Federal Court of Appeal | Cour d'appel fédérale

Date: 20230901

Dockets: A-65-22 (lead file)
A-151-22

Citation: 2023 FCA 183

CORAM: **STRATAS J.A.**
LOCKE J.A.
ROUSSEL J.A.

BETWEEN:

NADER GHERMEZIAN, MARC VATURI, GHERFAM EQUITIES INC., PAUL GHERMEZIAN, RAPHAEL GHERMEZIAN, and JOSHUA GHERMEZIAN

Appellants
(Respondents by cross-appeal)

and

THE MINISTER OF NATIONAL REVENUE

Respondent
(Appellant by cross-appeal)

Heard at Toronto, Ontario, on March 1, 2023

Judgment delivered at Ottawa, Ontario, on September 1, 2023.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

CONCURRED IN BY: STRATAS J.A.

LOCKE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20230901

Docket: A-65-22 (lead file)
A-151-22

Citation: 2023 FCA 183

CORAM: **STRATAS J.A.**
LOCKE J.A.
ROUSSEL J.A.

BETWEEN:

NADER GHERMEZIAN, MARC VATURI, GHERFAM EQUITIES INC., PAUL GHERMEZIAN, RAPHAEL GHERMEZIAN, and JOSHUA GHERMEZIAN

Appellants
(Respondents by cross-appeal)

and

THE MINISTER OF NATIONAL REVENUE

Respondent
(Appellant by cross-appeal)

REASONS FOR JUDGMENT

ROUSSEL J.A.

I. Overview

[1] The Canada Revenue Agency (CRA) has been conducting an audit of the Ghermezian family under its Related Party Initiative since at least 2014. The appellants are five members of the extended Ghermezian family and a related corporation, Gherfam Equities Inc.

[2] In the course of the audits, the Minister of National Revenue issued various requests and requirements to the relevant appellants for the provision of documents and/or information pursuant to sections 231.1 and 231.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA) (collectively, the "demands").

[3] As the appellants failed to provide most of the required material by the stipulated deadlines, the Minister served and filed on February 7, 2019, six applications requesting the issuance of compliance orders pursuant to section 231.7 of the ITA. The Minister subsequently amended the notices of summary application in April 2021, to specify the particular demands that were still outstanding.

[4] The appellants cross-examined the Minister's affiant, who in July 2019 was a case manager with the CRA and had the conduct of the appellants' audit matters. The appellants did not lead any evidence.

[5] The Federal Court heard the compliance applications over a period of four days in January 2022. The appellants opposed the applications, raising several arguments. These included the proper statutory interpretation of sections 231.1 and 231.2 of the ITA and the Minister's authority to obtain information and documentation from the appellants. The appellants argued that many of the requests issued under subsection 231.1(1) sought information and/or documentation that was compellable only through a requirement issued under subsection 231.2(1) and therefore were invalid. They also claimed that the demands did not provide a reasonable time for compliance and that they related to one or more unnamed persons, requiring prior judicial authorization under subsection 231.2(3) of the ITA.

[6] On February 23, 2022, the Federal Court issued a 364-paragraph decision (2022 FC 236) (FC decision), granting the Minister's applications. In particular, it held that subsection 231.1(1) of the ITA entitled the Minister to compel documents without physically attending at a place or premises where the documents were kept (FC decision at para. 78), but that it did not extend to compelling a taxpayer to respond to requests for undocumented information (FC decision at paras. 83, 111). It also found that the appellants had not met their burden of demonstrating that the demands did not stipulate a reasonable time to comply (FC decision at paras. 156-160). It further held that the Minister did not have to obtain prior judicial authorization under subsections 231.2(2) and (3) as the Minister was not seeking to verify compliance of unnamed persons (FC decision at paras. 161-169, 259, 326, 332, 335, 338-339).

