Federal Court  Cour fédérale

Date: 20161214

Docket: T-1958-14

Citation: 2016 FC 1376

Ottawa, Ontario, December 14, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MICHAEL ROSENBERG

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review application concerning the activities of the Minister of National Revenue with respect to a taxpayer, Mr. Michael Rosenberg. More particularly, Mr. Rosenberg is challenging a demand letter sent by the Minister on January 7, 2013, by which the Minister was seeking extensive information concerning some aspects of the income tax returns of Mr. Rosenberg and other entities for the taxation years 2006 and 2007.

[2] To be more precise, the Applicant contends that a demand for information dated January 7, 2013, should be declared to violate an agreement reached between the Applicant and a representative of the Minister on February 19, 2010. The demand letter addresses the same "straddling transactions" that are the subject of the "agreement" of February 2010.

I. Procedural History

[3] This case has had a somewhat checkered procedural history before ending up before this Court as a judicial review application. Originally, the Applicant sought to have the "agreement" that will be the subject of much discussion in this Court to be homologated by the Superior Court of Quebec. The Applicant asked for a declaration that the said "transaction" of February 2010 prevents the Respondent Minister from seeking information pursuant to section 231.1 of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [*ITA*]. The said demand for information was to be withdrawn and no other similar demand for information for fiscal years 2006 and 2007 should be made.

[4] The Superior Court of Quebec, in *Rosenberg c Agence du revenu du Canada*, 2014 QCCS 685, sided with the Canada Revenue Agency which argued that the Superior Court did not have jurisdiction, pursuant to articles 163 and 164 and the *Code of Civil Procedure* [CCP].

[5] The matter was appealed to the Quebec Court of Appeal (2014 QCCA 1651). The Court concluded that the homologation was not the true purpose of the proceedings in the Superior Court and found:

> [18] L’homologation de la transaction n’est, en l’espèce, que le véhicule procédural emprunté par l’appelant pour amener devant la Cour supérieure du Québec un débat visant à contrecarrer l’exercice des pouvoirs de vérification et d’enquête attribués au ministre par la *L.i.r.* et ultimement celui d’émettre une nouvelle cotisation.
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> [19] La nature du recours entrepris par l’appelant consistant essentiellement en une demande de contrôle judiciaire des actes de l’intimée, au sens de l'article 18 *L.c.f.*, il relève de la compétence exclusive de la Cour fédérale.
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> [TRANSLATION]
>
> [18] The homologation of the transaction, in this case, is merely the procedural vehicle used by the Plaintiff to bring before the Superior Court of Quebec a debate aiming to restrict the auditing and investigation powers of the minister under the ITA and ultimately the power to issue a reassessment.
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> [19] Since the proceeding instituted by the Plaintiff is essentially an application for judicial review of the Respondent's actions, under section 18 of the FCA, it falls under the exclusive jurisdiction of the Federal Court.

[6] Faced with this final ruling in the Province of Quebec, the Applicant turned to the Federal Court but, instead of seeking the judicial review, an action was launched against the Minister of National Revenue. The Minister brought a motion to strike the action initiated by Mr. Rosenberg under Rule 221 of the *Federal Courts Rules*, SOR/98-106. Before the Federal Court was also another proceeding, in the nature of a summary application under section 231.7 of the *ITA*, seeking an order directing Mr. Rosenberg to provide documents and information pursuant to the demand for information made in accordance with section 231.1 of the *ITA*. The summary application is still in abeyance.

[7] Justice Marie-Josée Bédard, then of this Court, ruled that the motion to strike did not meet the requirements that it be plain and obvious that the action cannot succeed (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959). In my view the matter is well articulated at paragraph 40 of the Court's decision (2015 FC 549):

> [40] The parties have not submitted any decisions in which the courts have decided on the validity of agreements between the Minister and taxpayers that would involve a waiver or restriction on the Minister's auditing powers, but the question is raised in this case. The dispute involves determining whether the Agreement deals with the Minister's audit powers and if so, whether it restricts the Minister's power to proceed with a new audit of the straddling transactions in which Mr. Rosenberg was involved in 2006 and 2007, and whether the Agreement is valid.

[8] Having found that the motion to strike must fail, Justice Bédard went on to conclude that the action for declaratory relief brought by Mr. Rosenberg was not appropriate in the circumstances. In the view of this Court, when acting under the powers conferred by section 231.1 of the *ITA*, the Minister qualifies under the definition of "federal board, commission or other tribunal". In the matter at hand, the Applicant relies on an agreement entered into with the Minister in order to object to the exercise of the powers under section 231.1 on the ground that this agreement is binding and valid. Given the kinds of remedies sought in the declaratory action, this Court was of the view that, pursuant to subsection 18(3) of the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*], the appropriate proceedings would be an application for judicial review under section 18.1 of the *FCA*.

[9] I note that the "Avis de demande de contrôle judiciaire suite aux directives de Madame la juge Bédard du 28 avril 2015" ([TRANSLATION] "Notice of Application for Judicial Review as directed by Madam Justice Bédard on April 28, 2015"), produced by Mr. Rosenberg following

the ruling of my former colleague, seeks a more limited remedy than what was sought in the action for declaratory relief. In that action, the Plaintiff, Mr. Rosenberg, was seeking a declaration and injunctive relief. In the case at hand, it is only the declaratory relief that is the subject of the judicial review application. The appropriate paragraphs from the application for judicial review read:

> (a) **DÉCLARER** qu'en date du 19 février 2010 une Entente est intervenue entre le Demandeur et la Défenderesse, que les parties sont liées par cette Entente et qu'elles doivent s'y conformer;
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> (b) **DÉCLARER** que, par conséquent:
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> i) la demande de renseignements et documents datée du 7 janvier 2014 (la « **Demande de Renseignements et Documents** ») contrevient à l'Entente et le Demandeur n'a aucune obligation d'y donner suite; et
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> ii) la Défenderesse ne peut cotiser à nouveau le Demandeur pour les années d'imposition 2006 et 2007 en ce qui concerne les opérations de stellage (« *straddling* ») faisant l'objet de l'Entente.
>
> [TRANSLATION]
>
> (a) **DECLARE** that on February 19, 2010, an Agreement came into effect between the Plaintiff and Defendant, that the parties are bound by this Agreement, and that they must comply with it;
>
> (b) **DECLARE** that, as a result:
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> i) the January 7, 2014, request for information and documents (the "Request for Information and Documents") violates the Agreement, and the Plaintiff has no obligation to comply with it; and
>
> ii) the Defendant cannot reassess the Plaintiff for the tax years 2006 and 2007 for the straddling operations subject to the Agreement.

II. The Facts

[10] The facts have been established through the filing of two affidavits. Mr. Rosenberg filed his own affidavit together with a number of documents, as did the auditor Marc-André Désilets. Neither affiant was cross-examined on his affidavit. Mr. Désilets is not the auditor who signed the agreement of February 2010. That auditor has not produced any evidence in this case.

[11] The facts are uncontroverted. The debate between the parties focuses on the agreement of February 2010. Some basic information is nevertheless required to understand the context in which the agreement was reached. The Applicant was the sole common shareholder of two corporations, 4341350 Canada Inc. and 4341376 Canada Inc. 4341350 acted as the nominee for the Applicant, his spouse, and their family trust along with 4341376 in certain "straddling transactions" done in the 2006 and 2007 taxation years. For our purposes, it is not necessary to enter into the complexities of the transactions and their structure. It suffices to know that it involved taking business losses in one year and turning the sale of partnerships into capital gains the year after. In this case, business losses occurred in December 2006 and the capital gains were realized in early 2007. Because the inclusion of business losses (100% of losses) and capital gains (50% of capital gains are taxable) is different, the taxpayer is advantaged.

[12] On October 17, 2008, a Canada Revenue Agency [CRA] auditor advised the taxpayers that the CRA had started an income tax compliance audit for their 2006 and 2007 income tax years.

[13] Between October 28, 2008, and March 2010, the CRA auditor met and exchanged information and documentation with the taxpayers and their representatives relating to the straddling transactions having taken place in 2006 and 2007. A letter dated February 19, 2010, prepared by the CRA auditor, and signed by the taxpayer and by the auditor, became the so-called "agreement" which is at issue in this case. It is the nature of this document, its effects and its validity that are the subject of this judicial review application. It will therefore be necessary to review at some length a document that runs for merely two pages. The agreement is reproduced in its entirety as Appendix "1" to these Judgment and Reasons.

[14] The parties disagree as to the scope of the agreement; if the agreement has the scope argued for by the Applicant, the Minister contends that the agreement is null and void.

III. The Agreement

[15] The first three paragraphs of the February 19, 2010, document set up the context in which an "agreement" is reached. Right up front, the drafter of the document, the CRA, declares that "[w]e have concluded our audit and review …" The document is precise as to what this is concerned with: "The focus of our audit was primarily on the taxpayers undertaking as venturers in a non-resident general partnership identified as "Mazel Partners G.P." with particular emphasis, on the partnership loss sustained in 2006 as well as the ensuing capital gain reported in 2007 …" The introduction to the "agreement" continues by identifying the counsel who took part in the discussions with the CRA. The document then explains that there appears to be uncertainty concerning the source and nature of the loss and income, in view of a decision of the Supreme

Court of Canada in *Friedberg v Canada*, 47 DTC 5507, [1993] 4 SCR 285 [*Friedberg*]. No details are supplied.

