Federal Court  Cour fédérale

Date: 20231108

T-252-19
T-254-19
T-258-19
T-259-19
T-261-19
T-262-19

Citation: 2023 FC 1488

Ottawa, Ontario, November 08, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

Docket: T-252-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

NADER GHERMEZIAN

Respondent

AND BETWEEN:

Docket: T-254-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

MARC VATURI

Respondent

AND BETWEEN:

Docket: T-258-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

GHERFAM EQUITIES INC

Respondent

AND BETWEEN:

Docket: T-259-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

PAUL GHERMEZIAN

Respondent

AND BETWEEN:

Docket: T-261-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

RAPHAEL GHERMEZIAN

Respondent

AND BETWEEN:

Docket: T-262-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

JOSHUA GHERMEZIAN

Respondent

ORDER AND REASONS

I. Overview

[1] This Order and Reasons addresses issues argued at a Case Management Conference [CMC] on November 6, 2023, following the parties' provision of written submissions in advance

of the CMC. These issues concern whether the Court should stay its proceedings in these matters pending the outcome of the Respondents' application for leave to appeal to the Supreme Court of Canada [SCC] (and any resulting appeal) from the recent decision of the Federal Court of Appeal [FCA] in *Ghermezian v Canada (National Revenue)*, 2023 FCA 183 [Ghermezian FCA] and, if no stay is granted, the process the Court should adopt to complete these proceedings including the adjudication of costs.

[2] For the reasons explained below, I am denying the request for a stay and issuing an Order prescribing steps and timelines for the completion of these proceedings, culminating with the adjudication of costs.

II. **Background**

[3] These proceedings involve six applications by the Minister of National Revenue [the Minister], seeking compliance orders under s 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the Act]. The Respondents are five individuals, all members of the Ghermezian extended family, and a related corporation, Gherfam Equities Inc. Each of the Minister's applications seeks to compel the relevant Respondent to provide documents and/or information previously sought by the Minister under s 231.1 and/or s 231.2 of the Act.

[4] On February 23, 2022, the Court released its Judgment and Reasons [the Judgment] in these applications. The Judgment granted the Minister's applications, subject to certain remaining steps outlined therein for applying the Court's conclusions surrounding the Respondents' success in some of their defence arguments to the development of the form of

compliance order in each application. Following completion of those steps, the Court issued the compliance orders on July 8, 2022 [Compliance Orders]. The Compliance Orders were accompanied by Supplementary Reasons of the same date, explaining the Court's conclusions on the principal outstanding disputes between the parties, related to the form of the compliance orders in the six applications, as identified in written submissions provided by the parties following the issuance of the Judgment [Supplementary Reasons].

[5] The Respondents appealed the Judgment, and the Minister cross-appealed. The Respondents brought a motion for a stay of the Judgment (and any subsequently issued compliance orders), which the FCA dismissed by Order dated May 13, 2022 [the Stay Dismissal]. The Respondents also appealed the Compliance Orders, once issued. On July 20, 2022, upon consent of the parties, the FCA issued an Order consolidating the appeals and staying the Compliance Orders pending the hearing and disposition of the appeals [Stay Order].

[6] On September 1, 2023, the FCA issued its decision in Ghermezian FCA, dismissing the Respondents' appeals but allowing the Minister's cross-appeals. In allowing the cross-appeals, Ghermezian FCA held that, pursuant to requests issued under s 231.1(1) of the Act, the Minister is authorized not only to compel the provision of documents but also to compel the provision of previously undocumented information (at paras 14-42). The FCA remitted these applications to this Court, so that the parties would have an opportunity to seek revised compliance orders reflecting the point that had been determined on the cross-appeals (at para 68).

[7] On October 6, 2023, the Court conducted its first CMC following the release of Ghermezian FCA, to canvas with the parties their positions on the process the Court should adopt to complete these proceedings and re-determine the compliance orders in accordance with the FCA's reasons. The Respondents advised the Court that they intended to seek leave to appeal Ghermezian FCA to the SCC and took the position either that the Stay Order served to stay these proceedings pending the outcome of their leave application (and any resulting appeal) and/or that this Court should implement such a stay. The Minister opposed the Respondents' position. The parties also identified that they had diverging positions on the process the Court should adopt to complete these proceedings by re-determining the compliance orders and performing the adjudication of costs.

[8] The Court subsequently issued directions obliging the parties to provide written submissions on the procedural issues identified at the October 6, 2023 CMC, to be followed by oral argument on those issues at another CMC to be held on November 6, 2023. The Court heard the parties' arguments at that CMC, and this Order and Reasons now addresses those issues.

III. **Issues**

[9] As explained above, the following issues require the Court's determination:

A. Do the Respondents meet the interests of justice test for a stay of the re-determination of the compliance orders?

B. If the Respondents are not entitled to a stay, what procedure should be followed for the re-determination of the compliance orders?

C. If the Respondents are not entitled to a stay, what procedure should be followed for the adjudication of the costs of these applications?

IV. **Analysis**

A. *Do the Respondents meet the interests of justice test for a stay of the re-determination of the compliance orders?*

[10] The parties agree on the legal principles governing the Court's adjudication of this issue. This Court has discretion to stay proceedings under paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7. The test that applies to a request for a stay differs depending on whether the Court is asked to stay its own process or whether it is being asked to enjoin a proceeding in another forum. In the latter case, the analysis is governed by the more demanding test prescribed by *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 [*RJR-MacDonald*]. However, where the Court is asked to grant a stay of its own process (as in the case at hand), the test is whether, in all the circumstances, it is in the interests of justice that the proceeding be stayed (see *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 at para 5).

[11] The parties further agree that, in considering the interests of justice, the circumstances to be taken into account include promoting the just, most expeditious and least expensive determination of the proceeding on its merits, as well as some of the considerations identified in *RJR-MacDonald* – i.e., whether there is a serious issue to be tried, the existence or not of irreparable harm, and the overall balance of convenience or interests (see *Viterra Inc v Grain*

Workers' Union (International Longshoreman's Warehousemen's Union, Local 333), 2021 FCA 41 at para 23; *Clayton v Canada (Attorney General),* 2018 FCA 1 at para 26).

[12] The Respondents argue that granting a temporary stay of these proceedings would be just and would prevent significant prejudice to them. They submit that there is otherwise a real possibility that they will be compelled under the re-determined compliance orders to produce some or all of the voluminous documentation and information the Minister is demanding, only to have the SCC subsequently allow the Respondents' appeals and conclude that some of that documentation and information was not compellable. The Respondents argue that such production would render their appeal moot. They rely on this Court's decision to stay its proceeding in *Bevins v Canada (Registrar of Firearms),* 2013 FC 980 [*Bevins*] at paragraph 11, so as not to deprive an appellant of its appeal rights before the SCC.

[13] The Respondents further submit that a temporary stay would promote the most expeditious process by avoiding a multiplicity of proceedings that could result if they later appeal the re-determined compliance orders. As for achieving the least expensive determination of the proceedings on their merits, the Respondents argue that, if a stay is not granted, the time, effort and expense that the parties would incur, in connection with the process of re-determining the compliance orders, may prove to be unnecessary if the SCC ultimately allows their appeal in whole or in part.

[14] The Respondents contend that the delay necessary to resolve the SCC appeal will cause little prejudice to the Minister, as it will be relatively brief in comparison to the approximately

eight years that these applications have been ongoing. Indeed, they argue that their position is supported by a finding in Ghermezian FCA (at para 69) to the effect that a further delay would not amount to a denial of justice.

[15] Finally, the Respondents submit that the Stay Order supports their request. At the time of the October 6, 2023 CMC, the Respondents took the position that the Stay Order remained in effect pending the outcome of their application for leave and appeal to the SCC. However, at the November 6, 2023 CMC hearing, the Respondents confirmed that they were no longer taking that position. As the Minister argues, the Stay Order clearly stays these proceedings only pending the appeal before the FCA that has now been concluded. Rather, the Respondents now argue that the considerations animating the Stay Order, including the FCA's application of the *RJR-MacDonald* to the circumstances then in effect, apply equally to the present circumstances.

[16] In my view, the most compelling of the Respondents' submissions is their point that, if the parties and this Court now complete their work to achieve re-determination of the compliance orders, and if the legal foundation for that re-determination is later changed by a successful appeal to the Supreme Court of Canada, then some of that time, effort and expense will have been wasted. However, as observed later in these Reasons when I identify the re-determination process, the remaining issue to be addressed in that process is sufficiently narrow that the required process should not be particularly onerous. As such, the associated time, effort and expense should not be substantial.

[17] For similar reasons, I do not find the Respondents' multiplicity of proceedings argument particularly compelling. The remaining issue for the Court's adjudication following Ghermezian FCA is how the re-determination of the compliance orders should take into account the FCA's conclusion that the Minister is empowered to request undocumented information under s 231.1 of the Act, which requests were excluded from the Compliance Orders that were issued before the appeal. As the Minister submits, this re-determination will be a factual exercise that will not involve any further adjudication of the points of law that the Respondents appealed to the FCA and now seek to appeal to the SCC. While this does not eliminate the possibility that the Respondents may choose to appeal the re-determined compliance orders, such a possibility is entirely speculative at this juncture.

[18] With respect to the Respondents' mootness argument, I have considered their reliance on *Bevins*. In that case, the applicants brought a motion for an interlocutory injunction, asking that the Federal Court order that the records in the long gun registry with respect to non-restricted firearms be destroyed. The applicants brought that motion in the context of Parliament having abolished the registry and having called for the destruction of existing registration records. However, the Québec government took the position that Parliament's initiative was unconstitutional and, having failed to prevail in that position before the Québec Court of Appeal, sought to appeal to the SCC (see paras 1-2). In declining to grant the applicants' motion for an interlocutory injunction to destroy the records, this Court concluded that it would be inappropriate to order the destruction of the documents that were at the heart of the proceeding before the SCC. This Court therefore stayed the motion for the interlocutory injunction pending the decision of the SCC (see paras 11-12).

[19] The facts of *Bevins* are quite distinct from those in the case at hand. I agree with the Minister's position that *Bevins* is distinguishable, principally based on the particular relief that this Court was being asked to grant when it issued the stay. As noted above, the applicants were seeking on motion an interlocutory injunction, which by its nature would have had the immediate effect of compelling the destruction of the registry records. In contrast, the relief currently under consideration in the case at hand is a process to give effect to Ghermezian FCA so as to complete the adjudication of the Minister's applications for compliance orders. That relief will not in itself render the Respondents' appeals moot or otherwise impair their appeal rights.

[20] Of course, the end result of this process, once completed, will be the issuance of compliance orders, and I appreciate the Respondents' argument that eventual compliance with such orders would require production of the relevant information and documentation to the Minister, notwithstanding their position on appeal that components of the Minister's demands are unlawful. The Minister submits that, once that stage of the process has been reached, the Minister will consider the status of the SCC appeal and whether to consent to a stay of the re-determined compliance orders, as the Minister did following issuance of the original Compliance Orders pending the appeal to the FCA. The Respondents take little comfort in the Minister's submission, as it offers no assurance that the Minister will consent to a stay pending the SCC appeal, once the re-determined compliance orders have been issued. However, absent the Minister's consent, it will remain available to the Respondents to seek a stay from the FCA or the SCC (see s 65.1 of the *Supreme Court Act* SC 1985, c. S-26).

[21] Moreover, I agree with the Minister's argument that the present circumstances are somewhat comparable to the circumstances that unfolded during the FCA appeal. As noted earlier in these Reasons, after this Court issued the Judgment (but before issuance of the Compliance Orders), the Respondents initiated their FCA appeal and brought a motion for a stay of the Judgment (which prescribed a process for determining the form of the compliance orders) and any subsequently issued compliance orders, pending the outcome of that appeal. In the Stay Dismissal, the FCA dismissed the Respondents' motion, finding that their mootness argument was speculative and premature and that they had not identified any irreparable harm that would be occasioned by allowing the Federal Court's process to conclude (at page 2).

[22] Subsequently, once this Court had completed the process prescribed by the Judgment and had issued the Compliance Orders, the FCA issued the Stay Order, finding that the shortcomings of the Respondents' previous stay motion no longer applied (at page 3).

[23] I am conscious that, in its analyses of those two stay motions, the FCA was applying the *RJR MacDonald* test, not the interests of justice test that governs my decision whether to grant a stay. However, as noted earlier in these Reasons, considerations animating the *RJR MacDonald* analysis may be taken into account in considering the interests of justice. Indeed, consistent with that thinking, the Respondents urge the Court to take into account the analysis underlying the Stay Order. I accept the submission that the reasoning animating the FCA's analyses is instructive, but I find that the analysis underlying the Stay Dismissal is the more applicable. While the circumstances before the FCA when addressing the Respondents' previous stay motions are not a perfect parallel to the present circumstances, I agree with the Minister's

position that those decisions support a conclusion that the Court should not stay its proceedings that have not yet advanced to a conclusion.

[24] Finally, I have considered the Respondents' contention that Ghermezian FCA supports their position that a further delay resulting from a stay would not materially prejudice the Minister. The Respondents rely on the FCA's finding that, while the Minister's audit of the Respondents had been going on for some time, it was not persuaded that a further delay would amount to a denial of justice (see para 69). As the Minister submits, this finding forms part of the FCA's remedial analysis, in which it concluded that the appeal record did not include the material necessary for the FCA to re-determine the compliance orders. In that context, the FCA found that the time necessary for the Federal Court to perform the re-determination would not represent a denial of justice (see paras 61-69).

[25] Against that backdrop, I do not read Ghermezian FCA as having concluded that delay is not prejudicial to the Minister, only that the particular delay associated with the Federal Court re-determining the compliance orders would not deny the Minister justice. A stay would result in additional delay of indeterminate duration, as the outcome of the Respondents' SCC leave application and duration of the appeal (if any) are presently unknown. I agree with the Minister that this delay is a factor militating against granting a stay. Considering that factor in combination with the other factors canvassed above, I decline to exercise my discretion to stay these applications pending the Respondents' SCC leave application and possible appeal.

B. *If the Respondents are not entitled to a stay, what procedure should be followed for the re-determination of the compliance orders?*

[26] The Respondents request the following process for re-determination of the compliance orders:

A. The Minister to be afforded 90 days to particularize the specific relief she seeks on the re-determination of the compliance orders, together with written submissions supporting her position;

B. The parties then to be afforded 60 days to identify any disagreement between them on the form of the compliance orders;

C. If any disagreement remains, the Respondents to be afforded 60 days to introduce affidavit evidence (if necessary) related to the items under disagreement, followed by further 60 days to provide written submissions on such items; and

D. A hearing to be scheduled to permit the parties to make oral submissions related to the re-determination of the compliance orders, following which the Court would make its decision and issue the compliance orders.

[27] The Minister objects to the Respondents' proposed process and timetable, noting that it would amount to 270 days (nine months) to complete the process, not including the time for the Court to make its re-determination. The Minister proposes the following process:

A. The parties to be afforded 30 days either to provide the Court with mutually agreed draft compliance orders or to advise the Court that an agreement has not been reached, in which case the parties shall identify any areas of disagreement between them;

B. If any disagreement remains at the end of the above 30 days, the Minister to be afforded 14 days to serve and file her proposed forms of compliance orders, accompanied by written submissions identifying all remaining areas of disagreement and the Minister's positions on those disagreements; and

C. the Respondents to be afforded 14 days from service of the Minister's proposed forms of compliance orders and submissions, to serve and file their proposed forms of compliance orders accompanied by written submissions on their positions on the remaining areas of disagreement.

[28] The Minister submits that this process and proposed timetable are consistent with the procedure adopted by the Court in its Judgment, which process was used for determination of the form of the original Compliance Orders.

[29] The most significant area of disagreement between the parties involves whether the process should include an opportunity for the Respondents to introduce new evidence. The Respondents submit that Ghermezian FCA contemplates the introduction of new evidence (at

paras 65-68) and that it is in the interest of justice that the Court have a proper evidentiary record and a full understanding of any practical limitations relating to the documents and information that the Respondents will be required to produce pursuant to the re-determined compliance orders. By way of example, at the CMC hearing, the Respondents refer to the possibility of introducing evidence that certain Respondents are not Canadian residents, which the Respondents would argue affects the Court's jurisdiction to issue the compliance orders or portions thereof.

[30] I agree with the Minister that the Respondents have identified no basis for the process for re-determination of the compliance orders to include further evidence. Issues such as whether the Respondents are Canadian residents, which required an evidentiary foundation, were previously raised by the Respondents, argued by the parties, and addressed in the Judgment. Such issues were no longer before the Court when it issued the Supplementary Reasons and the original Compliance Orders, and nothing in Ghermezian FCA has conferred upon the Court a mandate to reconsider such issues.

[31] The paragraphs in Ghermezian FCA upon which the Respondents rely identify the need for this Court to re-determine the compliance orders on the basis of the reasons in Ghermezian FCA. That mandate includes only the relatively narrow point that, pursuant to requests issued under s 231.1(1) of the Act, the Minister is authorized not only to compel the provision of documents but also to compel the provision of previously undocumented information. As noted in Ghermezian FCA, that process will require recourse to the record that was before the Court

when it issued the original Compliance Orders, but Ghermezian FCA does not contemplate the introduction of new evidence.

[32] It is my view that the process prescribed by the Judgment for determination of the form of the original Compliance Orders, which already served well as a process for that original determination, will also serve well as a process for the required re-determination. On that basis, I disagree with the lengthier timelines proposed by the Respondents and other steps that the Respondents propose to include. I also disagree with the Minister's submission that the initial stage of that process, which afforded the parties 60 days to attempt to reach agreement on the form of the compliance orders, should be shortened to 30 days in the re-determination process. It proved to be beneficial, in determining the form of the original Compliance Orders, to afford the parties enough time to make a meaningful effort to identify and resolve or at least narrow any disagreements on the form of the orders.

[33] I find no basis to depart from the process and related timelines that were previously successfully employed, other than that the process should now expressly contemplate that the parties' submissions on the form of compliance orders (if agreement on the form cannot be reached) be accompanied by any portions of the record before the Court in these applications upon which the parties rely to support their submissions. My Order will adopt that process.

C. *If the Respondents are not entitled to a stay, what procedure should be followed for the adjudication of the costs of these applications?*

[34] On this issue, the parties are largely in agreement that the Court should adopt the process for adjudication of costs of these applications, as prescribed by the original Compliance Orders. The parties diverge only in that the Respondents seek longer timelines for the steps in the process. I find no basis to depart from the timelines previously provided by the Compliance Orders. My Order will adopt that process and its timelines.

V. **Costs**

[35] The Minister's written submissions seek costs in the lump sum amount of $3500.00 related to her preparation of those submissions in advance of, and attendance at, the CMC at which the above issues were argued. However, neither party made any costs submissions at the CMC hearing, in support of quantification or otherwise.

[36] As such, I am not making a separate costs award related to this CMC. Rather, costs associated with the CMC should be addressed through the process for adjudicating costs of these applications, as referenced above and captured in my Order.

**ORDER IN T-252-19, T-254-19, T-258-19,
T-259-19, T-261-19, and T-262-19**

THIS COURT'S JUDGMENT is that:

1. The Respondents' request for a stay of these applications is dismissed.

2. The parties to each application shall confer in an effort to reach agreement on a proposed form of re-determined compliance order, taking into account the reasons of the Federal Court of Appeal in *Ghermezian v Canada (National Revenue)*, 2023 FCA 183.

3. Within 60 days of the date of this Judgment, the parties to each application shall jointly either provide the Court with the agreed proposed form of re-determined compliance order or advise the Court that agreement has not been achieved or has not been achieved in full.

4. If the parties to any application advise the Court, in accordance with paragraph 3, that agreement on a proposed form of re-determined compliance order has not been achieved or has not been achieved in full, the Minister shall, within 14 days of so advising the Court, serve and file her proposed form of re-determined compliance order, accompanied by: (a) written submissions identifying all remaining areas of disagreement and the Minister's positons on those disagreements; and (b) any portions of the record before the Court in these applications upon which the Minister relies to support her submissions. The Respondent shall then, within 14 days of such service, serve and file the Respondent's proposed form of re-determined

compliance order accompanied by: (a) written submissions identifying the Respondent's positions on the remaining areas of disagreement; and (b) any portions of the record before the Court in these applications upon which the Respondent relies to support the Respondent's submissions.

5. Following the Court's issuance of the re-determined compliance order in each of these applications, the Minister shall have 14 days from the date of that order to serve and file submissions on costs, limited to 3 pages plus any bill of costs or other supporting material. The Respondent shall have 14 days from service of the Minister's costs submissions to serve and file submissions on costs, again limited to 3 pages plus any bill of costs or other supporting material. The Minister shall have 5 days from service of the Respondent's costs submissions to serve and file a reply, limited to 2 pages.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-252-19, T-254-19, T-258-19, T-259-19, T-261-19, AND T-262-19
STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE v NADER GHERMEZIAN; MINISTER OF NATIONAL REVENUE v MARC VATURI; MINISTER OF NATIONAL REVENUE v GHERFAM EQUITIES INC; MINISTER OF NATIONAL REVENUE v PAUL GHERMEZIAN; MINISTER OF NATIONAL REVENUE v RAPHAEL GHERMEZIAN; MINISTER OF NATIONAL REVENUE v JOSHUA GHERMEZIAN

Following Case Management Conference on November 6, 2023

ORDER AND REASONS:	SOUTHCOTT J.
DATED:	NOVEMBER 8, 2023

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