persons," provide as follows:

Unnamed persons	**Personnes non désignées nommément**
(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 more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).	**(2)** Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).
Judicial authorization	**Autorisation judiciaire**
(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a	**(3)** Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou la production de documents prévues au paragraphe (1) concernant une

requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") if the judge is satisfied by information on oath that	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 :
(a) the person or group is ascertainable; and	**a)** cette personne ou ce groupe est identifiable;
(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.	**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;
(c) and **(d)** [Repealed, 1996, c. 21, s. 58(1)]	**c)** et **d)** [Abrogés, 1996, ch. 21, art. 58(1)]

[31] When the unnamed persons provisions are engaged, the Minister must, before issuing a requirement under s 231.2(1), apply for judicial authorization from the Federal Court under s 231.2(3), which prescribes the test to be employed by the Court when considering such an application. In *Canada (National Revenue) v Hydro-Québec*, 2018 FC 622 [*Hydro-Québec*], a decision upon which the Applicants rely, Justice Roy explained the purpose of the unnamed persons provisions as follows (at para 68):

> 68 It is obvious upon examination of the context in which subsections 231.2 (2) and (3) are found that Parliament wanted to limit the scope of the Minister's powers, extensive as they are. The purpose of the provision is to limit the scope of requests for information that can be issued. Thus, the fear of abuse that could be generated by the case law of Canadian Bank of

> Commerce, Richardson, McKinlay and Jarvis is seen in the obligation of judicial intervention in the case where the targeted individuals cannot be identified by name. Parliament wants to protect unnamed persons ex ante, so as to avoid undue invasions and not to remedy them later. The protection that Parliament wants to grant is based on a request made to administer or enforce the Act, which case law had interpreted as requiring a genuine and serious inquiry in the case of previously identified individuals, but especially, in the case of people who cannot even be named, that they be identifiable and that we want to verify whether this unnamed but identifiable person has respected duties and obligations outlined in the ITA. It is clear that Parliament is seeking a certain specificity if a request related to people who are unnamed may be targets. In this case, we are searching in vain for a criterion connected to the ITA that would turn the group into an ascertainable group for the purpose of administering or enforcing the Act and for which it would be permissible to seek information to thereupon verify compliance with the Act.

[32] The issue in dispute between the parties in the present applications is whether the unnamed persons provisions are engaged by the RFIs under review. The Information Sheets that were before the decision-maker identify the particular parties that the Minister was investigating in issuing each of the RFIs. However, the Applicants argue that the Minister did not name these parties in the RFIs themselves and was therefore required to seek judicial authorization under s 231.2(3) before issuing the RFIs.

[33] The Respondent disputes this interpretation of how the unnamed persons provisions operate. The Respondent argues that, because the parties under investigation are known to the Minister, the unnamed persons provisions do not apply.

[34] Reduced to its simplest articulation, the dispute surrounds the meaning of the term “unnamed persons.” In effect, the Applicants submit that it means unnamed in the RFI, and the

Respondent submits that it means unknown to the Minister. Before considering the merits of the parties' arguments on this issue, and the reasonableness of the RFIs against the backdrop of those arguments, it is useful to review some of the authorities that have considered the unnamed persons provisions.

(2) Jurisprudence

[35] The Respondent submits that the leading authorities are the decisions of the Federal Court of Appeal in *Canada (Customs and Revenue Agency) v Artistic Ideas Inc.*, 2005 FCA 68 [*Artistic Ideas*] and the subsequent decision of the Supreme Court of Canada in *Redeemer Foundation v Minister of National Revenue*, 2008 SCC 46 [*Redeemer*].

[36] In *Artistic Ideas*, the Minister began an audit of Artistic Ideas Inc. [Artistic], a company that arranged the sale of artwork to individual Canadian taxpayers who in turn donated the artwork to registered charities. In the course of the audit, the Minister served upon Artistic a requirement under s 231.2(1) of the ITA, which required it to provide information including the names of the donors and the charities. Artistic sought to strike that portion of the requirement. Justice Snider had concluded in the decision below that the Minister was entitled to the names of the charities but not to the names of the donors. The Minister appealed that decision.

[37] Writing for the Federal Court of Appeal, Justice Rothstein explained the operation of the unnamed persons provisions as follows (at para 8):

> 8 As I understand the scheme of section 231.2, the Minister may require a third party to provide information and documents pertaining to the third party's compliance with the Act. However,

> the Minister may not impose a requirement on the third party to provide information or documents relating to unnamed persons whom he wishes to investigate, unless he first obtains the authorization of a judge. The judge may authorize the Minister to require such information only if the unnamed persons are ascertainable and only if satisfied that information or documents relating to them is required to verify compliance by them with the Act.

[38] In upholding Justice Snider's decision, Justice Rothstein provided the following analysis (at paras 10-13):

> 10 According to the evidence in the present case, the donors are intended to be the subject of investigations by the Minister. They are precisely the persons to whom subsections 231.2(2) and (3) apply. If the Minister wants to obtain the names of the donors from Artistic, he must obtain an authorization from a judge to do so. The Minister has not obtained such authorization and therefore he cannot require Artistic to provide information about the donors.
>
> 11 However, where unnamed persons are not themselves under investigation, subsections 231.2(2) and (3) do not apply. Presumably, in such cases the names of unnamed persons are necessary solely for the Minister's investigation of the third party. In such cases a third party served with a requirement to provide information and documents under subsection 231.2(1) must provide all the relevant information and documents including the names of unnamed persons. That is because subsection 231.2(2) only pertains to those unnamed persons in respect of whom the Minister may obtain an authorization of a judge under subsection 231.2(3).
>
> 12 There is no evidence that the Minister wishes to have the names of the charities to verify their compliance with the Act. He is therefore entitled to the names of the charities under subsection 231.2(1) because subsections 231.2(2) and (3) do not apply to the charities.
>
> 13 The result is that Snider J. was correct in finding that Artistic had to disclose the names of the charities but did not have to disclose the names of the donors.

[39] The effect of *Artistic Ideas* was to clarify that the unnamed persons provisions are not engaged if the Minister serves a requirement seeking to identify unnamed persons who are not themselves being investigated as to their compliance with the ITA. Although not relying on *Artistic Ideas*, the Supreme Court subsequently confirmed this interpretation in *Redeemer* (see Chief Justice McLachlin and Justice LeBel for the majority at para 22 and Justice Rothstein in dissent, although not on this issue, at para 48).

[40] There are decisions predating *Artistic Ideas* and *Redeemer*, which appear inconsistent with these cases, because they interpret the unnamed persons provisions as applying whenever the Minister sought information about an unnamed person, regardless of whether that person was the subject of an investigation (see *Canadian Forest Products Ltd v Minister of National Revenue* (1996), 119 FTR 152 (FCTD) [*Canadian Forest Products*] and *Canada (Minister of National Revenue) v Toronto Dominion Bank*, 2004 FCA 359 [*TD Bank*] at para 8). However, in a number of subsequent decisions, this Court has addressed the apparent inconsistency between *Artistic Ideas* and *TD Bank* and has followed *Artistic Ideas* (see *Canada (National Revenue) v Morton*, 2007 FC 503 at para 11; *Canada (National Revenue) v Advantage Credit Union*, 2008 FC 853 at paras 16-17; *Canada (National Revenue) v Amex Bank of Canada*, 2008 FC 972 at para 54; *London Life v Canada (Attorney General)*, 2009 FC 956 [*London Life*] at paras 21-24). The Federal Court of Appeal has also adopted the interpretation of s 231.2(2) consistent with *Artistic Ideals* in *eBay Canada Ltd v Canada*, 2008 FCA 348 [*eBay*] at paragraph 23.

[41] I pause to note that the particular issue that was addressed differently in *Artistic Ideas* and *TD Bank* is not itself in dispute between the parties in the present applications. The Applicants'

counsel confirmed during the hearing that the Applicants are not asserting that s 231.2(2) is engaged in relation to unnamed persons who are not themselves under investigation. Regardless, that point has been settled by the jurisprudence canvassed above. However, it is important to assess the particular issue that is in dispute against the backdrop of this jurisprudence. As previously noted, that issue is whether s 231.2(2) is engaged when the Minister issues a requirement seeking information about a party, whose compliance with the ITA is under investigation, in circumstances where the identity of the party is known to the Minister but the party is not named in the requirement.

[42] It is useful at this stage of the analysis to refer to the particular facts, relevant to the individual RFIs under review, which give rise to this issue in these applications.

(3) Triple Five RFIs - T-1439-18 and T-1440-18

[43] Each of the two Triple Five RFIs lists in its subject line the names of seven corporations (Triple Five World Group Properties Limited, Triple Five Amusement World Enterprises Limited, Triple Five World Investments Limited, Triple Five World Malls Limited, Triple Five World Properties Limited, Triple Five World Ventures Limited, and World Alliance Consulting Limited). As previously noted, the RFIs request production of information and documents relating to these corporations, in particular banking information and documents including a list of bank accounts, bank statements, and details concerning incoming and outgoing funds transfers.

[44] The principal document in the record that was before the decision-maker, before issuing the Triple Five RFIs to Mr. Ghermezian and Mr. Vaturi, is the Ghermezian and Vaturi

Information Sheet. That document provides information about the background to the issuance of the RFIs, including identifying which entities are the subject of the Minister's investigation. The Information Sheet states, "Information is requested about these Canadian taxpayers:" and then references the Ghermezian Family Trust dated February 15, 1997 [97GFT] and Triple Five Worldwide Limited [T5WW] and its subsidiaries and sister companies. The Information Sheet then refers to "Tax years under consideration:" and identifies particular tax years for 97GFT, for T5WW and its subsidiaries, and for Mr. Ghermezian and Mr. Vaturi. The reference to the particular tax years for Mr. Ghermezian and Mr. Vaturi is prefaced by the words "For any consequential adjustments".

[45] The Applicants and the Respondent interpret the Information Sheet slightly differently. The Applicants' position is that it demonstrates that 97GFT and T5WW are the parties under investigation. The Respondent's position is that it identifies those parties as well as Mr. Ghermezian and Mr. Vaturi as under investigation. The Applicants dispute that the Information Sheet identifies Mr. Ghermezian and Mr. Vaturi as under investigation, because it refers only to the possibility of consequential adjustments to their tax returns, presumably depending upon the outcome of the investigations of 97GFT and T5WW.

[46] In my view, little turns on this particular area of disagreement, given the nature of the Applicants' unnamed persons argument. Specifically, they submit that 97GFT and T5WW are the parties under investigation and that, as those parties are not named in the Triple Five RFIs, the Minister was obliged to comply with ss 231.2(2) and (3) and seek judicial authorization before issuing the RFIs. The Respondent argues the Minister was under no such obligation,

because, as demonstrated by the Information Sheet, the identities of 97GFT and T5WW were known to the Minister. While the Respondent argues that Mr. Ghermezian and Mr. Vaturi, to whom the Triple Five RFIs were directed, were also under investigation, this point is not particularly responsive to the Applicants' argument, which turns on whether the unnamed persons provisions were engaged by the lack of a reference to 97GFT and T5WW in the RFIs.

[47] I will return to the Applicants' argument on this point later in this analysis.

(4) Gibraltar RFIs - T-1451-18 and T-1452-18

[48] Each of the two Gibraltar RFIs refers in its subject line to "Gibraltar entities managed and controlled by Nader Ghermezian and Marc Vaturi." As previously noted, the RFIs request production of corporate records and bank statements related to certain foreign corporations. The RFIs refer to seven corporations, subsidiaries of such corporations, and any other entities owned by the Ghermezian Family Trust. One of the seven corporations listed in the RFI is T5WW.

