Federal Court  Cour fédérale

Date: 20221018

Docket: T-1432-20

Citation: 2022 FC 1418

Toronto, Ontario, October 18, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

JOHN DOMINELLI

Respondent

ORDER AND REASONS

[1] The Minister of National Revenue [Minister] seeks a compliance order from this Court to require the Respondent [Mr. Dominelli] to provide outstanding documents relating to a 2016 audit [the Outstanding Materials], reproduced at Annex A to these Reasons. The Outstanding Materials were initially requested between June 2018 and November 2019. The Minister originally brought this Summary Application seeking a compliance order in December 2020 [the Summary Application], pursuant to s. 231.7(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp.) [ITA].

[2] Based on the evidence provided to this Court, I find that (i) it was reasonable for the Minister to expect that the Outstanding Materials should be part of Mr. Dominelli's books and records, and therefore Mr. Dominelli had a responsibility to produce them when he was first requested to do so in 2018-2019; (ii) Mr. Dominelli has not demonstrated his non-possession and the non-availability of the Outstanding Materials; and (iii) Mr. Dominelli has not taken all reasonable steps to search for and provide the Outstanding Materials. Therefore, I will grant the Order.

I. PROCEDURAL SUMMARY

[3] The Summary Application was heard in December 2020 over a period of three hearing days, at the conclusion of which I took the matter under reserve, pending settlement discussions. The Parties advised the Court that they had reached a settlement agreement on December 21, 2020, and the Applicant asked that I hold off issuing a decision until they confirmed that Mr. Dominelli had satisfied the terms of that agreement.

[4] I accordingly held my decision in abeyance. In early February 2021, the Minister advised the Court that Mr. Dominelli had failed to satisfy the agreement by the deadline and thus requested a judgment with respect to the Summary Application.

[5] Mr. Dominelli disagreed, contending that he had met all the terms of the agreement. Accordingly, he brought a motion to enforce the terms of the agreement [the Enforcement Motion]. On consent of both Parties a different judge was assigned to hear the Enforcement

Motion, since the record consisted of settlement-privileged information, in the event that I was ultimately required to rule on the matter, as is now the case.

[6] On February 11, 2022, Justice Pentney of this Court dismissed the Enforcement Motion, finding that the evidence demonstrated Mr. Dominelli had not met the terms of the settlement agreement (see *Canada (National Revenue) v. Dominelli*, 2022 FC 187). The matter thus reverted to me once again, requiring that I render judgment on the Summary Application. However, at case management conferences [CMC] held on May 3 and May 26, 2022, the Parties disagreed on whether the record was closed, and whether I, as the Summary Application judge, could refer to the settlement privileged materials filed in the Enforcement Motion.

[7] After receiving written submissions from the Parties in advance of the May 26, 2022 CMC to discuss whether the record was closed, I advised the Parties at that CMC that I would not refer to the Enforcement Motion record without the mutual waiver of settlement privilege by the Parties. As a result, I provided the Parties with three options at the end of the CMC, namely:

- Option 1 – for judgment to be rendered on the record that was before the Court in December 2020 when the matter was taken under reserve;

- Option 2 – for the Parties to provide a list of evidence in the Enforcement Motion over which they would mutually consent to waiving settlement privilege; or

- Option 3 – for the Respondent to bring a motion, pursuant to Rule 312, to file additional affidavits.

The Parties agreed to provide a joint position on which one of the options would be chosen (see complete Order at Annex B to these Reasons).

[8] On June 3, 2022, the Parties jointly wrote to the Court to advise that they had, on consent, selected the second option [Option 2], such that they would mutually waive settlement privilege over two affidavits sworn by Mr. Dominelli in February 2021, which were produced as part of the settlement process, along with its exhibits. A cross-examination of Mr. Dominelli on these affidavits was subsequently completed in June 2022, and the Parties filed the transcript thereof, along with written submissions addressing the significance of the evidence to the merits of the Summary Application.

[9] Having considered the entirety of the Record, including the written submissions and all of the evidence filed between December 2020 and June 2022, I will exercise my discretion to grant the Minister's Summary Application for the reasons provided below. My resulting Order obliges Mr. Dominelli to comply with the requirement to give all reasonable assistance in providing the outstanding documents to the Minister.

I. FACTUAL BACKGROUND

[10] Mr. Dominelli is the founder and CEO of NRT Technology Corp. [NRT], a Canadian company that owns and operates casino kiosk machines globally as well as private automated teller machines around North America.

[11] In 2010, Mr. Dominelli entered into two large Leveraged Insurance Annuity arrangements [LIAs]. The LIAs involved a series of financial transactions, whereby Mr. Dominelli (i) purchased an annuity policy with a short-term loan; (ii) purchased a life insurance policy with a death benefit of equal or greater value than the annuity premium, using the annuity's payments to pay part of the life insurance premiums; (iii) obtained a long-term loan with the annuity and insurance polices as collateral; and (iv) used the long-term loan proceeds to repay the short-term loan. The creditor for the short-term loan was Relius Group Consulting Inc. [Relius], the consulting insurance corporation of Mr. Robert Young. Mr. Young is also Mr. Dominelli's primary insurance advisor based in the Cayman Islands.

[12] Mr. Dominelli's mother was the "measuring life" in the annuity and insurance policies under his LIAs. She passed away in February 2017, terminating the policies and triggering a realization of death benefits.

[13] Over the years, Mr. Dominelli claimed over $139,000,000 in investment carrying charges [Carrying Charges] generated from insurance premiums and interest charges, which he deducted against his employment income from NRT on his income tax returns under subsection 20(1) of the ITA. Mr. Dominelli was initially audited in 2015 for his participation in the LIAs and for the deduction of carrying charges for his 2013 tax year.

[14] After providing some initial documents to the Minister's representatives at the Canada Revenue Agency [CRA], Mr. Dominelli and his counsel met with two CRA representatives in Belleville, Ontario in July 2016 to answer further questions. Following a number of

communications with Mr. Dominelli, the Minister expanded the scope of the audit, and disallowed carrying charges in the amounts of $12,209,338, $13,775,000, $16,448,331 and $20,004,340 for the 2012 to 2015 taxation years, respectively. At the time of hearing of these proceedings, Mr. Dominelli had ongoing appeals before the Tax Court of Canada [TCC] with respect to these rulings.

[15] The CRA commenced an audit for the 2016 taxation year in January 2018, in relation to which it issued four written requests, dated June and November 2018, and July and November 2019, under ITA subsection 231.1(1) for records, books and/or documents [2016 Materials]. The Minister asserts, in bringing this compliance motion, that Mr. Dominelli has only provided some of the 2016 Materials and that three audit items requested remain outstanding: (i - ii) proof of payment for his LIA's two annual insurance policy premiums, and (iii) supporting documents for the winding up of the LIAs [Outstanding Materials].

[16] On the record that was before me in December 2020, the evidence was essentially that Mr. Dominelli and his assistant had searched his own limited records several times, but that he relied almost entirely on his professional advisors to keep his records, to which he did not and still does not have access.

[17] With respect to the Outstanding Materials, Mr. Dominelli's counsel provided the following responses to CRA's requests through the years:

- In response to CRA's letter of June 14, 2018, Miller Thompson sent materials and responses in a letter dated January 28, 2019, including the following responses to Outstanding Items A and B:

[A] Please provide proof that Mr. Dominelli paid in 2016 the $4,000,000 payment of a portion of the annual premium payable under [Tricap] Policy # 20000001	We will continue to search for same. If located, we will provide same.
[B] Please provide proof that Mr. Dominelli paid in 2016 the $5,500,000 payment of a portion of the annual premium payable under [Tricap] Policy # 20000003	We will continue to search for same. If located, we will provide same.

- After subsequent exchanges between the Parties, CRA sent a July 23, 2019 letter to Mr. Dominelli adding the following item: "~~What was the procedure for unwinding the arrangements?~~ Was there any documentation to support the unwinding of the arrangements? If so, please provide." (The first question was struck on account of CRA having conceded that it was overbroad.)

- Mr. Chodikoff of Miller Thomson, one of Mr. Dominelli's lawyers, followed up with a letter to CRA dated September 19, 2019, stating in part:

> As you well know, Mr. Dominelli has willingly provided responses to a number of CRA requests for information pursuant to subsection 231.1(1) of the *Income Tax Act*. Specifically, the CRA has been provided with both documents and information on January 28, 2019 and March 28, 2019. The CRA's latest request for information (July 24, 2019) deals with the 2016 taxation year and here again, answers were provided to questions dealing with the 2016 taxation year in prior responses by and on behalf of Mr. Dominelli. It should be clear that Mr. Dominelli has been fully co-operative and will continue to conduct himself in this way.
>
> The CRA's July 24, 2019 letter containing, as it does, a request for information raises eight questions…As noted in Mr. Dominelli's previous responses to requests for information (and as an example his responses of January 28, 2019) he does not recall the details. He is the President of an extraordinary (*sic*) large and successful company and does rely on others to assist him. Here again, you were made aware of this in his prior responses and undoubtedly being as thorough as one would expect the CRA to be, you have in all probability contacted and connected with those individuals. Be that as it may, Mr. Dominelli continues to search for documents and as previously stated, if requested documents are found, they will be produced.
>
> In respect of fees paid to either Mr. Simone or Mr. Young…, Mr. Dominelli does not recall paying anything and he was not aware of any commission rate or structure either Mr. Young or Mr. Simone may have had with the insurance company. According to Mr. Dominelli's best

> recollection, he did not receive any proceeds from the life insurance policies or annuities upon Mrs. Dominelli's passing. Mr. Dominelli recalls that the death certificate was provided to Mrs. Young in person at NRT's Toronto Offices. With reference to the questions pertaining to the Limited Recourse Loan, Mr. Dominelli was not aware if documents were received regarding this subject because Mr. Jim Grundy (who is no longer at NRT) handled and managed the organizational process of the loan.
>
> As I mentioned earlier in this correspondence, Mr. Dominelli is still searching records for copies of wire transfers and cheques. However, he does recall that he paid the insurer company annual insurance premiums for the annuities in the amount of $600,000 and $1,000,000 every year, respectively.
>
> Should Mr. Dominelli find copies of records or have further information regarding the questions you raised, he will advise you through counsel as soon as possible.

- CRA responded to Mr. Dominelli on November 26, 2019, stating that "[u]nfortunately you failed to provide definitive answer to any of our questions or any supporting documentation. We strongly disagree with Mr. Chodikoff's assertion that responses to these questions have been provided previously by Mr. Dominelli." CRA proceeded to reproduce the same questions, including amongst them the three Outstanding Materials A, B and D (for proof of payment of the two life insurance policies, and documentation to support the unwinding of the insurance arrangements, respectively).

- A June 12, 2020 letter from counsel Molly Luu of Miller Thomson to CRA, referenced three further letters and answers submitted to CRA (of December 5, 2019, January 24 and January 28, 2020), noting:

> Your letter states that "much of the requested material remains outstanding." It is our position that the taxpayer has discharged his obligation, pursuant to the Income Tax Act, to provide responses to the CRA.
>
> Please provide a table of the exact questions that, according to your records, remain unanswered and we will respond to that outstanding list.
>
> Where his records are incomplete, the taxpayer has sought responses and information from his professional advisors. As set out in our previous correspondence, we have made inquiries of the professional advisors and have received an update that as of June 10, 2020, they are retrieving their records and will be reviewing them in short order. Once we receive a

> further response from the professional advisors, we will provide you with an update.
>
> As you can imagine, the COVID-19 crisis has hindered communication and the ability for all parties to conduct a thorough review of hard copies. We appreciate your patience.

- After a June 22, 2020 letter from CRA again requesting the same Outstanding Materials, Ms. Luu responded on July 17, 2020, stating that the office of Mr. Dominelli's advisor was restricted due to COVID-19. Regarding the $4.75M annuity of Policy #20000001, she responded:

  > Upon review of the portion of the documents to which he has access, Mr. Andrew Etcovitch, the taxpayer's legal counsel (who at the time was a Tax Partner at the law firm of McMillan LLP and represented the taxpayer with respect to the transactions at issue in this audit), advises that he has not yet been able to locate the requested documents. The taxpayer's financial professional, Mr. James Grundy (who was employed by the taxpayer at the time the transactions at issue in this audit were effected), advises that he cannot recall the answer to this question and does not have access to the necessary financial records required to provide an answer or the requested documents.

- Regarding the $7.5M annuities of Policy #20000003, Ms. Luu noted in her July 17, 2020 letter:

  > Upon review of the portion of the documents to which he has access, Mr. Etcovitch advises that he has not yet been able to locate the requested documents.
  >
  > Mr. Grundy advises that he cannot recall the answer to this question and does not have access to the necessary financial records required to provide an answer or the requested documents.

- Regarding the unwinding issue, Ms. Luu wrote in her July 17, 2020 letter:

  > Mr. Etcovitch answers as follows:
  >
  > Note that his response refers to the September 2010 transaction.
  >
  > If "unwinding" is meant to refer to early termination of the structure in its original format prior to its fruition, there was a "back door" built into the Limited Recourse Loan Agreement and the Annuity through the conversion option mechanism.

> If, on the other hand, unwinding is meant to refer to the payment of the Limited Recourse Loan from the proceeds of insurance following the death of an insured, there was an irrevocable direction by John Dominelli to pay the proceeds of the life insurance policy to his lender and this was supported by a collateral assignment of that life insurance policy to the lender.

[18] Since the correspondence summarized above, Mr. Dominelli has deposed to making further efforts to obtain the Outstanding Material. Specifically, in his two affidavits filed after the December 2020 hearing, along with the associated cross-examination of June 2022, Mr. Dominelli deposed that documents were sent to his lawyers on January 13, 2021 by Mr. Young, who, until that point, had been difficult to reach and slow to respond, due to travel and COVID-19. While certain documents were attached as exhibits, the communications with Mr. Young were not.

[19] Mr. Dominelli further deposed that Mr. Young advised him that following the death of his mother in February 2017, the 2016 premiums he owed to the insurance companies were "satisfied in full" as part of the wind up of the insurance policies associated with the LIAs. The wind up did not actually take place until December 2019.

[20] Mr. Dominelli also attached two letters as exhibits to his affidavit of February 2, 2021, bearing Advantage Insurance [Advantage] letterhead and signed by Mr. Stuart Jessop, Director. The letters indicate the amounts of the premiums that were owed to Tricap Assurance SPC [Tricap] in January 2016 for the #20000001 and #20000003 life insurance policies issued by Tricap, namely $4.75M and $7.5M respectively. Mr. Jessop states that Advantage was entitled to

collect the 2016 Outstanding Premium in place of Tricap as a result of a Reinsurance Agreement. Both Advantage letters state:

> On February 21, 2017, the insured life under the Life Policy and measuring life under the Annuity Policy died. It was not until late December of 2019 that the death benefit distribution was made, and the Life Policy was settled. As part of the winding up of the Annuity Policy and Life Policy, Advantage paid the full amount of death benefit in satisfaction of its obligations under the Reinsurance Agreement and Tricap's obligations under the Life Policy. Upon the distribution of the death benefit and in accordance with the provisions of the Reinsurance Agreement, Advantage was therefore able to account for premium obligations due under the Life Policy to the satisfaction of Tricap.

[21] No further explanation or supporting documents were provided to explain how the premiums were accounted for.

[22] On cross-examination, Mr. Dominelli deposed that he had no idea how the premiums were accounted for, and that he was in the dark as to how the premiums were paid. He also deposed that he did not specifically ask Mr. Young how Tricap accounted for his insurance premium obligations. Mr. Dominelli further deposed that he asked no one other than Mr. Young for the wind up documents and that this had taken a long time, having required multiple requests and reminders.

[23] Mr. Dominelli confirmed the entire proceeds of the life insurance payouts were needed to cover the principal of the loan from Relius.

II. THE LAW

[24] Canada has a self-reporting taxation regime in which the individuals are responsible for filing their taxes, maintaining records to justify their filings, and retaining those records (*R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at 648, [1990] SCJ No 25). The Minister is empowered with ITA enforcement, which includes wide discretion to determine the scope of an audit and the documents required to complete it (*Canada (National Revenue) v Lin*, 2019 FC 646 at para 24 [*Lin*]).

[25] The purpose of ITA s. 231.1 is to facilitate the Minister's unencumbered and immediate access to all books, records and information of the taxpayer (*Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 at para 27 [*Cameco*]. As Chief Justice Noël stated in *BP Canada Energy Co v Minister of National Revenue*, 2017 CAF 61 [*BP*] at paragraphs 58 and 59:

> [58] I agree with the Federal Court judge that subsection 231.1(1) could not have been drafted in broader terms. Based on the plain language of subsection 231.1(1), a document which "relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable under [the] Act" is accessible under that provision.
>
> [59] The introductory words of subsection 231.1(1) specify that in order to invoke this broad wording, the Minister must be acting for a purpose relating to the administration or enforcement of the Act. In the context of paragraph 231.1(1)(a), that purpose is verifying compliance with the Act.

[26] While s. 231.1(1) provides the Minister with broad latitude to request and obtain information, it does not give the Minister free reign over any possible document such that the

Court is obliged to order compliance. (The relevant parts of s. 230 and s. 231 of the ITA are reproduced at Annex C to these Reasons).

[27] Subsection 231.7(1) requires that three conditions must be met before the Court can order a person to provide access, assistance, information or documents sought by the Minister and required under s. 231.1 or s. 231.2. First, the Minister must show that the person against whom the order is sought was required under ITA s. 231.1 or s. 231.2 to provide the access, assistance, information or documents sought. Second, although the person was required to provide information or the documents the Minister seeks, he or she did not do so. Third, the information sought is not protected from disclosure by solicitor-client privilege (para 231.7 (1)(b); see, for instance, *Minister of National Revenue v Lee*, 2016 FCA 53 at para 6 ; *Friedman v Canada (National Revenue)*, 2021 FCA 101 at para 12 ; *Canada (National Revenue) v Chamandy*, 2014 FC 354 at paras 27-29 [*Chamandy*]).

[28] The Court must be satisfied that each of these three requirements are "clearly met" before exercising its discretion, given the serious consequences that can flow from the failure to obey a compliance order (*Minister of National Revenue v SML Operations (Canada) Ltd*, 2003 FC 868 at para 15 [*SML*]). The serious consequences include contempt of court pursuant to subsection 231.7(4), which may result in a fine and/or incarceration. Here, Parliament sought to give the courts a supervisory role that must not be taken lightly (*Minister of National Revenue v Carriero*, 2016 FC 1296 at para 12).

[29] The scope of audit requests can be broad, and the threshold for the reasonableness of an audit is low (*Saipem Luxembourg SA v Canada (Customs and Revenue Agency)*, 2005 FCA 218 at paras 31-37 [*Saipem*]). In *Saipem* at para 25, the FCA held that the required purpose of an audit request is met even if some of the information requested ultimately turns out to be irrelevant to the audit (see also *Canada (National Revenue) v Ghermezian*, 2022 FC 236 at para 225 [*Ghermezian*]). The breadth of audit requests are "a matter for the Minister, so long as the information requested is required for any purpose related to the administration or enforcement of the Act" (*Minister of National Revenue v Amdocs Canadian Managed Services Inc*, 2015 FC 1234 at paras 67-69 [*Amdocs*]; *Lin* at paras 23-24).

[30] Even if the three conditions have been met, the judge retains an overriding discretion under subsection 231.7(1) to impose appropriate conditions on the order that is granted (see also, ITA s 231.7(3)). The Courts have used conditions to prevent overreach and to ensure any resulting order suits the situation (see, for instance, *Canada (National Revenue) v Montana*, 2019 FC 900 at para 44 ; *Canada (National Revenue) v CN Construction Networks Ltd.*, 2020 FC 775 at para 32).

[31] Section 231.1 and the jurisprudence also make it clear that certain situations do not warrant granting an application under subsection 231.7(1). It is important to note that limits have been placed on materials that can be expected to be produced. The ITA has a built-in protection against the required production of any privileged material under para 231.7(1)(b). Subsection 231.5(1) requires that all persons "do everything that [they are] required to do" under subsections 231.1-231.4, unless they are "unable to do so." In other words, the ITA requires only that a

taxpayer exercise “reasonable efforts” to acquire requested information (*Canada (National Revenue) v Miller*, 2021 FC 851 at para 50 [*Miller*]).

[32] What is “reasonable” depends to a great extent on the context. In *Saipem*, the FCA held at para 31 that “one needs some understanding of the extent of the demand and the reasons for which it is made” when discussing the reasonableness of a notice of requirement from the Minister to produce documents, thus guiding this Court to consider the context when determining reasonableness.

[33] *Saipem* concerned the notice provision contained in s. 231.6(2). Here, we are dealing with a different provision, but one that nonetheless requires “reasonableness”. Today, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] provides the concept of reasonableness in administrative law, stating (among other things), that reasonableness takes its colour from the context (at para. 89). Where have the Courts drawn the line in describing “reasonable efforts” to obtain documentation requested in an audit?

[34] A s. 231.7 order should not be made where a document has been destroyed or where the information sought is beyond the taxpayer’s possession and they have no power to obtain it, even if the information may exist (*Amdocs* at para 75-76; *Lin* at para 26). Furthermore, documents which do not exist and cannot be produced, need not be provided (*Amdocs* at para 62).

[35] The case law has also guarded against an over-expansive interpretation of s. 231.1(1), including against the ordering of confidential planning documents for corporations (*BP* at para

99), or oral interviews (*Cameco* at para 34). More recent decisions suggest that the Minister, under s. 231.1(1), must be able to gain access to documented information when this information is or should be in the taxpayer's books and records (*Miller* at para 31; see also: *Ghermezian* at paras 108-110).

[36] In *Amdocs,* the Court refused to issue a compliance order when the taxpayer demonstrated both that (i) it was not in the possession of the information, and (ii) that it was not available to the taxpayer (at para 75). In that case, the taxpayer satisfied the Court that the evidence demonstrated, on a balance of probabilities, an inability to produce the information. Conversely, when the taxpayer has failed to demonstrate either the first element of non-possession, or the second element of non-availability, the Court should grant the Order sought (see: *Blue Bridge Trust Company Inc v Canada (National Revenue),* 2020 FC 893 at para 120 ; *Miller* including paras 31, 33, 37, 48-50, 63, 75-76, 82-83).

[37] In short, this review of the relevant jurisprudence illustrates that there are cases on both sides of the compliance divide. On the one hand, the Federal Courts have upheld compliance orders in cases where the Minister's requests for information were reasonable, and within the proper scope of an audit. On the other hand, the Courts have refused compliance orders where documents did not exist or form part of the information that should be in the books or records of the taxpayer.

III. PARTIES' POSITIONS

[38] In this Application, the Minister asks the Court for an order compelling Mr. Dominelli to provide the Outstanding Materials or to provide access to, assistance in obtaining, or information about these Outstanding Materials, with its costs to bring this Application. The Minister feels that Mr. Dominelli is improperly relying on Mr. Robert Young, his agent, to resolve the issue, when these records should plainly be available.

[39] Mr. Dominelli, in contrast, contends that the Court should refuse to grant the requested order because the questions on and requests for the Outstanding Materials have either been answered, or the information is not in his control or possession. He also argues for costs, due to having to defend what he asserts is an unwarranted Application. Mr. Dominelli argues that he has already provided access to and assistance in obtaining the Outstanding Materials to the extent the law requires of him.

[40] Mr. Dominelli indicates that he does not have the relevant information in his possession, asserting that he has provided details of his efforts to obtain the documents from Mr. Young in his written submissions in support of this motion, as well as his oral testimony as provided in his cross-examinations of June 10, 2022 and December 11, 2020.

[41] Based on the documents, testimony and factual backdrop, Mr. Dominelli relies heavily on *Lin* and *Amdocs*, where he asserts judges of this Court declined to issue compliance orders. He also cites *Cameco* for the proposition that the Minister can simply proceed with the 2016 audit

because he does not have and cannot obtain the Outstanding Materials: where documents cannot be produced, “it remains open to the Minister to make inferences when no answer is given. The Minister is also free to make assumptions and to assess on that basis” (*Cameco* at para 28).

[42] Mr. Dominelli also notes that the Minister should have used other provisions should she have wished to obtain documents from outside Canada, including subs. 231.2(1), or by applying to this Court to obtain information from a third party (para 231.2(3)).

IV. ANALYSIS

[43] Before explaining in more detail my decision to grant the compliance Order, I will first address the Minister’s objection to the last piece of evidence filed by Mr. Dominelli.

a. The May 2, 2022 Letter will not be considered

[44] During the Minister’s cross-examination of Mr. Dominelli’s February 2021 affidavits, which was conducted on June 10, 2022, Mr. Dominelli’s counsel attempted to have a letter she had written on May 2, 2022 [Letter] entered as an exhibit to the cross-examination, without it having been specifically mentioned by Mr. Dominelli in his affidavit. Mr. Swanstrom, counsel for the Minister, immediately objected to the Letter being raised during cross-examination. In the Letter, Ms. Luu set out the steps that she has taken on behalf of her client, Mr. Dominelli, to obtain the Outstanding Materials from various sources. She argues that the Letter is relevant, and is material evidence, given that extensive good faith efforts were undertaken to obtain further documentation relating to the Outstanding Materials.

[45] The Minister's objection to the Letter rests on two grounds. First, the Minister submits that it was drafted over a year after the Enforcement Motion and was not introduced on mutual consent pursuant to Option 2 (described at paragraphs 7-8 above and Annex B to these Reasons). The Minister contends that the Letter goes beyond the parameters of the evidence that the Parties agreed to in Option 2, which included only two affidavits sworn by Mr. Dominelli in February 2021, and their exhibits.

[46] Second, the Minister submits that the Letter is inadmissible hearsay, since it is a statement by Mr. Dominelli's counsel, which also lacks important particulars that would be necessary to have any probative value.

[47] I agree with the Minister, given the very specific parameters of Option 2 that the Parties carefully and jointly selected after the May 26 CMC. The Minister had argued throughout 2022 that one major issue with the materials filed for the Enforcement Motion, was that Mr. Dominelli could not be cross-examined on them. In the May 26, 2022 Order to the Parties setting out their three options, Mr. Dominelli was explicitly invited in Option 3 to move to open the record and bring new evidence, along with providing a calendar for resulting cross-examinations (again, see Annex B).

[48] If the particulars of what was asked of most the 15 third parties listed, when it was asked, from whom and what was received in response - or better yet copies of the communications themselves - were appended to the Letter, this may have been enough to satisfy the requirement

of showing a reasonable effort to comply with the Outstanding Documents. However, the letter lacked those particulars.

[49] Ultimately, I find the Letter to be an inappropriate figurative and literal attempt to shoehorn new evidence into the cross-examination of Mr. Dominelli after the record had already been perfected. The fact of the matter is that Mr. Dominelli has provided scant evidence of his own efforts in the years since the CRA's initial request for information, and since he received the additional information from Mr. Young and Mr. Jessop in early 2021.

[50] The Letter's contents are simply too little, too late to satisfy the Court that appropriate measures have been taken by Mr. Dominelli to locate or otherwise obtain the Outstanding Materials. The Parties clearly agreed to the scope of further evidence that would be placed before the Court, and that cross-examination would take place based on that evidence, including the Affidavit of Mr. Dominelli.

[51] I accordingly accept the Applicant's objection and will not consider the Letter.

b. A compliance order will issue for the Outstanding Materials

[52] Based on the material provided with this Summary Application, I find that the Minister's requests are reasonable, and by contrast, the efforts made by Mr. Dominelli are unreasonable.

[53] The requests for documents detailing payment of two life insurance policy premiums of $4.75M and $7.5M respectively, particularly when these are being used to support a deduction

Mr. Dominelli claimed on his tax returns, relate to information that is or should be in Mr. Dominelli's books or records. The same is true of the winding up of Mr. Dominelli's plan upon his mother's passing.

[54] Again, Mr. Dominelli claimed Carrying Charges of a total of $139,000,000 through the LIAs' insurance premiums and interest charges. This is a very large sum of money, and Mr. Dominelli's evidence was that he was not getting answers from Mr. Young when the Application was originally brought in 2020. By the time the settlement failed and the Parties returned before this Court, they had heard from Mr. Young and obtained what purported to be information confirming the documents sought for the Outstanding Materials. However, the documents provided in the Option 2 evidence suffer from fundamental weaknesses.

[55] For instance, Mr. Dominelli asserts that Mr. Young assured him during a telephone call that the two 2016 life insurance policy installments (of $4.75M and $7.5M) had been paid off in 2019 through part of the funds that came from the proceeds of the life insurance policies upon Mr. Dominelli's mother's death. However, no copies of cheques, money transfers, acknowledgments from the insurance companies, or even signed proof of such policy payments, were included in the Option 2 evidence provided to this Court.

[56] Mr. Dominelli confirmed the entire proceeds of the life insurance payouts were needed to cover the principal of the loan from Relius so there would be nothing left to satisfy the $4.75M and $7.5M premiums he owed. Thus, a simple reconciliation would leave the question

unanswered as to how these two substantial premium payments were satisfied through the settlement redistribution of the death benefit.

[57] Mr. Dominelli relies heavily on *Amdocs*, *SML*, *Lin* and *Chamandy*, where judges of this Court declined to issue compliance orders. However, these precedents do not convince me to reject this Application for a compliance order. First, the factual matrix of these cases differ. *Amdocs* and *SML* were corporate taxation cases where the Minister felt that it was not obtaining all that could be obtained from the corporations. In each case, the documents sought either did not exist or were not available, and the taxpayers were found to have taken "reasonable efforts" to obtain them.

[58] Ultimately, the role of the Court is not to issue an order that would be futile, such that it would only prolong the audit process. The vicious cycle could compound the frustration on both sides by further entrenching positions, with the taxpayer having been ordered to produce non-existent documents. It would also risk wasting scarce judicial resources: having failed to comply with the order, it would be foreseeable that the parties may file and defend contempt proceedings, which could well come to naught. As Justice Russell stated in *Amdocs*, "there is no point in ordering [a taxpayer] to do something it cannot do" (at para 76).

[59] Conversely, where it is plain and obvious that there is more the taxpayer can do to obtain documents that they should – but state they do not – have in their records, whether through their own efforts or those of their agents, then the order should be granted. In this case, Mr. Dominelli's efforts to obtain the documentation prior to the December 2020 hearing were

limited to sharing the names of his advisors with the CRA, and deposing that he asked his lawyer to make calls to ask that the material be shared.

[60] Furthermore, in *Lin*, as well as *Chamandy*, there was uncertainty of the subject of the audit. In this case, no such uncertainty existed, as the questions squarely related to Mr. Dominelli and no one else.

[61] Mr. Dominelli admitted in cross-examination that he does not understand how LIAs function, nor does he understand their tax consequences. He stated that he placed his trust in his advisors, and depends particularly on his insurance advisor in the Cayman Islands, Mr. Young, to arrange his insurance affairs, and keep his paperwork. He states that the missing items are not in his possession, but rather that his investment representatives hold all documents associated with the LIAs. He states that he has done everything he can to obtain them, and since those representatives cannot produce the documents, they do not exist.

[62] Mr. Dominelli contends that he has thoroughly looked for the requested information both under his control, and by asking his advisor Mr. Young, and has provided the evidence that the two insurance premiums were paid, along with documentation relating to the winding-up of his LIAs.

[63] Mr. Dominelli has consistently provided the same position for each of the three requests, regarding the information about the policy payments (Outstanding Items A and B), and the unwinding arrangement (Outstanding Item D). He maintains that he has already provided the

information, does not have it, or is still looking for it. In short, Mr. Dominelli insists that his books and records do not contain the requested information, and that he does not have any payment copies.

[64] Specifically, he states that his key representative, Mr. Young—who resides in the Cayman Islands and who has stated he was unable to search for the Outstanding Materials for significant periods during the past 18 months—has made efforts but has been unable to find the documents noted in the Outstanding Materials.

[65] Without any direct knowledge of what searches, if any, were actually conducted by Mr. Young, it would appear that the only attempt Mr. Dominelli made was to check his office records and to make requests of his Cayman Island tax representative. There is no evidence, aside from the late and insufficiently detailed Letter, to demonstrate that Mr. Dominelli made any effort whatsoever to obtain information from the other parties who might have held the documents he required, such as the issuers of the insurance policies, or the people who were responsible for unwinding the LIAs.

[66] Despite his reliance on LIAs to obtain tax deductions over several years, Mr. Dominelli admitted in cross-examination that he does not understand how these arrangements function, nor does he understand their tax consequences. He outsources anything to do with tax reporting and planning to his advisors and representatives. When his tax returns are prepared, he does not examine their contents beyond the amount of his tax liability.

[67] However, it is a trite principle of tax law that while one can outsource tax advisory services, such as by hiring accountants or a firm to file tax returns, one cannot evade all responsibility for record-keeping by deflecting any and all requests on those persons, and blame them for not keeping such records. A taxpayer hiring an accountant does not replace taxpayer accountability, as Chief Justice Noël stated in *BP* at para 81:

> An important part of the context surrounding subsection 231.1(1) is the notion of self-assessment which is at the root of the compliance system put in place under the Act. The system is one of self-assessment because the person who generates income is best positioned to identify, compute and report the amounts that are subject to tax under the Act.

[68] Certainly, the taxpayer may have recourse against such professionals for performance issues, or possibly through their professional bodies. However, taxpayers are ultimately responsible for their own affairs in our self-reporting system (*Schillaci v Canada (National Revenue)*, 2021 FC 27 at para 44; *R v Jarvis*, 2002 SCC 73 at para 49 [*Jarvis*]; *Northview Apartments Ltd v Canada (Attorney General)*, 2009 FC 74 at para 11). Taxpayers have a "duty to exercise care and accuracy in the completion" of returns, and those who sign returns prepared by a third party advisor, without reviewing them, run grave risks (*Sledge v The Queen*, 2016 TCC 100 at para 43).

[69] Simply put, taxpayers cannot, through outsourcing their tax affairs, absolve themselves of all responsibility for maintaining basic documents. This is particularly so when the documents relate to the payment of significant sums, which have then been used for tax deductions (the first two items in the Outstanding Materials). Similar comments apply to winding up documentation relating to the insurance plans, upon which these deductions were based.

[70] Even if taxpayers do not have the paper or electronic copies of the policies and payments in their possession, they must be able to access them, or at minimum show best efforts, on a reasonable basis, to have done so. Here, Mr. Dominelli is placing excessive reliance on his representatives. He has not demonstrated best efforts to obtain the documents.

[71] Has Mr. Dominelli made reasonable efforts to obtain the Outstanding Materials? As discussed above, the reasonable efforts to be taken by a taxpayer to assist with a request for information are thus also highly dependant on the context. Deflecting responsibility to one's accountant or insurance advisor to produce a tax receipt might (or might not) suffice for a $150 dinner bill deducted as a company expense. The same flexibility, however, does not apply to multi-million dollar deductions claimed on life insurance premium carrying charges.

[72] Here, it is reasonable to expect the taxpayer to go much further to comply with requests for information, rather than to simply place a couple phone calls over a period of several years, and attempt to shift all responsibility to a largely non-responsive advisor in the Cayman Islands, or other advisors to whom tax planning and record-keeping has apparently been delegated.

[73] Mr. Dominelli has not contested the validity of the information request under paragraph 231.1(1)(a) (as was the case in *BP*, for instance). Rather, Mr. Dominelli is arguing that he has already satisfied his obligations with respect to CRA's request by providing the required information, in addition to his counsel providing extra information in her Letter.

[74] I disagree. It was Mr. Dominelli's responsibility to be accountable for information about the policy payments and the unwinding arrangement, which he relied on for the deduction of his very substantial carrying charge deductions, and he cannot simply abdicate all responsibility for safeguarding his documentation by relying on his third party advisor, Mr. Young, or anyone else for that matter, to do so for him without any recourse to the materials.

[75] Moreover, when asked during cross-examination who had prepared his tax filings for the 2016 taxation year, Mr. Dominelli indicated that he could not recall the name of his accountant. In that same cross-examination, he produced a business card for his accountant, Stephen Shulman. But, just a few questions later, he indicated that Mr. Grundy — the former NRT Chief Financial Officer — had prepared his 2016 tax filings. This inconsistency demonstrates Mr. Dominelli's lack of effort and responsibility for his tax obligations under the ITA.

[76] I will simply point again to the basic principles of the tax regime of self-regulation and accountability of the taxpayer. As the SCC stated in *Jarvis* at paras 51-52:

> It follows from the tax scheme's basic self-assessment and self-reporting characteristics that the success of its administration depends primarily upon taxpayer forthrightness. …
>
> The sections within Part XV of the ITA provide the Minister with "Administration and Enforcement" powers. They also impose reciprocal obligations upon taxpayers: for example, in furtherance of the overall reporting and verification scheme, s. 230(1) of the ITA requires all taxpayers, for various specified periods of time, to maintain books and records of account at their place of business or residence in Canada. These documents must be kept "in such form and containing such information as will enable the taxes payable under [the ITA] or the taxes or other amounts that should have been deducted, withheld or collected to be determined".

[77] During the hearing, Mr. Dominelli's counsel referred to s. 15 of the Canada Revenue Agency's Taxpayer's Bill of Rights, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc17/taxpayer-bill-rights-guide-understanding-your-rights-a-taxpayer.html, which indicates that a taxpayer has the right to choose their representative to assist with their tax filings.

[78] That is accurate. However, s. 15 of the Taxpayer's Bill of Rights goes on to indicate that representation does not absolve taxpayers from their legal obligations under the ITA; that responsibility remains with the taxpayer, even if a representative acts on their behalf.

[79] Indeed, the individual taxpayer's responsibility is to understand or be informed of the law and to take reasonable steps to comply with the ITA (*Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 69). Mr. Dominelli's conduct and responses during the course of the 2016 Audit attempt to transfer all of his ITA record-keeping obligations to his professional advisors and representatives. That is unacceptable.

[80] Mr. Dominelli contends that sufficiency or deficiency of records in relation to s. 230 is not relevant on a s. 231.7 application such as this, because there are other means of addressing such perceived or real shortfall in the courts. He points to paragraph 74 of *Amdocs* which reads:

> Nor has the Minister asked the Court to order ACMS to create documentation that does not exist, even if this were a possible remedy available under s 231.7. The Minister has the power under s 230(3) of the ITA to specify what books and records ACMS should keep in order to fulfil its obligations under s 230(1) of the ITA, but that is not an issue before me. The Minister is at liberty to exercise this power hereafter.

[81] The Minister points to several ‘contradictions’ in the record, questioning Mr. Dominelli’s credibility. First, they argue that during the Belleville meeting with CRA in July 2016, Mr. Dominelli stated that he entered into the LIAs because he needed theft protection for his business, but he has since given different reasons. The Minister also points out that he was unable to answer most other interview questions related to the LIAs or their underlying mechanisms.

[82] Mr. Dominelli denies this and asserts that despite requests, he has neither received any follow-up letter nor notes from this meeting from the Minister. Mr. Dominelli also asserts that he has received no evidence to back up Ms. Bertrand’s (the Applicant’s affiant) version of these meetings. I note that the Applicant and his various representatives (including Mr. Grant, Mr. Chodikoff, and Ms. Luu) have consistently stated that Mr. Dominelli lacks knowledge of the details of his LIAs. The Applicant also pointed to similar other alleged “contradictions” contained in the Summary Application Records and Supplementary Records filed.

[83] I note that the summary application process outlined in s. 230.1(7) the ITA, which provides for limited testing of contradictions (for instance, the Court does not hear from witnesses in such motions), limits the ability of the Court to make credibility findings, nor is that necessary in this case.

[84] Rather, the issue at hand is whether Mr. Dominelli has been forthcoming with the information he is being properly requested to provide within the confines of an audit. The key question in this regard is whether Mr. Dominelli has done all that he reasonably can to assist the

Minister in obtaining the Outstanding Materials. I conclude that he has not. Based on all the evidence before this Court, he should have done — and thus still must do — more to demonstrate that he has been sufficiently diligent in complying with his obligations flowing from the ITA audit

c. There has not been an abuse of process

[85] Finally, I note that Mr. Dominelli argued that the Minister engaged in an abuse of process on the basis that:

(i) CRA admitted to undertaking an exchange of information with third parties listed in the insurance agreements, and obtained some information, but never confirmed to Mr. Dominelli what it received.

(ii) A CRA agent admitted in cross-examination to having necessary information to assess the 2016 carry-over charges.

(iii) Discovery documents submitted to CRA in relation to TCC appeals for 2012-2015 would subsume all 2016 materials, and thus makes this a duplicative request/proceeding (i.e., CRA should already have the above information).

[86] First, I note that the Minister contests Mr. Dominelli's second point. The Minister contends that CRA never stated they had the necessary information to assess the 2016 carry-over charges, but rather, this was inferred by Mr. Dominelli.

[87] Furthermore, going back to first principles, this Court provides wide latitude to the Minister to conduct its audits under the ITA. It may indeed have some of the information in its possession, but the passages that Mr. Dominelli relies on do not directly respond to the questions

asked or documents requested. Mr. Dominelli cites a case suggesting that even partial disclosure can satisfy the requirements (*SML* at para 21):

> [21] The applicant submits that it can be inferred based on the respondent's conduct that there are other documents and information that have not been provided by the respondent. However, given the partial production of some documents, and the severe penalties for non-compliance under the Act, I am unable to conclude that the respondent was uncooperative. As a result, I am not satisfied that the second condition has been met.

[88] However, in *SML*, the taxpayers were found to have cooperated with the Minister's request, even though they did not believe the first condition for a compliance Order had been met. The Court considered these actions as reasonable efforts to obtain the information sought by the Minister.

[89] Here, on the other hand, neither partial answers to the requests, nor Mr. Dominelli's unilateral interpretation of those answers being fully responsive, satisfy the obligation to answer questions properly asked in the course of an audit.

[90] Furthermore, Mr. Dominelli's second position (that each audit of a certain year's tax return is a separate inquiry) does not hold water, in that a party being audited for multiple years may have to answer requests for each of those years, and cannot satisfy an audit request for a different year with a position taken for another year, unless the Minister accedes to that multi-purpose response.

[91] Similarly, in response to his third point regarding other litigation currently before another court for other taxation years, each taxation year must be examined based on its own issues and

evidentiary record. Simply because Mr. Dominelli has appealed assessments for other taxation years does not prevent or bind this Court from looking at a further taxation year. Taxpayers are responsible for filing returns every year and the Minister is free to accept or challenge – through audit or reassessment and the tools at her disposal – each taxation year. As was stated in *Cameco* at para 41, "whether questions posed in the course of an audit might have direct or collateral consequences on ongoing or prospective litigation is not a relevant discretionary consideration."

[92] Justice Rowe of the Supreme Court of Canada, writing for the majority in *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29, states at para 36 that the primary focus of the doctrine of abuse of process in the context of administrative law is "the integrity of the courts' adjudicative functions, and less on the interest of the parties […] The proper administration of justice and ensuring fairness are central to the doctrine […] It aims to prevent unfairness by precluding 'abuse of the decision-making process.'"

[93] In this case, the Minister acted within the powers conferred to her by the ITA. Mr. Dominelli's arguments fail to show how the Minister's Application for a compliance order under s. 231.7 threatens the integrity of the Court's adjudicative functions. Mr. Dominelli's claim of an abuse of process comes across as an attempt to deflect attention from the key question of whether he has acted reasonably to provide the Minister with, or assist her in obtaining, the Outstanding Materials. I conclude that he has not yet done so.

V. CONCLUSION

[94] The Minister's Application is granted and a compliance order in respect of the Outstanding Materials, as modified in accordance with these reasons, will be granted.

[95] Costs are awarded to the Minister.

ORDER in T-1432-20

THIS COURT ORDERS that:

1. The Respondent, Mr. Dominelli, conduct a detailed and exhaustive search for the Outstanding Materials, described at Annex A, and Mr. Dominelli also ask his advisors to do the same.

2. Mr. Dominelli provide the results of his search efforts in a personal affidavit within 60 days from the date of this Order to Lynn Smijan, Related Party Initiative Manager, East Central Ontario Tax Services Office, Canada Revenue Agency, and/or to another authorized officer of the Agency having carriage of Mr. Dominelli's file. The affidavit must particularize Mr. Dominelli's search efforts, as well as his requests to his advisor(s), and include as an exhibit any documents he has located. For documents he is unable to find, Mr. Dominelli will particularize his search efforts.

3. The Applicant, the Minister of National Revenue (the Minister), is authorized to effect service of this Order on Mr. Dominelli, pursuant to Rule 139 of the Federal Courts Rules, SOR/98-106.

4. Costs are awarded to the Minister.

"Alan S. Diner"
Judge

ANNEX A

The Outstanding Materials

Outstanding Item A:

"According to Annuity Policy #M091201 the January 2016 annuity benefit was $750,000, and according to Insurance Policy #20000001, the 2016 annual premium due was 4,750,000. Please provide proof that the portion of the annual insurance premium payable, not covered by the annuity benefit, i.e. $4,000,000, was paid in 2016 by providing a copy of the cheque (both sides) or bank draft or wire transfer or any other form of payment."

Outstanding Item B:

"According to Annuity Policy #ADVA 1009-6057 the September 30, 2016 annuity benefit was $2,000,000, and according to Insurance Policy #20000003, the 2016 annual premium due was $7,500,000. Please provide proof that the portion of the annual insurance premium payable, not covered by the annuity benefit, i.e. $5,500,000, was paid in 2016 by providing a copy of the cheque (both sides) or bank draft or wire transfer or any other form of payment."

Outstanding Item D:

"~~What was the procedure for unwinding the arrangements?~~ [Struck out by CRA after having conceded that it was overbroad].

Was there any documentation to support the unwinding of the arrangements? If so, please provide."

ANNEX B

Options Provided after the May 2022 CMCs

Federal Court  Cour fédérale

Date: 20220526

Docket: T-1432-20

Toronto, Ontario, May 26, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

JOHN DOMINELLI

Respondent

ORDER

CONSIDERING that on December 21, 2020, after a hearing that took place over three days, accompanied by written and oral arguments, the Court took this matter (the "Compliance order application"), brought pursuant to s 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), under reserve; and,

CONSIDERING that on December 31, 2020, the parties indicated to the Court that they had reached a settlement according to the fulfilling of certain terms, and the Court agreed to await confirmation of a potential forthcoming discontinuance before rendering judgment; and

CONSIDERING that in February 2021, the parties advised the Court that the matter was not resolved and that the Respondent ("Dominelli") would bring a motion to seek enforcement of the agreement reached between the parties (the "Enforcement motion"); and,

CONSIDERING that on March 8, 2021, Dominelli wrote to request a one day hearing for the Enforcement motion and, *inter alia*, to request on behalf of both parties that the motion be heard by a judge other than myself, because if the Court were to find that there was no binding agreement to enforce, I would still need to render judgment on the Compliance order application and "should not have knowledge of *without prejudice* settlement discussions that will be raised as evidence in [the Enforcement motion]"; and

CONSIDERING that the Enforcement motion was heard by Justice Pentney on April 8, 2021 and that on February 11, 2022, the Enforcement motion was dismissed with costs (the "Enforcement Decision"); and

CONSIDERING that following dismissal of the Enforcement motion, the Applicant, the Minister of National Revenue (the "Minister") wrote to the Court on March 9, 2022 to request that it render judgment on the Compliance order application, for which the record was closed; and

CONSIDERING that also on March 9, 2022, Dominelli wrote to the Court to request a case management conference ("CMC"). In the letter, Dominelli agreed that the record was closed in the Compliance order application, but noted that important findings of fact had been made in the Enforcement Decision, that additional documents had been shared with the Minister by Dominelli in an effort to effect settlement, and, that it was critical that I hear from the parties

with regard to these documents, before rendering judgment in the Compliance order application; and

CONSIDERING that during the CMC held on May 3, 2022, the Parties expressed divergent positions. The Minister maintained that settlement privilege applies, and that the information exchanged as part of settlement discussions was inadmissible except for the narrow purpose of evidencing settlement within the confines of the Enforcement motion. Dominelli contended that the record was not closed and that settlement privilege does not apply to the Enforcement Decision and invited me to take notice of its factual findings; and

CONSIDERING that during the May 3, 2022 CMC, Counsel for Dominelli indicated that if the Court declined to refer to the Enforcement Decision and the underlying record of the Enforcement motion, Dominelli would consider making a request to file additional evidence to be included in the record of the Compliance order application; and

CONSIDERING that following the May 3, 2022 CMC, the Court requested brief written submissions from both parties; and

CONSIDERING the written submissions of Dominelli, filed on May 10, 2022 and the written submissions of the Minister, filed on May 16, 2022; and

CONSIDERING that in paragraphs 2 and 12 of *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37, the Supreme Court explained that settlement privilege "wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible" and that as a class

privilege, there is a *prima facie* presumption of inadmissibility, but that exceptions could be found when the justice of the case requires it; and

CONSIDERING that in *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at paras 31-35, the Supreme Court reaffirmed settlement privilege under common law, which, subject to the narrow exception of the need to prove the existence or scope of a settlement, and consistent with the goal of promoting honest and frank discussions toward settlement, communications exchanged by parties as they try to settle a dispute are protected and are inadmissible; and

CONSIDERING that Rules 266, 391 and 422 of the *Federal Courts Rules*, SOR/98-106 [the "*Rules*"] are all indicative of a deliberate choice in the procedural Rules of this Court to protect settlement privileged information and to sequester it from the judge hearing the merits of an application, except with the consent of all parties; and

CONSIDERING the Parties explicit efforts to separate settlement privileged information from the application judge (myself) by referring their Enforcement motion to a separate judge, and further evidenced by their written correspondence with this Court; and

CONSIDERING that while the correspondence exchanged during settlement discussions between the Parties was admissible for the narrow scope of enforcing a settlement agreement, in the absence of the mutual consent and waiver of both Parties, to whom the privilege belongs jointly, the Court does not consider the Enforcement motion materials, and Enforcement Decision based thereon, to be admissible outside of that narrow scope, and in particular, for the purposes of the merits of the underlying Compliance order application; and

CONSIDERING that allowing settlement privileged exchanges, and judicial findings based thereon, to be considered by the judge determining the merits of the primary (Compliance) proceeding, without the mutual consent of the parties, would set a precedent which could erode confidence in, and have a chilling effect on, honest and frank exchanges between parties to litigation with a view towards settling their disputes. Furthermore, enforcement orders could thus be used to bring settlement privileged information to light and to shoehorn otherwise inadmissible evidence into the record of the merits decider; and

CONSIDERING that significant time has passed since the Court took the Compliance order application under reserve in December 2020, and that there is a possibility that relevant documents and information may have subsequently been communicated to the Minister with respect to the Compliance order application's underlying request for information; and

CONSIDERING that other means are available, under special circumstances, where procedural fairness and the need to make a proper determination call for it, for reply evidence and sur-reply evidence to be exceptionally permitted (see Rule 312 of the *Rules* and paragraphs 5-13 of *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 121); and

CONSIDERING Rules 3, 4 and 55 of the *Rules*; and

CONSIDERING the outcome of the CMC on May 20, 2022; and

CONSIDERING the letter dated May 24, 2022 from Dominelli's counsel;

THIS COURT:

DECLINES to exercise its discretion to refer to the Enforcement Decision or the underlying evidentiary record of the Enforcement motion. Notwithstanding that the information is now public, the Court considers that record privileged and inadmissible for the purposes of the Compliance order application proceeding; and

ORDERS that the parties, by no later than June 3, 2022, write jointly to the Court to elect one of the following three alternatives:

1. That the Court render a decision on the basis of the evidentiary record that was before it when it took this matter under reserve on December 21, 2020; or

2. That the Court render a decision on the basis of the record that was before it when it took this matter under reserve on December 21, 2020, in addition to a list of specific paragraphs of the Enforcement Decision and/or evidence tendered in association with the Enforcement motion, over which the Parties mutually consent to waiving settlement privilege; or

3. That the Respondent, by no later than June 27, 2022 will serve and file a motion record seeking leave of the Court, pursuant to Rule 312, to file additional affidavits. The proposed affidavits will be attached and the memorandum of fact and law accompanying the motion record will address how the request satisfies the requirements to obtain a Rule 312 Order set out by the Federal Court of Appeal at paras 4-6 of *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88.

   If, as their respective positions to this point would suggest, the Parties select the third alternative, they will include in their June 3, 2022 letter a jointly proposed calendar

(contemplating Rules 306-310 of the *Rules*) for the conduct of cross-examinations and each party's records, as required. Each party's records should address the significance of the evidence, if admitted, to the merits of the ultimate decision on the Compliance Order.

The Court will consider all of these materials and submissions in writing and a single, final judgment will issue, addressing both the outcome of the Rule 312 motion, and the merits of the underlying Compliance order application.

If the Parties cannot reach an agreement, or do not respond to the Court's Order by June 3, 2022, they will be deemed to have selected the first alternative, and the Court will render it's decision on the basis of the record that was before it on December 21, 2020.

"Alan S. Diner"
Judge

ANNEX C

Excerpts from the *Income Tax Act*, RSC 1985, c 1 (5th Supp)

Records and books	**Livres de comptes et registres**
230 (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.	230 (1) Quiconque exploite une entreprise et quiconque est obligé, par ou selon la présente loi, de payer ou de percevoir des impôts ou autres montants doit tenir des registres et des livres de comptes (y compris un inventaire annuel, selon les modalités réglementaires) à son lieu d'affaires ou de résidence au Canada ou à tout autre lieu que le ministre peut désigner, dans la forme et renfermant les renseignements qui permettent d'établir le montant des impôts payables en vertu de la présente loi, ou des impôts ou autres sommes qui auraient dû être déduites, retenues ou perçues.
Limitation period for keeping records, etc.	**Durée de conservation**
(4) Every person required by this section to keep records and books of account shall retain	(4) Quiconque est requis, sous le régime du présent article, de tenir des registres et livres de comptes doit conserver :
(a) the records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained	a) les registres et livres de comptes, de même que les comptes et pièces justificatives nécessaires à la vérification des renseignements contenus dans ces registres et livres de comptes, dont les règlements

therein, for such period as is prescribed; and

prévoient la conservation pour une période déterminée;

(b) all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the end of the last taxation year to which the records and books of account relate.

b) tous les autres registres et livres de comptes mentionnés au présent article de même que les comptes et pièces justificatives nécessaires à la vérification des renseignements contenus dans ces registres et livres de comptes pendant les six ans qui suivent la fin de la dernière année d'imposition à laquelle les documents se rapportent.

Definitions

Définitions

231 In sections 231.1 to 231.8,

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

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

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

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

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

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

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

(a) a building within the curtilage of a dwelling-house that is connected to it by a

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

doorway or by a covered and enclosed passageway, and

ou par un passage couvert et clos;

(b) 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*)

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

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*)

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

Inspections

Enquêtes

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

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

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 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) 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

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

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,

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 :

(c) 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, and

c) 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;

(d) 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.

d) 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.

Requirement to provide documents or information

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to

Production de documents ou fourniture de renseignements

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve

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,

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) 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.

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

(3) Sur requête du ministre, un juge de la Cour fédérale peut,

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

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) 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;

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

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) 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

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) 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)).

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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1432-20
STYLE OF CAUSE:	THE MINISTER OF NATIONAL REVENUE v JOHN DOMINELLI
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 15, 17, AND 21, 2020
ORDER AND REASONS:	DINER J.
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APPEARANCES:

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