[16] The fourth paragraph in the "agreement" defines the concession that the CRA makes in the circumstances. Having reviewed the jurisprudence, published policies, commentaries and the existing legislation relative to straddling transactions, "the Canada Revenue Agency, ("the Agency") is at the present conjecture (emphasis added), satisfied with the reporting positions taken by the taxpayers, and as such the Agency *will not proceed with any reassessments for the taxation years mentioned in caption*, with the exception of a revision to the capital gain as initially declared by MCRFT in its 2007 taxation year." [My emphasis.]

[17] In return for agreeing not to proceed with any reassessment for the taxation years, the auditor, speaking on behalf of the CRA, states that "we herein request that the taxpayers refrain, abstain and terminate their practice of engaging in any similar transactions of "straddling" for Canadian Income Tax Act purposes." Before making such requests, the CRA again refers to the "technical vacuum" resulting from the *Friedberg* decision. The following two paragraphs of the "agreement" flesh out the request made of the taxpayer to refrain, abstain and terminate the use of "straddling" transactions for Canadian *Income Tax Act* purposes. Thus, the sixth paragraph is for the purpose of ensuring that the commitment made by the taxpayers is binding on the Applicant's spouse and their future executors. Furthermore, paragraph 7 seeks to make it even clearer that the taxpayers shall not shelter any income inclusion from other sources of revenues using straddling transactions. The "escape clause" favouring the taxpayers for future years is

limited to transactions that would be permitted by a policy statement or other pronouncement on the part of the CRA or a new final court judgment.

[18] That takes the reader to the sanctions that could ensue if the taxpayer did not abide by his side of the bargain. First, the CRA spells out that it has "the right to declare this agreement null and void" if "any evidence come[s] to our attention as to a breach regarding the terms of resolution forthwith mentioned". Hence, if the taxpayer does not refrain, abstain or terminate straddling transactions for the following taxation years, the agreement could be declared null and void.

[19] The other possible way for the agreement to be superseded is provided for at paragraph 10 of the document. It speaks of a different situation which would enable the CRA to review its position. It provides that "should the fact pattern for which we based our conclusion change at any time in the future, the Agency may, at such time, review its present position accordingly, in light of the facts and circumstances applicable at that time."

[20] Paragraph 9 of the document stresses that the agreement does not have any precedential value with respect to other taxpayers. Paragraph 11 confirms that the taxpayers "waive all rights of appeal and/or objection related to the reassessment issues concluded herein."

[21] On January 7, 2013, an auditor, who is not the auditor who stipulated the terms and concluded the agreement in 2010, sent a new demand for information. The subject matter of the letter leaves nothing to the imagination: "Review of your income tax returns for the 2006 and

2007 taxation years." Indeed, the letter, which runs for more than ten pages, starts off by stating: "The above-noted Income Tax Returns are currently under review. This review is specifically in relation to the "straddle loss" that was allocated by the Mazel Partners G.P. (Mazel) and therefore we are requesting information on other entities that are related to you and/or who participated in the arrangement." No one disputes that the straddling transactions for which the CRA declares it will not proceed with any reassessments for taxation years 2006 and 2007 in the "agreement" of February 19, 2010, are the transactions in which an interest is shown in January 2013.

[22] Similarly, there is no allegation made that the CRA is invoking "a breach regarding the terms of resolution", according to the 8th paragraph of the letter of agreement, or a new "fact pattern" in order to review its position according to the 10th paragraph.

IV. Summary of Applicant and Respondent Arguments

[23] The Applicant argues that the agreement concluded between him and the Minister is binding and, once properly interpreted, bars the Minister from re-auditing and re-assessing him for the taxation years 2006 and 2007 unless of course there is a breach on the part of the taxpayer regarding the terms of resolution or a change in the fact pattern occurs. In his view, such an agreement must be valid in order to bring certainty to arrangements entered between the CRA and taxpayers. The caselaw suggesting that the assessment of taxes cannot be made the subject of an arrangement is not applicable in the circumstances of this case.

[24] Evidently, the Minister argues the exact opposite. She essentially argues that, as a pure matter of contractual interpretation, the agreement did not bar the Minister from conducting another audit of the Applicant for those taxation years. Assessment and audit are two different things. The agreement is limited to not conducting a reassessment. Second, if the agreement would have the effect of barring such further audit, it would be void because such an agreement is illegal as being contrary to the *ITA* and public order.

[25] Both parties rely on the *Civil Code of Quebec* [CCQ] for the interpretation that they give to the agreement, in particular, they rely on articles 1425 to 1432 of the CCQ, under the general title of “Interpretation of Contracts”.

[26] The parties did not discuss in their memoranda of facts and law what is the standard of review that is applicable in the present circumstances. It is only at the hearing that the Court sought their views on the matter.

V. Standard of Review and Analysis

A. *Standard of Review*

[27] The parties argued their case without paying much attention to the standard of review that should be applicable in this case. The matter was raised by the Court at the hearing and the parties were invited to take a position.

[28] Both parties agreed that the matter before the Court on judicial review is the exercise of the power granted to the Minister pursuant to section 231.1 of the *ITA* to issue the demand letter of January 2013 that is sent to the taxpayer in spite of the "agreement" reached in February 2010. In the view of the taxpayer, the demand letter for years 2006 and 2007 can be sent only if any one of the conditions precedent provided for in the "agreement" is met. None is alluded to in the demand letter and none is offered on this record.

[29] The ability of the Court to grant declaratory relief has not been challenged. Indeed, Brown and Evans in their *Judicial Review of Administrative Action in Canada* (Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto, On: Carswell, 2013) (loose-leaf)), state at paragraph 1:7200:

> As a public law remedy, declarations may be used to provide an original determination of the plaintiff's legal rights, duties, status, or position. Accordingly, declarations have been granted to decide disputed questions of personal status, to determine whether a public body is in breach of contract, to declare the rights of public office holders and employees, to declare whether a person is a member of an association or has a right to pursue a trade, occupation or other activity, to determine a person's entitlement to statutory compensation or liability to pay a tax, and to declare the extent of the legal powers, immunities or duty of a public authority, especially when disputed by another. As well, of course, a court may declare a decision of a body that does not exercise powers, such as a trade association, to be invalid. [Footnotes omitted]

[30] As for the standard of review, the Minister contended, presumably relying on the presumption created in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, that "[w]hen considering a decision of an

administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness" (para 39). As is well established,

> [r]easonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.
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> (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47)

[31] As I understand it, the Minister considers that the challenge to her decision to exercise the power under section 231.1 of the *ITA* to seek information from a taxpayer must be resolved by the Court through a declaration that the exercise of the power was reasonable in the circumstances of this case. The exercise of power is a function of the interpretation that must be given to the "agreement" between the parties; it would be sufficient for the interpretation of the "agreement" to be reasonable, as opposed to correct, for the Minister to prevail. If there is more than one interpretation that can be given, and that which the Minister gives can be said to be an acceptable and possible outcome on the facts and the law, the Court's declaration should favour the Minister.

[32] The Applicant takes the view that he has been forced to turn his action into a judicial review application seeking a declaratory relief (para 18(1)(a) and ss 18(3) of the *FCA*). He seeks a declaration that the Minister cannot rely on section 231.1 of the *ITA*, as she is foreclosed to do so by the agreement she entered into with this taxpayer. Such declaration does not entail any deference on a standard of review of reasonableness.

[33] Declaratory relief may be obtained against a federal board, commission or other tribunal. The law requires that there be an application for judicial review according to subsection 18(3) of the *FCA*. That, in turn, leads to the grounds of review listed at subsection 18.1(4). Unfortunately, the parties in this case did not specify which ground for review was invoked. Although the grounds for review are listed, they would not at any rate provide complete clarity as to what standard of review would be applicable to a particular ground. However, that would have allowed to benefit from the guidance offered by the majority in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, concerning subsection 18.1(4).

[34] The Minister in this case did not give reasons for her interpretation of section 231.1 of the *ITA* and why effect was not given to the agreement of February 2010. It is implied that she does not consider the agreement as a bar to using section 231.1.

[35] Recently, the majority in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*Edmonton*], was satisfied to examine the issue in spite of reasons not being provided:

> [38] However, when a tribunal's failure to provide any reasons does not breach procedural fairness, the reviewing court may consider the reasons "which could be offered" in support of the decision (*Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Defence: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286). In appropriate circumstances, this Court has, for example, drawn upon the reasons given by the same tribunal in other decisions (*Alberta Teachers'*, at para. 56) and the submissions of the tribunal in this Court (*McLean*, at para. 72).

As Karakatsanis J. said for the majority, “I shall review the Board’s decision in light of the reasons which *could* be offered in support of it” [Emphasis in original] (para 40).

[36] I would apply the same approach in this case as used in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895. To paraphrase Moldaver J., for the Court, at paragraph 72, reasons are preferable but nothing is to be gained by sending the matter back to the Minister to explain what she has already explained before the Court. The Minister is the Respondent in a case where it is her decision to send the demand letter and she is the one who, through an auditor, has entered into an agreement.

[37] The Court has not been offered a cogent argument for why reasonableness should not be used. The default position is reasonableness and that was reasserted strongly in *Edmonton*.

[38] In view of my conclusion that the interpretation given by the Minister to the “agreement” is not rational, there is no need to reach a conclusion on the standard of review in this peculiar case. Even by giving the Minister the benefit of the more generous standard of review, her interpretation does not fall “within the range of acceptable and rational solutions” (*Dunsmuir*, para 47).