[49] As with the Triple Five RFIs, the principal document in the record that was before the decision-maker, before issuing the Gibraltar RFIs to Mr. Ghermezian and Mr. Vaturi, is the Ghermezian and Vaturi Information Sheet. As previous noted, the Applicants' position is that the Information Sheet demonstrates that 97GFT and T5WW are the parties under investigation. Unlike the Triple Five RFIs, the Gibraltar RFIs do contain express references to 97GFT and T5WW as parties in relation to which information and documentation is sought. However, the Applicants note that the Gibraltar RFIs do not expressly state that 97GFT and T5WW are the parties under investigation. The Applicants therefore argue that the Minister was obliged to

comply with ss 231.2(2) and (3) and seek judicial authorization before issuing the RFIs. The Respondent again responds that the Minister was under no such obligation, because, as demonstrated by the Information Sheet, the identities of 97GFT and T5WW were known to the Minister.

(5) Gherfam RFI – T-1501-18

[50] The Gherfam RFI is structured somewhat differently than the other RFIs under review in these applications. The Gherfam RFI consists of a letter, addressed to Gherfam and referring to Gherfam in its subject line, which states that Gherfam is required to provide all information and documents requested in the attached Audit Information Requests No. GEI-27 and GEI-29.

[51] Audit Information Request No. GEI-27 [GEI-27] is also addressed to Gherfam and refers in its subject line to "2014 Restructuring and Refinancing of the Mall of America." It requests production of particular documents and categories of documents relating to a restructuring and refinancing transaction related to the Mall of America that occurred in 2014.

[52] Audit Information Request No. GEI-29 [GEI-29] is again addressed to Gherfam and refers in its subject line to "$15 Million Loan from First Security Bank N.A." It requests production of information and documents relating to T5MN, including the historical asset holdings of T5MN and related entities and financial statements of T5MN.

[53] In referring to information requested in connection with entities related to T5MN, GEI-29 states, "This information is only requested in respect of entities that were <u>not</u> acquired or held at

any time, directly or indirectly, by any of the Ghermezian Family Trusts settled on September 1, 2002 and August 15, 2002 (commonly referred to as the Royce and Regent Trusts).” GEI-29 also includes a request framed as follows: “Provide any additional information or explanations that are relevant to determining whether or not the rules of former section 94 of the Act (for taxation years before 2007) applies to the Royce and Regent Trusts in respect of the transaction described in the background of this query.”

[54] The principal document in the record that was before the decision-maker, before issuing the Gherfam RFI, is the Gherfam Information Sheet. That document provides information about the background to the issuance of the RFI, including identifying which entities are the subject of the Minister’s investigation. The Information Sheet refers to “Tax years under consideration:” and identifies particular tax years for “the U.S. Family Trusts (Mall of America)” and for “the American Dream Trust(s).” In submissions at the hearing, the Respondent’s counsel explained that the Gherfam Information Sheet relates not only to the Gherfam RFI but also to another RFI that is not under review in the present applications. Counsel explained that the reference in the Information Sheet to the American Dream Trust(s) relates to that other RFI and is therefore irrelevant to the Gherfam RFI presently under review.

[55] The Respondent’s Memorandum of Fact and Law states that the transactional documents sought from Gherfam through the Gherfam RFI are for purposes of auditing Gherfam. However, the Respondent’s counsel has confirmed that this statement was an error in the Memorandum and that the transactional documents are sought for purposes of auditing the residency of eight Ghermezian U.S. Family Trusts (Mall of America) settled on August 15, 2002 and September 1,

2002, described as commonly referred to as the Royce and Regent Trusts. The Applicant does not dispute the Respondent's representation as to the targets of the investigation that prompted the Gherfam RFI. Its unnamed persons argument is consistent with that representation.

[56] The Applicant submits that the Gherfam RFI does not identify the targeted trusts by name and does not state that they are the subjects of the Minister's investigation. The Applicant therefore argues that the Minister was obliged to comply with ss 231.2(2) and (3) and seek judicial authorization before issuing the RFI. The Respondent again responds that the Minister was under no such obligation, because, as demonstrated by the Information Sheet, the identities of the trusts under investigation were known to the Minister.

(6) Reasonableness of the Decision to Issue the RFIs

[57] Returning to the dispute between the parties, as to whether the term "unnamed persons" employed in ss 231.2(2) and (3) means unnamed in the RFI or unknown to the Minister, I first note that it is not the role of the Court, sitting in judicial review of the RFIs, to determine the meaning of this term. Rather, taking into account the arguments raised by the parties, I must decide whether it was reasonable for the decision-maker to issue the RFIs without first seeking judicial authorization under ss 231.2(3).

[58] The Applicants' arguments on this issue include the point that neither the RFIs nor the supporting Information Sheets contain any consideration of the question whether the unnamed persons provisions of the ITA were engaged. In other words, there is no express indication that the decision-maker considered the possible application of ss 231.2(2) and (3) and whether

judicial authorization should be sought before issuing the RFIs. The Applicants submit that the absence of such consideration itself makes the decision to issue the RFIs unreasonable.

[59] I accept that there are circumstances where a decision may be found unreasonable because neither the decision nor the supporting record expressly demonstrates consideration of the impact of a potentially relevant statutory provision. An argument of that sort may be compelling where a party to a proceeding before a quasi-judicial tribunal raises an issue surrounding the application of a statutory provision and the tribunal's decision fails to demonstrate any consideration of that issue. However, such an argument is less compelling in circumstances such as those presently under review, where the nature of the administrative process is such that the issue was not raised before the decision-maker but rather is raised in the subsequent challenge of the decision through judicial review.

[60] In the present case, the decision that no judicial authorization was required in advance of the issuance of the RFIs can perhaps be best characterized as an implicit decision, and the judicial review of that decision is guided by the principles canvassed earlier in these Reasons (noting in particular paragraphs 123 and 137-138 of *Vavilov*). I must consider the record and the outcome of the decision, in assessing whether the implicit decision, that ss 231.2(2) and (3) were not engaged, was reasonable. In my view, as there is little in the record before the decision-maker that particularly assists with this analysis, my assessment of reasonableness must turn significantly on the outcome of the decision not to pursue the ss 231.2(2) and (3) process.

[61] As this aspect of the decision involves at least in part a matter of statutory interpretation, I note that I am conscious of the modern approach to statutory interpretation, requiring consideration of the text, context and purpose of the statutory provision in issue (see, e.g., *Vavilov* at paras 117-118, 121). One of the Applicants' principal submissions in support of its position on the disputed issue is that ss 231.2(2) and (3) employ the term "unnamed persons." They do not, for instance, employ a term such as "persons unknown to the Minister." I agree that consideration of this aspect of the text of the statute favours the Applicants' interpretation.

[62] However, the Respondent argues that it would be nonsensical to interpret the legislation as requiring the Minister to seek judicial authorization under ss 231.2 (3) in connection with an RFI targeting a person whose name the Minister already knows. The Respondent notes that the test the Minister must meet in an application under ss 231.2 (3) requires demonstration that: (a) the person or group of persons is ascertainable; and (b) the requirement is made to verify compliance by the person or persons with any duty or obligation under the ITA. The Respondent submits that the obligation to demonstrate the person or group is ascertainable supports her position that the unnamed persons provisions are directed at circumstances in which the Minister does not know the names of the parties she wishes to target.

[63] In order to issue a requirement directing a third party to provide the names of such parties and information or documentation related thereto, the Minister must convince the Court that it is possible to identify those names. I agree that test makes little sense in a circumstance where the Minister already knows the names. This argument, which relies upon the context of the statutory language in dispute, favours the Respondent's interpretation.

[64] The body of jurisprudence interpreting and applying the unnamed person provisions provides some guidance as to their purpose. In *MNR v Sand Exploration Ltd*, [1995] 3 FC 44 at page 7, Justice Rothstein described these provisions as intended to prevent fishing expeditions. In *Hydro-Québec*, Justice Roy (at para 53) referred to *Canadian Forest Products'* description of these provisions as intended to protect against abusive investigations and expanded upon this explanation at paragraph 68 (reproduced earlier in these Reasons).

[65] That explanation describes ss 231.2 (2) and (3) as affording protections against abusive investigations to the unnamed persons, not to the party who is the recipient of the requirement, and refers to those persons as targeted individuals who cannot be identified by name. The potential for abuse is addressed, because of the criteria the Minister must satisfy in order to obtain the necessary judicial authorization, including that such persons are identifiable. I consider this description of the purpose of the unnamed person's provisions to be consistent with the Respondent's interpretation, that the provisions are concerned with circumstances where the Minister is seeking information about taxpayers that the Minister cannot yet identify, and not with circumstances where the Minister knows that identity but has failed to include it in the applicable requirement.

[66] Both parties devoted considerable argument to the jurisprudence that has interpreted and applied the unnamed persons provisions. The Applicants place considerable reliance upon *Canadian Forest Products*, a case involving requirements issued to companies active in the forest industry, seeking information in the course of auditing other companies in the same industry. It appears that the Minister knew the names of the companies it was auditing but did

not name those companies in the requirements. The Minister advanced an argument, akin to the one now under consideration, that s 231.2(2) is designed to address a situation where the Minister is looking for noncomplying taxpayers and does not know their identities (see para 5). This Court rejected that argument, holding that, because the taxpayers under investigation were not named, the Minister was required to proceed under s 231.2(3). *Canadian Forest Products* was cited with approval in *Capital Vision*.

[67] The Respondent relies on the authorities that have applied ss 231.2(2) and (3) in circumstances consistent with the Respondent's interpretation of that provision, i.e. where the Minister was seeking from a third party the names of taxpayers that the Minister wished to investigate, but did not know, and information or documentation related to those taxpayers. In *Hydro-Québec*, while not addressing the particular issue presently in dispute, Justice Roy provided a succinct summary of some of these authorities (at para 62):

> 62 As noted, requests for information target persons who are unnamed but who are certainly ascertainable or are members of an ascertainable group for tax purposes. Moreover, we are seeking financial information directly related and pertinent to income generated by these people who owe taxes (beyond a certain threshold). In *GMREB-FCA*, the brokers and real estate agents on Montréal's South Shore are targeted to monitor the commissions received on the immovable properties sold. The group of brokers and agents could include about 2,000 people. The Federal Court of Appeal informs us that the audit of a real estate agent in March 2005 aroused the interest of the Minister, who wanted to know more about the income generated by commissions. In *eBay*, information was being sought about the PowerSellers' business volume; the information was on servers in the United States and, at the time, it was estimated that the Canadian PowerSellers program had about 10,000 participants. In *Sand Exploration*, it was individuals who had purchased an interest in certain seismic data (a number that was estimated at 12) that led to a tax benefit as a result of inflated prices (p 54). In *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46; [2008] 2 SCR 643 [*Redeemer*

> *Foundation*], attention was drawn by students' parents who made donations to reduce their children's tuition. It was the audit of the Redeemer University College Foundation that had created this attention regarding "donors" who had benefited from tax credits. In *Canada (Customs and Revenue Agency) v. Artistic Ideas Inc.*, 2005 FCA 68, Justice Rothstein, this time as an appellate judge, was satisfied that donors in what was suspected to be "art flips" (successive purchases and sales of artworks) and for which inappropriate tax deductions were claimed constituted an ascertainable group (paragraph 10). In the end, we studied a given group whose characteristics rendered the individuals ascertainable with the specific financial information requested to be certain of the reasonableness of the application.