[7] Given the mixed success of the parties on the interpretation of subsection 231.1(1), the Federal Court invited the parties to provide further submissions on the application of its

conclusions to the individual items in the requests. It also encouraged them to reach an agreement on the proposed form of compliance orders.

[8] On July 8, 2022, the Federal Court issued the compliance orders as well as supplementary reasons (2022 FC 1010), explaining its conclusions on the outstanding disputes, as identified by the parties in their written submissions.

[9] The appellants appeal the February 2022 judgment of the Federal Court (A-65-22) as well as the six subsequent compliance orders issued in July 2022 (A-151-22). While they raised other grounds in their notices of appeal, the appellants submit in their amended memorandum of fact and law that the Federal Court erred in holding that subsection 231.1(1) of the ITA empowered the Minister to compel the production of documents without physically attending the appellants' business premises. Second, they argue that the Federal Court erred in failing to find that the requirements issued under section 231.2 of the ITA were *ultra vires* on the basis that the Minister did not stipulate an objectively reasonable time for compliance. Third, they say that the Federal Court erred in finding that prior judicial authorization under subsection 231.2(3) of the ITA was not required when issuing a requirement with a dual intention of auditing a named person along with an unnamed person.

[10] In turn, the Minister cross-appeals on the basis that the Federal Court erred in holding that section 231.1 of the ITA did not authorize the compulsion of information, other than information contained in a document.

[11] On July 20, 2022, the Court consolidated the appeals of the judgment and of the six compliance orders. The compliance orders were stayed pending the disposition of the appeals. Prior to the hearing, the Court issued a Direction to the parties, requesting that they be prepared to make submissions at the hearing on the effect that *Miller v. Canada (National Revenue)*, 2022 FCA 183—which postdates the submission of the parties' memoranda—might have on the issues in the appeal.

[12] These are the reasons in both appeals. The original of these reasons shall be placed in file A-65-22 and a copy in (A-151-22). For the reasons that follow, I would dismiss the appeals and allow the cross-appeals.

II. Analysis

A. *Standard of Review*

[13] Since the appeals are from decisions of the Federal Court, the appellate standard of review applies. Therefore, errors of law are reviewable on a standard of correctness, whereas questions of fact or of mixed fact and law, from which a legal issue cannot be extricated, are reviewed on a standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33; *Miller* at para. 23).

B. *Interpretation of Subsection 231.1(1) of the ITA*

[14] It is noteworthy to mention at the outset that subsection 231.1(1) of the ITA was amended by subsection 54(1) of the *Fall Economic Statement Implementation Act, 2022*, S.C. 2022, c. 19, assented to on December 15, 2022. Since the Federal Court's judgment and compliance orders as well as the parties' submissions on appeal are based on the previous legislation, I refer in these reasons to subsection 231.1 as it read before the amendment. Subsection 231.2 has also been amended, but only in regards to the manner in which notice may be served on a bank or credit union.

[15] As stated above, in their memorandum, the appellants challenge the Minister's authority to compel the provision of documents through written requests, without physically attending the appellants' business premises. They argue that section 231.1 of the ITA grants an inspection power, which they describe as the power for an authorized person to access any premises to inspect, audit or examine a taxpayer's books and records or the property in inventory. Section 231.2, on the other hand, empowers the Minister (or a duly authorized delegate) to require, by duly served notice, any person to provide information and documents, within such reasonable time as stipulated in the notice (requirement power).

[16] The appellants maintain that none of the requests under the section 231.1 inspection power are valid as none were made in the context of an on-site attendance where the appellants' books and records were kept. Thus the conditions precedent set out in paragraph 231.7(1)(*a*) of the ITA for the issuance of compliance orders have not been met.

[17] The Minister, on the other hand, asserts that the audit powers under section 231.1 are not limited to merely requiring the production of pre-existing documents, but extend to compelling the provision of information that is or should be in a taxpayer's books and records.

[18] For ease of reference, I have reproduced subsections 231.1(1) and 231.2(1) as they read when the requests were sent:

Inspections	**Enquêtes**
231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,	**231.1 (1)** Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois :
(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and	**a)** inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;
(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,	**b)** examiner les biens à porter à l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;

and for those purposes the authorized person may

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

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

Requirement to provide documents or information

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

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

à ces fins, la personne autorisée peut :

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

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

Production de documents ou fourniture de renseignements

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

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

(b) any document.	**b)** qu'elle produise des documents.

[19] In my view, in *Miller*, this Court settled the scope of the Minister's authority under subsection 231.1(1) and determines a significant portion of this appeal. *Miller* binds us unless we are persuaded that it is manifestly wrong: *R. v. Sullivan*, 2022 SCC 19. The appellants did not make any such submission.

[20] In *Miller*, the Minister had sought a compliance order pursuant to section 231.7 of the ITA, requiring Mr. Miller to provide information and documents, as well as seek information and documents from his accountants, solicitors, and bank in Luxembourg. The compliance application in the Federal Court followed a series of requests issued under section 231.1 by the Minister.

[21] Mr. Miller challenged the scope of the requests made by the Minister. He argued that this Court's decision in *Canada (National Revenue) v. Cameco Corporation*, 2019 FCA 67 stood for the proposition that, where a request was issued under section 231.1, the Court could only order the production of documents in a taxpayer's possession and require a taxpayer to provide information about the provenance, location or maintenance of the taxpayer's books and records.

[22] In reasons reported as *Canada (National Revenue) v. Miller*, 2021 FC 851, the Federal Court concluded that the Minister had the authority under subsection 231.1(1) to require the production of information that went beyond the provenance, location or maintenance of Mr. Miller's books and records or other documents. In its view, the broad wording used in subsection 231.1(1) of the ITA, and particularly the reference to "information that is or should be

in the books or records of the taxpayer", gave the Court the authority to make the compliance order since the information solicited should have been in Mr. Miller's books and records. An example of such information included the terms and conditions of an oral contract between Mr. Miller and a corporate client based in Europe. The Federal Court also found, for the same reasons, that the Minister had the authority to require that Mr. Miller attempt to obtain the requested information and documents from his bank in Luxembourg, his accountant, and his solicitors.

[23] On appeal, this Court upheld the Federal Court's decision.

[24] As Mr. Miller's arguments rested primarily on the Court's decision in *Cameco*, this Court began by considering what precisely had been decided in that case. It found that the issue before the Court in *Cameco* concerned only the Minister's right to compel individuals to attend oral interviews to answer questions under paragraph 231.1(1)(*a*) of the ITA and that the decision's broader statements had to be understood in that context (*Miller* at para. 36).

[25] Then, after conducting a textual, contextual and purposive analysis and relying on the decision of the Supreme Court of Canada in *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, this Court concluded that the Federal Court had not erred in finding it had the authority under subsection 231.1(1) of the ITA to make the order it did.

[26] In my view, if the CRA had the authority under subsection 231.1(1) to seek the sort of information it did in *Miller*, which information went beyond the physical examination of a record

in the possession of the taxpayer at the taxpayer's business premises, then the appellants' arguments relating to the scope of the Minister's powers under subsection 231.1(1) must fail.

[27] It would be illogical to require that the Minister have to physically attend the taxpayer's business premises each time she required documents or that she have to issue a requirement under section 231.2 of the ITA. Paragraph 231.1(1)(*d*) of the ITA, which authorized the Minister to enter a person's business simply assisted the Minister in the execution of her investigative powers granted under paragraphs 231.1(1)(*a*) and (*b*). It did not foreclose her from requiring documents by sending a letter to the taxpayer, nor from requesting information.

[28] At the hearing, the appellants insisted that they were not asking this Court to overturn the decision in *Miller*, but argued that it was distinguishable on the facts and the law.

[29] They submit that, while the Court in *Miller* acknowledged the existence of overlap between sections 231.1 and 231.2, it did not engage with the paramountcy clause in section 231.2 or with the common law principle that the specific prevails over the general. The appellants argue that the introductory words "[n]otwithstanding any other provision of this Act" in subsection 231.2(1) of the ITA establish that provision's paramountcy over section 231.1 of the ITA. They say that if section 231.1 also authorized the issuance of compulsory written demands requiring a person to provide information and documents, this would create operational incompatibility between the provisions.

[30] I do not find this argument persuasive.

[31] In *Miller*, this Court was fully cognizant of the introductory words of section 231.2 and of its overlap with section 231.1 when it conducted its contextual analysis (*Miller* at paras. 67-68). Mr. Miller had argued that both sections were a complete code such that the powers under section 231.2 could not be exercised under section 231.1. The Court found this argument untenable in light of the decision in *Redeemer* (*Miller* at para. 68).

[32] In *Redeemer*, the Supreme Court of Canada confirmed the Minister's broad powers under subsection 231.1(1) of the ITA. The appellant Foundation was a registered charity, operating a forgivable loan program that financed the education of students at an affiliated college. Concerned that certain contributions to the Foundation were not valid charitable donations, the CRA asked the Foundation for a list of its donors. The Foundation sought judicial review of the CRA's request for donor information. The issue before the Supreme Court was whether the Minister could rely on subsection 231.1(1) to obtain the identity of the donors or whether the Minister had to obtain prior judicial authorization under subsections 231.2(2) and (3) of the ITA. The Supreme Court found that, on its face, section 231.1 covered the situation at bar as the information at issue was information that was either in the Foundation's books or should have been pursuant to the record-keeping requirements found in subsection 230(2) (*Redeemer* at para. 13). The Supreme Court concluded that judicial authorization was not required (*Redeemer* at para. 1).

[33] At paragraph 15 of its decision, the Supreme Court specifically considered the interplay between sections 231.1 and 231.2 of the ITA. The Foundation had argued that the principles of statutory construction required the Court to read subsection 231.1(1) as not permitting access to

third-party records without judicial authorization. It maintained that section 231.2 would serve no purpose if section 231.1 were read as providing authority to the Minister to obtain information of unnamed parties during the audit of a taxpayer. The Supreme Court rejected the Foundation's arguments in the following terms:

> Statutory provisions must be interpreted in a textual, contextual and purposive way, and all sections of a related group of provisions should be given coherent meaning if possible. But, we do not accept the argument that s. 231.2 serves no purpose if s. 231.1 is read as authorizing the Minister to obtain information on unnamed third parties during the audit of a taxpayer. The Minister may well need to obtain information about one or more taxpayers outside the context of a formal audit. Section 231.2 responds to this need, subject to a requirement for judicial authorization if the Minister is seeking information relating to unnamed persons from a third party record holder. It follows that the argument that s. 231.1(1) should be read down to avoid redundancy fails.

[34] In addition to confirming the Minister's broad powers under subsection 231.1(1), *Redeemer* illustrates that while the two provisions overlap, this does not make them redundant. Both provisions authorize the Minister to request the provision of information and documents that are or should be in the taxpayer's books and records. However, section 231.2 of the ITA grants the Minister broader and different powers. It is not limited to the audit context. The wording in subsection 231.2(1) is also permissive, not mandatory. Where appropriate, the Minister "<u>may</u>" choose to proceed under subsection 231.2(1) of the ITA as opposed to subsection 231.1(1) of the ITA.

[35] Moreover, the existence of overlap between the two provisions does not mean that they are in conflict with one another, as the appellants suggest. On the contrary, statutory provisions are presumed to work together and of being capable of operating without coming into conflict with any other (Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis,

2022), § 11.01). It is only when both provisions cannot apply without conflict that the courts will resort to certain rules and techniques to resolve the conflict and determine which provision will prevail. Such rules and techniques include determining which provision is paramount, either through legislative intent or by implied exception where the more specific provision shall prevail.

[36] The problem with the appellants' paramountcy argument is that they have not demonstrated the existence of a conflict between the two provisions. The fact that the procedural requirements in section 231.2 are absent from section 231.1 does not establish a conflict. Given that subsection 231.2(1) allows the Minister to seek information from persons who are not part of the audit process (third-party record keepers), one can easily understand the requirement that notice be served on the person required to provide the information or documentation. In *Miller*, this Court noted the different procedural requirements, but found that the audit process would likely be significantly hindered if the Minister were required to proceed under section 231.2 of the ITA every time information that should have been recorded in the taxpayer's books and records was required from a taxpayer (*Miller* at para. 66).

[37] The doctrine of paramountcy, as argued by the appellants, cannot be engaged in the absence of conflict between the two provisions. It is therefore unnecessary to determine which provision prevails.

[38] The appellants also argue that, in *Miller*, it was undisputed that Mr. Miller had failed to maintain books and records as required in section 230 of the ITA. They say they made no such

admission. While that may be so, it is unclear from the record to what extent, if any, the issue of whether or not the information should have been in the appellants' books and records was canvassed before the Federal Court. As the issue was not dealt with in the Federal Court's reasons, one can infer that it was not central to the appellants' arguments. If the appellants had wanted to raise this defence—either because it was outside the six-year limitation period provided in paragraph 230(4)(*b*) of the ITA or for any other reason—they had to do so explicitly and with sufficient particularity, such that the Federal Court could make a determination on the issue. The issue before the Federal Court was not whether the information was or should have been in the appellants' books and records, only whether the information in question was documented.

[39] The appellants further submit that "the legislative history of section 231.1 demonstrates that the power to audit or examine does not include a power to seize documents or information" (appellants' responding memorandum of fact and law at para. 17, emphasis in original). They contend that the CRA auditor's power to seize documents was intentionally removed by Parliament pursuant to the 1986 amendments.

[40] This Court considered the legislative history of section 231.1 in *Miller* when it examined the application of *Cameco*. This Court nonetheless found that the Federal Court could compel the production of information that was or should have been in Mr. Miller's books and records.

[41] The appellants also attempt to distinguish *Miller* on the basis that it did not involve any section 231.2 requirements and that it concerned a narrower or more discrete volume of items.

These factual differences do not make the legal holdings in *Miller* any less applicable in this case.

[42] Despite the able submissions of counsel for the appellants, I am not persuaded that this Court's decision in *Miller* does not settle the issue of the Minister's authority under subsection 231.1(1) of the ITA. Accordingly, the Federal Court did not err in law in determining that subsection 231.1(1) entitled the Minister to demand the provision of documentation without physically attending the place or premises where the documentation is kept. However, the Federal Court committed a legal error in concluding that it did not permit the Minister to require undocumented information.

C. *Reasonable Time for Compliance*

[43] The appellants submit that subsection 231.2(1) expressly obliges the Minister, when issuing section 231.2 requirements, to stipulate a reasonable time for compliance. They argue that the Minister failed to perform an assessment of the time required for compliance and provide the appellants with an objectively reasonable period to reply. They rely in part on the alleged statement made by the CRA's affiant during cross-examination that he recommended the 30-day period because it was the shortest period permitted by the CRA policy. The appellants consider this unreasonable, since they were expected to assemble a vast amount of very dated documents and information.

[44] They submit that the failure to stipulate an objectively reasonable time for compliance renders the requirements *ultra vires* and unenforceable. As a result, the condition precedent set out at paragraph 231.7(1)(*a*) of the ITA for the issuance of compliance orders was not met and the Federal Court erred in holding otherwise.

[45] The appellants further submit that the Federal Court erred in shifting to them the onus to show that they were unable to comply within the stipulated period. They say that the extensive scope of the information and documents sought, coupled with the affiant's statement, amply demonstrated that the Minister failed to stipulate a reasonable time for compliance. In their view, there was no need for any of the appellants to adduce evidence in order to embellish the record.

[46] I do not find the appellants' arguments convincing.

[47] The Federal Court took no issue with the appellants' argument that the Minister is required to perform an assessment of the time required for compliance and provide the recipient with an objectively reasonable period to reply, based on the volume and details of the requirements and circumstances then known to the Minister (FC decision at para. 153). However, the Federal Court disagreed with the appellants' proposition that, if the time for compliance stipulated in a requirement was not reasonable, the taxpayer was under no obligation to even attempt to comply.

[48] Relying on a decision of the British Columbia Court of Appeal, *R v. Sedhu*, 2015 BCCA 92, the Federal Court held that, if the appellants wished to assert that the time

afforded for compliance with the requirements was either objectively or subjectively unreasonable, they bore the burden of proof on that issue (FC decision at para. 156). Although the Federal Court did not disagree with the appellants' submission that many requirements, on their face, appeared to seek large volumes of documentation and information, it found that it had an insufficient evidentiary foundation to clearly understand how much material was being sought or, more importantly, how challenging or time-consuming the assembly of that material would be. The answers to these questions were available to the appellants and they had adduced no evidence on this issue (FC decision at para. 159).

[49] The decision in *Sedhu* was rendered in the context of a criminal proceeding pursuant to section 238 of the ITA, involving charges for failure to comply with subsection 231.2(1) requirements. Although not bound by the decision, I do find it persuasive.

[50] In dismissing the appeal, the British Columbia Court of Appeal determined, based on the scheme of the ITA, that Parliament could not have intended to require that the Crown establish, as an element of the *actus reus*, the subjective and objective reasonableness of the requirement. In particular, it found that the type of evidence proving subjective reasonableness would be in the hands of the person required to comply with the requirement, thus rendering enforcement of the offence virtually impossible (*Sedhu* at para. 35). As for the objective reasonableness of the requirement, it found that the Minister was required to consider an objectively reasonable time for compliance based on the information in his or her hands at the time the requirement was served. However, the Court concluded that Parliament could not have meant to require, in every

case, evidence of how that period was determined or proof beyond a reasonable doubt that the time specified was reasonable at the time of its issuance (*Sedhu* at para. 36).

[51] I find this reasoning convincing. I see no reason why it should not apply to the compliance context.

[52] The determination of whether a stipulated time is reasonable is a fact-specific question. As previously stated, the appellants argue that it is obvious from the requirements that the time for compliance is unreasonable given that the Minister is seeking vast and very outdated information. As the Federal Court noted, it may indeed be the case that the task of complying is significant. However, the requested information may also already exist, possibly on a USB drive or otherwise (FC decision at para. 159). The appellants are in a better position than the Minister to know what actions were required to comply with the requirements. Without any evidence to that effect, there was no basis upon which to conclude that the time specified in the requirements was unreasonable.

[53] The appellants have failed to convince me that the Federal Court committed a reviewable error on this issue.

D. *Prior Judicial Authorization*

[54] The appellants submit that, since the demands relate to one or more unnamed persons, prior judicial authorization was required pursuant to subsections 231.2(2) and (3) of the ITA.

They argue that the Federal Court misinterpreted *Redeemer*, construing it too broadly. In their view, it "would undermine the effectiveness of, and frustrate Parliament's purpose in, enacting subsection 231.2(2) if the Minister can avoid seeking prior judicial authorization simply by joining a demand for documents and information about unnamed persons with a demand for documents and information about a named person" (appellants' amended memorandum of fact and law at para. 68).

[55] As previously mentioned, subsection 231.2(1) provides that the Minister may, upon notice, require that any person provide information or documents for any purpose related to the administration or enforcement of the ITA. This authority is subject to subsections 231.2(2) and (3) if the Minister seeks information relating to unnamed persons from a third party:

Unnamed persons	**Personnes non désignées nommément**
(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).	**(2)** Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).
Judicial authorization	**Autorisation judiciaire**
(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as	**(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

the "group") if the judge is satisfied by information on oath that	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;

[56] In determining whether judicial authorization was required, the Federal Court correctly relied on *Redeemer* and this Court's decision in *Canada (Customs and Revenue Agency) v. Artistic Ideas Inc*., 2005 FCA 68.

[57] In *Artistic Ideas*, the Minister had sent a requirement for information to Artistic Ideas Inc. The company arranged for the sale of artwork to individual Canadian taxpayers who then donated the artwork to registered charities. The donors obtained a tax deduction for the donation based on the appraised value of the works of art, which value exceeded the amount the donor had paid for the art. The Minister sought to obtain the names of the donors and charities. This Court confirmed that the Minister was entitled to the charities' names but not the donors' names. It focused on the audit status of the unnamed persons. It found that, since the Minister intended for the donors to be subject to investigation, judicial authorization under subsections 231.2(2) and (3) was required (*Artistic Ideas* at para. 10). The Court went on to say at paragraph 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).

[58] In *Redeemer*, as previously mentioned, the Supreme Court was very much aware that the CRA was seeking information about unknown persons (donors), in the course of the Foundation's audit. It found that the CRA clearly had a valid purpose in requesting and using the information to complete its audit of the Foundation (*Redeemer* at para. 17). It also noted that, when a charity is audited, it is presumed that reviewing the validity of the organization's charitable status or the legitimacy of the donations it receives will always entail a possibility that the donors will be investigated and, ultimately, reassessed (*Redeemer* at para. 18). The Supreme Court concluded that the subsection 231.2(2) requirement should not apply to situations where the purpose for requesting the information is to verify the compliance of the taxpayer being audited. It added that the CRA should be able to obtain the information it would otherwise have the ability to see in the course of an audit, regardless of whether or not there was a possibility or probability that the audit would lead to the investigation of other unnamed taxpayers (*Redeemer* at para. 22).

[59] My reading of these decisions and other case law is that prior judicial authorization will only be required where the Minister seeks information relating to ascertainable unnamed persons with the intention that the information will be used to verify the unnamed persons' compliance with their obligations under the ITA (*eBay Canada Ltd. v. Canada (National Revenue)*, 2008 FCA 348 at para. 23; *Zeifmans LLP v. Canada*, 2022 FCA 160 at paras. 4-5).

[60] In the case of the appellants, the Federal Court found that the evidence demonstrated that the Minister did not intend to investigate the tax compliance of the unnamed persons, but rather the tax compliance of the relevant appellants and other named entities (FC decision at paras. 259, 326, 332, 335, 339). These are findings of fact. The appellants have not demonstrated that the Federal Court made a palpable and overriding error in respect of these findings.

III. Remedy

[61] Having found that the Federal Court erred in holding that the Minister could only compel documented information, I have the authority, pursuant to subparagraph 52(*b*)(i) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 to give the judgment that the Federal Court should have given.

[62] The relevant factors in determining whether to decide the matter or send it back to the Federal Court include whether the matter is factually voluminous and complex, whether it involves oral or documentary evidence, whether it involves the assessment of credibility, whether the result is uncertain or factually suffused, whether the parties have had the opportunity to make specific submissions on the issues that remain to be decided, and whether the additional delay caused by sending the matter back would be contrary to the interests of justice (*Sandhu Singh Hamdard Trust v. Navsun Holdings Ltd.*, 2019 FCA 295 at paras. 59-60; *Canada v. Piot*, 2019 FCA 53 at paras. 113-115, 124-128; *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161 at para. 157; see also *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at paras. 175-178, 182).

[63] At the hearing, the Court asked the Minister's counsel whether the matter should be sent back to the Federal Court for redetermination in the event that the cross-appeals were allowed. Counsel responded that the materials upon which the Minister sought a compliance order could simply be granted as no further analysis was required. In counsel's view, if the Court agreed that undocumented information could be sought, then the "requirements as sought by the Minister can simply be enforced". The carving done by the Federal Court no longer needed to be done, subject to a few imprecision arguments that the Minister did not appeal.

[64] To begin with, I find the Minister's response confusing. It is unclear to what materials the Minister is referring. The Minister initially applied for compliance orders in February 2019 in respect to the requests for information issued between 2015 and 2019. In April 2021, the Minister amended the compliance applications to specify which demands were still outstanding. In four of the six applications, the Minister submitted appendices that coded the various requests, identified the purpose of the requests and the information provided by the appellants, and indicated what information and documentation the Minister was seeking in relation to the various requests. Then, when the applications were heard, some of the information requested was no longer being sought. In the end, the Minister proposed compliance orders taking into account the February 2022 judgment. The Federal Court then modified the proposed compliance orders before their issuance in July 2022.

[65] If counsel is suggesting that the requests as sought by the Minister can simply be enforced, then the compliance orders would need to take into account the outstanding information at the date of the hearing and some of the adjustments made by the Federal Court. If,

on the other hand, no further analysis is required, as counsel suggested, then the compliance orders, as issued by the Federal Court, would stand. Either way, I consider some additional analysis to be required.

[66] For instance, the Federal Court found that the words “if they exist” was sufficient to capture the principle that only pre-existing documents could be compelled under section 231.1. I do not believe it would be sufficient to simply remove this language from the compliance orders. The Federal Court did not limit itself to the inclusion of these words to limit the compliance orders to documented information; it also found that some of the language proposed by the Minister should be removed (see for example paragraphs 24-25, 32 of July 2022 reasons). The difficulty with these findings is that the proposed compliance orders as well as the submissions made by the parties following the February 2022 judgment are not part of the appeal record filed by the parties.

[67] In addition, and more importantly, the Minister submitted the proposed compliance orders as it understood the Federal Court’s February 2022 reasons for judgment. It is unclear to me whether, and the extent to which, the Minister excluded items from the draft compliance orders on the basis that they constituted requests for undocumented information, such as written answers to questions.

[68] Given the number of appellants, the number of requests under section 231.1, and the extensive yet incomplete appeal record, I do not consider that this Court should take up the task of sorting out what was requested, what was provided, what was ordered and what should

properly be included in, or removed from, the individual compliance orders. I find that it makes more sense to remit the matter to the Federal Court so that the parties have the opportunity to seek revised compliance orders on the basis of these reasons, if they so choose.

[69] While I appreciate that the Minister's audit of the appellants has been ongoing for some time, I am not persuaded that a further delay would amount to a denial of justice.

[70] For the reasons I have set out above, I would dismiss the appeals but allow the cross-appeals, both with costs in this Court to the Minister of National Revenue. I would refer the matter back to the Federal Court for redetermination in light of these reasons.

"Sylvie E. Roussel"
J.A.

"I agree.
David Stratas J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-65-22 (LEAD FILE) A-151-22
	NADER GHERMEZIAN, MARC VATURI, GHERFAM EQUITIES INC, PAUL GHERMEZIAN, RAPHAEL GHERMEZIAN, and JOSHUA GHERMEZIAN v. THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 1, 2023
REASONS FOR JUDGMENT BY:	ROUSSEL J.A.
CONCURRED IN BY:	STRATAS J.A. LOCKE J.A.
DATED:	SEPTEMBER 1, 2023

APPEARANCES:

Bobby J. Sood Michael H. Lubetsky Stephen S. Ruby Sarah Cormack	FOR THE APPELLANTS
Rita Araujo Peter Swanstrom Jesse Epp-Fransen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davis Ward Phillips & Vineberg LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPELLANTS
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT