Federal Court of Appeal | Cour d'appel fédérale

Date: 20200511

Docket: A-184-19

Citation: 2020 FCA 85

CORAM: **WEBB J.A.**
RENNIE J.A.
MACTAVISH J.A.

BETWEEN:

ROOFMART ONTARIO INC.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on March 2, 2020.

Judgment delivered at Ottawa, Ontario, on May 11, 2020.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: WEBB J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Background

[1] Roofmart Ontario Inc. appeals the order of the Federal Court (2019 FC 506, *per* Campbell D.R. J.) granting an application by the Minister of National Revenue under subsection 231.2(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and its equivalent subsection

289(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15. While I will refer only to the ITA, these reasons apply equally to the provisions in the ETA.

[2] Colloquially known as an unnamed persons requirement and its acronym UPR, these provisions allow the Minister to make an application to the Federal Court requiring a person (a third party) to disclose information relating to an unnamed person or unnamed persons. To grant the application the Court must be satisfied that certain statutory preconditions for judicial authorization as set out in subsection 231.2(3) have been met. Subsection 231.2(3) provides:

Judicial authorization	**Autorisation judiciaire**
(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") if the judge is satisfied by information on oath that	(3) Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou la production de documents prévues au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément — appelée « groupe » au présent article —,s'il est convaincu, sur dénonciation sous serment, de ce qui suit :
(a) 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)]
(4) to (6) [Repealed, 2013, c. 33, s. 21]	(4) à (6) [Abrogés, 2013, ch. 33, art. 21]

[3] The evidence before the Federal Court demonstrated that compliance with the ITA was a significant problem in the residential construction sector of the Canadian economy. A study undertaken by Statistics Canada identified the construction industry as part of the "hidden sector" and a report from the Ontario Ministry of Labour estimated that 28% of the construction industry's economic activity was unreported or underreported and that as much as one fifth of residential construction takes place unreported. Roofmart, which sells to residential and commercial contractors, is one of the largest suppliers of roofing and building materials in Ontario. To address the issue of compliance in the industry, the CRA identified Roofmart as the subject of a UPR due to the size of its business, its clientele, and its geographic location.

[4] The Minister, with a supporting affidavit from the CRA official responsible for addressing the issue, Mr. Blackmore, made an application to the Federal Court. The application targeted Roofmart customers whose total annual purchase and/or billed amount was $20,000 or greater (for the period from January 1, 2015 to December 31, 2017); and customers whose total annual purchase and/or billed amount was $10,000 or greater (for the period from January 1, 2018 to June 30, 2018). Roofmart itself was not under tax audit at the time the Minister made the application.

[5] The Minister sought the following information related to the group of persons described above:

a) The Customers' legal name, business or operating name, contact person, business address, postal code, and all telephone numbers on file;

b) The Customers' business number, if known;

c) The Customers' itemized transaction details including invoice date, invoice number, total sale amount, method of payment, and address of delivery; and

d) All bank account information for the Customers (including transit, institution, and account numbers) from credit applications and/or otherwise maintained by Roofmart in its records.

[6] After reviewing the evidence, the judge concluded that the persons targeted by the application were ascertainable. In his view, the total annual purchase requirement was sufficient to establish the target group of residential and commercial contractors and their identities.

[7] Turning to the second requirement, that the request be "made to verify compliance by the person or persons in the group with any duty or obligation" under the ITA, the judge was satisfied, on the evidence, that the Minister sought the information to verify the unnamed persons' compliance with the ITA. The judge rejected the appellant's argument that the Minster must be currently engaged in an audit of the target group of unnamed persons to succeed in obtaining judicial authorization. In so doing, the judge relied on the decision of this Court in *Canada (National Revenue) v. Greater Montréal Real Estate Board*, 2007 FCA 346, [2008] 3 F.C.R. 366, leave to appeal to SCC refused, 32404 (24 April 2008)(*GMREB),* which held that the verification requirement in paragraph 231.2(3)(*b*) could include a "tax audit project" and did not require an existing audit of particular individuals (*GMREB* at paras. 19, 42-43).

[8] In considering the application, the Federal Court judge rejected what he framed as additional conditions the appellant claimed the Minster must satisfy in order for the Court to grant judicial authorization. The judge noted that in *GMREB* this Court cautioned against interpreting subsection 231.2(3) in a manner that adds requirements beyond those set forth in the ITA (*GMREB* at para. 38).

[9] The judge also rejected the appellant's argument that the application was not initiated by a person with the Minister's delegated authority as required by the legislation. The appellant relied on *Murphy v. Canada (National Revenue)*, 2009 FC 1226 in support of this argument, but the judge distinguished the case, noting that *Murphy* was a judicial review concerned with a different provision of the ITA than the application before the Court (Federal Court reasons at para. 7).

[10] The judge concluded that the statutory preconditions had been met and granted the Minister's application.

II. Issues on Appeal

[11] The appellant raises three main objections to the order.

[12] First, the appellant contends that the application is *ultra vires* because it was not brought by a person authorized by the statute to do so. Second, the appellant argues that the Federal Court erred in its application of the statutory criteria. More particularly, it was an error to find that the unnamed persons are "ascertainable" within the meaning of paragraph 231.2(3)*(a)* of the ITA, and that the information was required to "verify compliance" within the meaning of paragraph 231.2(3)*(b)* of the ITA. Third, the appellant argues that Federal Court applied the incorrect burden of proof to its assessment of the Minister's application.

[13] In my view, there is no merit to these arguments and the appeal should be dismissed.

III. Preliminary observations

[14] Before I turn to the arguments advanced before us, three preliminary observations are in order. They concern the standard of review, basic principles regarding the interpretation of taxation legislation, and the legislative history of section 231.2 and its doppelganger in the ETA.

[15] I begin with the standard of review.

[16] The appellant argues that this Court should review the Federal Court decision on each of the statutory preconditions on a standard of correctness.

[17] I do not agree. These are questions of mixed fact and law that warrant review on a standard of palpable and overriding error. Questions of mixed law and fact are questions about whether the facts satisfy the legal tests (*Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35). They involve the application of a relevant legal standard, in this case the statutory criteria, to a particular set of facts (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 26).

[18] The second preliminary observation concerns the principles governing the interpretation of taxation legislation.

[19] The appellant argues that the purpose of requiring judicial authorization for a UPR is to allow arbitration between the Minister's duty to enforce the Act and the taxpayer's right to

privacy, and to protect the taxpayer against unreasonable fishing expeditions. The appellant emphasized the need for a high standard of proof of objective evidence in order to protect unnamed persons from undue invasions of privacy. The appellant argues that the statute imposes more onerous requirements on an authorizing judge than those the Federal Court recognized. It contends that the Minister must disclose all relevant evidence pertaining to the requirement, including the purpose for which the information is collected and the use to which the information will be put.

[20] Where the words of a provision are clear and unambiguous, as they are here, the words must simply be applied (*Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 at para. 40). 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 S.C.R. 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 S.C.R. 715 at para. 23).

[21] As I will describe, the appellant's argument asks us to do that which these basic principles prohibit. It asks that the clear words of section 231.2 be qualified by reading in broader concepts such as the requirement of balancing privacy rights against the requirement that the Minister have the requisite tools to administer the Act. Parliament has already done that balancing and made its decision. It has left the Federal Court the obligation of ensuring that two

factual prerequisites are established in the evidence on a balance of probabilities. To read in limitations as urged would undermine consistency, predictability and fairness in the application of the Act (*Canada v. Lehigh Cement Limited*, 2014 FCA 103, [2015] 3 F.C.R. 117 at paras. 41-42).

[22] The final preliminary observation concerns the legislative history of subsection 231.2(3). As noted, the appellant's argument that the judge erred in his consideration of subsection 231.2(3) is inconsistent with the provision's legislative history.

[23] When Parliament first enacted section 231.2, it required the Minister to meet several statutory preconditions in order to access the provision's power. These preconditions have been winnowed through legislative amendments. In 1996, Parliament repealed paragraphs 231.2(3)(*c*) and (*d*), doing away with two preconditions: that there be reasonable grounds to believe the subject of a UPR had not complied with the Act; and that the information or documents requested were not otherwise more readily available.

[24] The appellant relies on the Supreme Court of Canada decision in *James Richardson & Sons v M.N.R.*, [1984] 1 S.C.R. 614 to argue that a UPR is not to be used for the purpose of gathering information. In that case, the Supreme Court cautioned that the Minister could not employ subsection 231(3) (an earlier provision that was analogous to section 231.2) to check on the general compliance of an entire class of taxpayers; instead, for the Minister to obtain information, the tax liability of such persons must be the subject of a "genuine and serious inquiry" (*Richardson* at 624-625).

[25] *Richardson* is of no assistance to the appellant. Parliament enacted section 231.2 (the provision at issue here) to address the Supreme Court's decision in *Richardson* (see *eBay Canada Limited v. Canada (National Revenue)*, 2008 FCA 348, [2010] 1 F.C.R. 145 at para. 62 (*eBay I*)). Section 231.2 gives the Minister the express power to request information from unnamed persons—something the provision at issue in *Richardson* did not do.

[26] In *GMREB* this Court warned that the Supreme Court's decision in *Richardson* should be read with caution (*GMREB* at para. 26), a caution which bears both repeating and reinforcing. The Court in *GMREB* concluded that the legislative amendments demonstrated Parliament's intention to ease the Minister's burden of proof to obtain authorization for the issuance of a UPR; proof of a "genuine and serious inquiry" was no longer required (*GMREB* at paras. 36-38). In *eBay I*, this Court confirmed the principles stemming from *GMREB* (*eBay I* at paras. 62, 68).

[27] The provisions Parliament deleted cannot be resuscitated or brought in through the back door in the guise of policy arguments pertinent to the exercise of the judge's discretion whether to grant the order. I reiterate the Court's conclusion in *GMREB* that there are no additional criteria that need to be met before the Court can issue an authorization (*GMREB* at para. 38). With these observations made, I turn to the appellant's specific challenges to the order.

IV. The *vires* argument

[28] Subsection 231.2(3) of the ITA states that the application for judicial authorization is to be made by the Minister. The appellant argues that it was not the Minister who made the

application, but Mr. Blackmore, the CRA official who swore the affidavit in support of the application.

[29] Subsection 220(2.01) of the ITA grants the Minister the authority to delegate the exercise of her powers to an officer or a class of officers. Under that authority, the incumbents of certain listed positions may make an application to a judge. Mr. Blackmore did not have delegated authority to bring the application. According to the appellant, this lack of authority is fatal; the explicit delegation scheme described above precludes any further sub-delegation (*Bancheri v. M.N.R.*, [1999] T.J.C. No 22 (T.C.C.) at para. 45).

[30] In support of its contention that it was Mr. Blackmore, in fact, who brought the application, the appellant points to correspondence between Mr. Blackmore and Roofmart discussing the possibility the application would proceed on consent. Mr. Blackmore wrote that "we" intend to bring an application irrespective of the position taken by Roofmart. During cross-examination on his affidavit Mr. Blackmore also stated that he "decided to proceed with a UPR to Roofmart […]" (cross-examination of Mr. Blackmore, appeal book, tab 6, p. 145 at line 8).

[31] This evidence is of no consequence. The notice of application was brought by the Minister of National Revenue, and not by Mr. Blackmore. The notice of application describes, in several paragraphs, why the Minister is seeking the order. It notes, in paragraphs (e) and (f), that the Minister seeks the information to verify that certain of Roofmart's customers have complied with their duties and obligations under the ITA and ETA. Because the Minister does not know the identities of Roofmart's customers, she seeks judicial authorization to impose requirements

on Roofmart. The notice of application is signed by counsel for the Attorney General, who is referred to in the notice of application as "counsel for the applicant", with the applicant clearly stated as being the Minister.

[32] Roofmart's argument confounds the authority to bring the application, which rests with the Minister or their delegate, with the role of the person who swore the affidavit filed in support of the Minister's application. Mr. Blackmore, in his affidavit, deposes as to the rationale underlying the request for a UPR and addresses the statutory criteria. He did not, however, bring the application. The fact that Mr. Blackmore's affidavit is proffered in support of the Minister's application does not change the fact that it is the Minister, not the affiant, who made the application for authorization (see e.g. *GMREB* at para. 49). The two are discrete legal identities, at least for these purposes. This, however, does not entirely dispose of the appellant's argument that the application was not lawfully instituted.

[33] The second branch of the appellant's *vires* argument is that there was no evidence before the Court that the Minister's counsel had the Minister's authority or instructions to bring the application. This argument evolved at the oral hearing of the matter. More is required, it was said, to prove that the Minister *per se* instructed the filing of the notice of application. That proof might come either in the form of the retainer or instructions from the Minister. When pressed by the Court to answer whether the appellant was asserting that the Minister's counsel did not have authority to bring the application, counsel responded that that the Minister's counsel had not discharged her burden to establish that she had authority to bring the application.

[34] This argument fails. Once retained, counsel have all the authority—apparent, ostensible and implied—to take all necessary steps and actions in litigation on behalf of their client (*Sourani v. Canada*, 2001 FCA 185 at para. 4; *Bandag Inc. v. Vulcan Equipment Co Ltd. et al.*, [1977] 2 F.C. 397 (T.D.) at para. 8).

[35] While it is true that when an opposing party challenges a solicitor's authority, the burden of proof lies on the person who alleges the authorization (see e.g. *Sasko-Wainwright Oil & Gas Ltd. v. Old Settlers' Oils Ltd*., [1957] 7 D.L.R. (2d) 393 (Alta. C.A.) at 395; *Ashburton Oil Ltd. v. Sharp*, 1992 CarswellBC 2591 (B.C.S.C.) at para. 1), such an objection to authority should be made not in an application or appeal but by way of a motion to stay the proceeding. The court need not, and ordinarily should not, entertain such an objection as if it were a defence (*Sasko*, *supra* at 396). An exception lies where it is plain that there is a want of authority in a given proceeding. Here, there is nothing in the record that justifies, even remotely, the argument that counsel did not act with instructions.

V. The requirement of an ascertainable group

[36] The appellant relies on the Federal Court decision in *Canada (National Revenue) v. Hydro-Québec*, 2018 FC 622 (*per* Roy J.). In that decision, the Federal Court held that "[w]hen the group is generic and has no connection to the ITA, and information can be requested outside of the scope of the ITA (such as identifying the business clients of a public utility) there is no longer any limit on the fishing expedition" (at para. 78). The appellant refers to these comments in *Hydro-Québec* as the "legal test" and argues that the Federal Court in this case erred in law by

failing to apply the test as articulated in *Hydro-Québec* and by not weighing Mr. Blackmore's evidence against that test. This failure, the appellant says, will result in an invasion of privacy into thousands of taxpayers' detailed personal information.

[37] I disagree that the Federal Court's recent decision in *Hydro-Québec* sets out the applicable legal test. The above passage is not a legal test but analysis of whether, on the facts of that case, there was an "ascertainable group" and whether the information was required for the purposes of verifying compliance. They are the judge's appreciation of the evidence before the Court and no more. Further, as will become clear, the suggestion in the reasons that the information sought was available through other means and therefore could not be obtained through a UPR is inconsistent with this Court's jurisprudence and ought not to be followed.

[38] In the case before us, the Federal Court was satisfied that the unnamed persons targeted by the application were an ascertainable group (Federal Court reasons at para. 11). There was ample evidence that justified its conclusion that the group was ascertainable. The total annual purchase requirement was sufficient, in view of the Federal Court, to establish the target group of residential and commercial contractors among Roofmart's customers (Federal Court reasons at para. 11). I see no reviewable error in that conclusion.

[39] The fact that the UPR may target an unspecified or large number of accounts or that a significant amount of financial information may be captured does not affect its validity. The statutory criteria are not altered by the size of the request. The question remains the same: is the group ascertainable?

[40] Nor does the fact that the UPR may inadvertently sweep in some of Roofmart's customers who are neither commercial nor residential construction contractors but nevertheless buy large volumes of roofing materials. The existence of some customers who may be of no interest to the Minister for the purposes of verifying compliance cannot determine whether an order should issue. This argument would, if given effect, sterilize the Minister's ability to do horizontal or sector wide assessments of tax compliance.

[41] In *Minister of National Revenue v. Rona Inc*., 2016 CarswellNat 5372, aff'd 2017 FCA 118, the Federal Court authorized the Minister to issue a UPR targeting the commercial customers of 57 Rona stores. The Minster in that case sought the name, address, and the total amount of annual transactions on each commercial account for a period of three years. As the decisions of this Court in *eBay I*—where the UPR targeted an estimated 10,000 individuals—and *Rona* demonstrate, the question of whether a group is ascertainable is not determined by the scale of the request (*eBay I* at para. 11).

[42] That the group in this case is ascertainable is a finding of mixed fact and law, and the appellant has demonstrated no error that would warrant interference. This ground of appeal fails.

VI. Verification of compliance

[43] The appellant next argues that the Minister failed to prove that the information it sought will verify compliance with the ITA. According to the appellant, the words "verify compliance" in paragraph 231.2(3)*(b)* of the ITA require the Minister to demonstrate that a tax audit is

underway and is conducted in good faith (*GMREB* at para. 48). The Court in *Hydro- Québec* held that this test must be strictly met. The appellant asserts that the respondent failed, according to this strict test, to establish that the information was required for a tax audit conducted in good faith.

[44] This argument is inconsistent with the jurisprudence of this Court.

[45] *GMREB* established that a pending or existing tax audit of a particular individual is not a precondition to the exercise of power under subsection 231.2(3) (*GMREB* at paras. 19, 42-43). The Court held that under subsection 231.2(3) Parliament intended to permit a broad inquiry, subject to the conditions being met. Trudel J.A., noted (at para. 45):

> Regardless of what the GMREB says on this point, it appears to me that in removing paragraphs (c) and (d) from subsection 231.2(3), *Parliament permitted a type of fishing expedition*, with the authorization of the Court and on conditions prescribed by the Act, all for the purpose of facilitating the MNR's access to information. It seems to me that the strict approach adopted by the judge in this case is not appropriate for the provision under review. This approach, borrowed from *Richardson*, was necessitated by the scope of the former statutory provision which, if interpreted too broadly, left open the possibility of abuse by tax enforcement officials (*Sand Exploration, supra*).
>
> [Emphasis added]

[46] In cross-examination Mr. Blackmore was unable to explain precisely how the information obtained by the authorization would actually be used for verification purposes. Mr. Blackmore, who is not an auditor, gave a general sense of the purpose to which the information would be put (cross-examination of Mr. Blackmore, appeal book, tab 6, p. 190 at line 6 - p. 199 at line 7). The Federal Court found that his testimony was sufficient to establish that the information sought

would assist in determining whether the unnamed persons had filed their returns as required, made payroll, GST and HST remittances, reported any and all of the income earned on the sale or supply of roofing materials, or claimed the purchases as business expenses (Federal Court reasons at para. 13).

[47] The evidence before the Federal Court sufficiently tethers the request to the purposes of verification of compliance.

[48] In sum, the appellant's arguments attempt to reinsert criteria into the legal test that are no longer in the legislation. The arguments also seek to convert the application for an order into a judicial review of the reasonableness of the Minister's decision to seek the information, which it clearly is not. For these reasons, I would find that the Federal Court committed no palpable and overriding error and dismiss this ground of appeal.

VII. Standard of Proof

[49] I turn to the appellant's final argument: that the judge did not apply the correct standard of proof in assessing the Minister's application. It argues that a higher duty—one of absolute candour and full disclosure—is required, and that in seeking an authorization under subsection 231.2(3), the Minister cannot leave "a judge [...] in the dark" on facts relevant to the exercise of discretion, even if those facts are harmful to the Minister's case (*Canada (National Revenue) v. Derakhshani*, 2009 FCA 190 at para. 29). The appellant also says the Minister has a "high standard of good faith" to make "full disclosure" so as to "fully justify" an order under subsection

231.2(3) (*Canada (Minister of National Revenue) v. National Foundation for Christian Leadership*, 2004 FC 1753, aff'd 2005 FCA 246 at paras. 15-16; see also *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 at para. 26).

[50] According to the appellant, the Minister failed to meet this high standard in the case at bar.

[51] The jurisprudence on which the appellant relies derives from a different era, when UPR applications were made *ex parte*. That era ended in 2013, when Parliament amended the ITA and ETA to remove the *ex parte* stage of the authorization process.

[52] It is well-established that *ex parte* applications trigger a higher standard of disclosure. Mareva injunctions and Anton Pillar orders readily come to mind (*Eli Lilly Canada Inc. v. Novopharm Limited*, 2010 FC 241 at para. 10; *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189 at para. 37). In *Minister of National Revenue v. Sand Exploration Ltd.*, [1995] 3 F.C. 44 (T.D.), a case decided under the old *ex parte* provisions, Rothstein J. observed, “the fact that the Minister may obtain a court authorization *ex parte* places an obligation on the Minister to act in the utmost good faith and ensure full and frank disclosure of information” (at para. 16). This jurisprudence ceased to be relevant with the 2013 amendments.

[53] Roofmart had prior notice of the Minister's intention to seek an order, had an opportunity to comment on the draft UPR order, and was represented by counsel on the return of the application in the Federal Court.

[54] The appellant argues that because UPR orders are an intrusion into the private business affairs of individuals and may require a party, such as the appellant, to breach its obligation to protect the confidentiality of their customers' information, the *ex parte* standard of disclosure should none the less apply.

[55] I do not accept this limitation on the discretion of the Court to grant a UPR. Canada has a system of self-assessment and self-reporting of income. It depends on the integrity and honesty of taxpayers to be fair and efficient *(R. v. McKinlay Transport Ltd*., [1990] 1 S.C.R. 627 at 636). Parliament has granted the Minister corresponding powers to verify and test compliance. These powers lie at the heart of the Minister's ability to enforce taxation legislation. The broader public interest in the enforcement of our system of taxation outweighs the appellant's private and commercial interests in not disclosing its clients' personal information (*eBay Canada Limited v. Canada (National Revenue)*, 2008 FCA 141 at para. 39 (*eBay II*)). This Court's response in *eBay I* to similar policy arguments regarding taxpayer privacy bears repeating here (*eBay I* at para. 67):

> In a self-reporting system of taxation, "[t]axpayers have a very low expectation of privacy in their business records relevant to the determination of their tax liability" (*Redeemer Foundation v. Canada (Minister of National Revenue*), 2008 SCC 46 at para. 25) and a requirement "provides the least intrusive means by which effective monitoring of compliance with the *Income Tax Act* can be effected" (*R. v. McKinlay Transport Ltd.*, *supra* at 649).

[56] Finally, there is the question of the Court's overriding discretion. Even if the criteria set out in the ITA are met, the judge has discretionary authority to remedy abuses (*Rona*, 2017 FCA 118 at para. 7; *RBC Life Insurance Company* at para. 23; see also *Derakhshani* at para. 19). Judicial discretion remains a component of subsection 231.2(3), but that discretion is not a means by which Parliament's policy choices, as expressed in the subsection, are to be revisited.

[57] In this case, the Federal Court exercised its discretion in favour of the Minister. This Court in *Rona* reiterated that when a court of appeal is faced with the exercise of discretion by a judge, it must "be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner" (*Rona* at para. 7, citing *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478 at para. 52). I see no error in the exercise of the judge's discretion in this case.

[58] For the foregoing reasons, I would dismiss the appeal.

"Donald J. Rennie"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED APRIL 24, 2019, AMENDED ON AUGUST 1, 2019, IN COURT FILE NO. T-1587-18)

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