[68] I agree with the Respondent that these authorities, many of which were canvassed earlier in these Reasons, involve the application of the unnamed persons provisions in circumstances where the Minister was seeking information which included identification of groups (and in many cases large groups) of taxpayers, where the Minister wished to investigate those taxpayers and issued requirements in order to obtain their names. Those authorities involved analysis by the Court as to whether the taxpayers or groups thereof were ascertainable, *Hydro-Québec* representing an example where the Court concluded they were not.

[69] The Applicants have identified authorities where courts have employed the term "unnamed," in considering the application of ss 231.2(2) and (3), most notably a number of such references in Justice Rothstein's analysis in *Redeemer*. In contrast, there is language in some of the authorities that could be argued to support the Respondent's interpretation. For instance, in *Hydro-Québec*, Justice Roy described the requirement for judicial authorization as a function of the fact that the targets of the information gathering are unnamed and therefore unknown (at para 30). In *London Life*, Justice Pinard refers to the different processes that are required, depending on whether the Minister is requesting information about a "known taxpayer" or "unknown

persons" (at para 17). In *Blue Bridge Trust Company Inc v Canada (National Revenue)*, 2020 FC 893, Justice Lafrenière refers to prior judicial authorization not being required when a taxpayer is known (at para 105).

[70] Indeed, in paragraph 48 of *Redeemer*, Justice Rothstein refers to a requirement to obtain judicial authorization in a circumstance where the Canada Revenue Agency [CRA] has formed the intent to obtain information pertaining to compliance of specific but unnamed persons and requests that a charity provide information so that the CRA can obtain the information and names of the unnamed persons (my emphasis).

[71] In my view, none of the authorities canvassed above is determinative of the statutory interpretation issue presently in dispute. While the particular factual circumstances under consideration in the authorities, and the language used in applying the unnamed persons provisions, are relevant to the consideration of the issue, none of the authorities provides a considered analysis and pronouncement on the particular issue now in dispute. The one case that does speak directly to this issue is *Canadian Forest Products*. However, the Respondent notes that this decision has been overtaken by *Artistic Ideas*, *Redeemer*, and other subsequent authorities, and submits that it should not be followed.

[72] I agree that *Canadian Forest Products* must be approached with caution. While it has not been expressly overruled by subsequent jurisprudence, its conclusion to the effect that the unnamed persons provisions were engaged whenever the Minister sought information about an unnamed person, regardless of whether the unnamed person was the subject of the investigation,

is clearly no longer good law. Of course, that conclusion is not the issue currently under dispute. However, the evolution of the jurisprudence casts sufficient doubt on the reasoning in *Canadian Forest Products*, that I would be reluctant to place substantial reliance upon it in guiding the analysis of the issue now before the Court.

[73] Against that jurisprudential backdrop, I return to the standard of review applicable to the decisions under consideration in these applications. The question is whether the decision-maker's implicit decisions, that it was unnecessary to seek judicial authorization under s 231.2(3) before issuing the RFIs, were outside the range of acceptable outcomes and therefore unreasonable in the circumstances of this case. There is no definitive jurisprudence on the point, factors relevant to the text, context and purpose of the relevant provisions do not clearly resolve the issue, and such jurisprudence and factors in some respects support the implicit decisions. I therefore cannot conclude that the decisions are unreasonable.

[74] I also find particularly compelling the Respondent's argument that the decision-maker could hardly have been expected to pursue an application under s 231.2(3), in an effort to satisfy the Court that the persons the Minister wished to investigate were ascertainable, when the identities of those persons were actually known to the Minister. At most, the decision-maker might have expressly included the full names of the relevant targeted persons in each of the RFIs and expressly identified them as the targets of the investigation, in which case the Applicants would not be advancing the unnamed persons argument presently under consideration. However, I have difficulty concluding that those measures would have afforded the persons under investigation with any additional protection of the sort that the unnamed persons provisions are

concerned with. Therefore, focusing on the outcome in the present matters, in relation to the RFIs under review in all five applications presently before the Court, I find that it was reasonable for the decision-maker to have issued the RFIs without seeking judicial authorization in advance.

(7) Additional Arguments of the Applicants

[75] Before leaving this issue, I will address briefly additional arguments advanced by the Applicants, either orally or in writing, in relation to the unnamed persons issue.

[76] In relation to the Gherfam RFI, the Applicant notes that the record does not include a list of the names of the eight trusts that are the subject of the Minister's investigation, perhaps raising the possibility that the Minister does not actually know the identities of these trusts. However, the record describes the trusts as U.S. family trusts of the Ghermezian family, notes the names by which they are commonly referred to (the Royce and Regent Trusts) and, significantly, identifies the dates of their settlement. In my view, the record does not support a conclusion that the targets of the investigation were unknown to the Minister, such that it was unreasonable for the decision-maker to have issued the Gherfam RFI without seeking judicial authorization under the unnamed persons provisions.

[77] In relation to the Triple Five RFIs, the Applicants' Memorandum of Fact and Law advances a couple of particular unnamed persons arguments. The Applicants did not press these arguments during oral submissions. However, as the Applicants noted in general that they continued to rely on their written submissions, I wish to address these arguments.

[78] First, the Applicants note that the Triple Five RFIs impose a requirement to provide "information and documents for the above-named corporations, either alone or jointly with any other person" (Applicants' emphasis). The Applicants submit that, because the RFIs failed to define "any other person," that language represents a reference to one or more unnamed persons within the meaning of s 231.2(2).

[79] Second, the Applicants note that the Triple Five RFIs require the "names of the sending party for transfers from other bank accounts" together with their account information and "names of the receiving party" together with account information. The Applicants submit that the sending and receiving parties are also unnamed persons within the meaning of s 231.2(2).

[80] I find no merit to these submissions. As explained earlier in these Reasons, the unnamed persons provisions are not engaged where a requirement seeks information related to an unnamed person that is not the subject of the Minister's investigation. The Applicants have not identified any basis in the record to regard these particular portions of the RFIs as referring to parties under investigation. I therefore find no basis to conclude that it was unreasonable for the decision-maker to issue the Triple Five RFIs without recourse to the unnamed persons provisions.

[81] In relation to the Gibraltar RFIs, the Applicants' Memorandum of Fact and Law also advanced an additional unnamed persons argument which, while not pressed during oral submissions, I will briefly address. These RFIs include a requirement to provide information and documents for "all entities not listed above that currently/previously are/were legally or

beneficially owned by the Ghermezian Family Trust dated February 15, 1997 (or one of its predecessors).” The Applicants submit that this requirement requests information or documents relating to one or more unnamed persons within the meaning of s 231.2(2).

[82] Again, I do not find merit in this submission. The Applicants have not identified any basis in the record to regard this language as referring to parties under investigation. I therefore find no basis to conclude that it was unreasonable for the decision-maker to issue the Gibraltar RFIs without recourse to the unnamed persons provisions.

D. *Whether the RFI is invalid because the Minister failed to comply with the criteria in s 231.6 of the ITA for foreign-based information*

(1) Statutory Provisions Relevant to Foreign-Based Information

[83] This argument advanced by the Applicants, again in relation to all five RFIs under review, is based on s 231.6, which provides as follows:

Definition of *foreign-based information or document*	**Sens de *renseignement ou document étranger***
231.6 (1) For the purposes of this section, foreign based information or document means any information or document that is available or located outside Canada and that may be relevant to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person.	**231.6 (1)** Pour l’application du présent article, un renseignement ou document étranger s’entend d’un renseignement accessible, ou d’un document situé, à l’étranger, qui peut être pris en compte pour l’application ou l’exécution de la présente loi, y compris la perception d’un montant payable par une personne en vertu de la présente loi.

Requirement to provide foreign-based information

(2) Notwithstanding any other provision of this Act, the Minister may, by notice served personally or by registered or certified mail, require that a person resident in Canada or a non-resident person carrying on business in Canada provide any foreign-based information or document.

Obligation de fournir des renseignements ou documents étrangers

(2) Malgré les autres dispositions de la présente loi, le ministre peut, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne résidant au Canada ou d'une personne n'y résidant pas mais y exploitant une entreprise de fournir des renseignements ou documents étrangers.

Notice

(3) The notice referred to in subsection 231.6(2) shall set out

(a) a reasonable period of time of not less than 90 days for the production of the information or document;

(b) a description of the information or document being sought; and

(c) the consequences under subsection 231.6(8) to the person of the failure to provide the information or documents being sought within the period of time set out in the notice.

Contenu de l'avis

(3) L'avis doit:

a) indiquer le délai raisonnable, d'au moins 90 jours, dans lequel les renseignements ou documents étrangers doivent être fournis;

b) décrire les renseignements ou documents étrangers recherchés;

c) préciser les conséquences prévues au paragraphe (8) du défaut de fournir les renseignements ou documents étrangers recherchés dans le délai ci-dessus.

Review of foreign information requirement

Révision par un juge

(4) The person on whom a notice of a requirement is served under subsection 231.6(2) may, within 90 days after the service of the notice, apply to a judge for a review of the requirement.

(4) La personne à qui l'avis est signifié ou envoyé peut, dans les 90 jours suivant la date de signification ou d'envoi, contester, par requête à un juge, la mise en demeure du ministre.

Powers on review

(5) On hearing an application under subsection 231.6(4) in respect of a requirement, a judge may

Pouvoirs de révision

(5) À l'audition de la requête, le juge peut :

(a) confirm the requirement;

a) confirmer la mise en demeure;

(b) vary the requirement as the judge considers appropriate in the circumstances; or

b) modifier la mise en demeure de la façon qu'il estime indiquée dans les circonstances;

(c) set aside the requirement if the judge is satisfied that the requirement is unreasonable.

c) déclarer sans effet la mise en demeure s'il est convaincu que celle-ci est déraisonnable.

Idem

(6) For the purposes of paragraph 231.6(5)(c), the requirement to provide the information or document shall not be considered to be unreasonable because the information or document is under the control of or available to a non-resident person that is not controlled by the person served with the notice of the requirement under subsection 231.6(2) if that person is related to the non-resident person.

Précision

(6) Pour l'application de l'alinéa (5)c), le fait que des renseignements ou documents étrangers soient accessibles ou situés chez une personne non-résidente qui n'est pas contrôlée par la personne à qui l'avis est signifié ou envoyé, ou soient sous la garde de cette personne non-résidente, ne rend pas déraisonnable la mise en demeure de fournir ces renseignements ou documents, si ces deux personnes sont liées.

Time period not to count

(7) The period of time between the day on which an application for review of a requirement is made pursuant to subsection (4) and the day on which the application is finally disposed of shall not be counted in the computation of

(a) the period of time set out in the notice of the requirement; and

(b) the period of time within which an assessment may be made pursuant to subsection 152(4).

Suspension du délai

(7) Le délai qui court entre le jour où une requête est présentée conformément au paragraphe (4) et le jour où la requête est définitivement réglée ne compte pas dans le calcul :

a) du délai indiqué dans l'avis correspondant à la mise en demeure qui a donné lieu à la requête;

b) du délai dans lequel une cotisation peut être établie conformément au paragraphe 152(4).

Consequence of failure

(8) If a person fails to comply substantially with a notice served under subsection 231.6(2) and if the notice is not set aside by a judge pursuant to subsection 231.6(5), any court having jurisdiction in a civil proceeding relating to the administration or enforcement of this Act shall, on motion of the Minister, prohibit the introduction by that person of any foreign-based information or document covered by that notice.

Conséquences du défaut

(8) Si une personne ne fournit pas la totalité, ou presque, des renseignements ou documents étrangers visés par la mise en demeure signifiée conformément au paragraphe (2) et si la mise en demeure n'est pas déclarée sans effet par un juge en application du paragraphe (5), tout tribunal saisi d'une affaire civile portant sur l'application ou l'exécution de la présente loi doit, sur requête du ministre, refuser le dépôt en preuve par cette personne de tout renseignement ou document étranger visé par la mise en demeure.

[84] These provisions relate to requirements to provide a “foreign-based information or document,” which s 231.6(1) defines as any information or document that is available or located outside Canada and that may be relevant to the administration or enforcement of the ITA, including the collection of the amount payable under the ITA by any person.

[85] When the Minister serves a requirement under s 231.6, that section operates to afford the person served with certain protections. Under s 231.6(3), the requirement must afford the person no less than 90 days for the production of the information or document, provide a description of the information or document being sought, and set out the consequences of failing to comply. Under s 231.6(4), the person served has the right, within 90 days of service, to apply to the Court for a review of the requirement. Section 231.6(5) provides that the Court may then confirm the requirement, vary it as the judge considers appropriate in the circumstances, or set aside the requirement if the judge is satisfied that the requirement is unreasonable.

(2) Application of Section 231.2(1) to Foreign-Based Information

[86] The Applicants argue that, based upon the descriptions in the RFIs, the requested documents and information are *prime facie* available or located outside Canada and therefore constitute foreign-based information. They therefore submit that it was unreasonable for the Minister to issue the RFIs under s 231.2 rather than s 231.6. In support of this position, the Applicants argue that the Respondent has failed to adduce any evidence in these applications showing that the documents and information requested in the RFIs are located or available within Canada.

[87] The Respondent's position on this argument is that the Minister is not required to resort to the foreign-based requirement regime under s 231.6 because, even if some of the information sought is located outside Canada, this fact does not invalidate the RFIs issued under s 231.2. In support of this position, the Respondent places substantial reliance on an argument that the Applicants are required to produce any information or documents requested in an RFI issued under s 231.2 that are in their power, possession and control, even if they are located outside of Canada. That is, independent of the foreign-based information regime, if the information or documentation is within the Applicants' power, possession or control, they will have to produce it, regardless of where it is located.

[88] The Applicants dispute this interpretation of the ITA. They rely on the principle of statutory interpretation expressed in Latin as *generalia specialibus non derogant*, meaning that the general does not derogate from the specific. The Applicants also refer to the expression of this principle as follows in *James Richardson & Sons v MNR*, [1984] 1 SCR 614 at p 621 (quoting from *Pretty v Solly* (1959), 53 ER 1032):

> The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

[89] In other words, the Applicants argue that, as Parliament enacted s 231.6 to apply specifically to circumstances in which the Minister wished to require production of foreign-based material, the more general power to issue requirements under s 231.2 should not be interpreted as also applying to production of foreign-based material.

[90] Returning again to the standard of review, I note that the Court's role is to decide, against the backdrop of the parties' arguments on this point, whether it was reasonable for the decision-maker to issue the RFIs under s 231.2 rather than 231.6. Similar to my consideration of the unnamed persons issue, I note that the decision to employ s 231.2 rather than 231.6 represents an implicit decision, and the judicial review of that decision is guided by the principles canvassed earlier in these Reasons, relying on paragraphs 123 and 137-138 of *Vavilov*. I must consider the record and the outcome of the decision, in assessing whether the implicit decision that s 231.6 was not engaged was reasonable.

[91] The Respondent relies on a number of authorities to support its expansive interpretation of the operation of s 231.2. First, it refers to *Revcon Oilfield Constructors Incorporated v Canada (National Revenue)*, 2017 FCA 22 [*Revcon*] as authority for its submission that the Applicants must comply with the RFIs issued under s 231.2 if the information and documents sought are within their power, possession and control. *Revcon* involved an appeal from a compliance order issued upon an application by the Minister under s 231.7 of the ITA. The appellants argued that the Federal Court did not have the authority to issue the order, because it directly or indirectly ordered the appellant's law firm to disclose material, contrary to jurisprudence to the effect that 231.7 was of no force and effect in so far as it related to lawyers and notaries. The Federal Court of Appeal rejected this argument, holding that the order was directed only against the appellant, not its lawyers.

[92] In expressing this conclusion, Justice Stratas stated that the order required the appellant to disclose all documents in its power, possession and control, wherever located. However, this

statement related to the conclusion that the order applied only to the appellant. It does not represent a finding that the order applied to documents in the appellants' power, possession and control located outside Canada, as the decision does not indicate that extra-territorial application of the order was an issue before the Court.

[93] The Respondent also relies on *R v McKinley Transport Ltd.*, [1990] 1 SCR 627 [*McKinley*], submitting that the facts of that case involved information outside Canada that was in the power, possession or control of a person in Canada. The Respondent notes that the books and record of the Canadian corporate taxpayer were located at the premises of its corporate parent in Michigan. The Respondent submits that the absence of any suggestion in that case, that s 231(3) of the ITA (the predecessor to the s 231.2(1)) could not be used to obtain information from a Canadian taxpayer whose records were in the U.S., supports its position.

[94] However, I agree with the Applicants' response that *McKinley* did not analyze the issue of the application of s 231(3) to foreign-based information. That case involved a challenge to that provision under s 8 of the *Canadian Charter of Rights and Freedoms*. Moreover, it arose out of circumstances that predated the addition to the ITA of the foreign-based information provisions. In my view, *McKinley* provides no support for the Respondent's position.

[95] Turning to more recent jurisprudence, the Respondent also relies on the decision of the Federal Court of Appeal in *eBay*. This case is closer to addressing the point in issue, as it considered an argument by the appellant, eBay Canada Inc [eBay Canada], that the Minister was unable to require production of information under s 231.2 because the information was located

outside Canada and thus constituted foreign-based information under s 231.6. The Federal Court found, and Federal Court of Appeal affirmed, that the Minister was not required to resort to s 231.6, notwithstanding that the required information was stored on computer services located outside Canada. The Respondent refers in particular to paragraphs 50 to 53 of this decision, which the Respondent submits demonstrates the Federal Court of Appeal relying on a conclusion that the information was within eBay Canada's power, possession and control.

[96] Again, I disagree that this authority supports the Respondent's position. The result in *eBay* turned on the Federal Court's finding, affirmed by the Federal Court of Appeal, that the relevant information was located in Canada, because eBay Canada was able to access it from its computers in Canada. Indeed, the Federal Court of Appeal concludes its analysis by stating that, because the facts of that case did not engage s 231.6, it was unnecessary to consider whether the presence of that section in the statutory scheme reduced the Minister's powers under s 231.2 when the requirement related to foreign-based information (at para 53). I read this statement as expressly confirming that the Court was not addressing the proposition the Respondent is advancing in the present case.

[97] At the hearing, I asked counsel to address *R v Pierlot*, [1994] 1 CTC 134 [*Pierlot*] and its relevance to this issue. In that case, the Prince Edward Island Supreme Court, Appeal Division considered the appellant's appeal from his conviction for failing to comply with a requirement issued under s 231.2(1) of the ITA, requesting information including the name and address of any estate that provided funds to him as an inheritance. The appellant took the position that, as

such funds were inherited from family estates in Belgium, the requested information was foreign-based and the Minister was required to resort to s 231.6 to obtain it.

[98] In dismissing the appeal, the Court concluded that, although the names and addresses of the estates could be classified as foreign-based information under s 231.6, it could equally well be requested under s 231.2(1), because it was far-fetched to believe that the appellant would receive these funds and not know details as to their source. In other words, the Minister was only asking the appellant for something that he has.

[99] With the benefit of the parties' respective submissions on *Pierlot*, I conclude that it does not assist the Respondent. It does not stand for the proposition advanced by the Respondent that the Minister can obtain foreign-based information through a requirement issued under s 231.2, provided it is in the possession, power or control of the recipient of the requirement. Rather, somewhat like *eBay*, this case turned on a factual determination that the relevant information was available to the recipient in Canada. In other words, these authorities support the conclusion only that, if foreign-based information is also located in Canada, it can be compelled under s 231.2 by virtue of its Canadian location. They do not support a conclusion that information which is located only outside Canada can be compelled under s 231.2 because it is within the power, possession or control of the recipient of the requirement.

[100] Taking into account the parties' respective arguments on the point, the Respondent has not convinced me that the statutory scheme of the ITA permits the Minister to require production of foreign-based information through s 231.2(1). However, my role is not to arrive at a definitive

conclusion on this point, and I need not do so in order to decide these applications for judicial review, as another argument advanced by the Respondent (canvassed next in these Reasons) satisfies me as to the reasonableness of the decisions to issue the RFIs without recourse to s 231.6.

(3) Uncertainty as to Location of Requested Information

[101] The record before the decision-maker and now before the Court does not indicate where the requested material is actually located. However, the Respondent acknowledges that some of the information sought in the RFIs may be located outside Canada and that the Information Sheets that were before the decision-maker reflect this possibility. The Respondent submits that the possibility the material may be outside Canada does not translate into a conclusion that the Minister must resort to s 231.6 to request the information and that the RFIs issued under s 231.2(1) are therefore invalid. Indeed, the record indicates that, in contemplation of this possibility, the Minister has issued separate requirements under both s 231.2 and 231.6 in relation to this information (although only the s 231.2 requirements are the subject of the present applications for judicial review).

[102] In response, the Applicants take the position that the weight of the evidence before the decision-maker suggests that the information being requested is foreign-based and that the decision-maker had no evidentiary foundation for a conclusion that the information was located in Canada. The Applicants argue that it was therefore unreasonable for the decision-maker to seek the information under s 231.2 rather than s 231.6.

[103] I accept that there was information before the decision-maker that supports the Applicants' assertion that the information is foreign-based. The Applicants rely in part on the foreign locations of incorporation and operation of various entities that are the subject of the RFIs. The Information Sheets also contain some evidence that speaks to the possible location of the information and documentation sought. For instance, the Gherfam Information Sheet notes that the taxpayer's representative has previously indicated that the Mall of America (the refinancing of which the Gherfam RFI relates to) is located in the United States, that the accounting for that entity is performed there, and that the documents supporting the accounting for the Mall of America are not maintained in Canada. Similarly, the Ghermezian and Vaturi Information Sheet indicates that some of the information supporting the Triple Five RFIs and Gibraltar RFIs was provided by the Government of Hong Kong. In contrast, the Information Sheet also indicates that the Government of Hong Kong confirmed that some of the bank statements were mailed to addresses for Mr. Vaturi in Canada.

[104] However, the location of the information is not an issue for the Court to decide in the present applications. The record does not contain sufficient evidence to support a conclusion on this question. Rather, the Court's role is to assess, based on that record, whether it was reasonable for the decision-maker to issue the RFIs under s 231.2 rather than s 231.6. The Applicants have not convinced me that this decision was unreasonable. I find compelling the Respondent's submission that, when seeking information and documentation through its powers under the ITA, the Minister cannot necessarily be expected to know where the material is located. Nor must the Minister necessarily accede to the taxpayer's representation as to such location. Without deciding the point, I would not rule out the possibility that there could be

circumstances in which the record before the Minister includes evidence that information is located outside Canada that is so compelling that it would be unreasonable for the Minister to proceed otherwise than under s 231.6. However, this is not such a case.

[105] As the Respondent puts it, the Minister is entitled to pursue a process of "poke-and-check" (language recently employed in *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 [*Cameco*] at para 43) in its efforts to verify a person's compliance with the ITA. In *eBay*, the Federal Court of Appeal described the Minister's powers as a function of Canada's self-reporting tax system (at para 34):

> 34 The Supreme Court of Canada has provided additional guidance which is relevant to the interpretation of the Act's enforcement powers. Thus, in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, a case involving a challenge under section 8 of the *Canadian Charter of Rights and Freedoms* to the Minister's power to require the production of documents, Justice Wilson noted (at 648) that the major drawback of a self-reporting tax system such as ours is that some taxpayers will attempt to evade tax, by failing to report income, for example. Accordingly, she said:
>
> > [T]he Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all books and records which may be relevant to the preparation of these returns. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. … A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained.

[106] It would be inconsistent with the rationale for the Minister's powers under the ITA to require the Minister to accede to the taxpayer's representations as to the location of material that is sought through such powers.

[107] Of course, this does not mean that a requirement issued under s 231.2 has extra-territorial application. It means only that the determination of the location of the requested material need not take place before the requirement is issued. If the Minister concludes that a recipient has failed to comply with a s 231.2(1) requirement, for instance by failing to disclose material that the Minister believes to be located in Canada, the Minister can bring an application to the Federal Court under s 231.7 for a compliance order. Indeed, I understand from the representations of counsel for both parties that such applications, in relation to the RFIs, are already underway. Unlike an application for judicial review, an application under s 231.7 would afford an opportunity for the parties to adduce evidence relevant to the location of the material, to equip the Court to decide whether the compliance order should be issued.

[108] As previously noted, the Minister has issued not only the RFIs currently under review but also foreign-based information requirements under s 231.6. The Applicants argue that the issuance of the s 231.6 requirements represents an acknowledgement by the Minister that the information being sought is foreign-based. The Applicants also assert that the Minister should not be entitled to invoke both ss 231.2 and 231.6 and issue both types of requirements simultaneously. The Applicants refer to the differences in the statutory regimes applicable to the two subsections, including the time periods provided for compliance and the consequences of noncompliance.

[109] In response, the Respondent relies on *R v Grimwood*, [1987] 2 SCR 755 (at paras 2-3) and *Bayer Inc v Canada (Attorney General)*, 2020 FC 750 [*Bayer*] (at para 51) to support its position that the Minister is not constrained in the number of requirements she may issue. While I accept those authorities as support for that proposition, they are not particularly on point, as neither addresses the question whether the Minister may issue requirements under both ss 231.2 and 231.6 simultaneously.

[110] Nevertheless, I am not convinced by the Applicants' argument that the Minister is prohibited from doing so. Again, this is not to say that the Minister has recourse to both ss 231.2 and 231.6 for purposes of obtaining foreign-based information. Rather, it may turn out that some of the material sought is located within Canada and some of it is located outside Canada. The Canadian-based material would be engaged by the s 231.2 requirement and be subject to statutory consequences including the possibility of a compliance application under s 231.7. The foreign-based material would be engaged by the s 231.6 requirement, along with its statutory consequences including the s 231.6(8) prohibition against introducing in any subsequent civil proceeding any foreign-based material that was not produced in response to the requirement. In my view, the Applicants' arguments do not demonstrate an inconsistency in the simultaneous use of both ss 231.2 and 231.6.

[111] Returning again to the standard of review, and focusing again on the outcome in these matters, I find no basis to conclude, based on the Applicants' arguments surrounding the foreign-based information provisions, that the decision-maker acted unreasonably in issuing the RFIs under s 231.2(1).

E. *Whether the RFI is invalid because it was not issued for purposes related to the administration or enforcement of the ITA*

(1) The Applicable Test

[112] As expressly stated in s 231.2(1), the issuance of a requirement under that subsection must be issued for a purpose related to the administration or enforcement of the ITA. It is common ground between the parties that the test for whether the Minister is acting for such a purpose is an objective one (see, e.g., *McKinley* at p 639). Beyond that, the parties disagree on the precise articulation of how this issue is to be assessed.

[113] As a starting point, the Respondent relies on *Canadian Bank of Commerce v Attorney General of Canada*, [1962] SCR 729 at page 739:

> The purpose of the requirement, then, is to obtain information relevant to the tax liability of some specific person or persons whose liability to taxes is under investigation; this is a purpose related to the administration or enforcement of the Act. …

[114] This point is repeated in *McKinley* at p 639 and *Saipem Luxembourg S.A. v Canada (Customs and Revenue Agency)*, 2005 FCA 218 [*Saipem*] at para 26. *Saipem* observed that the required purpose is met even if much of the information requested ultimately turns out to be irrelevant. In *Tower v Minister of National Revenue*, 2003 FCA 307 [*Tower*], the Federal Court of Appeal explained the relevant principles as follows (at para 29):

> 29 A number of cases have dealt with the scope of subsection 231.2(1) (see *R. v. McKinley Transport Ltd.*, *supra*; *James Richardson & Sons Ltd. v. Minister of National Revenue*, *supra* and *R. v. Jarvis*, 2002 D.T.C. 7547 (S.C.C.) at paragraph 51). The

> relevant principles from these authorities establish that the determination of a taxpayer's tax liability is a purpose related to the administration and enforcement of the Act. A requirement is valid if the requested information may be relevant in the determination of the tax liability of the named taxpayer. This is a low threshold. Subsection 231.2(1) gives the Minister a broader authority to obtain information than would be the case if, for example, the Minister were conducting pre-trial examinations for discovery in the context of an income tax appeal.
>
> [Emphasis added]

[115] The Respondent emphasizes the reference in *Tower* to the low threshold for meeting the applicable test, resulting from the explanation that a requirement is valid if the requested information may be relevant to determining the taxpayer's liability. The Respondent accordingly argues that provided that, objectively assessed, the RFIs seek to obtain information that may be relevant to the tax liability of the persons that the Minister is investigating, then the issuance of the RFIs was reasonable.

[116] I accept that these principles flow from the jurisprudence identified above. However, the Applicants identify authorities which, they argue, introduce additional principles that must be taken into account when determining whether a request is for the purpose of administration and enforcement of the ITA.

[117] The Applicants rely on *Montréal Aluminum Processing Inc v Canada* (1992), 58 FTR 80 (FC AD) [*Montréal Aluminum*], at para 13, for the proposition that the recipient of a requirement for information is entitled to fair notice as to the purpose for which the Minister purports to exercise her powers under s 231.2(1):

> 13 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 it is obvious and beyond doubt will fail.

[118] The Respondent disputes the precedential value of the reference to fair notice in *Montréal Aluminum.* That case involved an appeal from a decision of a motions judge that had dismissed the defendants' motion to strike the plaintiffs' statement of claim. In allowing the appeal, the Federal Court, Appeal Division found that the plaintiffs' assertion, that it was entitled to fair notice of the Minister's purpose, was arguable and was not bound to fail. The Respondent submits that this reasoning cannot be interpreted as a conclusion that the law affords such an entitlement to the recipient of a requirement. The Respondent notes that the above paragraph from *Montréal Aluminum* was cited in *Capital Vision* (at para 71) but submits that *Capital Vision* provided no further analysis of the argument that there is an entitlement to fair notice.

[119] I agree with the Respondent's submissions on *Montréal Aluminum*. Also, I note that both *Montréal Aluminum* and *Capital Vision* involved allegations that the Minister was being less than forthright in his representations as to the purpose of the applicable requirements. The reference to an entitlement to fair notice can perhaps be understood in that particular context. In contrast, in the case at hand, I agree with the Respondent's submission that the Applicants have not adduced any evidence of bad faith or improper purpose on the part of the Minister. I therefore conclude that a principle of "faire notice" is not a lens through which the Court must assess the RFIs under review in the cases at hand.

[120] The Applicants also argue that, in order to establish that the RFIs have been issued for purposes related to the administration or enforcement of the ITA, a tax audit must be conducted in good faith, on a genuine factual basis, and with the objective of ensuring compliance with the ITA. The Applicants rely on *Canada (National Revenue) v Greater Montréal Real Estate Board*, 2007 FCA 346 [*GMREB*], in which the Federal Court of Appeal expressed the following conclusion (at para 49):

> 49 Having thus defined the applicable test on an application for judicial authorization under subsection 231.2(3), it is my view, based on the MNR's *ex parte* notice of application, supported by the affidavit of auditor Christiane E. Joly, that the tax audit in this case was conducted in good faith, that it had a genuine factual basis and that its objective was to ensure compliance with the Act.

[121] In *Hydro-Québec*, Justice Roy relied on *GMREB*'s reference to a tax audit conducted in good faith with a genuine factual basis (see, e.g., paras 58, 70, 75 and 100), in concluding that there was no such audit underway in that case.

[122] The Applicants argue, based on these authorities, that the Minister must establish that it is conducting a tax audit in good faith and on a genuine factual basis and that it has failed to do so in the present case. However, it must be recognized that both *GMREB* and *Hydro-Québec* involved applications under s 231.2(3) for authorization to issue an unnamed persons requirement. In such an application, the Minister is the applicant and can adduce affidavit evidence to establish that she is conducting an audit that meets the requirements identified in these authorities.

[123] In contrast, there is little scope for introduction of such evidence on an application for judicial review of requirements issued under s 231.2(1) where, with limited exceptions, the record before the Court must be confined to what was before the decision-maker. This is not to say that good faith, and the genuine nature of the Minister's inquiries, are not relevant to requirements issued under s 231.2(1). However, in the absence of any evidence adduced by the Applicants suggesting bad faith or improper purpose on the part of the Minister, I find these principles relied upon in *GMREB* and *Hydro-Québec* add little to the jurisprudence guiding my decision in these particular applications for judicial review.

[124] Finally, the Applicants also rely on authorities that employ language to the effect that there must be a rational connection between the information sought in a requirement and the administration and enforcement of the ITA. In *Saipem*, in referring to an earlier authority that had considered the question of reasonableness in the context of an application reviewing a foreign-based information requirement under s 231.6, the Federal Court of Appeal stated (at para 25):

> 25 I take this to mean that the learned judge was satisfied that there was a rational connection between the information sought and the issue in respect of which the information was sought.
>
> [Emphasis added]

[125] In his recent decision in *Bayer*, Justice Fothergill relies on *Saipem* in stating as follows (at para 51):

> 51 The Minister is not constrained in the number of requirements she may issue pursuant to s 231.6(2) of the ITA. A variation of the existing Requirement to restore the criteria previously applied by the CRA, and limiting its scope to the agreements with the 21 named pharmaceutical and life sciences companies, will not

> foreclose further requests or requirements for information as the audit continues. The sole constraint placed on the Minister is that a rational connection must exist between the information sought and the administration and enforcement of the ITA (*Saipem* at para 26).
>
> [Emphasis added]

[126] As with *GMREB* and *Hydro-Québec*, I must treat the language in *Saipem* and *Bayer* with caution, as those cases were not addressing requirements issued under s 231.2(1) of the ITA. Both *Saipem* and *Bayer* involved applications reviewing a foreign-based information requirement issued under s 231.6. However, *Bayer* relies on the necessity for a rational connection between the information sought and the administration and enforcement of the ITA in the context of the Court's consideration, under s 231.6(5) of the ITA, of the question whether the information sought is relevant to such administration and enforcement. As that question parallels the assessment required under 231.2(1), whether requirement is issued for a purpose related to the administration or enforcement of the ITA, the "rational connection" language may have application to the matters presently before the Court.