B. *Analysis*

[39] There are two issues that need to be addressed. First, the agreement reached between the Minister’s representative and the taxpayer must be reviewed for the purpose of determining what its scope is. The parties disagree on this score. If the Respondent is right and that the agreement

has a very narrow scope, there might not be a need to decide if the agreement is illegal. On the other hand, if the agreement is as broad as claimed by Mr. Rosenberg, it will then be necessary to consider whether a broad agreement is illegal. I begin with an interpretation of the agreement.

(1) Scope of the Agreement

[40] The agreement reached on March 4, 2010, but drafted by the Minister's representative on February 19, 2010, was concluded in the Province of Quebec with a taxpayer who resides in Montreal. The said agreement indicates that it was drafted in Montreal by a Minister's representative operating out of the Montreal offices of the CRA. In the circumstances, there is little doubt that such an agreement is governed by the CCQ. The parties have operated on that basis and it seems to me to be beyond discussion that federal legislation is complimented in the Province of Quebec by the civil law of the province. In his masterful *exposé* in *Canada (Attorney General) v St Hilaire*, 2001 FCA 63, [2001] 4 FC 289, Justice Robert Décary, speaking for the whole Court on this, recognized the suppletive nature of the civil law in federal matters governed by federal law. Here, there would be no reason to seek to rely on the common law to determine the nature of the arrangement and the rules that would govern its interpretation.

[41] The Respondent has not suggested that the author of the February 2010 document was not authorized to do so. In fact, the Respondent does not dispute either that an agreement was reached.

[42] The Minister's position boils down to arguing that his concession in the agreement was to decline to reassess the taxpayer for the years 2006 and 2007 at this point in time. Essentially, the

commitment would have been valid on the day on which it was agreed to, without that commitment being valid the day after. With respect, I disagree. This cannot be a reasonable interpretation of this agreement.

[43] The agreement reached by the parties in this case is a contract as defined in the CCQ:

NATURE AND CERTAIN CLASSES OF CONTRACTS	DE LA NATURE DU CONTRAT ET DE CERTAINES DE SES ESPÈCES
1378. A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.	**1378.** Le contrat est un accord de volonté, par lequel une ou plusieurs personnes s'obligent envers une ou plusieurs autres à exécuter une prestation.
Contracts may be divided into contracts of adhesion and contracts by mutual agreement, synallagmatic and unilateral contracts, onerous and gratuitous contracts, commutative and aleatory contracts, and contracts of instantaneous performance or of successive performance; they may also be consumer contracts.	Il peut être d'adhésion ou de gré à gré, synallagmatique ou unilatéral, à titre onéreux ou gratuit, commutatif ou aléatoire et à exécution instantanée ou successive; il peut aussi être de consommation.

[44] The instrument created between the parties is the common expression of their intention. In the case at bar, there is no extraneous evidence offered by either party. Thus, Mr. Rosenberg did not offer his personalized view of what was intended and the signatory of the contract, on behalf of the Minister, is not part of these proceedings; he did not testify and he has not been disavowed. The letter of demand of 2013 was prepared by a different auditor and he is the one

who testified through his affidavit. As already indicated, neither one of the affiants was cross-examined on the affidavit.

[45] We are therefore left with relying on the interpretative tools of contracts provided for in the CCQ. The CCQ encompasses a whole section called "Interpretation of contracts". Both parties in fact rely to some extent on certain provisions of the CCQ. The Respondent is right to stress the importance of articles 1427 and 1428 of the CCQ. They read:

1427. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.	**1427.** Les clauses s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'ensemble du contrat.
1428. A clause is given a meaning that gives it some effect rather than one that gives it no effect.	**1428.** Une clause s'entend dans le sens qui lui confère quelque effet plutôt que dans celui qui n'en produit aucun.

[46] As for the Applicant, he brought to the Court's attention article 1432 which reads:

1432. In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer.	**1432.** Dans le doute, le contrat s'interprète en faveur de celui qui a contracté l'obligation et contre celui qui l'a stipulée. Dans tous les cas, il s'interprète en faveur de l'adhérent ou du consommateur.

Of course, in order to resort to article 1432, there must first be an attempt to interpret the contract as per the rules that are provided for in the CCQ. It is only if the common intention of the parties cannot be discovered through appropriate interpretation that it can be said that a contract will be

ambiguous (*Richard-Gagné c Poiré*, 2006 QCCS 4980; *Compagnie d'assurance l'Anglaise américaine c Chayer*, [1986] RJQ 962). In my view, it is quite easily possible to discern what was the intention of the parties through an examination of the terms of the contract they entered into on March 4, 2010, on the basis of a document stipulated on behalf of the Minister on February 19, 2010.

[47] I would add article 1425 to these three articles:

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.	**1425.** Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.

[48] The document is not a model of clarity. However, a careful reading of the document brings about an unambiguous understanding of what the parties were mutually agreeing to.

[49] The CRA having established that the audit and review of the taxpayers' affairs for years 2006 and 2007 had been concluded, it recognized that there was some difficulty stemming from a Supreme Court of Canada decision. At the fourth paragraph of the document, the CRA stipulates that having reviewed jurisprudence, published policies, commentaries as well as the existing legislation relative to the transactions under examination ("straddling" transactions) the CRA declares itself "satisfied with the reporting positions taken by the taxpayers …" On that basis, the CRA commits itself: the CRA states that it "will not proceed with any reassessments for the taxation years mentioned in caption". The commitment is limited, as it relates only to some transactions straddling taxation years 2006 and 2007. It also follows a complete review

which resulted in the expression of satisfaction "with the reporting positions taken by the taxpayers". This is the obligation that, by contract, the CRA declares itself willing to abide by.

[50] In return, the taxpayer is requested at paragraph 5 to "refrain, abstain and terminate their practice of engaging in any similar transactions of "straddling" for Canadian Income Tax Act purposes." The Minister is careful to point out again that there is a technical vacuum created by the Supreme Court of Canada decision.

[51] Thus, paragraphs 4 and 5 of the document establish what the parties agreed to do. On the one hand, the taxpayer has the benefit of not being reassessed for years 2006 and 2007; on the other hand, the taxpayer agrees to refrain from conducting his business in such a way as to create straddling transactions for the purpose of the *ITA*. There is, in my view, a *quid pro quo*. Each party obligates itself towards the other. They both intend to benefit.

[52] Paragraphs 6 and 7 are for the purpose of spelling out what is the obligation created concerning the taxpayer. First, spouses and/or future executors are bound by the agreement; second, the obligation applies to other forms of income and not only business income. Furthermore, the agreement is said to apply only to Mr. Rosenberg and does not constitute a precedent that would be applicable to other taxpayers. We are not concerned here with the validity of such clauses.

[53] Having established what the parties have agreed to, the agreement concludes with the circumstances under which the agreement would cease to have effect. These are critical paragraphs that shed light on the scope of the obligations of the parties (art 1427 of the CCQ).

[54] The first such paragraph is paragraph 8. It spells out that any evidence that would come to the attention of the CRA "as to a breach regarding the terms of resolution forthwith mentioned, the Agency reserves the right to declare this agreement null and void." In my view, this paragraph can only mean one thing. Through the use of the words "breach regarding the terms of resolution", the parties can only refer to the agreement reached concerning the obligation made to the taxpayer to refrain, abstain and terminate their practice of engaging in similar transactions of "straddling". This is how the matter is resolved between the parties: the taxpayer will not do that again in the future. This particular clause deals specifically with the side of the transaction which can constitute a "breach regarding the terms of resolution". The only breach that can be the subject of the CRA declaring the agreement null and void has to be the obligation contracted by the taxpayer. That obligation is to refrain, abstain and terminate the practice of engaging in straddling.

[55] The Respondent has argued that there was no real commitment on her part. Paragraph 4 is simply declaring that, at that moment in time (February 19, 2010), the CRA was not reassessing the taxpayer. However, such cannot be the case in view of paragraphs 8 and 10. It is important to note that the parties saw fit to state in paragraph 8 that the agreement is null and void if the taxpayer breaks his commitment. The clause is for the benefit of the Minister in that it is for the

Minister to declare the agreement null and void. However, there is no need for such a clause if, as argued by the Minister, she can proceed to reassess whenever she wants.

[56] The same is true with respect to the other clause, at paragraph 10, which would allow for the contract to be "reopened". In it, the CRA stipulates that it "may … review its position accordingly, in light of the facts and circumstances applicable at that time." What are those facts and circumstances applicable at that time? The answer to the question is found in the first half of paragraph 10 where the CRA agreed that "should the fact pattern for which we based our conclusion change at any time in the future". In other words, it is only if there is a new fact pattern that the CRA would be in a position to review its "present position", present position being found at paragraph 4 as being "satisfied with the reporting positions taken by the taxpayer".

[57] Again, if the Minister is right and she can proceed to reassess when she wants, there is no need to create a mechanism whereby the Minister will review her position if the fact pattern that gave rise to the expressed satisfaction with the reporting positions of the taxpayer has changed. That could well be a misrepresentation if it can be argued that paragraph 4 was meant as no more than a comfort letter for the time being. More was stated through the combination of paragraphs 4, 5, 8 and 10. Good faith presides. Article 1375 of the CCQ reads:

1375. The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.	**1375.** La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction.

[58] Once the clauses of the contract are interpreted together, one shedding some light on the other, it emerges an understanding that is neither ambiguous nor vague. In view of the uncertainty created by some caselaw, the parties agree to, on the one hand, not assess the taxpayer for years 2006 and 2007 about its straddling transactions, and on the other hand, the taxpayer agrees not to use that financial structure for tax purposes in the future. If the taxpayer does not abide by his obligation and breaches the terms of resolution arrived at, the CRA may declare the agreement null and void. If the fact pattern on which the CRA based its conclusion that it is satisfied with the reporting position taken by the taxpayer changes, then the CRA could review its present position "in light of the facts and circumstances applicable at that time".

[59] I repeat. There is no allegation on this file that Mr. Rosenberg, his spouse or "future executors" have entered into straddling transactions for the purpose of the *ITA* since the agreement. Similarly, there is no allegation whatsoever that the fact pattern has changed.

[60] It follows, in my view, that the parties intended to reach an agreement whereby the taxpayer would be left alone with respect to the straddling transactions of 2006 and 2007 on condition that he does not use that technique for tax purposes for future years. The matter can be reopened if the taxpayer breaks his commitment or the fact pattern changes. Without any one of those two conditions present, the Minister commits to not proceed with any reassessment.

[61] The Respondent argues that if the common intention of the parties to the agreement was that the Minister can review her position should the fact pattern change, she did not agree to refrain from conducting a new review using section 231.1 of the *ITA*. The Minister contends that

in order to see if the fact pattern has changed, she needs the ability to audit those two years concerning the very transactions she expressed satisfaction about after an audit. The Respondent therefore argues that the Minister could not have chosen to waive her ability to ascertain if the fact pattern has in fact changed. In my view, that argument fails both as a matter of interpretation of contracts and because of what the parties have chosen to agree to. The only way such an interpretation can be reasonable is if it accounts for all the clauses in the contract. That interpretation does not do that.

[62] As shown earlier, article 1428 of the CCQ favours giving meaning to a contract rather than interpreting it such that it has no effect. Going outside of the words that were agreed to by the parties, the Minister suggests, in a circular way, that she needs to audit in order to find a new fact pattern. First, the agreement does not define "fact pattern". But the fact pattern giving rise to the agreement was studied by the CRA for 16 months prior to the agreement. There was only one. A full audit was conducted and concluded according to the agreement. How does a new audit conform with the Minister's statement that the audit was concluded and only if a different fact pattern emerges will she proceed with any reassessment? That, to my way of thinking, makes the obligation to which the Minister agreed meaningless. According to the interpretation given, she can proceed with a reassessment whenever she wants, including using a new audit to try to discover some different fact pattern. Indeed, during the hearing, counsel for the Minister described such an arrangement as "a comfort letter". Comfort, what comfort? In essence, the Minister would have agreed to nothing on her side because, having reckoned that she was satisfied with the reporting positions, she could at any time in the future audit again the taxpayer for the purpose of attempting to find a new fact pattern. We must remember that the Minister had

declared, in the first sentence of the agreement that "[w]e have concluded our audit and review of the taxpayers and taxation years mentioned in caption." If that were to be read as proposed by the Minister, the Minister would have been stating only that she has concluded her work for now, but she could start all over again at her convenience. This, in my view, runs afoul of article 1425 of the CCQ: the Minister seeks to argue that the common intention was to allow for an audit that leads to a reassessment when the CRA stipulates that it "will not proceed with any reassessments." Contrary to article 1425, the Minister seeks to adhere to the literal meaning of some words to the detriment of the true intent of the parties. As was pointed out repeatedly by counsel for the Applicant, who would agree to such a deal, given what the taxpayer was agreeing to in return?

[63] There is also the wording of the obligation contracted by the Minister which stands in the way of the interpretation that counsel presses on the Court. The contract provides that "the Agency <u>will not proceed with any reassessments</u> for the taxation years mentioned in caption." [My emphasis.] Here, the Minister wants to proceed with a reassessment in spite of the fact that no new fact pattern is even alleged to exist. The demand of January 7, 2013 is particularly clear: the demand of information is for the specific purpose of reviewing income tax returns for 2006 and 2007. The so-called "audit" is the means to the end. It is the process that is used by the Minister to lead to a reassessment. The subject matter of the letter is "[r]eview of your income tax returns for the 2006 and 2007 taxation years" and the letter starts off with: "The above-noted Income Tax Returns are currently under review. The review is specifically in relation to the "straddle loss" that was allocated by the Mazel Partners G.P. (Mazel) …" If the demand for

information is not the CRA proceeding with any reassessment for the taxation years, it is very much unclear what that may mean.

[64] And there is more, the evidence before the Court seems clear that the audit is for the purpose of reassessing the taxpayer. First, we learn that the auditor is a member of the "Specialty Audit Section of the International and Ottawa Tax Services Office". Second, the affiant spells out his role. He is conducting an audit which is "une vérification de conformité" ("a compliance audit"). Such "compliance audit" "sert à s'assurer que la déclaration de revenus est conforme à la Loi de l'impôt sur le revenu" ([TRANSLATION] "is used to ensure that the tax return complies with the Income Tax Act") (affidavit of Marc-André Désilets, para 2). Third, this new audit conducted from Ottawa, and not Montreal, has a definite aim: reassessing the taxpayer. One can read at paragraph 25 of the affidavit that "[à] la conclusion de cette vérification de conformité, des avis de nouvelles cotisations des années d'imposition 2006 et 2007 du demandeur pourraient, entre autre, être émis conformément aux articles 9 et 38 de la *LIR*" ([TRANSLATION] "after this compliance audit, notices of reassessment for tax years 2006 and 2007 may be issued to the Plaintiff, among other things, under sections 9 and 38 of the ITA"). If the words "proceed with any reassessments" have any meaning in the context of this agreement, that must be that the process leading to a reassessment and "des avis de nouvelles cotisations" ("notices of reassessment") was not to commence while the agreement is in place or the fact pattern has changed. If the Minister is right, the clause in the contract would not be given any effect, contrary to article 1428 of the CCQ.

[65] The parties, through this agreement, were, it seems to me, agreeing to something very specific. The effect of the agreement is for all intents and purposes negated through the interpretation given to it by the Respondent. I would conclude that the only interpretation that can be given to the agreement between the parties, once all its terms are read together, requires that there be an effect on each party to the agreement. I fail to see how the agreement can be interpreted reasonably if clauses of the agreement can be ignored. The agreement holds together through the interpretation of the clauses one with the other. If the agreement does not obligate the Respondent for the future, there is no real object to the agreement.

[66] It is not for the Court to assess the wisdom of such an agreement. It is not either for the Court to interpret the agreement to favour one party over the other. The words used, and agreed to, by the parties speak for themselves. Being satisfied with its audit of 2006 and 2007, the Minister chose to obligate herself to not proceed with any reassessment for the taxation years until and unless there is a new fact pattern, which is not alleged in this case. A demand letter, leading to a reassessment would appear to me to be the epitome of proceeding with a reassessment.

[67] Clearly the parties were agreeing to the state of affairs as of the date of the agreement. Paragraph 4 of the February 2010 agreement underlines that the Agency is satisfied with the "reporting positions" at this point in time or, in the words of the agreement "at the present conjecture (emphasis added)." That however does not negate the requirement for the fact pattern to change in order to proceed with a reassessment; it helps strengthen the fact that at the time the agreement was signed, the Agency was satisfied and the taxpayer is on notice that if things

change, the "Agency may, at such time, review its present position accordingly, in light of the facts and circumstances applicable at that time" (para 10).

[68] The Minister chose to obligate herself not to proceed to a reassessment until and unless the fact pattern has changed. That is the effect of reading paragraphs 4 and 10 together, which she cannot escape. That for sure stems from the rather peculiar agreement she reached with this taxpayer. But the interpretation of this contract leads to that conclusion. That was the intent of the parties to which the Court must give effect (art 1425 of the CCQ).

(2) Is the agreement, properly interpreted, a binding instrument?

[69] That, however, does not end the matter. There is also the argument that if the contract entered into results in the agreement not to audit, then the contract is null and void.

(a) *The agreement cannot waive the obligation to enforce the Act*

[70] The Respondent urges the Court to consider that the said agreement must be read with section 220 of the *ITA*. No agreement could run afoul of subsection 220(1), which reads:

Minister's duty	**Fonctions du ministre**
220 (1) The Minister shall administer and enforce this Act and the Commissioner of Revenue may exercise all the powers and perform the duties of the Minister under this Act.	220 (1) Le ministre assure l'application et l'exécution de la présente loi. Le commissaire du revenu peut exercer les pouvoirs et fonctions conférés au ministre en vertu de la présente loi.

[71] In so doing, the Respondent argues that it is not possible to waive her duty to administer and enforce the *ITA*. In order to make the argument, the Respondent would have to show that the agreement constitutes a refusal to administer and enforce the *Act*. That has not been done. To start with, the Respondent put much emphasis on section 220 of the *ITA*, and in particular on the words, "[t]he Minister shall administer and enforce this Act." As the argument goes, the use of the word "shall" would have some special meaning preventing the Minister from waiving its power to "audit" repeatedly.

[72] I am afraid this argument cannot prevail. There is no doubt that the word "shall" conveys the notion that it is imperative (s 11, *Interpretation Act*, RSC, 1985, c I-21). However, the context in which the word is used is essential to understand what Parliament meant. This is the kind of provision that is seen in numerous pieces of federal legislation. It is Parliament vesting the executive branch with powers, duties and functions. Parliament uses the imperative to give a minister the duty, the responsibility, over a segment of the public service for particular purposes. Actually, subsection 220(2) provides that "[s]uch officers, clerks and employees as are necessary to administer and enforce this Act shall be appointed or employed in the manner authorized by law." Parliament also uses "may", which is permissive (s 11, *Interpretation Act*), when dealing with the use of powers: the Minister must enforce the *Act*, as it is a duty given by Parliament, but she may decide on the use that is to be made of the powers she has under the *Act*.

[73] For instance, the *Department of Employment and Social Development Act*, SC 2005, c 34, designates the Minister of Employment and Social Development to exercise some powers, duties and functions. More specifically, the Minister "shall exercise the powers and perform the duties

and functions (a) relating to human resources and skills development … and (b) relating to social development …" (subsection 5(2)). One finds the same pattern in many other Acts of Parliament (e.g. *Department of Public Works and Government Services Act*, SC 1996, c 16; *Department of Natural Resources Act*, SC 1994, c 41; *Department of Indian Affairs and Northern Development Act*, RSC, 1985, c I-6). That is even true of the *Department of Justice Act*, RSC, 1985, c J-2, which provides that the Minister of Justice do a number of things and the Attorney General shall, among other things, advise the heads of departments on all matters of law connected with such departments and shall have the conduct of all litigation involving the Crown. Parliament does not purport to tell the Attorney General how to perform the duty when the Minister is designated to be in charge of a particular jurisdiction. In effect, these provisions are for the governance of the executive branch. Where Parliament decides on duties and functions, it speaks in terms of "shall". In so doing, Parliament is not doing anything more than to signal what area of the federal jurisdiction the Minister is responsible for, what she is to do. Recently Parliament has chosen the formulation "is to", instead of the more traditional "shall", in setting the jurisdiction, the area for which the Minister of Foreign Affairs bears responsibility and for which he is accountable to Parliament in the new *Department of Foreign Affairs, Trade and Development Act*, SC 2013, c 33, s 174:

10 (2) In exercising and performing his or her powers, duties and functions under this Act, the Minister is to	10 (2) Dans le cadre des attributions que lui confère la présente loi, le ministre :
…	…

But the meaning is the same. A Minister of the Crown is tasked by Parliament as having the responsibility for a particular governmental function. Parliament is ordering the Minister of

National Revenue responsible to administer and enforce the *ITA*. It is the Minister of National Revenue, and no one else, who bears the responsibility of enforcing and administering, as the Attorney General is given the responsibility to conduct litigation involving the Crown, *inter alia*, no one else.

[74] Without belaboring the point excessively, I also note that the French version of sections conferring powers, duties and functions, like subsection 220(1) of the *ITA*, or the *Department of Justice Act*, or the other pieces of legislation, speaks in the present tense. It is enough to establish that an obligation is created.

[75] Contrary to the assertion of the Respondent, the use of the word "shall" does not signal "no discretion to be exercised by the Minister" (memorandum of facts and law, para 28) in the performance of the duty imposed by law. The word "shall" simply signals that, as part of the machinery of government, there is a minister of the Crown who is responsible for the administration and enforcement of the *ITA*. The Minister cannot decline to administer and enforce the Act, it is her duty. The Attorney General cannot decide that she will not have the carriage of litigation involving the Crown because she "shall have the regulation and conduct of all litigation for or against the Crown". How she decides to perform that duty is another matter.

[76] In order to administer the Act, the Minister is given a number of specific powers that the Commissioner of Revenue may exercise (ss 220(1) of the *ITA*). It is less than clear how the duty to enforce and administer the *Act* translates into the inability of the Minister as part of the administration of the *Act* to enter into a contract with a taxpayer whereby the Minister commits

to “not proceed with any reassessment for” years 2006 and 2007 unless the taxpayer does not abide by his side of the bargain or a different fact pattern for those years emerges.

[77] The Minister did not waive her duty to administer and enforce. Rather she has chosen to administer and enforce the *Act* by reaching an agreement whereby the Minister and the taxpayer agree that the assessment made for years 2006 and 2007 is complete, having concluded the audit and review of the taxpayer, with a specific focus on the straddling transactions of those two years. The Minister has no choice: she “shall, with all due dispatch, examine a taxpayer’s return of income for a taxation year, assess the tax for the year, the interests and penalties, if any …” (ss 152(1) of the *ITA*). This has been done and there is no indication that the assessment already conducted has not been done in accordance with the facts and the law. The effect of the contract is not even that the Minister, through her own agreement, has committed to never reassess the taxpayer with respect to the 2006-2007 straddling transactions. She merely agreed to reassess only where the taxpayer has breached his obligation under the contract and where the fact pattern that was found to reach the conclusion in the initial assessment changes in the future. Section 220 of the *ITA* requires that the Minister administer and enforce the *ITA*. That section does not mandate how the statute must be administered and enforced, and how the powers are to be used.

[78] Therefore, the issue before this Court, and it is a narrow one, is whether or not the Minister can renege on the arrangement negotiated with and arrived at with the taxpayer. Put more positively, is the agreement valid? This “deal” is not concerned with the assessment with respect to the “straddling transactions” for years 2006 and 2007, as a conclusion had been reached. It is concerned with the circumstances under which it would be possible for the Minister

to proceed with any reassessment. The Minister's position is that not only she should not have made that "deal", as it was surely her prerogative, but, having made that contract, that contract cannot be binding on her because it is not valid.

(b) *Is the agreement valid?*

[79] The Respondent argues that, at any rate, she cannot be bound by an agreement whereby she is prevented from assessing a taxpayer for the amount owed. If the facts are known and the law is understood, it is not possible to reach an agreement for an amount that will be less than what the formula will produce.

[80] The case law on which the Minister is relying has proven to be followed strictly in the last few years. There has been reluctance on the part of the courts to give effect to agreements whereby the amount of taxes assessed, the taxpayer's liability for tax under the Act, is the subject of the settlement. But the cases do not go beyond that finding, which gives the case law a limited scope.

[81] In the case of *Galway v Minister of National Revenue*, [1974] 1 FC 593, [1974] 1 FC 600 [*Galway*], the Federal Court of Appeal raised *ex proprio motu* in an application for consent judgment the ability of the Minister to assess on a basis other than the *ITA*. At page 598 the issue is put thus by the Court:

> This is clearly not a case where there should be a reduction in the amount of the tax in dispute. It is a case where the whole $200,500 was taxable or it was not. In those circumstances, we have grave doubt as to whether the Minister is legally entitled to reassess for a

> part of the amount of tax in question. If he is not legally entitled to do so, the Court cannot require him to do so.

[82] That led to the Court's invitation for submissions from the parties. The Court concluded in the second judgment, at pages 602 and 603, that an assessment must be on the basis of the facts found and the law understood. There cannot be a compromise on the amount once the facts are known and the law ascertained:

> The reason for that doubt, as indicated by our Reasons of April 22, was that, in our view, the Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it. It follows that he cannot assess for some amount designed to implement a compromise settlement and that, when the Trial Division, or this Court on appeal, refers an assessment back to the Minister for reassessment, it must be for reassessment on the facts in accordance with the law and not to implement a compromise settlement.
>
> Is the position any different where the parties consent to a judgment? In ordinary litigation between private persons of full age and mentally sound, the Court has not, in normal circumstances, any duty to question a consent by the parties to judgment. We should have thought that the same statement applies where the Crown, represented by its statutory legal advisers, is one of the parties. There is, however, at least one exception to the unquestioning granting of consent judgments, regardless of who the parties are, namely, that the Court cannot grant a judgment on consent that it could not grant after the trial of an action or the hearing of an appeal. It follows that, as the Court cannot, after a trial or hearing, refer a matter back for assessment except for assessment in the manner provided by the statute and cannot therefore, at such a stage, refer a matter back for reassessment to implement a compromise settlement, the Court cannot refer a matter back by way of a consent judgment for reassessment for such a purpose. [My emphasis]

[83] As can be seen, the refusal to accept the agreement of the parties as binding was on a very narrow basis. Indeed, the Court went on to agree that the parties could reapply "on the basis

of a consent to a judgment designed to implement an agreement of the parties as to how the assessment should have been made by application of the law to the true facts." In other words, once the facts are ascertained and the law as understood is applied to them, there is one answer that comes out. An agreement to depart from that result will not be binding.

[84] That appears to be the long and short of it. That is the conclusion of the Federal Court of Appeal in *Cohen v R*, (1980) 80 DTC 6250 [*Cohen*], where the Court, relying on *Galway*, found that "[t]he agreement whereby the Minister would agree to assess income tax otherwise in accordance with the law would, in my view, be an illegal agreement."

[85] The line of cases generated by *Galway* is to the same effect (*Harris v Canada*, [2000] 4 FCR 37 (FCA), *CIBC World Markets Inc v Canada*, 2012 FCA 3, 426 NR 182). The assessment is on the basis of the facts as known and the law as understood. Any agreement must take that into account. However, that line of authorities does not go any further.

[86] On the contrary, case law emanating from the Tax Court of Canada acknowledges that tax matters are settled every day. In *Consoltex v R*, (1997) 97 DTC 724, Bowman J. cited this passage from *Principles of Canadian Income Tax Law* (Hogg, Peter W., Joanne E. Magee, and Jinyan Li, *Principles of Canadian Income Tax Law* 5th ed, (Toronto: Thomson Carswell, 2005)):

> The attitude of the Federal Court of Appeal in *Cohen* and *Galway* is far too rigid and doctrinaire. If the Minister were really unable to make compromise settlements, he or she would be denied an essential tool of enforcement. The Minister must husband the Department's limited resources, and it is not realistic to require the Minister to insist on every last legal point, and to litigate every dispute to the bitter end. Most disputes about tax are simply disputes about money which are inherently capable of resolution

> by compromise. Presumably, the Minister would agree to a compromise settlement only on the basis that it offered a better net recovery than would probably be achieved by continuance of the litigation. It seems foolish to require the Minister to incur the unnecessary costs of avoidable litigation in the name of an abstract statutory duty to apply the law. (p 844)

Indeed, in *Enterac Property Corp v R*, (1998) 98 DTC 6202, MacDonald J.A. all but invited that the matter be revisited:

> By proceeding to trial this would also give counsel an opportunity to ask the Court to revisit the jurisprudence in *Nathan Cohen, et al v. Her Majesty the Queen*, 80 DTC 6250 (F.C.A.), *David Ludmer, et al. v. Her Majesty the Queen*, 95 DTC 5311 (F.C.A.) leave to appeal refused, [1995] 4 S.C.R. vii, in light of the comments of Judge Bowman in *Consoltex Inc. v. The Queen*, [1980] C.T.C. 318 (F.C.A.) and the statement of Chief Justice Laskin in *Smerchanski and Eco Exploration Co. Ltd. v. Minister of National Revenue*, 76 DTC 6247 (S.C.C.)

[87] More recently, Bowie J. of the Tax Court of Canada suggested that agreements freely concluded ought to be binding. He said in *1390758 Ontario Corporation v The Queen*, 2010 TCC 572, [2010] DTC 1385, [*1390758 Ontario Corporation*]:

> [35] I agree with Bowman C.J. and the authors Hogg, Magee and Li that there are sound policy reasons to uphold negotiated settlements of tax disputes freely arrived at between taxpayers and the Minister's representatives. The addition of subsection 169(3) to the Act in 1994 is recognition by Parliament of that. It is not for the Courts to purport to review the propriety of such settlements. That task properly belongs to the Auditor General.
>
> [36] The reality is that tax disputes are settled every day in this country. If they were not, and every difference had to be litigated to judgment, unmanageable backlogs would quickly accumulate and the system would break down.
>
> [37] The Crown settles tort and contract claims brought by and against it on a regular basis. There is no reason why it should not settle tax disputes as well. Both sides of a dispute are entitled to

> know that if they invest the time and effort required to negotiate a settlement, then their agreement will bind both parties.

Webb J., as he then was, endorsed fully the comments of Bowie J. in *Huppe v The Queen*, [2011] DTC 1042, 2010 TCC 644 [*Huppe*]. He went on to find that precedents like *Galway* and *Cohen* were concerned with binary situations: it was an all or nothing proposition, either the whole amount was to be included or not in *Galway* and the income was non-taxable capital gain or not in *Cohen*. Webb J. seems to have found that the precedential value of this line of cases is limited:

> [13] It seems to me that this case can be distinguished from *Galway*, *Cohen* and *Garber*. This is not a case whether it is all or nothing and this is not a case where the Appellant continued to negotiate following the repudiation by the Crown. <u>As a result I do not agree with the position of the Crown that the Crown is simply not bound even if there was an agreement to settle this Appeal.</u> [My emphasis]

[88] It goes without saying that if an agreement is for the purpose of arriving at an assessment that is neither consonant with the facts as found nor defensible on a proper understanding of the law, the *Galway* line of authorities is binding on this Court (see *Willers v Joyce & Anor (Re: Gubay (deceased))*, [2016] UKSC 44). But this case is not a case concerning an assessment justifiable on the facts and the law (*1390758 Ontario Corporation*, para 40). The assessment, the taxpayer's liability for taxes concerning particular transactions has already taken place and nothing on this record suggests that it is not justifiable on the facts and the law. Instead, we have an agreement that stipulates that if the facts change, the Minister may then be able to proceed with any reassessment. In fact, the agreement reached conforms with the *Galway* line of authorities. The CRA has already assessed the taxpayer based on the facts as known and the

legislation as understood. If there is a change, the parties agree that the Minister can proceed with reassessments; if the facts have changed, reassessments may occur.

[89] In my view, the *Galway* line of authorities is not binding on this Court, in the peculiar circumstances of this case that are significantly different from the findings in those cases. It bears repeating that the Minister entered freely into this agreement after having conducted a proper assessment. The Minister proceeded to that assessment over many months and an agreement was reached. The party opposite governed himself accordingly by not entering into more straddling transactions. I certainly share the view of Bowie J. that the system would crumble under its own weight if agreements were not possible, or were so uncertain that it would be negligent to agree to anything if the contracting party can renege as he wishes. An agreement that does not encroach on the *Galway* line of authorities ought to be enforceable because it is part of the administration of the *ITA*. The Minister shall administer the *ITA* and she did.

[90] During the hearing of this case, the Court alluded to the recent decision of the Supreme Court of Canada concerning plea bargains in the criminal context. In *R v Anthony-Cook*, 2016 SCC 43, the Court made comments that were eerily similar to those of Bowie J. in *1390758 Ontario Corporation* and Webb J. in *Huppe*:

> [1] Resolution discussions between Crown and defence counsel are not only commonplace in the criminal justice system, they are essential. Properly conducted, they permit the system to function smoothly and efficiently.
>
> [2] Joint submissions on sentence — that is, when Crown and defence counsel agree to recommend a particular sentence to the judge, in exchange for the accused entering a plea of guilty — are a subset of resolution discussions. They are both an accepted and acceptable means of plea resolution. They occur every day in

> courtrooms across this country and they are vital to the efficient operation of the criminal justice system. As this Court said in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, not only do joint submissions "help to resolve the vast majority of criminal cases in Canada", but "in doing so, [they] contribute to a fair and efficient criminal justice system" (para. 47). [Footnote omitted]

In order to foster confidence that the agreement reached will hold, the Court favored a high threshold before a trial judge would see fit to depart from the agreement: the proposed sentence would bring the administration of justice into disrepute or is not in the public interest (para 29). Certainty is paramount unless the administration of justice is brought into disrepute.

[91] In the context of an agreement between the tax authorities and taxpayers, unless there is authority to prevent such agreements, I share the view of Bowie J. and Webb J., and declare that an agreement such as the one before this Court, that does not contravene the *Galway* line of authorities, is binding on the parties. It is certainly the prerogative of the Minister to decide not to enter into any agreement with any taxpayer. The experience demonstrates that such is not the practice and practitioners like Justices Webb and Bowie welcome such agreements. It was obviously the opinion of Bowman C.J. too. As was stressed by counsel for Mr. Rosenberg in this case, certainty is an essential ingredient. That was also the conclusion of the Supreme Court in *Anthony-Cook* as it found that a high test was needed to overcome an agreement on sentence. Thus, unless the authority of *Galway* should be extended, which I have concluded is not required and desirable, or unless the agreement is contrary to public order, the contract is valid and binding.

[92] More than 60 years ago, the President of the Exchequer Court of Canada (Thorson P.) had found that the Minister may decide how she will proceed to reach an assessment:

> There is no justification in any of the statements made in these cases for counsel's contention that the Minister did not make any assessment prior to July 27, 1951. There are several errors implicit in it. It is erroneous to say that unless the Minister has done all the acts that he may possibly do in the performance of his administrative function of assessment he has not made an assessment at all. There is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is, therefore, idle to attempt to define what the Minister must do to make a proper assessment. It is exclusively for him to decide how he should, in any given case, ascertain and fix the liability of the taxpayer. The extent of the investigation that he should make, if any, is for him to decide. Of necessity it will not be the same in all cases.
>
> (*Provincial Paper Ltd v Minister of National Revenue*, [1955] Ex CR 33, [1954] CTC 367, at p 38)

The Minister can therefore decide how the statute should be enforced when it comes to the extent of an investigation.

(c) *Is the agreement contrary to public order?*

[93] The last issue to examine is whether or not is contrary to public order the contract that limits the Minister in the use of a power she may use (ss 231.1(1) of the *ITA*). Article 1373 of the CCQ provides:

1373. The object of an obligation is the prestation that the debtor is bound to render to the creditor and which consists in doing or not doing something.	**1373.** L'objet de l'obligation est la prestation à laquelle le débiteur est tenu envers le créancier et qui consiste à faire ou à ne pas faire quelque chose.
The debtor is bound to render a prestation that is possible and determinate or determinable and that is neither forbidden by law nor contrary to public order.	La prestation doit être possible et déterminée ou déterminable; elle ne doit être ni prohibée par la loi ni contraire à l'ordre public.

An agreement to defraud the tax system is null (*Construction C & J Dugas inc c Charlebois*, JE 95-1891; *Lessard v Labonte*, [1963] C.S. 247). That is well established in law. But does that go beyond?

[94] The Respondent put forth the bold proposition that the "law is clear, no agreement between the Minister and taxpayers can interfere with the Minister's powers to conduct audits" (memorandum of fact and law, para 34).

[95] In support of that proposition, the Respondent relies on case law coming out of Quebec's Courts. In *Vermette c Blainville (Ville)*, [1994] JQ no 2573, the Superior Court concluded that a contract the purpose of which is to limit the legislative power of a municipality to adopt by-laws will not be binding:

> [38] Il ressort de cette jurisprudence et des autres décisions citées par les parties qu'une ville ne peut limiter son pouvoir législatif, mais qu'elle peut effectivement s'engager, par contrat, lorsqu'il s'agit d'une décision administrative, et que les tribunaux maintiendront cet engagement s'il n'est pas contraire à la loi ou à sa charte.

> [TRANSLATION]
>
> [38] It is clear from this case law and the other decisions cited by the parties that a city cannot fetter its legislative power, but that it can enter into a contractual agreement for administrative decisions, and that the courts will maintain this agreement provided it does not violate legislation or its charter.

This case stands for the proposition that there cannot be fettering of the legislative power. There is no fettering of legislative power in this case (see Hogg, Monahan & Wright, *Liability of the Crown*, 4th ed, (Toronto: Carswell, 2011, no 9.6). This case does not support the Respondent's contention.

[96] Similarly, the case of *Corporation de gestion des marchés publics de Montréal c Montréal (Ville de)*, 2006 QCCS 2877, is also of no assistance. In that case, the City entered into an agreement whereby it "s'engage à: maintenir, selon les normes habituelles d'entretien, l'accès à ces différents marchés par les rues, ruelles et trottoirs publics" ([TRANSLATION] "agreed to maintain, according to applicable standards, access to these markets by the public streets, alleys and sidewalks." Subsequently, there was a decision prohibiting access by car during some prescribed time periods. The Superior Court sided with Montreal because its Charter specifically prohibited entering into contracts relating to traffic ("circulation"):

> La compétence de la Ville de réglementer la circulation, la paix, l'ordre public, la décence et les bonnes mœurs, ne peut être soumise à quelques obligations contractuelles quelconques ou quelques ententes de toute nature, tel qu'il appert de la charte aux articles 1 ou 9a).
>
> [TRANSLATION]

> The City's jurisdiction to regulate traffic, peace, public order, decency and accepted standards of behaviour cannot be bound by any contractual obligations or agreements of any kind, as shown in sections 1 and 9(a) of the charter.

In further support, the Superior Court relied on case law on the fettering of the legislative power. Again, this is of no assistance, nor is another case referred to by the Superior Court, and also cited by the Respondent. In *Habitations de la Rive-Nord inc c Repentigny (Ville)*, 2001 CanLII 10048, the Quebec Court of Appeal referred directly to a judgment of the Supreme Court of Canada which confirmed that municipal councils cannot fetter their legislative powers (*Pacific National Investments Ltd c Ville de Victoria*, 2000 CSC 64, [2000] 2 RCS 919, at paras 55 to 57). None of these authorities assists in resolving the issue.

[97] These authorities refer to a House of Lords case going back to 1926. In *Birkdale District Electric Supply Co Ltd v The Corporation of Southport*, [1926] AC 355, the parties had a contract "whereby it was agreed that the price of electrical energy supplied by the appellants in the urban district of Birkdale should not exceed the price of electrical energy supplied in the adjoining borough of Southport." When the appellants started charging more in Birkdale than in Southport, the matter ended up before the Courts, the appellants arguing that the contract was *ultra vires* as it was "inconsistent with the due exercise by them of the powers vested in them by statute, and also as being contrary to specific provisions in the Electric Lighting Act" (p 856).

[98] The contract was enforced. No one contests that the power to pass legislation cannot be fettered. But such is not the case here. In effect, every time a contract is concluded, a public authority exercises discretion. Patrice Garant, in his *Droit administratif* (Patrice Garant, *Droit*

administratif, 6th ed., (Montréal : Éditions Yvon Blais, 2010)) suggests that the true test "consiste à se demander non pas si un pouvoir statutaire est limité par la conclusion du contrat, mais si le contrat est compatible avec les objectifs recherchés par la loi" ([TRANSLATION] "is not to ask whether a statutory power would be limited by entering into the contract, but whether the contract is compatible with the objectives of the legislation" (p 37).

[99] In the case at bar, the Minister is not fettering her discretion. The agreement merely confirms that, in view of a concluded audit and review of this taxpayer for two taxation years concerning very specific transactions, the matter is closed. There is nothing in the nature of a legislative power that will not be exercised. There is simply the recognition that certainty as to the treatment of this taxpayer is attained through the commitment that "the Agency will not proceed with any reassessments for the taxation years" 2006 and 2007, with respect to this taxpayer and only about some well identified transactions. And even then, the agreement provides that the Minister is not prevented from reassessing if the fact pattern changes.

[100] The agreement is in fact in the furtherance of the legislation as it allows for matters to be settled. The agreement is compatible with the legislation's goal. Evidently the Respondent saw fit, and in her interest, to put this matter behind the parties. The Minister was getting something in return and the parties agreed that, in case the taxpayer did not abide by the obligation he agreed to, the agreement was null and void. Similarly, if the facts were found to be different, the Minister may review her position. This is perfectly in line with *Galway*. This agreement simply says that given the facts as known, and in view of the uncertainty in the law created by some case

law, there should be an agreement which implies that the Minister will not proceed to a reassessment if things remain the same.

[101] It seems to me that in order to make arrangements with taxpayers, there must be a measure of certainty as to the agreement itself. As with plea agreements in criminal law, certainty is paramount. If the Minister is not interested in reaching agreements with taxpayers, she can instruct officials to that effect. There is not any indication in this case that the author of the letter of February 2010 acted without authority. Actually no one debates that there are agreements with taxpayers every day in this country. That there be agreement on the basis of the facts as known at the time of the agreement and the law as understood is also more than likely. It is difficult to see how agreements are not in the furtherance of the objects and purposes of the legislation. Far from disabling the Minister from fulfilling the primary purpose for which the legislation was created, the exercise of discretion to enter into this type of agreement helps fulfil the administration and enforcement of the *ITA*. In my view, the analogy with plea bargaining, although not perfect, is apposite.

[102] The agreement between the parties is not null and void and it is binding. The undertaking in this case is compatible with the public duty. The Minister is of course free to exercise her discretion in order to decline to enter into these types of arrangements. She did not in this case.

VI. Costs

[103] The parties offered written submissions on the issue of costs after the hearing of this case, both with respect to the motion to strike and with respect to the merits of what became a judicial review application following the motion to strike the action. The matter of the costs concerning the motion to strike is not unambiguous. Bédard J. was silent on costs. The Federal Court of Appeal found in *Exeter v Canada (Attorney General)*, 2013 FCA 134 [*Exeter*], that "[a] judge's decision whether or not to award costs on a motion cannot later be overridden by the judge deciding the underlying action or application. For this purpose, an order on an interlocutory motion that is silent on costs is treated as an award of no costs" [authorities omitted] (para 14).

[104] Nevertheless, a direction was issued on July 29, 2015, after Bédard J. had joined the Superior Court of Quebec, by a different judge allowing for the adjudication of costs for the motion to strike at the hearing on the merits. However, the direction provided for written submissions to be filed well before the hearing on the merits. That was never done.

[105] To complicate matters, the two decisions before the Quebec courts were with costs and the parties in their material on the motion to strike sought their costs. Despite that, no order of costs was made and I have not found any other explanation. The Applicant, Mr. Rosenberg, suggests that the costs should follow the event. That is not what Bédard J. ordered. The old rule, prior to 1998, was that the costs were to follow, or were awarded in the cause (*Exeter*, para 10). As explained by Rothstein J., then of this Court, this approach changed with new rule 401 (*AIC Ltd v Infinity Investment Counsel Ltd* (1998), 148 FTR 240, at para 11): costs are to be on

the motion unless of course there is an order that costs will be in the cause (*Singer v Enterprise Rent-A-Car Co*, [1999] 4 FC D-65). At any rate, the Applicant has dealt with the cost issue on the motion to strike as a discrete issue, requiring adjudication on its own. The Respondent seems to be satisfied that there is a Direction in place.

[106] In those circumstances, in spite of the silence of Bédard J. and the *dictum* in *Exeter*, I have chosen to treat the Direction of July 29, 2015, as the latest judicial pronouncement on the matter and considered the cost issue on the motion to strike proper, as per the Direction.

[107] There are also submissions made concerning the application for judicial review. I shall address each in turn.

A. *The motion to strike and the use of an action before the Federal Court*

[108] There were two matters before Bédard J. It is the Respondent who moved a motion to strike the action introduced by Mr. Rosenberg following his unsuccessful trip before the Quebec courts. The CRA contended that the action had no likelihood of success and that the action introduced in the Federal Court was an inappropriate procedural vehicle. The Quebec Court of Appeal had found that "[l]a nature du recours entrepris par l'appelant consistant essentiellement en une demande de contrôle judiciaire des actes de l'intimée, au sens de l'article 18 *L.c.f.*" (2014 QCCA 1651, at para 18), yet the Applicant persisted by proceeding by action instead of by judicial review application before the Federal Court. That was challenged by the Respondent.

[109] Justice Bédard therefore disposed of two issues. Is it plain and obvious that the action initiated by Mr. Rosenberg cannot succeed? And is an action the right procedural vehicle in this case?

[110] The two issues were fully addressed by the parties. Mr. Rosenberg, the Applicant, prevailed on the motion to strike: the Court ruled that it was not plain and obvious that he could not succeed. On the other hand, it is the Respondent, the CRA, that was successful as to whether or not the matter should be pursued as an action instead of a judicial review application. She found that "the proceeding brought by the plaintiff cannot succeed in its current form, but that there is nonetheless a live issue between the parties and in this respect it is not plain and obvious that the plaintiff's position cannot succeed in the context of an appropriate proceeding" (para 35). Leave was granted for the Applicant to turn his action into the judicial review application. In the result, each side won and lost.

[111] The Applicant suggests that his win is more important, significant, than that of the CRA. I fail to see why. In spite of the guidance of the Quebec Court of Appeal, the Applicant chose to proceed by way of action in the Federal Court. He was disabused, thanks to the Respondent's motion. The effect of the Respondent's motion was to clarify that there was an issue to be decided, but also that the proceedings should not be lengthened by proceeding by way of action.

[112] The success on the motion was divided. I have considered whether one party should be awarded costs in spite of the fact that each side prevailed on one argument. In my view, each side has had equal success before Bédard J. No cost will be awarded on the motion decided by her.

B. *The merits of the application*

[113] On the application for judicial review, the Applicant prevails and is entitled to costs. Originally, the Applicant sought costs on a solicitor-client basis. However, a different tack was taken in the written submissions. The Applicant stressed instead the offer to settle that was rejected by the Respondent to argue that Rule 420 of the *Federal Courts Rules* would allow for some costs enhancement. I take it that costs on a solicitor-client basis were not pursued. Given that the Applicant changed his position by arguing for costs on a basis different than the one presented, it may be that this constitutes a breach of the duty of fairness. The Respondent is all of a sudden subject to a liability without having an opportunity to respond. However, I have concluded that Rule 420 is not engaged on the facts of this case and it will not be necessary to discuss further the duty of fairness.

[114] The offer to settle is in fact basic. Both sides would return to the situation *ex ante*. Following the decision of Bédard J. on April 28, 2015, the Applicant forwarded an offer on May 20, 2015, whereby the Applicant would withdraw proceedings against the CRA to challenge the demand letter whilst the CRA would withdraw its demand letter and an applicant for a compliance order pursuant to section 231.7 of the *ITA*. The offer stated that the proceedings would be withdrawn on a without costs basis. It is not completely clear what costs there would be given that there had been divided success on the motion to strike.

[115] In essence, the Applicant's proposal is for the CRA to renounce its enforcement effort against him in return for not seeking costs on a motion to strike for which the Applicant was successful only in part. If there is no cost award, there is no benefit for the Respondent. What is

the incentive to accept the offer to settle? After all, the Court had merely declined to strike the action, as it was not plain and obvious that it cannot succeed. That cannot be considered to be a ringing endorsement, as somewhat suggested by the Applicant in his submissions on costs (para 4), of the position taken by the Applicant. Indeed, it is not clear that the judgment obtained is as favourable as the terms of the offer to settle if the costs on the motion to strike, the bargaining chip offered by the Applicant, was not obtained.

[116] Although the offer to settle was clear and unambiguous, there was not a compromise that was offered (*MK Plastics Corporation v Plasticair Inc*, 2007 FC 1029; *H-D USA, LLC v Berrada*, 2015 FC 189) that would be an incentive to accept. It is rather a demand to surrender. I would therefore decline to apply Rule 420.

[117] The Applicant also raised that the issue was novel and required considerable preparation.

[118] I see no reason to depart from Rule 407. The Applicant has submitted a bill of costs on the basis of Column III, which is appropriate. The disbursements of $5 271.18, including taxes, appear to be high, but not unreasonable. As for the fees, a second counsel was appropriate (item 14(b)); I would award an amount for the travel expenses of one counsel. However, the Applicant indicates that 16 hours, over two days, were spent in court. It is rather 12 hours over two days that is more appropriate; three units per hour are awarded for item 14. As for the number of units per item other than item 14 where three units would be appropriate, I would have thought that the maximum number of units would be less than adequate in view of the relative complexity of this matter. I would allocate the maximum number of units minus one per item for items 2, 10, 11

and 15. The miscellaneous items should be close to the middle of the range. The amount proposed by the Applicant is between $8 620.00 and $14 840.00. In accordance with Rule 400(4), a lump sum of $11 000.00 is awarded on account of fees.

JUDGMENT

THIS COURT'S JUDGMENT is as follows:

1. The Court declares that the parties are bound by the agreement signed on February 19, 2010 and they must comply with the terms therein;

2. The Court declares that the demand letter dated January 7, 2013, is in violation of the said agreement; consequently the Applicant has no obligation to respond to that demand letter which is hereby set aside;

3. It follows that any reassessment would have to be in accordance with the agreement as interpreted herein;

4. Costs for a total of $16 271.19, including disbursements, are awarded to the Applicant.

"Yvan Roy"

Judge

APPENDIX "I"

Canada Revenue Agency / Agence du revenu du Canada

Montreal, February 19, 2010.

Charles G. Neuhaus, CA
5250 Decarie
Suite 604
Montreal, Quebec
H3X 2H9

Your file

Our file

Without Prejudice

Re : Michael Rosenberg, ("MR"), Chanie Rosenberg, ("CR") and Michael and Chanie Rosenberg Family Trust, ("MCRFT"), herein identified as 4341350 Canada Inc. & and 4341376 Canada Inc. collectively identified as the "taxpayers."
Income Tax Audit, Taxation Years 2006 and 2007

Dear Sir,

We have concluded our audit and review of the taxpayers and taxation years mentioned in caption. The focus of our audit was primarily on the taxpayers undertaking as venturers in a non-resident general partnership identified as "Mazel Partners G.P." with particular emphasis, on the partnership loss sustained in 2006 as well as the ensuing capital gain reported in 2007, pursuant to the disposition of the partnerships interests previously held by the taxpayers in the said partnership.

In the course of our audit, we had the opportunity to discuss with yourself and your legal counsel Me. André P. Gauthier, Stephen D. Hart, Mathieu Gendron and Jean-Philippe Leduc respectively a number of tax issues relative to the operations of the partnership in question.

Furthermore, we have reviewed your representations and responses to our queries thereof, relative to the source and nature of the loss and income as reported in the context of the Supreme Court of Canada decision, as rendered in Friedberg vs. The Queen 1993 DTC 5507.

On the basis of our review of the relevant jurisprudence, published policies, commentaries as well as our review of the present existing legislation relative to the transactions undertaken by the taxpayers and on the merit of your technical representations and responses thereto, the Canada Revenue Agency, ("the Agency") is at the present conjecture (emphasis added), satisfied with the reporting positions taken by the taxpayers, and as such the Agency will not proceed with any reassessments for the taxation years mentioned in caption, with the exception of a revision to the capital gain as initially declared by MCRFT in its 2007 taxation year.

2/

However, as part of this agreement, consideration made of the technical vacuum created by the Friedberg decision, we herein request that the taxpayers refrain, abstain and terminate their practice of engaging in any similar transactions of "straddling" for Canadian Income Tax Act purposes.

This commitment with the Agency is binding upon the taxpayers, spouses, and/or future executors, to the extent that such transactions would constitute straddling transactions in the manner identified in the taxpayer's tax returns for the taxation years audited 2006 and 2007.

As a result, the taxpayers will not seek to shelter any income inclusion from other sources of revenues, by the use of similar financial instruments and or straddling practices aforementioned for all future taxation years, unless clearly permitted by a policy statement or similar pronouncement by the Agency or a new final court judgment.

Furthermore, should any evidence come to our attention as to a breach regarding the terms of resolution forthwith mentioned, the Agency reserves the right to declare this agreement null and void.

This agreement is being made without prejudice and applies strictly to the taxpayers herein mentioned and as such, does not establish any general or administrative precedent applicable to any other taxpayers.

Please note that, should the fact pattern for which we based our conclusion change at any time in the future, the Agency may, at such time, review its present position accordingly, in light of the facts and circumstances applicable at that time.

The taxpayers concerned, upon acceptance of the above conclusion, waive all rights of appeal and/or objection related to the reassessment issues concluded herein.

Could you please sign the second copy of this letter in the space indicated below, pursuant to your acceptance of our findings, and return it to our attention at your earliest convenience.

Yours truly,

R. Amar

Ralph Amar
Specialized Audit
Montreal, Tax Services Office

.....3/

The taxpayers hereby confirm and agree to the foregoing this 19th day of February 2010.

Per:----------
4341350 Canada Inc.
Authorized Representative

Per:----------
4341376 Canada Inc.
Authorized Representative

Incl.: Waiver of Objection Rights

WAIVER OF OBJECTION RIGHTS

The Canada Revenue Agency (CRA) and the Michael and Chanie Rosenberg Family Trust (the "Declarant") have agreed upon how one or more audit issues should be reassessed as outlined in the CRA's final letter, dated February 19, 2009 and itemized as follows:

CRA will proceed to reassess an audit adjustment for the taxation year ended December 31, 2007, of the Declarant, to reflect an income inclusion of an amount of $309,776 representing, a difference in the revised amount of the total capital gains for the said year audited of $13,879,900 (previously $13,570,124), this as herein agreed and pursuant to S. 9(1)), and 39(1) of the Income Tax Act, ("the Act").

The Declarant waives the right to object to the CRA's reassessment of the above-itemized audit issue(s) for the pertinent taxation period(s).

The Declarant acknowledges that:

1. the impact of the provisions of subsection 165(1.2) of the *Income Tax Act*;
   - have been explained; and
   - are understood to mean that no further recourse, including objection and appeal rights, to any authority with respect to the reassessment of the above referenced issue(s) by the CRA is available upon signing this waiver document;
2. additional tax, interest and/or penalty, as applicable, in addition to that which had previously been reassessed, may result from the CRA's reassessment of the issues itemized above in accordance with the CRA's final letter referred to above; and

3 this document is being freely and voluntarily signed.

X _____

signature of Declarant or Representative Date: February 19, 2010.

Michael Rosenberg

name of signatory (printed)

Trustee

title of signatory

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1958-14
STYLE OF CAUSE:	MICHAEL ROSENBERG v MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 31, 2016, NOVEMBER 1, 2016
JUDGMENT AND REASONS:	ROY J.
DATED:	DECEMBER 14, 2016

APPEARANCES:

Me Guy Du Pont Me Michael Lubetsky Me Reuben Abitbol	FOR THE APPLICANT
Me Andrew Miller Me Marissa Figlarz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT