Federal Court  Cour fédérale

Date: 20230721

Docket: T-2250-22

Citation: 2023 FC 1000

Ottawa, Ontario, July 21, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

ZEIFMANS LLP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of National Revenue (Minister) brings this summary application under section 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) as amended [*ITA*]. The Minister seeks a compliance order that would compel Zeifmans LLP (Zeifmans), a tax and accounting partnership, to provide documents and information that were requested in a January 30, 2019 letter issued pursuant to section 231.2 of the *ITA*, and titled "Requirement to Provide Documents or Information" (Requirement).

[2] The Requirement is connected to Canada Revenue Agency (CRA) tax audits, under the Related Party Audit Program (RPAP), of individuals and entities related to or economically connected to members of the Ghermezian family (Ghermezian Group). In 2014, the CRA informed Nader Ghermezian that it had commenced audits of his personal tax returns and the tax returns of entities controlled by him or persons related to him. In 2015, the CRA advised Mr. Ghermezian's daughter, Diana Vaturi, and his son-in-law Marc Vaturi that it had commenced audits of their personal tax returns.

[3] Zeifmans is not under audit. The Minister sent the Requirement to Zeifmans because it is the authorized representative for the Vaturis. The Requirement required Zeifmans to provide certain categories of documents and information related to Mr. Ghermezian, Ms. and Mr. Vaturi, and entities owned, operated, controlled or otherwise connected to them, for the period January 1, 2012 to December 31, 2017. Zeifmans has not provided any of the requested documents or information.

[4] Zeifmans' position in response to the Minister's compliance application is that this Court should not issue an order that would compel it to produce the documents and information in the Requirement, for two reasons. First, the statutory conditions for issuing a compliance order under section 231.7 of the *ITA* have not been met, including because the Minister was required to obtain judicial authorization under subsection 231.2(3) of the *ITA* before issuing the Requirement and she did not do so. Second, even if the statutory conditions have been met, the judicial discretion afforded by section 231.7 should be exercised against ordering Zeifmans to

comply with the Requirement, or any part of it. Accordingly, Zeifmans asks the Court to dismiss the Minister's application.

[5] The Minister submits that the Court should not entertain Zeifmans' arguments. The Minister contends Zeifmans' arguments against granting a compliance order strike at the core of the Requirement's validity, and Zeifmans already had an opportunity to challenge the Requirement's validity. Zeifmans brought an application for judicial review to set aside the Requirement, and the application was dismissed: *Zeifmans LLP v Canada (National Revenue)*, 2021 FC 363 [*Zeifmans FC*]. Zeifmans' appeal of *Zeifmans FC* was also dismissed: *Zeifmans LLP v Canada*, 2022 FCA 160 [*Zeifmans FCA*]. To the extent Zeifmans raises arguments on this application that were or should have been raised on judicial review, the arguments constitute an impermissible collateral attack on the Requirement. Also, the Minister states Zeifmans' arguments are an abuse of the Court's process. Zeifmans attempts to relitigate issues that were decided in *Zeifmans FC* and *Zeifmans FCA*, including by relying on case law that was expressly overturned in *Zeifmans FCA*.

[6] Alternatively, and in any event, the Minister submits Zeifmans' arguments lack merit. The Minister states she has satisfied the section 231.7 conditions for issuing a compliance order, and an exercise of judicial discretion against ordering Zeifmans to comply with the Requirement is not warranted in this case.

[7] I am not persuaded that Zeifmans' position on this application constitutes a collateral attack on the Requirement. Section 231.7 of the *ITA* expressly obliges the Court to examine the

underlying section 231.2 request, and Zeifmans' arguments address that question. The judicial review application addressed a different question of whether the Minister's decision to proceed without judicial authorization was reasonable. Zeifmans' arguments that the section 231.7 conditions for a compliance order have not been met are made in the appropriate forum, and not collaterally.

[8] Furthermore, in each proceeding the judge's decision must be based on the record that is before them. The record in this proceeding is materially different from the record that was before the Court in *Zeifmans FC*. The Court held in *Zeifmans FC* that the reasonableness of the Minister's decision to proceed without judicial authorization in each case depends on whether the evidence in the record establishes that unnamed persons are under investigation or audit by the CRA, and there was "no evidence in the record that the Unnamed Persons are a current investigation target": *Zeifmans FC* at paras 49, 64. The evidence on this application establishes that Unnamed Persons, as defined in *Zeifmans FC*, were and are an investigation target. In fact, Unnamed Persons were already under audit when the Requirement was issued, and the audits are not yet complete.

[9] It is not an abuse of the Court's process to permit Zeifmans to raise substantive arguments addressing the very issues the Court is obliged to decide on this application. Deciding on this record whether a compliance order should be granted does not revisit the decisions in *Zeifmans FC* or *Zeifmans FCA* or call those decisions into question. The nature of the proceedings, the legal tests, and the evidentiary records are different.

[10] In my view, Zeifmans' arguments have merit. Based on the record that is before me, I am not satisfied that the subsection 231.7 conditions for issuing a compliance order have been met. In addition, I am not satisfied I should grant a compliance order in the exercise of judicial discretion.

[11] Accordingly, for the reasons below, this application is dismissed.

II. **Issues**

[12] The issues are:

1. Are Zeifmans' arguments barred by the doctrines of collateral attack or abuse of process?
2. Should the Court grant a compliance order under section 231.7 of the *ITA*, compelling Zeifmans to provide the documents and information in the Requirement?

[13] I will also address a preliminary issue regarding Zeifmans' objection to the Minister's reply memorandum.

III. **Analysis**

A. *The parties' records*

[14] As differences between this record and the record on judicial review are relevant to the issues, I will begin by summarizing the record that is before me.

[15] The Minister commenced this proceeding by filing a notice of summary application on October 26, 2022. The Minister's application record, filed on November 2, 2022, consists of the notice of summary application, written submissions, a draft order, and the following affidavit evidence:

1. *Affidavit of Andrew Bowe, affirmed November 1, 2022*: Mr. Bowe is a strategic advisor in the High Net Worth Compliance Directorate within the CRA's Compliance Programs Branch. Prior to January 18, 2021, he was an International and Large Business Case Manager in the CRA's former Edmonton Tax Services Office. Mr. Bowe was the case manager for the Ghermezian Group audits under the RPAP from May 2015 until January 18, 2021. He supervised the audits of Mr. Ghermezian and the Vaturis at the material times. Mr. Bowe's affidavit provides information about the history of the audits and the events that led to the issuance of the Requirement.
2. *Affidavit of Ismail Choulli, affirmed November 1, 2022*: Mr. Choulli is an International and Large Business Case Manager in the CRA's High Complexity Audit Tax Services Office (formerly the Edmonton Tax Services Office). In August 2021, Mr. Choulli was assigned as Case Manager for the audits of Mr. Ghermezian and the Vaturis. Mr. Choulli's affidavit provides some of the same information as Mr. Bowe's affidavit, but it is more limited because Mr. Choulli became involved in the audits after the Requirement had issued.
3. *Affidavit of Brendan Tait, affirmed November 2, 2022*: Mr. Tait is a paralegal with the Department of Justice's (DOJ) Ontario Regional Office, Tax Law Services Section. Mr. Tait helped to prepare the Minister's compliance

application. Mr. Tait's affidavit attaches a letter and email from the DOJ informing Zeifmans of the Minister's intention to commence a compliance application, and responding correspondence from Zeifmans' counsel. Mr. Tait attests that the DOJ has not received any of the documents or information specified in the Requirement from Zeifmans.

[16] Zeifmans served an affidavit of Tomer Shenhav, sworn November 7, 2022. Mr. Shenhav is an associate lawyer at the law firm representing Zeifmans in this application. His affidavit attaches excerpts from the *ITA*, and excerpts from CRA Income Tax Audit Manuals that were published in April 2015 and July 2020. It also attaches a copy of the certified tribunal record (CTR) the Minister produced in Zeifmans' judicial review proceeding, which certifies and attaches copies of the two documents that were considered by the Minister's delegate in issuing the Requirement—namely, a draft copy of the Requirement, and a 9-page "Information Sheet for a Requirement to Provide Information" (Information Sheet). The Information Sheet reproduced as part of the CTR is heavily redacted. A less redacted Information Sheet, produced later in the judicial review proceeding, is also an exhibit to Mr. Shenhav's affidavit.

[17] Mr. Bowe, Mr. Choulli and Mr. Shenhav were cross-examined on their affidavits.

[18] Zeifmans' responding record, filed December 1, 2022, consists of Mr. Shenhav's affidavit, transcripts from the three cross-examinations, and Zeifmans' written submissions.

[19] The evidence that is germane to the issues on this application is mostly from Mr. Bowe's affidavit and cross-examination, and the Information Sheet.

[20] On December 2, 2022, the Minister served a 50-page reply memorandum of argument, referencing more than 30 additional authorities.

B. *Preliminary Issue – Minister's reply memorandum*

[21] At the hearing, the Minister sought leave to "regularize" the filing of written reply submissions. Zeifmans objected on the basis that the *Federal Courts Rules* do not contemplate written reply, and Zeifmans would be prejudiced. The Minister served the reply on the Friday before a Tuesday hearing, without any attempt to notify Zeifmans or seek consent.

[22] The Minister states the reply submissions were intended to provide Zeifmans with as much notice as possible regarding submissions she is entitled to make orally. The Minister acknowledges that the written reply was submitted after 5 pm on the Friday before the hearing, and she did not seek Zeifmans' consent or provide a covering letter to explain her reasons for preparing it—a mistake she contends was due to haste. The Minister states she did not know what Zeifmans would argue until she received the responding record, and she prepared a written reply so that the two hours allotted for the hearing of this application could be used efficiently.

[23] Zeifmans counters that the Minister always bears the burden in a compliance application and is not entitled to advanced notice of a respondent's position. Zeifmans states the volume of the Minister's written submissions on this application overwhelm Zeifmans' written

submissions, and there was insufficient time to fully consider the reply arguments and additional authorities. If the Court were to accept the Minister's written reply memorandum, Zeifmans requested a greater proportion of the hearing time in order to respond.

[24] At the hearing, I stated that I would accept the Minister's reply memorandum for filing under reserve of objection, which I would consider following the hearing, and that I would give Zeifmans additional time to respond to the Minister's submissions.

[25] The Minister should have requested a special sitting. The Minister set this matter down for a two-hour hearing at general sittings and did not revise the time estimate despite the Court's direction asking whether the estimate remained accurate. Since the Minister read in most of the reply memorandum as oral submissions, the efficiencies the Minister expected would be realized by preparing a written reply did not materialize. The application was the last matter on the general sittings list, the Court sat late to accommodate a three-hour hearing, and even with the extra hour, the hearing was rushed. Although I stated that I would give Zeifmans additional time to respond to the Minister's submissions, in the end, the time for each side's submissions was roughly equal.

[26] In hindsight, I recognize that Zeifmans' ability to properly address the issues first raised by way of the Minister's reply may have been compromised. The Minister's written submissions exceeded the page limit provided under the *Rules* and were more than double Zeifmans' 30 pages of written submissions. The extra hour of hearing time did not address the imbalance, and

although neither party requested an adjournment, it probably would have been preferable to adjourn the matter to a special sitting.

[27] That said, and as noted above, the Minister read in much of the reply as oral submissions, and while Zeifmans' submissions may have been less organized and thorough than it would have preferred, Zeifmans capably addressed the new issues raised in the reply. I informed the parties that I would take extra time to render my decision and I have carefully considered all the written and oral submissions, and the cited authorities. Since I have decided that the Minister's application must be dismissed, any prejudice to Zeifmans was not so significant as to affect the result. For these reasons, I have decided to admit the Minister's reply memorandum.

C. *The statutory conditions under section 231.7 of the* ITA

[28] Before turning to the issues I must decide, in this section I will outline Zeifmans' arguments that are alleged to constitute an impermissible collateral attack or an abuse of the Court's process. For context, I will provide some high-level observations about the statutory regime and reproduce the relevant statutory provisions.

[29] In order to maintain the integrity of the tax system and to ensure compliance with Canada's self-assessing and self-reporting system of taxation, the *ITA* includes provisions giving the Minister broad powers to investigate and audit taxpayers: *R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at 648. The statutory provisions that are at issue in this proceeding are part of the *ITA*'s administration and enforcement provisions that allow the Minister, or persons

authorized to act on her behalf, to audit taxpayers, request documents and information from taxpayers or third parties, and take prescribed actions if taxpayers or third parties do not comply.

[30] The Minister issued the Requirement to Zeifmans pursuant to section 231.2 of the *ITA*. Subsection 231.2(1) confers broad and general powers to require any person to produce any information or any document for any purpose related to the administration or enforcement of the *ITA*: *Canada (National Revenue) v Lee*, 2016 FCA 53 at para 5 [*Lee*]. However, the Minister's powers are constrained by subsection 231.2(2). In certain circumstances, the Minister must obtain a judge's authorization to issue a section 231.2 requirement: *ITA*, ss 231.2(2) and 231.2(3). The Minister did not obtain judicial authorization before issuing the Requirement to Zeifmans.

[31] The Requirement is dated January 30, 2019 and addressed to "Zeifmans LLP". The key parts of the Requirement are the following (emphasis in original):

> **Subject: Requirement to provide information regarding Marc Vaturi, Diana Vaturi (also known as Diana Ghermezian), and Nader Ghermezian**
>
> For purposes related to the administration or enforcement of the *Income Tax Act* (the "**Act**"), Zeifmans LLP ("**Zeifmans**") is required to provide within **thirty (30) days** from the date of this notice of requirement, pursuant to the provisions of subsection 231.2(1) of the Act, the following information and documents pertaining to the period of **January 1, 2012 to December 31, 2017**.
>
> For the above-named individuals, whether solely or jointly, and entities owned, operated, controlled or otherwise connected to the above-mentioned individuals, please provide:
>
> 1. All correspondence including emails and records in a chain of communications including attachments, between Zeifmans and the above-mentioned individuals and connected entities;

2. All records of communications made with other domestic and/or international accounting firms, registry offices, provincial bodies, and other government bodies (not including audit queries and responses issued between Zeifmans and Canada Revenue Agency) on behalf of the above individuals and connected entities;

3. All correspondence items mentioning or identifying Dalia Ghermezian, James Ghermezian, and Michael Ghermezian in any manner, jointly or severally, whatsoever;

4. All accounting records, director and shareholder resolutions, share certificates, registry documents, property assessments and bank statements provided to Zeifmans by the above individuals or connected entities (or provided to Zeifmans by third parties on behalf of the above individuals or connected entities);

5. Accounting records including working papers, adjusting journal entries, and trial balances;

6. Step memorandums, tax planning letters, letters of engagement;

7. Memo to files, client profiles;

8. Loan documents, including signed agreements, and grid loan records;

9. Emails including draft versions of loan agreements and grid loan working papers/calculations;

10. Records authorizing decisions relating to tax planning and/or accounting services; and

11. All other correspondence, letters, instructions, opinion letters or reports, minutes of meetings, records of discussions and telephone conservations, notes, jottings, or other written/recorded communication discussing, planning, or otherwise relevant to the information requested.

The above list is not exhaustive and we may request additional information required for our audit at a later time. For any one or more individuals that the request applies to, please provide the information either jointly, if it applies to multiple individuals, or individually, if it only applies to a single person.

[…]

[32] As previously stated, Zeifmans has not provided any documents or information sought by the Requirement, and its application for judicial review challenging the Requirement was dismissed. The Minister now seeks a compliance order pursuant to section 231.7 of the *ITA*.

[33] Section 231.7 of the *ITA* allows this Court to issue an order that would compel Zeifmans to provide any information or document sought by the Requirement "if the judge is satisfied" that Zeifmans was required under section 231.2 to provide such documents or information and did not do so:

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.

[34] Because of the serious consequences that can flow from non-compliance, Zeifmans contends this Court should not order the production of information or documents sought by the

Minister unless the statutory conditions of section 231.7 have been clearly met: Minister of *National Revenue v Chamandy*, 2014 FC 354 at para 41 [*Chamandy*]; *Minister of National Revenue v SML Operations (Canada) Ltd*, 2003 FC 868 at para 15 [*SML*]. Zeifmans submits the statutory conditions for a compliance order have not been met in this case. The partnership was not required under section 231.2 of the *ITA* to provide the requested documents and information, and the Requirement is not valid.

[35] Zeifmans' principal argument in this regard is that the Minister was required to obtain prior judicial authorization under subsection 231.2(3) of the *ITA*, and she issued the Requirement without doing so. The Minister was required to obtain judicial authorization because the Requirement requested documents and information relating to one or more "unnamed persons" who were under audit by the CRA at the time.

[36] Section 231.2 of the *ITA* reads as follows:

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

reasonable time as is stipulated in the notice,

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

(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).

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

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

section referred to as the "group") if the judge is satisfied by information on oath that	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)]

[37] Zeifmans presents two additional reasons why the conditions of section 231.7 have not been met: (i) parts of the Requirement are vague and ambiguous such that they are incapable of meaningful reply without speculation, and (ii) the Requirement was issued to a limited liability partnership, which is not a "person" for the purposes of the *ITA*, and the evidence does not establish that the persons who were obligated to respond to the Requirement are the same persons who would be sanctioned under a compliance order.

[38] Even if the statutory conditions have been met, Zeifmans submits that the judicial discretion afforded by section 231.7(1)—which states a judge "may" order a person to provide information or documents sought by the Minister under section 231.2—should be exercised against ordering Zeifmans to comply with the Requirement or any part thereof. Zeifmans'

reasons include: the conditions of section 231.7 have not been clearly met; Zeifmans is not itself under audit; Zeifmans must navigate obligations to the Minister as well as concurrent professional obligations to its clients and to the regulatory bodies that govern accountants' conduct, and it would be unfair to impose an obligation on Zeifmans to decide, based on the vague and ambiguous wording of the Requirement, which of the Minister's requests for documents and information are valid and which requests are not valid.

D. *Issue 1: Are Zeifmans' arguments barred by the doctrines of collateral attack or abuse of process?*

[39] The Minister contends that this Court should not entertain Zeifmans' "substantive" arguments that the statutory conditions for a section 231.7 compliance order have not been met. The Minister distinguishes Zeifmans' substantive arguments from its "discretionary" arguments, which are premised on the exercise of judicial discretion.

[40] The Minister states Zeifmans made the following arguments challenging the validity of the Requirement in *Zeifmans FC*: (i) the Minister was required to seek judicial authorization to issue the Requirement under subsection 231.2(2) of the *ITA* because the Requirement sought information about unnamed persons; (ii) the Requirement is ambiguous because "entities owned, operated, controlled or otherwise connected to" Mr. Ghermezian, Ms. Vaturi and Mr. Vaturi are not defined terms, and it is unclear what is meant by the references to such entities; (iii) the Requirement was not issued to a person as required by section 231.2, because a partnership is not recognized as a person under the *ITA*. Zeifmans' arguments were dismissed by this Court in *Zeifmans FC*, and by the Federal Court of Appeal (FCA) in *Zeifmans FCA*. According to the

Minister, Zeifmans' substantive arguments in this proceeding are not merely close to, or related to, the arguments it made in *Zeifmans FC*—they are identical.

[41] Thus, the Minister submits Zeifmans had an opportunity to challenge the Requirement, the challenge was unsuccessful, and Zeifmans is now attempting to mount an impermissible collateral attack on the Requirement in these proceedings. For similar reasons, the Minister submits Zeifmans is attempting to relitigate the same issues that were decided in *Zeifmans FC* and *Zeifmans FCA*, which constitutes an abuse of the Court's process.

(1) Collateral Attack

[42] The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal: *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 71. The doctrine is generally invoked where a party attempts to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when the party has not used the direct attack procedures that were open to it, such as an appeal or judicial review: *Ibid*.

[43] The Minister submits that Zeifmans' substantive arguments strike at the core of the Requirement's validity, and constitute a collateral attack on the Requirement. According to the Minister, the attack is collateral because the object of a section 231.7 application is to provide a means to enforce compliance. While the text of subsection 231.7(1) puts the question of whether Zeifmans was "required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so" before the Court, it is not a specific object of the

proceeding to reverse, vary or nullify the Requirement: *R v Bird*, 2019 SCC 7 at para 21 [*Bird*]. The proceeding with the specific object of reversing, varying or nullifying the Requirement was Zeifmans' application for judicial review.

[44] Relying on the Supreme Court of Canada's (SCC) decision in *R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706 [*Maybrun*], the Minister submits that Zeifmans' collateral attack on the Requirement is an impermissible one. *Maybrun* identifies five factors that may be considered in order to determine whether Parliament intended to permit collateral attacks on an administrative order in the context of proceedings to enforce the order:

i. the wording of the statute from which the power to issue the order derives;

ii. the purpose of the legislation;

iii. the availability of an appeal;

iv. the nature of the collateral attack in light of the appeal tribunal's expertise or *raison d'être*; and

v. the penalty on a conviction for failing to comply with the order.

(*Maybrun* at paragraphs 41-52)

[45] In *Bird*, the SCC recognized that the third *Maybrun* factor permits a court to consider not only a right of appeal to an administrative appeal tribunal, but also whether there are other effective mechanisms or forums for challenging the order at issue, including judicial review: *Bird* at paras 44, 49. Similarly, the fourth factor permits a court to consider the nature of the collateral attack in light of the expertise or *raison d'être* of other mechanisms or forums for challenging the order: *Bird* at para 75.

[46] The Minister argues that all five *Maybrun* factors, as refined in *Bird*, support a conclusion that it was not Parliament's intention to permit a respondent to collaterally attack a section 231.2 requirement in the context of a section 231.7 compliance application. The Minister states that the third and fourth *Maybrun* factors are the most salient factors in this case, because judicial review provided an effective, alternative mechanism for Zeifmans to challenge the validity of the Requirement.

[47] The Minister submits Zeifmans' position in this proceeding mirrors the position that was advanced by the respondent and rejected by the Saskatchewan Court of Appeal (SKCA) in *Mitchell v Candle Lake (Resort Village)*, 2021 SKCA 44 [*Mitchell*]. Mr. Mitchell, who had commenced construction without a building permit, failed to comply with a stop work order issued by the village pursuant to section 17 of the *Uniform Building and Accessibility Standards Act*, SS 1983-84, c U-1.2 [*UBASA*]. The village applied to the court for a compliance order under section 23 of the *UBASA*, and in the context of that proceeding, Mr. Mitchell argued that the court was not empowered to grant a compliance order because the underlying section 17 stop work order was invalid. The chambers judge disagreed, finding that, absent any appeal of the stop work order, it remained in effect. The chambers judge issued an order under section 23 of the *UBASA* that required Mr. Mitchell to comply with the section 17 stop work order. The SKCA dismissed Mr. Mitchell's appeal, finding that the chambers judge did not err by refusing to allow him to collaterally attack the stop work order in the compliance proceeding.

[48] The Minister states it was implicit in the SKCA's decision that a compliance application under section 23 of the *UBASA* is not a proceeding "with the specific object of reversing, varying

or nullifying the underlying order". The Minister argues the same can be said for a compliance application under section 231.7 of the *ITA*. The object of this compliance proceeding is not to reverse, vary or nullify the Requirement, and therefore, Zeifmans' attack on the Requirement is a collateral attack.

[49] Zeifmans submits the Minister's position is contrary to the language of section 231.7 and established jurisprudence, including *SML* and *Chamandy*, that the sanctions of section 231.7 may only be imposed if the statutory conditions of that section have been clearly met. Zeifmans notes that the effect of the Minister's position would be to bar any respondent to a section 231.7 application from raising so-called substantive defences, whether or not they had previously challenged the underlying section 231.1 or 231.2 request on judicial review.

[50] In my view, Zeifmans' position on this application is not a collateral attack on the Requirement. While I accept that it is not a specific object of this proceeding to reverse, vary or nullify the Requirement (and Zeifmans does not ask for such relief), it is a specific object of compliance proceedings to determine whether the section 231.7 conditions are met. It is the judge hearing the compliance application who must be satisfied that the section 231.7 conditions are met, and consequently, there is no alternative forum to decide the issue.

[51] Zeifmans asks the Court to dismiss the Minister's application because the section 231.7 conditions have not been met. Zeifmans' arguments are made in the proper forum. They are not "collateral".

[52] I disagree with the Minister that Zeifmans' position mirrors Mr. Mitchell's position in *Mitchell*.

[53] The SKCA explained Mr. Mitchell's argument on appeal in this way (*Mitchell* at paragraph 28):

> Placed in an appellate context, I understand Mr. Mitchell to argue that in considering whether to grant a s. 23 order, the Chambers judge was obliged to examine the statutory prerequisites for its issuance, which, he submits, included an examination of the validity of the underlying order. As the argument goes, had the Chambers judge approached the Village's application in this manner, he would have found himself without authority to make an order under s. 23. For this reason, Mr. Mitchell says the *Chambers Decision* cannot stand and must be set aside.

[54] The SKCA reviewed the leading cases on collateral attack, including *Maybrun*, noting that Mr. Mitchell was seeking to challenge the underlying administrative order in a compliance proceeding, rather than a penal proceeding: *Mitchell* at para 41. The SKCA outlined reasons why the doctrine of collateral attack should extend to circumstances where a party ignores a regulatory appeal process and then seeks to challenge an administrative order in subsequent compliance proceedings: *Mitchell* at para 48.

[55] With that, the SKCA went on to consider the *Maybrun* framework of analysis in order to determine what the Legislature intended to be the appropriate forum for Mr. Mitchell to challenge the stop work order issued under section 17 the *UBASA*: *Mitchell* at paras 46-79. The SKCA found that most *Maybrun* factors weighed in favour of a conclusion that the Legislature did not intend for a person to be able to collaterally attack the validity of a section 17 stop work order in the context of subsequent section 23 proceedings.

[56] While the SKCA in *Mitchell* applied the doctrine of collateral attack to a compliance proceeding, I agree with Zeifmans that there are material differences between the *UBASA* provisions that were at issue in *Mitchell* and section 231.7 of the *ITA*. A key difference is that section 231.7 of the *ITA* expressly obliges the hearing judge to examine the underlying section 231.1 or 231.2 request. The fact that, in the Minister's words, "the text of ss. 231.7(1) puts the question of whether Zeifmans was 'required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so' before the Court", demonstrates that Zeifmans' arguments are made in the appropriate forum, and not collaterally.

[57] As the FCA stated in *Miller v Canada (Minister of National Revenue)*, 2022 FCA 183 [*Miller*], the Minister must satisfy the Court of three "conditions precedent" before the Court may issue a section 231.7 compliance order: (i) the person against whom the order is made must have been required under section 231.1 or 231.2 of the *ITA* to provide the access, assistance, information or document that is the subject of the order; (ii) that person must have failed to provide the access, assistance, information or document in question; and (iii) in the case of information or a document, it must not be subject to solicitor-client privilege: *Miller* at paras 19, 25-27; *ITA*, ss 231.7(1)(a)-(b); also see *Lee* at para 6.

[58] Thus, the statutory conditions of section 231.7 require the Court to determine whether the Minister had the authority to issue the underlying Requirement (for example, see *Miller* at paragraph 60), and they constrain the Court's authority to issue a compliance order (for example, see *Miller* at paragraph 79). The collateral attack cases the Minister relies on did not invoke the

doctrine in similar circumstances, to bar arguments about whether statutory conditions for issuing an enforcement order have been met.

[59] Zeifmans adds that the Minister has not put forward a section 231.7 case where the doctrine of collateral attack was invoked. The Minister counters that the question is whether the doctrine applies, not whether it has been argued before. While that may be true, Zeifmans' point remains noteworthy. The doctrine of collateral attack operates regardless of whether a party used the direct attack procedures that were open to it, yet the authorities the parties have put before me demonstrate that this Court regularly entertains responding arguments that the statutory requirements of section 231.7 were not met. The FCA has also entertained such responding arguments in compliance application appeals.

[60] Even in compliance proceedings where it was apparent that the responding parties had filed applications for judicial review to challenge the Minister's section 231.1 or 231.2 requests, the doctrine of collateral attack was not raised. Zeifmans notes that in *Friedman v Canada (Minister of National Revenue)*, 2021 FCA 101 [*Friedman*], the appeals from judicial review and compliance applications were heard and considered together, and described as "discrete legal proceedings": *Friedman* at para 26. I would add that in *Canada (Minister of National Revenue) v Ghermezian*, 2022 FC 236 [*Ghermezian Compliance*] the Court acknowledged that some of the respondents to the compliance proceeding had challenged the Minister's requirements issued under section 231.2 in judicial review proceedings, and yet the Court considered the arguments that the statutory conditions were not met.

[61] While I have found that Zeifmans' position on this application is not a collateral attack on the Requirement, the parties addressed the *Maybrun* factors at some length and I will address them for completeness. Applying the *Maybrun* framework leads to a similar conclusion.

[62] The *Maybrun* framework provides clues for discerning legislative intent with regard to the appropriate forum to challenge an administrative order: *Mitchell* at para 75. In my view, all five factors favour a conclusion that Parliament's intent was to permit an aggrieved person to challenge an underlying section 231.1 or 231.2 request in a section 231.7 compliance proceeding. Consequently, Zeifmans' arguments are not an impermissible collateral attack on the Requirement.

i. *the wording of the statute from which the power to issue the order derives*

[63] The Minister submits that the wording of the *ITA* signals Parliament's intention to require timely, up-front compliance, and not a need for the Minister to "resort to criminal charges and sanctions to secure compliance": *Bird* at para 28. The Minister notes that section 231.2 of the *ITA* is situated within a broader suite of information-gathering provisions that facilitate unencumbered and immediate access to all books, records, and information of the taxpayer, and lie at the heart of the Minister's ability to enforce taxation legislation: *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 at para 27; *Roofmart Ontario Inc v Canada (National Revenue)*, 2020 FCA 85 at para 55 [*Roofmart*]. Subsection 231.2(1) confers broad and general powers on the Minister, and provides her with considerable discretion in determining to whom a requirement is issued and the specific information or documents that the recipient is

required to produce. It operates notwithstanding any other provision of the *ITA*, and is subject only to subsection 231.2(2).

[64] Zeifmans submits the language of section 231.7 expresses Parliament's clear intention that the validity of an underlying section 231.1 or 231.2 request is to be considered in a compliance application. This is unlike the compliance provision in *Mitchell*—section 23 of the *UBASA* does not direct the judge to consider whether the respondent was required to comply with the underlying administrative order. Zeifmans submits the Minister's position on this application leads to a "circular absurdity"—her decision to issue a requirement without prior judicial authorization avoids the judicial oversight of subsection 231.2(3), while the doctrine of collateral attack circumscribes the arguments a judge may consider when deciding whether they are satisfied that a person was "required under section 231.1 or 231.2 to provide the access, assistance, information or documents" because the Minister should have obtained prior judicial authorization. This cannot have been Parliament's intention.

[65] I agree with Zeifmans. The language of section 231.7 specifically tasks the judge hearing the application with deciding whether the person against whom the compliance order will be made was required under section 231.1 or 231.2 of the *ITA* to provide the access, assistance, information or document that is the subject of the order. None of the collateral attack cases the Minister relies on involved a regime that required the Court to consider the validity of the underlying administrative order or directive. Judicial review of a section 231.1 or 231.2 request addresses a different question of whether the Minister's decision was unreasonable. In each type of application, the judge's decision is based on the record that is before them. The record in this

proceeding, which includes the Minister's supporting affidavits and the cross-examination testimony, is materially different from the record that was before the Court in *Zeifmans FC*.

[66] It is also relevant that the *ITA* does not include a mechanism for an aggrieved party to challenge a section 231.1 or 231.2 requirement. The Minister states Parliament is presumed to know that a right of judicial review exists. In my view, this argument does not assist the Minister. Knowing that a recipient can apply for judicial review of a section 231.1 or 231.2 requirement, Parliament nonetheless imposed the conditions of section 231.7(1)(a). This indicates Parliament did not intend for judicial review to be the sole forum for considering whether the Minister properly exercised her authority in issuing the Requirement.

ii. *the purpose of the legislation*

[67] The Minister submits that the purpose of the legislation militates against permitting a collateral attack on the Requirement. The *ITA* provides for a broad suite of enforcement mechanisms because it would be naïve to think that all taxpayers will properly self-report and pay the taxes they owe: *Miller FCA* at paras 6, 8. The Minister argues that the breadth of these powers reflect the importance Parliament has placed on ensuring compliance with the self-reporting taxation system. Permitting a "breach first, challenge later" approach would be contrary to this purpose, as it would undermine the administrative regime and compromise the Minister's ability to administer and enforce the *ITA* on a timely basis. Instead of placing responsibility on the individual recipient for complying with a requirement, permitting collateral attacks during compliance proceedings would have the effect of flipping that responsibility—in

effect, compelling the Minister to act by bringing a compliance application—all while the recipient lies in wait, having breached the requirement.

[68] Zeifmans acknowledges that the enforcement mechanisms in the *ITA* are broad, but submits that the express limits of the statutory provisions also reflect Parliament's intentions. I agree.

[69] There is a considerable body of jurisprudence interpreting the section 231.7 conditions in light of the purpose of the *ITA*. As noted above, a condition precedent for a compliance order is that the judge hearing the compliance application must be satisfied that the respondent was required under section 231.1 or 231.2 of the *ITA* to provide the access, assistance, information or document that is the subject of the order: *Miller* at paras 19, 25-27. As the FCA stated in *Roofmart* (at paragraph 20):

> [20] […] Where Parliament has specified precisely which conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers and the Minister would rely on those conditions (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, [2005] 2 SCR 601 at para 11). Additional conditions cannot be read into the legislation. Nor can a supposed purpose "be used to create an unexpressed exception to clear language," or to supplant clear language (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715 at para 23).

[70] I fail to see how Zeifmans' substantive arguments in this proceeding would have the effect of "flipping" responsibility to the Minister. The process for obtaining a compliance order is a process prescribed by Parliament. The statutory conditions are imposed by Parliament.

[71] Finally, I am not persuaded by the Minister's arguments that permitting a respondent to challenge whether a statutory condition for a compliance order has been met undermines the administrative regime, or compromises the Minister's ability to administer and enforce the *ITA* in a timely way. The Minister sets the deadline for responding to a section 231.1 or 231.2 request. Parliament has provided for an expeditious, summary mechanism that allows the Minister's compliance application to be heard within a very short time after commencing the proceeding—only five clear days' notice is required: *ITA*, s 231.7(2). An appeal of a compliance order does not suspend its operation unless so ordered by a judge of the court to which the appeal is made: *ITA*, s 231.7(5). The summary application process provided by section 231.7 is more expeditious than an application for judicial review, and the Minister may commence a compliance proceeding while an application for judicial review is pending: *Canada (Minister of National Revenue) v Friedman*, 2019 FC 1583.

iii. *the availability of an appeal*

[72] The Minister submits this factor, as refined in *Bird*, is an important *Maybrun* factor for the present application. Even though the *ITA* does not provide for a right to appeal a section 231.1 or 231.2 request, judicial review provides an effective mechanism to challenge such a request. Judicial review appropriately balances the principles of (1) ensuring that the legislative decision to assign decision-making powers to administrative bodies is not undermined; and (2) ensuring that individuals have an effective means available to them to challenge administrative orders: *Bird* at para 26. The Minister submits Parliament clearly turned its mind to the availability of judicial review, as section 231.8(a) of the *ITA* extends the period of time within which the Minister may assess a taxpayer for a taxation year where the taxpayer brings an

application for judicial review in respect of a section 231.2 requirement. The only reasonable inference, according to the Minister, is that Parliament was alive to the possibility of judicial review when it enacted sections 231.2 and 231.7 and intended that recipients of section 231.2 requirements would challenge them through the mechanism of judicial review. Zeifmans had a fair and meaningful opportunity to challenge the Requirement in proceedings specifically for that purpose, and Parliament cannot have intended to allow Zeifmans to have "a second bite at the same cherry".

[73] Zeifmans submits that section 231.8(a) of the *ITA* is a legacy provision, left over from when the process for obtaining judicial authorization under subsection 231.2(3) was by way of *ex parte* application, with a right for the recipient of the requirement to seek review of the judge's authorization order.

[74] While Zeifmans' argument would explain why section 231.8(a) is not triggered when a recipient judicially reviews a section 231.1 request, the more important point, in my view, is that Parliament, despite being alive to the possibility of judicial review, imposed a condition that the judge who hears a compliance application must be satisfied the recipient was "required under section 231.1 or 231.2 to provide the access, assistance, information or documents". Judicial review does not address that issue. The language of section 231.8 does not override Parliament's clear words in section 231.7.

[75] Zeifmans also points out, and I agree, that the absence of an appeal mechanism presents a significant point of distinction between this case and *Mitchell*. The SKCA considered the

UBASA appeal process to be "robust", providing an express, expeditious means to challenge a section 17 order before a specialized appeal board equipped to perform its adjudicative function and render a decision within 30 days, and providing further recourse to the Court of Queen's Bench on questions of law. The SKCA found that allowing Mr. Mitchell to attack the validity of a section 17 order in the context of enforcement proceedings would "undermine the integrity of the administrative system and allow him to circumvent the appropriate review mechanisms put in place by the Legislature": *Mitchell* at para 77.

[76] I would add that in *Bird*, the SCC outlined three different mechanisms that Mr. Bird had available to him to challenge the underlying administrative order, and decided that two of them together—the mechanism of writing to the Parole Board, with the possibility of a *habeas corpus* application before a provincial superior court—constituted an effective means to challenge the order. The SCC "could not say with certainty" whether the third mechanism of judicial review before the Federal Court would have provided an effective means to challenge the administrative order, primarily because judicial review may not have provided timely and accessible relief: *Bird* at paras 59, 72. While the delay of judicial review to challenge a section 231.1 or 231.2 request does not engage the same liberty interests that were at stake in *Bird*, I would note that Zeifmans filed its notice of application for judicial review on March 1, 2019 (*Zeifmans FC* at paragraph 7) and the hearing was more than in 18 months later. In comparison, the Minister's notice of application for a compliance order was filed October 26, 2022 and heard December 6, 2022, even with an adjournment to facilitate the scheduling of cross-examinations. Despite a more comprehensive evidentiary record than the record on judicial review (a point to which I will return), this matter was heard in less than 6 weeks.

[77] In summary, this factor also supports a conclusion that a section 231.7 compliance proceeding is an appropriate forum for determining whether Zeifmans was required under section 231.2 to provide the information and documents requested in the Requirement.

iv. *the nature of the collateral attack in light of the appeal tribunal's expertise or* raison d'être

[78] As noted above, this factor as refined in *Bird* permits a court to consider the nature of the collateral attack in light of the expertise or *raison d'être* of other mechanisms or forums for challenging the order: *Bird* at para 75.

[79] The Minister submits that the nature of Zeifmans' attack on the Requirement is the type of challenge Parliament tasked the Federal Court with addressing by way of judicial review, and it is within the Federal Court's judicial review expertise. A summary application under subsection 231.7(1) of the *ITA* is less suitable to decide substantive challenges to the Requirement's validity. Summary applications are heard within tight timelines, and since the responding record is filed after the Minister has filed a record and cross-examinations have taken place, the Minister is in the procedurally unfair position of having to guess at the respondent's position. The Minister states Parliament cannot have intended a fundamentally unfair process that would allow respondents to "lie in wait, armed with a number of challenges to the validity of the requirement, only to reveal them after the Minister has served and filed her affidavit(s), written representations, and after cross-examinations have been concluded".

[80] In my view, the Federal Court's expertise is a neutral consideration. A judge of the Federal Court has the expertise and statutory authority to decide both judicial review and

compliance proceedings. The Court's role in each type of proceeding is a more relevant consideration for discerning legislative intention, as are procedural differences and questions of fairness. These factors favour Zeifmans' position.

[81] In *Zeifmans FC*, the Court's role was to conduct a reasonableness review of the Minister's decision to issue the Requirement. In the absence of formal reasons explaining the Minister's decision, the Court was required to consider whether it could discern from the record that the Minister was alive to the key issues, including issues of legislative interpretation, and reached a reasonable decision on them: *Zeifmans FCA* at paras 10-11.

[82] The Court has a different role in a 231.7 proceeding, and Zeifmans substantive arguments are directly relevant to the issues the Court must decide. It would make little sense for Parliament to task the Court with deciding whether the section 231.7 conditions are met, based on a record that includes the Minister's supporting affidavits and evidence elicited by Zeifmans' cross-examinations, and restrict the arguments Zeifmans may raise based on that evidence.

[83] I am not persuaded that the shorter timelines of compliance proceedings make them less suitable for deciding substantive challenges to the Requirement's validity. For the reasons discussed above, the expeditious and summary procedure for section 231.7 compliance applications is procedurally advantageous to the Minister. Despite shorter timelines, the record before me is more comprehensive than the record that was before the Court in *Zeifmans FC*, which consisted of a 15-page CTR (the most relevant part of which was the 9-page Information

Sheet), and an affidavit of one of Zeifmans' partners; the Minister did not file affidavit evidence in support of her position: *Zeifmans FC* at para 8.

[84] A summary application by the Minister is the procedure that Parliament prescribed for obtaining a compliance order. The Minister decides the scope of a request under section 231.1 or 231.2, the scope of the order sought in the section 231.7 compliance application, and the evidence she will file to support the application. I fail to see any unfairness from following the usual sequence that an applicant files their evidence and record first, particularly in this case, where the Minister might have anticipated some of Zeifmans' arguments and could have tailored her evidence accordingly.

v. *the penalty on a conviction for failing to comply with the order*

[85] The Minister submits that this factor militates against permitting a collateral attack. The Minister states Zeifmans faces no penal jeopardy at this point in the proceedings, because a compliance order would only require Zeifmans to comply with the Requirement. Any consequences for failing to obey the compliance order, such as incarceration and fines, are too remote to be relevant.

[86] There is no merit to the Minister's argument. I agree with Zeifmans that serious consequences flow from a failure to obey a compliance order. The penalty is contempt: *ITA*, s 231.7(4). Section 231.7 operates notwithstanding the penalty provisions under section 238 for failing to comply with a request or requirement under section 231.1 or 231.2 of the *ITA*, and

imposes more serious consequences. Those serious consequences are the very reason for bringing a section 231.7 application.

[87] For these reasons, I am not persuaded that the *Maybrun* factors signal Parliament's intent to confine Zeifmans' arguments to the forum of judicial review. Zeifmans' arguments address statutory conditions that are part of the section 231.7 process Parliament prescribed, and Zeifmans' position on this application is not an impermissible collateral attack on the Requirement.

(2) Abuse of Process

[88] The doctrine of abuse of process has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel or *res judicata* are not met, but allowing the litigation to proceed would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at paras 37, 42 [*CUPE*]. The Minister submits Zeifmans' substantive arguments are an attempt to relitigate issues that were decided in *Zeifmans FC* and *Zeifmans FCA*, and an abuse of the Court's process.

[89] The Minister submits that *CUPE* identifies three underlying bases for applying abuse of process to preserve the integrity of the adjudicative process: *CUPE* at para 51. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and

possibly an additional hardship for some witnesses. Third, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. According to the Minister, allowing Zeifmans' to make the same arguments that were rejected in *Zeifmans FC* and on appeal would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice: *CUPE* at para 51.

[90] In *Zeifmans FCA*, the FCA found the Minister's implicit interpretation of section 231.2 to be "consistent at a conceptual level with much authority", including *Canada (Customs and Revenue Agency) v Artistic Ideas Inc*, 2005 FCA 68 [*Artistic Ideas FCA*] and *eBay Canada Ltd v MNR*, 2008 FCA 348 [*eBay*]. The Minister states Zeifmans is attempting to revive an interpretation of section 231.2 from *Canada (MNR) v Toronto Dominion Bank*, 2004 FCA 359 [*TD Bank FCA*], notwithstanding the finding in *Zeifmans FCA* that *TD Bank FCA* is inconsistent with binding authority, and ought not to be followed: *Zeifmans FCA* at paras 5-6. The Minister contends the judicial interpretation of section 231.2 in *Zeifmans FC* and *Zeifmans FCA* was more than a "reasonableness review", and permitting Zeifmans to relitigate this point would undermine the core function of the FCA to provide consistency in the law. It would undermine the credibility of the judicial process if this Court were to adopt an interpretation of section 231.2 that is inconsistent with *Zeifmans FCA*, a proceeding that involved the same parties and the same facts.

[91] The Minister submits there is no new evidence that warrants a departure from the previous conclusion in *Zeifmans FC* and *Zeifmans FCA* that the Requirement was not unduly vague, a conclusion the Minister contends was closer to a factual determination than a reasonableness determination. While the Minister filed new evidence on this application, Zeifmans' argument relates to whether it could respond to the Requirement, and it has not filed any new evidence.

[92] The Minister states Zeifmans' argument that the Requirement was not served on a person relitigates a point of law decided against it. In *Zeifmans FC*, the Court concluded the Requirement was effectively addressed to each individual partner of the accounting partnership by virtue of subsection 244(20) of the *ITA*. The FCA considered service on Zeifmans LLP to be valid and effective.

[93] I disagree with the Minister that Zeifmans' arguments are an abuse of the Court's process.

[94] In *Zeifmans FC*, the Federal Court was conducting a reasonableness review of the Minister's decision to issue the Requirement without prior judicial authorization. The FCA confirmed this was the correct approach (*Zeifmans FCA* at para 2):

> [2] The Federal Court conducted reasonableness review of the Minister's decision to issue the requirement. This was proper. Reasonableness is the presumptive standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653. And, contrary to the submissions of the accounting firm, there is nothing here to rebut that presumption: this is not the sort of rare case described in *Vavilov* where the

> governing legislation offers indicia telling us that we should review for correctness.

[95] The Minister's interpretation of section 231.2 of the *ITA* and how she applied that interpretation to the facts of the case do not bind the Court, even if reasonable. To the extent that the Minister's implied interpretation of section 231.2 and application to the facts are consistent with binding authorities, it is those authorities that I must follow.

[96] In *Zeifmans FC* the Court reviewed the reasonableness of the Minister's decision based on the record before it, which was essentially the 9-page Information Sheet. Some key findings were: (i) where there is no evidence that unnamed persons themselves are subject to audit or investigation by the CRA to verify their compliance with the *ITA*, there is no reason for the Minister to proceed under subsection 231.2(2)—the Minister is entitled to require the third party to provide the information requested if the unnamed persons are not subject to audit (*Zeifmans FC* at paragraphs 45, 47); (ii) the reasonableness of the Minister's decision to proceed without judicial authorization in each case depends on whether the evidence in the record establishes that unnamed persons are under investigation or audit by the CRA (*Zeifmans FC* at paragraph 49); (iii) there was no evidence in the record before the Court that the Unnamed Persons (defined as entities owned, operated, controlled or otherwise connected to Mr. Ghermezian, Ms. Vaturi and Mr. Vaturi) were an investigation target, and no evidence in the Information Sheet that the Requirement was for any purpose other than to further the ongoing audit of Mr. Ghermezian and the Vaturis (*Zeifmans FC* at paragraphs 24, 64, 67).

[97] The Court's factual finding that the Unnamed Persons were not subject to audit or investigation was afforded deference on appeal (*Zeifmans FCA* at paragraph 7):

> [7] As for the Federal Court's finding of fact that the Canada Revenue Agency had not targeted the unnamed entities for investigation, only an error of law or palpable and overriding error can cause us to displace it. The Federal Court had evidence before it on which it made its finding of fact and it made no legal error. Thus, the Federal Court's finding of fact must stand in this Court: the unnamed entities were not investigative targets.

[98] The approach on this application is not reasonableness review. Moreover, the issues will not be decided "on the same facts", as the Minister contends. The FCA stated, at paragraph 4 of *Zeifmans FCA*, "On the facts here, the Federal Court found that "[t]here is no evidence in the record that [ascertainable unnamed persons] are a current investigation target" (at para. 64) and so the Minister's decision to issue the requirement without prior judicial authorization was reasonable." As will be discussed below, there is evidence in the record before me that "entities owned, operated, controlled or otherwise connected to" Mr. Ghermezian or the Vaturis were under audit when the Minister issued the Requirement.

[99] Zeifmans' second argument, regarding vagueness/ambiguity, is also affected by the nature of a judicial review and the evidentiary record that was before the Court in *Zeifmans FC*.

[100] In *Zeifmans FC*, Zeifmans argued that the requests for information and documents in the Requirement are so broad that they have no apparent connection to the CRA's audit of Mr. Ghermezian, Ms. Vaturi and Mr. Vaturi, and it was not possible to conclude that the Minister reasonably exercised her power to obtain information within the scope of her authority, for a purpose related to the administration and enforcement of the *ITA*: *Zeifmans FC* at para 74.

Zeifmans also argued that the Requirement did not clearly define "entities owned, operated, controlled or otherwise connected to" the three individuals. The Court addressed these arguments using a reasonableness review framework. The Court found there was no evidence in the record that the Requirement was issued for any purpose other than in furtherance of the audit of the three individual taxpayers, and made findings that were based on the Information Sheet. Zeifmans' description of various paragraphs of the Requirement as being too broad or unduly vague were insufficient to undermine the stated purpose of the Requirement, the audit context provided in the Information Sheet and the reasons given for requiring the information and documents listed in the Requirement: *Zeifmans FC* at para 76.

[101] On this application, there is more than the Information Sheet. The record includes Mr. Bowe's affidavit and cross-examination testimony, and the Court must analyze Zeifmans' arguments in that context and in view of the requirements of 231.7 of the *ITA*.

[102] On the question of whether the Requirement was issued for a purpose other than furthering the audits of Mr. Ghermezian and the Vaturis, Mr. Bowe's evidence is that:

- he was the lead case manager for the Ghermezian Group audits that were underway at the time the Requirement issued;
- his defined term "Audits" includes the audits of Nader Ghermezian, Diana Vaturi and Marc Vaturi, as well as audits of "entities owned, operated, controlled or otherwise connected to" them;
- the Requirement was issued as part of the Audits and to verify Mr. Ghermezian's and the Vaturis' compliance with the *ITA*;

- the CRA directorate from which the Audits derived (the International and Large Business Directorate) was more focused on corporate entities;
- many economically connected entities were under audit by the CRA at the time the Requirement issued, including offshore entities;
- a purpose of the audits of connected entities was to verify whether the entities were complying with their obligations under the *ITA*;
- the information requested in the Requirement could be relevant to the audits of the connected entities, and the CRA may use the information for the audits.

[103] Zeifmans' third argument, regarding whether a partnership is a person, is not identical to the argument Zeifmans raised on judicial review. Different considerations apply in an enforcement proceeding. In *Zeifmans FC*, the Court found that the Minister acted reasonably in issuing the Requirement to the partnership, Zeifmans LLP. However, the Court specifically noted that any concerns regarding enforcement would be addressed in a compliance proceeding: *Zeifmans FC* at para 73.

[104] I agree with Zeifmans that none of the three, underlying bases for applying the doctrine of abuse of process favours the Minister's position. First, the evidentiary records in the two proceedings are different. Applying the outcome on judicial review to the question the Court must decide in this application would yield an inaccurate result. Second, if the Court were to reach a result that is similar to the result on judicial review, the proceeding would not be a waste of judicial resources because a compliance order may issue. Third, reaching a result that differs from the result on judicial review would not undermine the credibility of the judicial process or

the aim of finality. The difference can be explained. On this application, the Court is not deciding whether to set aside the Requirement. The process Parliament prescribed for obtaining a compliance order requires me to decide if the section 231.7 criteria are met. If I am not satisfied on this record that a compliance order should be granted, it does not call the decisions in *Zeifmans FC* or *Zeifmans FCA* into question.

[105] On top of that, the Minister never volunteered that "entities owned, operated, controlled or otherwise connected to" Mr. Ghermezian or the Vaturis were under audit when she issued the Requirement. The Minister did not file affidavit evidence in the judicial review proceeding, and in this proceeding the evidence about these other audits was revealed in cross-examination. Faced with contrary evidence on a factual premise for the findings in *Zeifmans FC* and *Zeifmans FCA*, I agree with Zeifmans that precluding it from raising substantive arguments would undermine the integrity of the adjudicative process.

[106] In conclusion, it is not an abuse of process to permit Zeifmans to raise substantive arguments that address the issues the Court must decide on this application.

E. *Issue 2: Should the Court grant a compliance order under section 231.7 of the* ITA*, compelling Zeifmans to provide the documents and information in the Requirement?*

[107] The parties agree that, before granting an order that would compel Zeifmans to provide documents or information in the Requirement, this Court must be satisfied that:

a. Zeifmans was required under section 231.2 of the *ITA* to provide the documents or information;

b. Zeifmans did not provide the documents or information; and

c. the documents or information are not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1) of the *ITA*).

[108] The first point is the determinative point on Issue 2, namely, whether Zeifmans was required under section 231.2 of the *ITA* to provide the documents and information in the Requirement.

[109] As noted above, subsection 231.2(1) permits the Minister to require any person to provide any document or information for any purpose related to the administration or enforcement of the ITA, subject to subsection 231.2(2). The Minister "shall not impose on any person (…referred to as a 'third party')", a requirement under subsection 231.2(1) to provide documents or information relating to one or more unnamed persons, unless the Minister first obtains the authorization of a judge under subsection 231.2(3): *ITA*, ss 231.1(2).

[110] The Minister submits she has satisfied the section 231.7 conditions for the documents and information sought by the Requirement. The Requirement was made under subsection 231.2(1) for purposes related to the administration or enforcement of the *ITA*, namely, to verify whether Nader Ghermezian, Diana Vaturi and Marc Vaturi complied with their duties and obligations under the *ITA* for the period January 1, 2012 to December 31, 2017, including whether they complied with foreign reporting obligations and reported their income from all worldwide sources. The subsection 231.2(2) limitation did not apply.

[111] The Minister and Zeifmans disagree on the conditions that would trigger the subsection 231.2(2) requirement to obtain judicial authorization. The Minister's position would confine judicial authorization to circumstances where the Minister seeks information from a third party about persons who are unknown to the Minister, for the purpose of primarily auditing those unknown persons. Zeifmans argues that the statutory limits of the Minister's authority under section 231.2 relate to unnamed persons—there is no "unknown persons" provision in the *ITA*.

[112] Zeifmans submits that in *Canada (Minister of National Revenue) v Toronto Dominion Bank*, 2004 FC 169 [*TD Bank FC*], a decision upheld in *TD Bank FCA*, the Court refused to issue a compliance order under section 231.7 where the formalities of section 231.2 of the *ITA* were not met. Zeifmans states that, like *TD Bank FC*, on this application the Minister seeks a compliance order against a third party record holder who is not under audit. Unlike *TD Bank FC*, the Requirement seeks extensive documents and information in relation to unnamed persons, and the Minister was actively auditing unnamed persons when she issued the Requirement. Consequently, there is even more reason for concern with the lack of judicial authorization in this case.

[113] In *TD Bank FCA*, the FCA held that the Minister must obtain judicial authorization before issuing any section 231.2 requirement for information or documents relating to unnamed persons, whether or not they are under audit. Zeifmans argues that subsection 231.2(2) is clear and unqualified, and urges the Court not to disregard the literal meaning of the provision: *TD Bank FC* at paras 27-29, 34, aff'd by *TD Bank FCA*; *Canada Trustco Mortgage Co v R*, 2005 SCC 54 at paras 10-13. Zeifmans submits that while the FCA stated in *Zeifmans FCA* that *TD*

Bank FCA ought not to be followed to the extent it is inconsistent with *Artistic Ideas FCA*, the FCA did not overturn *TD Bank FCA*.

[114] In any event, Zeifmans states that in *Artistic Ideas FCA*—a case where the third party recipient was itself under audit, and the information the Minister sought about unnamed parties was limited to their names—the Minister was required to obtain judicial authorization before imposing a requirement on a third party to provide documents or information relating to unnamed persons the Minister wished to investigate. Zeifmans contends that even under the arguably lower *Artistic Ideas FCA* threshold, the Minister should have obtained judicial authorization prior to issuing the Requirement, because unnamed persons referenced in the Requirement were under investigation by the CRA at the time. These are precisely the unnamed persons to whom subsections 231.2(2) and (3) of the *ITA* apply: *Artistic Ideas FCA* at para 10.

[115] Zeifmans submits Mr. Bowe's affidavit and cross-examination testimony, the Information Sheet, and the Requirement's extensive requests for substantive information and documents directed at unnamed persons provide abundant evidence that unnamed persons were under active investigation when the Requirement issued, that the Requirement was issued as part of the audits of unnamed persons, and that the CRA could use the information and documents for such audits. If the Minister was not required to obtain prior judicial authorization to issue the Requirement for documents and information of unnamed persons who were being audited, Zeifmans submits it is hard to imagine when the protection of subsection 231.2(2) would be triggered.

[116] The Minister's answer to Zeifmans' argument seems to rest on two, overlapping premises. The first relates to the definition of unnamed persons, which the Minister seems to define so as to exclude persons who are known to the Minister. The second relates to the purpose of the Requirement.

[117] The Minister contends the FCA confirmed in *Zeifmans FCA* that judicial authorization under subsections 231.2(2) and (3) is only required where the Minister seeks information about unknown persons for the purpose of primarily auditing those unknown persons. The Minister states that judicial authorization is not required where she (i) is conducting an audit of named or known persons; (ii) requests that the person(s) under audit or a third party provide information about the person(s) under audit; and (iii) requests information that may include information concerning unnamed or unknown persons that is relevant to the determination of the tax liability of known persons. The Minister relies on the following citations in support: *Zeifmans FCA* at paras 4-6; *Artistic Ideas FCA* at paras 8, 10-11; *eBay* at para 23; *Redeemer Foundation v Canada (National Revenue)*, 2008 SCC 46 at paras 19-22 [*Redeemer Foundation*]; *Ghermezian JR* at paras 39-41; *Ghermezian Compliance* at paras 258-259. As I will explain below, the cited paragraphs do not, in my view, stand for the principles the Minister asserts.

[118] According to the Minister, Zeifmans relies heavily on *TD Bank FCA* to dispute the above principles, a case that has been overruled and is no longer good law: *Zeifmans FCA* at paras 5-6. The Minister also states *TD Bank FCA* has been overtaken by *Redeemer Foundation*, which confirms that judicial authorization is not required when the Minister is auditing named taxpayers, even if the information, once obtained, would lead to investigations of other persons:

Redeemer Foundation at para 22. The Minister submits the facts on this application parallel the facts in *Redeemer Foundation*—the Minister is engaged in an audit of named taxpayers and seeks documents and information for the purposes of auditing those taxpayers. The Minister argues that Zeifmans' reasoning would lead to an absurd result. In situations like this, the Minister could never obtain information or documents about an unnamed person who is not under audit, even if it is relevant to the audit of another taxpayer.

[119] The Minister maintains there is no evidence in the record to conclude that she sought the documents and information of the Requirement to audit unnamed or unknown persons. The Minister states that whether Mr. Ghermezian and the Vaturis owned, operated, controlled or were otherwise connected to entities in Canada or abroad is relevant to determining their compliance with the *ITA* and whether they properly reported or disclosed their worldwide income. Specifically, Ms. Vaturi and/or Mr. Vaturi received substantial electronic fund transfers (EFTs) from three related Hong Kong entities between 2014 and 2018 that were not reported as income on their tax returns. Mr. Vaturi was a director of the corporations until mid-2014. The CRA believes the EFTs represent proceeds from offshore business activities.

[120] The Minister states she properly issued the Requirement under subsection 231.2(1) of the *ITA* because no unnamed persons were targeted for audit. The Minister states Zeifmans "curates" Mr. Bowe's evidence, and does not provide a complete picture of the evidence as a whole (which Zeifmans vigorously disputes). According to the Minister, the Requirement was not issued to audit unnamed or unknown persons to verify their compliance with the *ITA*; rather, it was issued for the audits of "six named or known taxpayers", which included Nader

Ghermezian, Diana Vaturi and Marc Vaturi, and Mr. Bowe repeatedly stated that the Requirement was issued for this purpose and only for this purpose. The Minister insists that Mr. Bowe did not suggest or imply that the Requirement was issued for purposes of auditing unnamed persons, or the known entities owned, operated, controlled or otherwise connected to Nader Ghermezian, Diana Vaturi and Marc Vaturi that were being audited by the CRA. The known entities that were under audit were "not necessarily" the same entities that sent EFTs to the Vaturis, or the same entities that Zeifmans would have information about.

[121] I do not agree with the Minister that her position was recently confirmed at paragraphs 4 to 6 of *Zeifmans FCA*. The FCA did not state that judicial authorization is only required where the Minister seeks information about persons who are unknown to her, or where a requirement is primarily for the purposes of auditing unknown persons. The term "unknown persons" is not mentioned in the decision.

[122] Paragraphs 4 to 6 of *Zeifmans FCA* read as follows (emphasis added):

> [4] The Federal Court concluded that the Minister was reasonable in interpreting section 231.2 and finding that prior authorization was not needed. It would appear that the Minister took the view that prior judicial authorization is needed only where a requirement requests information and documents relating to ascertainable unnamed persons in order to verify the unnamed persons' compliance with their obligations under the Act. On the facts here, the Federal Court found that "[t]here is no evidence in the record that [ascertainable unnamed persons] are a current investigation target" (at para. 64) and so the Minister's decision to issue the requirement without prior judicial authorization was reasonable.
>
> [5] We agree. As the Federal Court observed, the Minister's interpretation of section 231.2 of the Act was consistent at a conceptual level with much authority: multiple binding decisions of this Court (*Canada (Customs and Revenue Agency) v. Artistic*

> *Ideas Inc.*, 2005 FCA 68, 330 N.R. 378 and *eBay Canada Ltd. v. Canada (National Revenue)*, 2008 FCA 348, [2010] 1 F.C.R. 145 at para. 23); an obiter of the Supreme Court of Canada that is consistent at a conceptual level with *Artistic Ideas* (*Redeemer Foundation v Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643); and numerous Federal Court decisions that have followed *Artistic Ideas* (e.g., *Canada (National Revenue) v. Morton*, 2007 FC 503, [2007] 4 C.T.C. 108 at para. 11, *Canada (National Revenue) v. Advantage Credit Union*, 2008 FC 853, 331 F.T.R. 252 at paras. 16-17, *Canada (National Revenue) v. Amex Bank of Canada*, 2008 FC 972, 333 F.T.R. 259 at para. 54, *London Life v. Canada (Attorney General)*, 2009 FC 956, 377 F.T.R. 8 at paras. 21-24 and *Ghermezian v. Canada*, 2020 FC 1137 at paras. 39-41). We consider ourselves bound by the interpretation of section 231.2 offered by this Court in *Artistic Ideas* and *eBay*, cases that postdate and differ at a conceptual level and in interpretive result with *Canada (Minister of National Revenue) v. Toronto Dominion Bank*, 2004 FCA 359, 332 N.R. 70.
>
> [6] By adopting and applying an interpretation of section 231.2 of the Act that was consistent with *Artistic Ideas*, *eBay* and their progeny, the Minister adopted and applied an interpretation that was reasonable. *Artistic Ideas*, *eBay* and its progeny correctly interpret section 231.2. To the extent that *Toronto Dominion Bank* stands for something different from *Artistic Ideas*, *eBay* and their progeny, it should not be followed. The Federal Court effectively said just that. We agree with the Federal Court for the reasons it gave.

[123] The FCA's reference to information and documents relating to ascertainable unnamed persons in order to verify the unnamed persons' compliance with their obligations under the *ITA* is the language of section 231.2(3). That language does not, in my view, support the Minister's position that judicial authorization is not required where she (i) is conducting an audit of named or known persons; (ii) requests that the person(s) under audit or a third party provide information about the person(s) under audit; and (iii) requests information that may include information concerning unnamed or unknown persons that is relevant to the determination of the tax liability of known persons.

[124] In *Zeifmans FC*, the Court used the term "unnamed persons" to mean the persons about whom the information and documents are sought: *Zeifmans FC* at para 33. In the case before it, the defined term "Unnamed Persons" meant entities owned, operated controlled or otherwise connected to Mr. Ghermezian, Ms. Vaturi and Mr. Vaturi: *Zeifmans FC* at para 24. The Court stated that the reasonableness of the Minister's decision to proceed without judicial authorization in each case depends on whether the evidence in the record establishes that the unnamed persons are under investigation or audit by the CRA (*Zeifmans FC* at paragraphs 33, 49), and found there was "no evidence in the record that the Unnamed Persons are a current investigation target" (*Zeifmans FC* at paragraph 64).

[125] The evidence on this application establishes that Unnamed Persons, as defined in *Zeifmans FC*, were and are an investigation target. In fact, Unnamed Persons were already under audit when the Requirement issued, and the audits are not yet complete.

[126] In *Zeifmans FCA*, the FCA quoted the factual finding from paragraph 64 of *Zeifmans FC*, and its reasoning was tied to that finding (emphasis added):

> [7] As for the Federal Court's finding of fact that the Canada Revenue Agency had not targeted the unnamed entities for investigation, only an error of law or palpable and overriding error can cause us to displace it. <u>The Federal Court had evidence before it on which it made its finding of fact and it made no legal error. Thus, the Federal Court's finding of fact must stand in this Court: the unnamed entities were not investigative targets.</u>
>
> […]
>
> [10] […] Looking at the entire record, the reviewing court must be sure, from explicit words in reasons or from implicit or implied things in the record or both, that the administrator was alive to the key issues, including issues of legislative interpretation, and reached a decision on them.

> [11] Here, a review of the record before the Minister and the decision reached by the Minister leaves us in no doubt: we know where the Minister was coming from, the Minister was aware of section 231.2, the Minister implicitly or impliedly adopted an interpretation of section 231.2 that was consistent with *Artistic Ideas*, *eBay* and their progeny, and applied that interpretation to the facts of this case in a reasonable way. The Minister's decision was reasonable.

[127] Based on the evidentiary record that is before me, I find the Minister's position in this proceeding to be inconsistent with *Artistic Ideas FCA*.

[128] *Artistic Ideas FCA* was an appeal from an application to strike out part of a section 231.2 requirement. The applicant, Artistic Ideas Inc, had arranged for the sale of artwork to Canadian taxpayers, who then donated the artwork to registered charities to obtain a tax benefit based on the difference between the appraised value of the artwork and the purchase price. In the course of Artistic Ideas Inc's audit, the Minister issued a requirement that included a request to disclose the names of the donors and charities. The donors and charities were unnamed persons.

[129] The FCA set out the relevant factual findings from *Artistic Ideas Inc v Canada (Customs and Revenue Agency)*, 2004 FC 573 [*Artistic Ideas FC*], namely: (i) the Minister's audit of Artistic Ideas Inc was a genuine and serious inquiry into its tax liability; (ii) the names of the donors and charities were relevant to the audit of Artistic Ideas Inc; (iii) the Minister wanted to reassess the donors for engaging in art flips; and (iv) there was no evidence suggesting that the Minister intended to audit the charities. Based on these findings, the Court in *Artistic Ideas FC* had concluded that the Minister was entitled to the names of the charities, but not the names of the donors.

[130] The Court's conclusion was upheld by the FCA (*Artistic Ideas FCA* at paragraphs 10-13, 17):

> [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.
>
> […]
>
> [17] In cases in which the Minister advises the third party that he has no reason to invoke subsection 231.2(3) and the third party refuses to disclose the names of unnamed persons because it is not satisfied that the unnamed persons are not under investigation, the third party may seek recourse in the Federal Court or the Minister may seek recourse under other provisions of the *Income Tax Act*.

[131] In this case, the Requirement seeks documents and information relating to one or more unnamed persons who were and are investigative targets. The Minister was required to obtain prior judicial authorization, and she did not.

[132] The Minister accuses Zeifmans of curating the evidence and not providing a complete picture. The accusation is not justified. In fact, it was the Minister's summary of the evidence that was at times inaccurate, or even misleading. The Minister does not clearly define unnamed persons, and her argument alternates between the terms unnamed persons and unknown persons in a confusing way. For example, at paragraph 118 of the reply memorandum the Minister states that she "properly issued the requirements under ss. 231.2(1) because no unnamed persons were targeted for audit", without explaining that the statement is not even arguably true unless "unnamed persons" is synonymous with "persons unknown to the Minister". In this case, many connected entities are known to the Minister, including connected entities under audit. The Minister states she did not name them in the Requirement because it would have created an overly complicated requirement and she was not certain of all the relationships.

[133] The distinction between the terms is even more important in view of the Court's definition of Unnamed Persons in *Zeifmans FC*. Mr. Bowe's cross-examination testimony was clear that Unnamed Persons, as that term was defined in *Zeifmans FC*, were under audit when the Minister issued the Requirement, and the audits are ongoing:

> 120. Q. So this phrase, entities owned, operated, controlled, or otherwise connected to Marc Vaturi, Diana Vaturi and/or Nader Ghermezian, which we're going to call "connected entities", some of those entities were under audit at the time of this January 30, 2019 letter.

> A. Yes, yes. I don't recall exactly which entities would have been under audit.
>
> 121. Q. But some of them were under audit at the time of this letter, January 30, 2019.
>
> A. Yes.
>
> […]
>
> 138. Q. And as you said earlier, many of these economically connected entities were under audit at the time of the letter, correct?
>
> A. Correct.
>
> 139. Q. My understanding is that the audit of the Ghermezian group is not yet complete. Is that correct?
>
> A. I believe that to be true.

[134] The Minister tries to explain that the known entities that were under audit were "not necessarily" the same entities that sent EFTs to the Vaturis or the same entities that Zeifmans has information about. It is difficult to make sense of this argument. The Minister should know which entities are under audit. The Court does not know who they are. In any event, the Requirement is not limited to the three offshore entities that sent EFTs to the Vaturis. It uses a catch-all sentence that would capture entities that are in any way connected to Mr. Ghermezian and the Vaturis. Mr. Bowe's evidence is that such connected entities were and are under audit.

[135] In view of my findings that the Minister's position is inconsistent with *Artistic Ideas FCA*, it is not necessary to address the parties' arguments regarding *TD Bank FCA*. While I would agree with Zeifmans that the FCA did not overrule *TD Bank FCA* outright, any analysis of the extent to which *TD Bank FCA* stands for something different from *Artistic Ideas FCA, eBay*

and their progeny would be contextual (each of the cases involved different kinds of proceedings, and different provisions of the *ITA*) and such analysis best left for another case.

[136] I have considered the other authorities the Minister relies on in support of her position that judicial authorization under subsections 231.2(2) and (3) is only required where the Minister seeks information about unknown persons for the purpose of primarily auditing those unknown persons. I am not persuaded they establish that the Minister did not exceed her authority by issuing the Requirement without prior judicial authorization.

- ***Artistic Ideas FCA* at paras 8, 10-11**: There is no mention of "unknown persons" in the decision. In fact, it seems that the Minister knew the names of some donors when it issued the requirement (see *Artistic Ideas FC*, e.g. at paragraph 18), and the "unnamed" donors were a group that included persons who were both known and unknown to the Minister.
- ***eBay* at para 23**: This was an appeal from a decision of the Federal Court affirming its earlier, *ex parte* order that authorized the Minister to impose a section 231.2 requirement on eBay (as noted above, a previous version of 231.2 allowed the Minister to bring an *ex parte* application for judicial authorization to issue a requirement, and allowed a recipient to seek review of the judge's authorization order). The requirement asked for the names of "PowerSellers" in Canada with high sales volumes. Paragraph 23 of *eBay* states that subsection 231.2(2) is intended to be used when the Minister wishes to verify whether unnamed persons are in compliance with their obligations under the *ITA*. It does not say that unnamed persons means persons that are unknown to the Minister.

- ***Redeemer Foundation* at paras 19-22**: The issue in *Redeemer Foundation* was whether the Minister was required under s. 231.2(2) of *ITA* to obtain judicial authorization before asking a registered charity for information about the identity of its donors. In the course of a legitimate audit of the charity, CRA's auditor had made an oral request for a list of donors—information that should have been in business records the charity was required to keep. The SCC held that judicial authorization was not required because the Minister was entitled to information about the identity of the donors through the combined effect of s. 230(2)(a) and s. 231.1 of the *ITA*. At paragraph 22, the SCC stated "The s. 231.2(2) requirement should not apply to situations in which the requested information is required in order to verify the compliance of the taxpayer being audited. Regardless of whether or not there is a possibility or a probability that the audit will lead to the investigation of other unnamed taxpayers, the CRA should be able to obtain information it would otherwise have the ability to see in the course of an audit." The circumstances before me go beyond a possibility or probability of investigation—connected entities were already targeted for investigation and some were already being audited. Furthermore, *Redeemer Foundation* involved a section 231.1 request to a taxpayer under audit. In my view, *Redeemer Foundation* is distinguishable from the circumstances of this case, and does not support the Minister's position.
- ***Ghermezian JR* at paras 39-41**: In *Ghermezian JR*, the Court considered the parties' arguments as to whether the term "unnamed persons" in subsections 231.2(2) and (3) means unnamed in a section 231.2 requirement, or unknown to

the Minister. However, the Court did not interpret the term "unnamed persons", as this was not the Court's role on judicial review. The Court's role was to decide whether it was reasonable for the Minister to issue the requirements without prior judicial authorization: *Ghermezian JR* at para 57. After reviewing a number of authorities, the Court found that none of them was determinative of the statutory interpretation issue in dispute: *Ghermezian JR* at para 71. Ultimately, the Court could not conclude that the Minister's decision was unreasonable because there was no definitive jurisprudence on the point, factors relevant to the text, context and purpose of the provisions did not clearly resolve the issue, and the jurisprudence and factors "in some respects" supported the Minister's implicit decisions to issue the requirements without prior judicial authorization: *Ghermezian JR* at para 73. This decision does not establish that unnamed persons mean persons that are unknown to the Minister.

- ***Ghermezian Compliance* at paras 258-259**: *Ghermezian Compliance* comes closest to the Minister's position, but even this case does not lay down a general principle that judicial authorization is only required where the Minister seeks information about unknown persons for the purposes of primarily auditing those unknown persons. The Court discussed the general principles applicable to the Minister's power to issue a requirement relating to unnamed persons in paragraphs 161 to 169 of *Ghermezian Compliance*, not paragraphs 258 to 259, and noted that the merits of the parties' arguments could only be assessed in the context of each individual requirement on which the Minister relies. Paragraphs 258 to 259 are part of the Court's contextual analysis of the parties' arguments

> for a specific request, Request GG-24, addressed to Mr. Ghermezian and his brothers: *Ghermezian Compliance* at paras 250-260. As I will explain below, the context-specific analysis for Request GG-24 is distinguishable from the context of the Requirement the Minister issued to Zeifmans.

[137] The Minister had issued Request GG-24 under section 231.1 of the *ITA*, not section 231.2, and the Court analyzed the "unnamed persons argument" on the basis that the Minister cannot avoid the need for prior judicial authorization by choosing to issue a request under 231.1 instead of under section 231.2: *Ghermezian Compliance* at para 258. The limits of the Minister's powers to request information about unnamed persons are different for a section 231.1 request. Under section 231.1 of the *ITA*, the Minister is entitled to inspect any document of a taxpayer under audit that should be in their books and records, including information the taxpayer is required to keep about third parties: *Miller FCA* at paras 47, 52; *Redeemer Foundation* at paras 1, 24. Zeifmans is not under audit, and the same principle does not apply in the context of the section 231.2 Requirement issued to Zeifmans.

[138] Furthermore, it appears the Minister's request for a compliance order in *Ghermezian Compliance* was relatively limited. The Minister sought a compliance order in respect of one item in Request GG-24. While I am unable to determine the precise scope of that item from the Court's reasons, it appears that the "unnamed persons argument" focused on a request that Mr. Ghermezian and his brothers "identify arrangements that could be considered trusts under the laws of Canada". In contrast, the scope of the requested information about unnamed persons in this case is broad. The Requirement uses a "catch-all sentence" to capture entities connected to

Nader Ghermezian, Diana Vaturi and Marc Vaturi in any way, and then seeks a broad scope of documents and information from Zeifmans for each of these entities—including but not limited to all accounting records, tax planning letters, memos to files, client profiles, correspondence, and records of communications with domestic or international accounting firms, registry offices, provincial bodies and other government bodies. As Zeifmans points out, the Requirement seeks precisely the same, broad scope of production about each of the connected entities as it does for the taxpayers the Minister says she is targeting.

[139] I would add that the Court in *Ghermezian Compliance* found that "the jurisprudence and policy considerations favour the Minister's position". Based on the facts of that case, the Court was satisfied that the information and documents about possible unknown trusts was relevant to investigate the tax position of Mr. Ghermezian and his family.

[140] I am not satisfied that the jurisprudence and policy considerations favour the Minister's position in this case.

[141] The Minister submits there is no evidence that she sought the documents and information of the Requirement to audit unnamed or unknown persons. She submits Mr. Bowe's evidence was clear that the Requirement was issued only for the purpose of auditing the named persons. I disagree.

[142] As noted above, the Minister states the requirement was made to verify whether Nader Ghermezian, Diana Vaturi and Marc Vaturi complied with their duties and obligations under the

ITA for the period January 1, 2012 to December 31, 2017, including whether they complied with foreign reporting obligations and reported income from all worldwide sources. The Minister states that she is auditing Mr. Ghermezian and the Vaturis, and the Requirement was issued for the purposes of obtaining documents and information to audit them.

[143] However, the Minister also states the purpose of the Requirement was to further the audits of "six named or known taxpayers" that included Mr. Ghermezian and the Vaturis. The Minister does not say who the other three "named or known taxpayers" are. The Information Sheet indicates that the Minister sought information about Mr. Ghermezian, the Vaturis, and three other Canadian taxpayers whose names are redacted. The three unidentified taxpayers are not mentioned in Mr. Bowe's affidavit or in the Minister's original memorandum of argument, and the record does not explain why they are under audit or how the documents and information sought by the Requirement relate to them.

[144] Mr. Bowe's evidence about the purpose of the Requirement is not clear. At best, his evidence is equivocal. Mr. Bowe could not say which entities were under audit, but they were "not necessarily" the same entities that sent EFTs to the Vaturis, and "just because there are connected entities under audit doesn't mean that the purpose of this [Requirement] is to gather information for audit about those other entities". However, Mr. Bowe's affidavit states that the Requirement was issued as part of the "Audits" and to verify Mr. Ghermezian's and the Vaturis' compliance with the *ITA*, and he confirmed on cross-examination that his defined term Audits means audits of the Ghermezian Group as a whole. Mr. Bowe was the lead case manager for the Ghermezian Group audits that were underway at the time the Requirement issued, at a

directorate that was more focused on corporate entities, and he testified that many economically connected entities were under audit by the CRA at the time the Requirement issued. He also stated that a purpose of the audits was to verify whether the entities were complying with their obligations under the *ITA*, and that the CRA may use the information in the Requirement for those audits. As previously stated, the Requirement seeks precisely the same, broad scope of production from each of the connected entities as it does for the taxpayers the Minister says she is targeting.

[145] Finally, the record does not clearly explain how the specific documents and information of the Requirement would advance the audits of Mr. Ghermezian and the Vaturis, a point that has added significance in view of the evidence about the purpose of Requirement.

[146] The Minister asserts that whether Mr. Ghermezian and the Vaturis owned, operated, controlled or were otherwise connected to entities in Canada or abroad is relevant to determining their compliance with the *ITA* and whether they properly reported or disclosed their worldwide income. Specifically, Ms. Vaturi and/or Mr. Vaturi received substantial EFTs from three related Hong Kong entities between 2014 and 2018 that were not reported as income on their tax returns. The Minister states that verifying if connected entities are managed and controlled from Canada by these taxpayers is relevant because Mr. Vaturi claimed the EFTs were loans under subsection 15(2) of the *ITA* and there would be a corresponding deduction under paragraph 20(1)(j) in a subsequent taxation year. The Minister states that identifying the relationships between the connected entities and Mr. Ghermezian or the Vaturis is relevant to determining whether the EFTs fall within 15(2) and whether a 20(1)(j) deduction is permissible. To fall

under 15(2) and 20(1)(j), the connected entities who made the alleged loans would need to be dealing at non-arm's length, and the Minister states she needs to understand the relationship between the connected entities and these three taxpayers to make that determination.

[147] I am not satisfied that this explains how the Requirement advances the audits of Mr. Ghermezian and the Vaturis. The Requirement does not even mention the EFTs, or ask for information about the relationship between the paying entities and Mr. Ghermezian or the Vaturis during the period in question. I fail to see how the specific requests in the Requirement are directed at determining whether the paying entities were non-arm's length, and whether the payments were proceeds from offshore business activities. The Minister states that she sought information directly from Mr. Ghermezian and the Vaturis but they provided incomplete information (without explaining what they provided or how it was incomplete). If Mr. Ghermezian and the Vaturis provided insufficient information to satisfy the Minister that the EFTs were loans, rather than proceeds from offshore business activities, it is unclear to me why the CRA needs the documents and information in the Requirement in order to conclude that the EFTs should be reported as income.

[148] I disagree with the Minister that Zeifmans' reasoning leads to an absurd result because the Minister could never obtain information or documents about an unnamed person who is not under audit, even if it is relevant to the audit of another taxpayer. If unnamed persons are the intended subjects of an investigation, the Minister can obtain judicial authorization by satisfying the requirements of subsection 231.2(3)—namely, that the information or documents relating to one or more unnamed persons (forming an ascertainable group) is required to verify compliance

with the *ITA*: *MNR v Greater Montréal Real Estate Board*, 2007 FCA 346 at para 21 [*GMREB*]. The unnamed persons do not need to be known to the Minister, and an audit does not need to be underway: *GMREB* at paras 19-21, 44-45. In this case, Ghermezian Group Audits under the RPAP have been underway for years.

[149] In summary, the Minister has not established that she did not require judicial authorization pursuant to subsection 231.2(3) of the *ITA*, prior to issuing the Requirement. I am not satisfied the statutory conditions of section 231.7 have been met.

[150] The Minister states the Court has discretion to impose conditions or excise portions of the Requirement in the exercise of its discretion. I am not satisfied that the Court should exercise discretion to do so in the circumstances of this case.

[151] While the Minister states she is not required to seek a compliance order in respect of all items in the Requirement, in this case the Minister asks for an order that would compel Zeifmans to provide all of the documents and information in the Requirement. The Minister did not make submissions as to the portions of the Requirement that could be excised, or the conditions that could be imposed in the exercise of the Court's discretion, and I am not in a position to make such a determination.

[152] In *Miller FCA*, the Minister had sought a compliance order in respect of several items from a section 231.1 request. The Federal Court granted an order in respect of seven of them, dismissing the application in respect of several other items: *Miller FCA* at para 11. The FCA

noted that the Federal Court accepted that all the items it ordered the appellant to provide were items that a taxpayer could be required to provide under section 231.1, and thus could be the subject of a compliance order under section 231.7 of the *ITA*: *Miller FCA* at para 17.

[153] The record on this application does not permit me make a similar determination. I am not in a position to determine which items of the Requirement or which information or documents are ones that Zeifmans could be required to provide under section 231.2.

[154] In addition, the Minister's authority to issue a requirement is restricted in the sense that the information and documents must be for a purpose related to the administration or enforcement of the *ITA*.

[155] If the Minister had sought judicial authorization before issuing the Requirement, she would have had to satisfy the Court, with information on oath, that (i) the unnamed person or persons are ascertainable; and (ii) the Requirement was made to verify their compliance with any duty or obligation under the *ITA*. The Court on an application for judicial authorization also has an overriding discretion to refuse authorization or to impose any conditions the judge considers appropriate to remedy abuses, as long as the discretion is not exercised so as to revisit Parliament's policy choices by re-inserting statutory conditions for obtaining authorization that have been repealed: *GMREB* at para 38; *Roofmart FCA* at para 56.

[156] There is no evidence before me about the unnamed persons—they are not identified, there is no information about the nature of their audits, and there is no information about the

CRA's efforts to obtain information from them directly. I am not in a position to exercise discretion in a manner that balances the interests of the Minister with those of Zeifmans, unnamed persons, and other affected persons to ensure that any compliance order would only compel Zeifmans to provide documents or information that meet the conditions of section 231.7 of the *ITA*.

[157] In view of my decision not to grant a compliance order for the reasons above, it is unnecessary to address Zeifmans' second and third arguments relating to ambiguity/vagueness of the Requirement, and the fact the Requirement was served on a partnership. As I explained in the section on abuse of process, it is not the Court's role on this application to decide whether the Requirement or any part of it should be set aside. In view of the Court's role on this application, it seems to me that Zeifmans' second and third arguments would only be relevant if I were inclined to grant a compliance order for at least some of the documents and information in the Requirement, because a failure to obey such order would carry the risk of sanctions for contempt of court. Since I am not granting a compliance order, concerns about the ability to comply with the order due to ambiguity, and ensuring that the proper parties are bound by the order, do not arise.

F. *Conclusion*

[158] For the above reasons, the Minister's application is dismissed with costs to Zeifmans.

[159] If the parties are unable to reach an agreement on costs, Zeifmans may serve and file cost submissions within 20 days of this decision and the Minister may serve and file cost submissions

within 15 days thereafter. Each parties' cost submissions shall not exceed two pages, not including any bill of costs.

JUDGMENT in T-2250-22

THIS COURT'S JUDGMENT is that:

1. The applicant's reply memorandum is admitted.
2. This summary application for an order under section 231.7 of the *Income Tax Act* is dismissed.
3. Costs are awarded to the respondent. In the event the parties are unable agree, the amount and terms of a cost award remain to be determined.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
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