[127] That said, in my view, little turns on the application of the "rational connection" language against the backdrop of the principle derived from the jurisprudence canvassed above, that RFIs serve a proper purpose under s 231.2(1) if they seek to obtain information that may be relevant to the tax liability of the persons that the Minister is investigating. The Applicants argue that the decisions to issue the RFIs were unreasonable because the record does not demonstrate a rational connection between the information sought in the requirements and the tax liability of the persons under investigation by the Minister. As previously noted, the Respondent argues that such decisions were reasonable, because the RFIs seek to obtain information that may be

relevant to the tax liability of such persons. I have difficulty seeing much daylight between these two articulations of the test to be applied by the Court.

[128] I therefore turn to the application of the test to the five RFIs before the Court.

(2) Triple Five RFIs - T-1439-18 and T-1440-18

[129] As previously explained, each of the two Triple Five RFIs requests production of information and documents relating to seven corporations listed in the subject line, in particular banking information and documents including a list of bank accounts, bank statements, and details concerning incoming and outgoing funds transfers.

[130] The Ghermezian and Vaturi Information Sheet identifies the entities under investigation as 97GFT and T5WW and related companies, and refers to the possibility of consequential adjustments to certain tax years for Mr. Ghermezian and Mr. Vaturi. The Applicants note that, in explaining the history of the audit and the information and documents to be requested, the Information Sheets contain little or no express reference to either 97GFT or T5WW. I understand the Applicants to be arguing that the Information Sheet fails to demonstrate a rational connection between the information sought (which relates to the seven listed companies) and the tax liabilities of either 97GFT or T5WW.

[131] I would summarize some of the key points contained in the Ghermezian and Vaturi Information Sheet as follows:

A. The audit is a related party initiative audit of the Ghermezian family and their related economic entities. Four Ghermezian brothers are identified;

B. The CRA has issued past information requests, many involving offshore entities, responses to which were delayed or not provided;

C. Prior to the start of the audit, the CRA sent a questionnaire to the four Ghermezian brothers, requesting information including identification of all entities directly or indirectly owned or held in trust by them, all entities where they held or had held a position as director since 2011, and all of their other bank accounts and personal property holdings;

D. The CRA has identified that, since the 1990s and 2000s, the "group" has had corporations in various "tax efficient" countries. A trust to the benefit of the families of the four brothers was settled by relatives in the United Kingdom in 1997. Nader Ghermezian was the director of most of the Hong Kong companies. During 2013, after receiving the CRA's questionnaire, Mr. Ghermezian and (in some cases) his son-in-law, Marc Vaturi, resigned as directors for more than 30 Hong Kong corporations. They were replaced by two of Mr. Ghermezian's sons, referred to as "non-resident", but with a note that the CRA has not confirmed they are actually non-resident. A footnote to this portion of the Information Sheet also states that the CRA has evidence connecting T5WW to the Ghermezian family. However, the group's tax counsel has resisted the provision of

information about the Hong Kong companies, arguing that the CRA does not have jurisdiction over companies owned by non-residents;

E. Data collected by the audit team during 2015 demonstrated various entities in the group receiving or sending wire transfers from/to offshore related entities. This includes funds wired from three related Hong Kong corporations, indirectly held by the 1997 trust, to a Canadian resident member of the group. Despite Mr. Vaturi's previous resignation as a director of the Hong Kong corporations, electronic fund transfer data shows the transfers were directed from the home of Mr. Vaturi and his wife in Canada;

F. Based on details in contracts and emails obtained by the CRA, it believes that these funds are proceeds from offshore business activities, that Mr. Ghermezian and Mr. Vaturi maintain control over the offshore entities, and that the management and control of the entities occurs in Canada;

G. Banking information obtained from the Government of Hong Kong confirmed that Mr. Vaturi controlled numerous Hong Kong bank accounts and that some of the bank statements for these accounts were mailed to him at Canadian addresses;

H. The CRA wishes to obtain various documents which would normally be maintained in minute books for the foreign entities, additional banking information for several Hong Kong corporations, and various source documents;

I. The CRA's reasons for requiring this information include verification of foreign affiliate ownership of 97GFT; obtaining further support for the CRA's position that the offshore entities are managed and controlled from Canada; verification of the source of deposits made into the bank accounts of Mr. Vaturi's wife; verification of the source of deposits made into the Hong Kong bank accounts for the purposes of tracing unreported income; tracing withdrawals from the accounts to verify if additional income has been subverted to other taxpayers or unknown bank accounts of the Vaturis or the Ghermezians; and verification of the income of 97GFT from 1997 to present.

[132] In my view, this information meets the low threshold applicable to demonstrating that the information sought in the Triple Five RFIs may be relevant to the tax liability of the persons under investigation (or, expressed otherwise, that there is a rational connection between the information sought and such tax liability).

[133] I appreciate that the Information Sheet does not include a corporate organization chart, or information to the same effect, explaining precisely how or why the Minister believes the seven companies who are the recipients of the RFIs are related to or controlled by the subjects of the investigation. Nor does the Information Sheet set out in precise detail how the information and documentation sought will figure in the Minister's assessment of the particular tax liability issues that are under consideration. However, I do not consider that level of precision or detail to be necessary to meet the applicable test.

[134] The Respondent refers the Court to *Nadler (Estate) v Canada (Attorney General)*, 2005 FC 935 [*Nadler*], affirmed 2005 FCA 385, in which Justice Gauthier (then a judge of the Federal Court) explained as follows (at para 9):

> 9 Subsection 231.2(1) of the *Income Tax Act*, R.S.C. 1985 c.1, (5th supplement) (the Act) expressly refers to the collection of any amount payable under the Act. The Act does not require that the third party from whom the information is sought be given any details as to the purpose of the Requirement. The Requirement properly indicates the name of the taxpayer concerned, refers to the appropriate enabling provision and gives a description of the information required which is sufficient to enable Canada-Israel Securities Ltd. to prepare its response.

[135] The Triple Five RFIs easily meet the requirements set out in *Nadler*. Even examining the these RFIs and the supporting Information Sheet for a level of detail beyond that required by *Nadler*, it is clear that the Minister has reason to believe that there are relationships between members of the Ghermezian/Vaturi families, the trust and corporation under investigation (97GFT and T5WW), and the corporations to which the Triple Five RFIs are issued. The Ghermezian and Vaturi Information Sheet identifies various areas related to tax liability, the exploration of which the Minister believes will be advanced by obtaining the information and documentation requested in the Triple Five RFIs. Applying the deferential standard of review applicable pursuant to *Vavilov*, I find no basis in the record to conclude that it was unreasonable for the decision-maker to issue these RFIs for such purposes.

[136] In arriving at this conclusion, I have considered the Applicants' argument that the foreign entities that are the subject of the investigation pursued through the Triple Five RFIs are outside the Minister's jurisdiction. The Applicants support this position in part with submissions

surrounding the test for determining corporate residency and rely on Justice Boswell's decision in *Canada (National Revenue) v Lin*, 2019 FC 646 [*Lin*], at paragraphs 28-29:

> B. *Is a Non-Resident required to respond to a Request for Information under section 231.1 of the ITA?*
>
> 28 Resident status under the *ITA* (i.e., ordinary resident, a factual resident, a deemed resident, a deemed non-resident, and a non-resident) affects the obligations of individuals to pay taxes. Not all non-residents are exempt from paying taxes, however, as subsection 2(3) of the *ITA* specifies circumstances when a non-resident may be liable to pay tax on income earned in Canada.
>
> 29 Mr. Lin filed tax returns for the period of the audit. However, by virtue of section 18.5 of the *Federal Courts Act*, RSC 1983, c F-7, determining his residency status for purposes of the *ITA* during the tax years in question is an issue beyond this Court's jurisdiction. That issue lies within the jurisdiction of the Tax Court of Canada because it involves determining his liability to pay tax under the *ITA* as a non-resident (*Johnson v The Queen*, 2007 TCC 288).

[137] The Applicants submits that, prior to issuing the Triple Five RFIs, the Minister must first establish its jurisdiction over the foreign entities referenced within those RFIs. For instance, the Applicants suggest the Minister could commence a proceeding before the Tax Court of Canada as described in *Lin* or, in the case of a company incorporated in Hong Kong, through a proceeding before the competent authority prescribed by treaty in the *Canada – Hong Kong Income Tax Agreement*.

[138] I find little merit to these submissions. *Lin* does not assist the Applicants, as Justice Boswell's decision to dismiss the Minister's application for a compliance order in that case turned on the lack of clarity in the Minister's requests, in that it was unclear whether they were directed to the respondents personally or to related or associated entities (paras 30-32). Justice

Boswell correctly notes that it is the Tax Court, not the Federal Court, which has jurisdiction over the determination of a taxpayer's residency status. However, his decision did not turn on this point, and I do not read *Lin* as suggesting that a dispute as to a person's residency precludes the Minister from exercising her powers under s 231 *et seq* to obtain information and documentation relevant to that person's tax liability, including material relevant to the residency determination.

[139] It may be that, through future proceedings before a court or other body of competent jurisdiction, it will be determined that the taxpayers under investigation by the Minister in these proceedings are not resident in Canada, with whatever impact that determination may have as to whether the taxpayers have a Canadian tax liability. However, the Applicants have not convinced me that the Minister is presently unable to pursue information and documentation relevant to those issues. More precisely, this argument does not convince me that it was unreasonable for the decision-maker in the present applications to issue the Triple Five RFIs.

[140] Finally, I have considered the Applicants' argument that the Triple Five RFI's are overly broad, because of the number of persons about which information and documentation is requested, and because they seek material dating back 21 years. The Applicants note that this time period is far beyond the statutory three year limitation period for reassessing tax or the six year period for maintaining business records. They argue that the RFIs constitute an improper fishing expedition, violate the principle of proportionality, and are abusive.

[141] Relying on *Cameco*, the Applicants assert that, although the Minister's powers are broad, they are not unlimited. I accept this proposition, but I do not find that it supports their position that the Triple Five RFIs are overly broad. *Cameco* holds that the principle of proportionality has no role in a request for compliance order under s 231.7 (at para 42). In my view, this conclusion must apply equally to a requirement issued under s 231.2(1) that may subsequently become the subject of a compliance order. *Cameco* also explains that the Minister is entitled to determine the scope and manner of an audit (at para 43). *Lin* observes (at para 25) that there is no statutory time limit within which to make a request for information under s 231.1(1). Again, I find this observation equally applicable to a requirement issued under s 231.2(1).

[142] I appreciate that there are a number of parties implicated in the Triple Five RFIs and that they apply to a significant period of time. However, taking into account the apparent breadth of the corporate group the Minister is investigating and the range of dates identified in the Ghermezian and Vaturi Information Sheet, and applying the principles identified above from *Cameco* and *Lin*, I find no basis to conclude that the breadth of the Triple Five RFIs renders them unreasonable.

(3) Gibraltar RFIs - T-1451-18 and T-1452-18

[143] As previously explained, each of the two Gibraltar RFIs requests production of corporate records and bank statements related to certain foreign corporations described as managed and controlled by Mr. Ghermezian and Mr. Vaturi. The RFIs refer to seven corporations, subsidiaries of those corporations, and any other entities owned by the Ghermezian Family Trust. One of the seven corporations listed in the Gibraltar RFIs is T5WW.

[144] Like the Triple Five RFIs, the Gibraltar RFIs are supported by the Ghermezian and Vaturi Information Sheet, the contents of which are summarized in the previous section of these Reasons. As with the Triple Five RFIs, I understand the Applicants to be arguing that this Information Sheet fails to demonstrate a rational connection between the information sought (which relates to the corporations and entities referenced therein) and the tax liabilities of 97GFT or T5WW.

[145] My analysis of this issue above in relation to the Triple Five RFIs, including the analysis of the Applicants' jurisdictional argument and their argument surrounding the breadth of the information requested, applies equally to the Gibraltar RFIs. I also note that, in the Gibraltar RFIs, the information requested includes information related to T5WW and information related to entities legally or beneficially owned by 97GFT (i.e. the two subjects of the investigation). In my view, the information contained in the Ghermezian and Vaturi Information Sheet meets the low threshold applicable to demonstrating that the information sought in the Gibraltar RFIs may be relevant to the tax liability of the persons under investigation (or, expressed otherwise, that there is a rational connection between the information sought and such tax liability).

[146] The Applicants' arguments do not convince me that it was unreasonable for the decision-maker in the present applications to issue the Gibraltar RFIs.

(4) Gherfam RFI – T-1501-18

[147] As explained in more detail earlier in these Reasons, the Gherfam RFI requests (through GEI-27) production of particular documents and categories of documents relating to a

restructuring and refinancing transaction related to the Mall of America that occurred in 2014, and (through GEI-29) production of information and documents relating to T5MN, including documents showing the historical asset holdings of T5MN and related entities and the financial statements of T5MN.

[148] The Gherfam Information Sheet identifies that the U.S. Family Trusts (Mall of America) are the subjects of the Minister's investigation. The Applicant, Gherfam, argues that the Gherfam Information Sheet fails to demonstrate a rational connection between the information sought and the tax liabilities of these trusts.

[149] The arguments of both parties on this issue focus significantly on the fact that both GEI-27 and GEI-29 reference an issue described as "GG-01 (Trust Residency)." It is apparent from those references, other references in the Gherfam RFI, and the Gherfam Information Sheet that the Minister is seeking documentation and information through the Gherfam RFI to support its position that the trusts are resident in Canada. However, the Applicant asserts that the record does not demonstrate a rational connection between the particular material requested and the residency issue. The Respondent takes the position that the Minister is under no obligation to provide in the RFI a detailed roadmap as to how the information will be used to assess the residency issue, nor must the Information Sheet do so in order to support the reasonableness of the RFI.

[150] I would summarize some of the key points contained in the Gherfam Information Sheet as follows (omitting references to the Gherzian Dynasty Trust (American Dream), which is outside the scope of the RFI under review):

A. The requirement is to be served on Gherfam, the current directors of which are identified as the four Ghermezian brothers, and relates to the 2002 to 2016 tax years for the U.S. Family Trusts (Mall of America);

B. Prior to the start of the audit, the CRA sent a questionnaire to the four Ghermezian brothers, requesting information including identification of all entities directly or indirectly owned or held in trust by them, all entities where they held or had held a position as director since 2011, and all of their other bank accounts and personal property holdings;

C. The CRA has identified that, since the 1990s and 2000s, the "group" has had corporations in various "tax efficient" countries. A trust to the benefit of the families of the four brothers was settled by relatives in the United Kingdom in 1997. Nader Ghermezian was the director of most of the Hong Kong companies. During 2013, after receiving the CRA's questionnaire, Mr. Ghermezian and his son-in-law, Marc Vaturi, resigned as directors for more than 30 Hong Kong corporations. They were replaced by two of Mr. Ghermezian's sons, referred to as "non-resident", but with a note that the CRA has not confirmed they are actually non-resident. A footnote to this portion of the Information Sheet also states that the CRA has evidence connecting T5WW to the Ghermezian family. However, the group's tax

counsel has resisted the provision of information about the Hong Kong companies, arguing that the CRA does not have jurisdiction over companies owned by non-residents. The taxpayer has been made aware that the CRA has found that the 1997 UK settled trust is factually (or alternatively, deemed) resident of Canada;

D. In 2002, the group created eight family trusts in the United States. According to the trust deeds, the purpose of these trusts was to avoid Canadian tax liability. The four brothers were named as the protectors of the trusts and each one is also a trustee of the two trusts named after him. While two other family members, the same individuals for all eight trusts, are named as trustees of each trust, various sections of the trust deed clarify that the named brother and the protectors make the trust's decisions;

E. One of the purposes of the review is to determine the residency of these eight trusts. Under the deeming provisions of s 94(1) of the ITA, a contribution to the trust by a Canadian is required. The definition of contribution is extremely broad and could include: a transfer, a guarantee, a loan, and various other methods of connecting the trusts to Canada. In 2006, the eight family trusts were used to acquire approximately 67% of the Mall of America. In respect of the US Family Trusts, there is no statute barred date as these trusts have never filed a trust return in Canada;

F. Data collected by the audit team during 2015 demonstrated various entities in the group receiving or sending wire transfers from/to offshore related entities.

This includes funds wired from three related Hong Kong corporations, indirectly held by the 1997 trust, to a Canadian resident member of the group. Despite Mr. Vaturi's previous resignation as a director of the Hong Kong corporations, electronic fund transfer data shows the transfers were directed from the home of Mr. Vaturi and his wife in Canada;

G. The specific documentation and information requested is identified in GEI-27 and GEI-29. This material is necessary in order to support the CRA's primary and secondary (alternate) positions regarding the residency of the eight Ghermezian U.S. Family Trusts (Mall of America). The CRA's primary position is a factual determination of the residency of the trust based on common law rules. Its secondary position applies s 94 to deem trusts that have been factually established to be non-residents for Canadian income tax purposes to be trusts resident in Canada for income tax purposes under certain conditions.

[151] Both the Gherfam RFI and the Gherfam Information Sheet indicate that s 94 of the ITA (both before and after a 2007 amendment) is relevant to the Minister's assessment of the residency of the trusts that are the subject of her investigation. As noted above, the Information Sheet describes the effect of this section as deeming a trust to be a Canadian resident based on a contribution to the trust by a Canadian. The Information Sheet describes various forms that such a contribution may take, including a transfer, a guarantee or a loan.

[152] The parties also provided submissions on s 94 at the hearing of these applications. The Applicant argues that s 94 is a complicated statutory provision and that the references to that provision in the RFI and Information Sheet provide insufficient detail to adequately explain how the Minister thinks the material sought through the RFI might, through the operation of that provision, affect the trusts' residency for purposes of Canadian income tax. However, I agree with the Respondent that the Applicant's position seeks a level of detail beyond what the law requires of the Minister. Indeed, as previously observed, *Nadler* explained that the ITA does not require that the party from whom the information is sought be given any details as to the purpose of the requirement (at para 9).

[153] Nor is it my role in these applications to analyze the intricacies of the operation of s 94, whether the Information Sheet accurately captures them, or whether the information provided about the transactions that are the subject of the Gherfam RFI suggests s 94 is likely to apply as a result of those transactions or some aspect thereof. I am satisfied that the information and documentation about those transactions sought through the RFI may be relevant to the residency issue or, put differently, there is a rational connection between the two. Considering the question of whether the Gherfam RFI was issued for purposes related to the enforcement or administration of the ITA, the evidence in the record meets the low threshold necessary to sustain the reasonableness of the RFI.

[154] In so concluding, I have considered the Applicant's arguments as to the breadth of the Gherfam RFI, including the range of years to which it applies. As with the other RFIs and the Ghermezian and Vaturi Information Sheet canvassed earlier in these Reasons, the breadth of the

information sought through the Gherfam RFI is supported by the breadth of the corporate group and the range of dates that the Gherfam Information Sheet indicates the Minister is investigating. I find no basis to conclude that the breadth of the Gherfam RFI renders it unreasonable.

[155] I have also considered the Applicant's arguments that the trusts that are the subject of the investigation pursued through the Gherfam RFI are not within the Minister's jurisdiction. The Applicant advanced arguments comparable to those previously canvassed in these Reasons in connection with the other RFIs, including supporting this position with submissions surrounding the test for determining the residency of a trust.

[156] I will not repeat my analysis of the jurisdictional argument raised in relation to the other RFIs, other than to say that I reject this argument in connection with the Gherfam RFI for the same reasons. It may be that, through future proceedings, it will be determined that the trusts are not resident in Canada. However, the Applicant has not convinced me that the Minister is presently unable to pursue information and documentation relevant to that determination. More precisely, this argument does not convince me that it was unreasonable for the decision-maker in the present applications to issue the Gherfam RFI.

[157] However, the Applicant has raised additional arguments, in relation to the Gherfam RFI, which I must consider before deciding the outcome of the judicial review in T-1501-18.

[158] First, the Applicant notes that GEI-27 of the Gherfam RFI states, in relation to the various categories of financing documentation requested, that copies of documents provided in

response to that query must be a certified copy of the executed version. In addition to arguing that the certification process would require accessing documents that are located outside Canada, the Applicant submits that requiring the Applicant to engage in that process, as opposed to producing pre-existing documentation, exceeds the Minister's authority.

[159] I need not address this particular argument, as the Respondent's counsel advised the Court at the hearing that the Applicant has been informed that the Minister is no longer insisting on certified copies.

[160] However, there remains one argument advanced by the Applicant, which, while not one of its principal submissions, resonates with me as undermining the reasonableness of a component of the Gherfam RFI. The last operative paragraph of GEI-29 sets out the following requirement:

> 4. Provide any additional information or explanations that are relevant in determining whether or not the rules of former section 94 of the Act (for taxation years before 2007) applies to the Royce and Regent Trusts in respect of the transaction described in the background of this query.

[161] The Applicant argues that this paragraph is not sufficiently precise for the Applicant to understand what it is required to provide in response. The paragraph requires the Applicant to undertake a legal analysis surrounding the operation of former s 94, including potentially speculating on how the Minister would propose to invoke that section, and then make a determination as to what information could be relevant to informing that analysis.

[162] I agree that this paragraph is problematic. As previously explained, the Respondent relies on the analysis in *Nadler* (at para 9), in which Justice Gauthier found no serious issue with the requirement in that case, because it properly indicated the name of the taxpayer concerned, referred to the appropriate enabling provision, and gave a description of the information required which was sufficient to enable the recipient to prepare its response. In my view, paragraph 4 of GEI-29 does not give a description of the information required which is sufficient to enable the Applicant to prepare its response to that paragraph. I therefore find that the Gherfam RFI is unreasonable in this respect.

F. *Whether the relief sought by the Applicants is appropriate in the circumstances*

[163] This brings me to the consideration of remedies in these applications for judicial review. The Applicants seek a long list of remedies in each of the applications. However, the Applicants made no substantive submissions in support of the particular heads of relief sought, other than asking that the RFIs be quashed. Regardless, with respect to the applications in Court file numbers T-1439-18, T-1440-18, T-1451-18 and T-1452-18, as I have found that the relevant RFIs are reasonable, those applications will be dismissed.

[164] However, in relation to T-1501-18, I have found one component of the Gherfam RFI unreasonable, which raises the question of the appropriate remedy to impose. I find no basis to consider any of the heads of relief other than the possibility of quashing the RFI. The alternative to quashing the Gherfam RFI could possibly be some form of severance, in which the problematic paragraph four of the RFI is excised from the document, with the rest to remain in

effect. I note that Justice Fothergill adopted such an approach in *Bayer* (at paras 49-52). However, that case involved an application under s 231.6 of the ITA. Section 231.6(5) expressly provides that, on such an application, the Court has various powers including varying the requirement as the judge considers appropriate in the circumstances.

[165] It may be that the Court could impose a similar remedy in a matter, such as the case at hand, involving judicial review of a s 231.2(1) requirement. However, at the hearing, I sought from the Respondent's counsel the Respondent's position on the appropriate remedy in the event I were to find a component of an RFI unreasonable. The Respondent took the position that the appropriate result was to quash the RFI, with supporting reasons. I understand it would then be the Minister's intention to re-issue the RFI without the unreasonable component or with the basis for the finding of unreasonableness otherwise addressed. As the Respondent has not sought severance, and neither party has made submissions in support of the availability or appropriateness of severance, my Judgment will quash the Gherfam RFI and return the decision to issue that RFI to the decision-maker to be re-determined in accordance with these Reasons.

V. **Costs**

[166] At the hearing, each of the parties confirmed that it is seeking costs and took a position that costs should follow the event in each matter. As the Respondent has prevailed in Court file numbers T-1439-18, T-1440-18, T-1451-18 and T-1452-18, it will have its costs in those four matters. As the Applicant, Gherfam Equities Inc., has prevailed in T-1501-18, albeit on a minor point, it will have its costs in that matter.

JUDGMENT IN T-1439-18, T-1440-18, T-1451-18, and T-1452-18

THIS COURT'S JUDGMENT is that:

1. These applications for judicial review are dismissed.
2. In each application, costs are awarded to the Respondent against the Applicants in that application.

JUDGMENT IN T-1501-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.
2. The Requirement for Information dated July 10, 2018, issued by a delegate of the Minister of National Revenue under s 231.2(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), is quashed, and the decision to issue said Requirement for Information is returned to the decision-maker for re-determination in accordance with the Court's Reasons.
3. Costs are awarded to the Applicant.

"Richard F. Southcott"
Judge

APPENDIX "A"

Definitions

231 In sections 231.1 to 231.8,

authorized person means a person authorized by the Minister for the purposes of sections 231.1 to 231.5; (personne autorisée)

document includes money, a security and a record; (document)

judge means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court. (juge)

dwelling-house means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence and includes

(a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and

(a) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence; (maison d'habitation)

Inspections

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be

Définitions

231 Les définitions qui suivent s'appliquent aux articles 231.1 à 231.8

personne autorisée Personne autorisée par le ministre pour l'application des articles 231.1 à 231.5 (authorized person)

document Sont compris parmi les documents les registres. Y sont assimilés les titres et les espèces. (document)

juge Juge d'une cour supérieure compétente de la province où l'affaire prend naissance ou juge de la Cour fédérale. (judge)

maison d'habitation Tout ou partie de quelque bâtiment ou construction tenu ou occupé comme résidence permanente ou temporaire, y compris :

a) un bâtiment qui se trouve dans la même enceinte qu'une maison d'habitation et qui y est relié par une baie de porte ou par un passage couvert et clos;

b) une unité conçue pour être mobile et pour être utilisée comme résidence permanente ou temporaire et qui est ainsi utilisée. (dwelling-house)

Enquêtes

231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois :

a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux

in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

b) examiner les biens à porter à l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;

and for those purposes the authorized person may

à ces fins, la personne autorisée peut :

(a) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept,

a) sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres;

(b) and require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

b) requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin, requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

Prior authorization

(2) Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that

Autorisation préalable

(2) Lorsque le lieu mentionné à l'alinéa (1)c) est une maison d'habitation, une personne autorisée ne peut y pénétrer sans la

dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3)

permission de l'occupant, à moins d'y être autorisée par un mandat décerné en vertu du paragraphe (3).

Application

Mandat d'entrée

(3) Where, on ex parte application by the Minister, a judge is satisfied by information on oath that

(3) Sur requête ex parte du ministre, le juge saisi peut décerner un mandat qui autorise une personne autorisée à pénétrer dans une maison d'habitation aux conditions précisées dans le mandat, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :

(a) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph 231.1(1)(c),

a) il existe des motifs raisonnables de croire que la maison d'habitation est un lieu mentionné à l'alinéa (1)c);

(b) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

b) il est nécessaire d'y pénétrer pour l'application ou l'exécution de la présente loi;

(c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused,

c) un refus d'y pénétrer a été opposé, ou il existe des motifs raisonnables de croire qu'un tel refus sera opposé.

the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are specified in the warrant but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, the judge may

Dans la mesure où un refus de pénétrer dans la maison d'habitation a été opposé ou pourrait l'être et où des documents ou biens sont gardés dans la maison d'habitation ou pourraient l'être, le juge qui n'est pas convaincu qu'il est nécessaire de pénétrer dans la maison d'habitation pour l'application ou l'exécution de la présente loi peut ordonner à l'occupant de la maison d'habitation de permettre à une personne autorisée d'avoir raisonnablement accès à tous documents ou biens qui sont gardés dans la maison d'habitation ou devraient y être gardés et rendre tout autre ordonnance indiquée en l'espèce pour l'application de la présente loi.

(d) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any

document or property that is or should be kept in the dwelling-house, and

(e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act, to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

Requirement to provide documents or information

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

Unnamed persons

(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 more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

Production de documents ou fourniture de renseignements

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord international désigné ou d'un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :

a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu'elle produise des documents.

Personnes non désignées nommément

(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

Judicial authorization

(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") if the judge is satisfied by information on oath that

(a) the person or group is ascertainable; and

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

(c) and **(d)** [Repealed, 1996, c. 21, s. 58(1)]

….

Definition of *foreign-based information or document*

231.6 (1) For the purposes of this section, foreign based information or document means any information or document that is available or located outside Canada and that may be relevant to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person.

Requirement to provide foreign-based information

(2) Notwithstanding any other provision of this Act, the Minister may, by notice served personally or by registered or certified mail, require that a person resident in Canada or a non-resident person carrying on business in

Autorisation judiciaire

(3) Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou la production de documents prévues 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 :

a) cette personne ou ce groupe est identifiable;

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

c) et **d)** [Abrogés, 1996, ch. 21, art. 58(1)]

….

Sens de *renseignement ou document étranger*

231.6 (1) Pour l'application du présent article, un renseignement ou document étranger s'entend d'un renseignement accessible, ou d'un document situé, à l'étranger, qui peut être pris en compte pour l'application ou l'exécution de la présente loi, y compris la perception d'un montant payable par une personne en vertu de la présente loi.

Obligation de fournir des renseignements ou documents étrangers

(2) Malgré les autres dispositions de la présente loi, le ministre peut, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne résidant au Canada ou d'une

Canada provide any foreign-based information or document.

personne n’y résidant pas mais y exploitant une entreprise de fournir des renseignements ou documents étrangers.

Notice

(3) The notice referred to in subsection 231.6(2) shall set out

(a) a reasonable period of time of not less than 90 days for the production of the information or document;

(b) a description of the information or document being sought; and

(c) the consequences under subsection 231.6(8) to the person of the failure to provide the information or documents being sought within the period of time set out in the notice.

Contenu de l’avis

(3) L’avis doit :

a) indiquer le délai raisonnable, d’au moins 90 jours, dans lequel les renseignements ou documents étrangers doivent être fournis;

b) décrire les renseignements ou documents étrangers recherchés;

c) préciser les conséquences prévues au paragraphe (8) du défaut de fournir les renseignements ou documents étrangers recherchés dans le délai-ci dessus.

Review of foreign information requirement

(4) The person on whom a notice of a requirement is served under subsection 231.6(2) may, within 90 days after the service of the notice, apply to a judge for a review of the requirement.

Révision par un juge

(4) La personne à qui l’avis est signifié ou envoyé peut, dans les 90 jours suivant la date de signification ou d’envoi, contester, par requête à un juge, la mise en demeure du ministre.

Powers on review

(5) On hearing an application under subsection 231.6(4) in respect of a requirement, a judge may

(a) confirm the requirement**;**

(b) vary the requirement as the judge considers appropriate in the circumstances; or

(c) set aside the requirement if the judge is satisfied that the requirement is unreasonable.

Pouvoirs de révision

(5) À l’audition de la requête, le juge peut :

a) confirmer la mise en demeure;

b) modifier la mise en demeure de la façon qu’il estime indiquée dans les circonstances;

c) déclarer sans effet la mise en demeure s’il est convaincu que celle-ci est déraisonnable.

Idem

(6) For the purposes of paragraph 231.6(5)(c), the requirement to provide the information or document shall not be considered to be unreasonable because the information or document is under the control of or available to a non-resident person that is not controlled by the person served with the notice of the requirement under subsection 231.6(2) if that person is related to the non-resident person.

Précision

(6) Pour l'application de l'alinéa (5)c), le fait que des renseignements ou documents étrangers soient accessibles ou situés chez une personne non-résidente qui n'est pas contrôlée par la personne à qui l'avis est signifié ou envoyé, ou soient sous la garde de cette personne non-résidente, ne rend pas déraisonnable la mise en demeure de fournir ces renseignements ou documents, si ces deux personnes sont liées.

Time period not to count

(7) The period of time between the day on which an application for review of a requirement is made pursuant to subsection (4) and the day on which the application is finally disposed of shall not be counted in the computation of

(a) the period of time set out in the notice of the requirement; and

(b) the period of time within which an assessment may be made pursuant to subsection 152(4).

Suspension du délai

(7) Le délai qui court entre le jour où une requête est présentée conformément au paragraphe (4) et le jour où la requête est définitivement réglée ne compte pas dans le calcul :

a) du délai indiqué dans l'avis correspondant à la mise en demeure qui a donné lieu à la requête;

b) du délai dans lequel une cotisation peut être établie conformément au paragraphe 152(4).

Consequence of failure

(8) If a person fails to comply substantially with a notice served under subsection 231.6(2) and if the notice is not set aside by a judge pursuant to subsection 231.6(5), any court having jurisdiction in a civil proceeding relating to the administration or enforcement of this Act shall, on motion of the Minister, prohibit the introduction by that person of any foreign-based information or document covered by that notice.

Conséquences du défaut

(8) Si une personne ne fournit pas la totalité, ou presque, des renseignements ou documents étrangers visés par la mise en demeure signifiée conformément au paragraphe (2) et si la mise en demeure n'est pas déclarée sans effet par un juge en application du paragraphe (5), tout tribunal saisi d'une affaire civile portant sur l'application ou l'exécution de la présente loi doit, sur requête du ministre, refuser le dépôt en preuve par cette personne de tout renseignement ou document étranger visé par la mise en demeure

Compliance order

Ordonnance

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :

a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

Notice required

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

Avis

(2) La demande n'est entendue qu'une fois écoulés cinq jours francs après signification d'un avis de la demande à la personne à l'égard de laquelle l'ordonnance est demandée.

Judge may impose conditions

(3) A judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

Conditions

(3) Le juge peut imposer, à l'égard de l'ordonnance, les conditions qu'il estime indiquées.

Contempt of court

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

Outrage

(4) Quiconque refuse ou fait défaut de se conformer à une ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.

Appeal

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does

Appel

(5) L'ordonnance visée au paragraphe (1) est susceptible d'appel devant le tribunal ayant compétence pour entendre les appels des décisions du tribunal ayant rendu

not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

l’ordonnance. Toutefois, l’appel n’a pas pour effet de suspendre l’exécution de l’ordonnance, sauf ordonnance contraire d’un juge du tribunal saisi de l’appel.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1439-18, T-1440-18, T-1451-18, T-1452-18, T-1501-18
STYLE OF CAUSE:	NADER GHERMEZIAN V ATTORNEY GENERAL OF CANADA and between; MARC VATURI V ATTORNEY GENERAL OF CANADA and between; NADER GHERMEZIAN V ATTORNEY GENERAL OF CANADA and between; MARC VATURI V ATTORNEY GENERAL OF CANADA and between; GHERFAM EQUITIES INC V ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE VIA TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 12-13, 2020
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	DECEMBER 9, 2020

APPEARANCES:

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