Federal Court  Cour fédérale

Date: 20220708

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

Citation: 2022 FC 1010

Ottawa, Ontario, July 8, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

Docket: T-252-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

NADER GHERMEZIAN

Respondent

AND BETWEEN:

Docket: T-254-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

MARC VATURI

Respondent

AND BETWEEN:

Docket: T-258-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

GHERFAM EQUITIES INC

Respondent

AND BETWEEN:

Docket: T-259-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

PAUL GHERMEZIAN

Respondent

AND BETWEEN:

Docket: T-261-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

RAPHAEL GHERMEZIAN

Respondent

AND BETWEEN:

Docket: T-262-19

THE MINISTER OF NATIONAL REVENUE

Applicant

and

JOSHUA GHERMEZIAN

Respondent

SUPPLEMENTARY JUDGMENT AND REASONS

I. Overview

[1] On February 23, 2022, the Court released its Judgment and Reasons [the Judgment] in these six applications by the Minister of National Revenue [the Minister], seeking compliance

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

[2] The Judgment granted the Minister's applications, subject to certain remaining steps outlined therein, for applying the Court's conclusions surrounding the Respondents' success in some of their defence arguments to the development of the form of compliance order in each application. Those steps have now been completed, and the Court is issuing the compliance orders on the same date as these Supplementary Reasons. These Reasons are intended to explain the Court's conclusions on the principal outstanding disputes between the parties, related to the form of the compliance orders in the six applications, as identified in written submissions provided by the parties following the issuance of the Judgment.

II. **Background**

[3] Consistent with the nomenclature employed in the Judgment, for purposes of these Reasons I will refer to the invocation of s 231.1 as a "Request" and the invocation of s 231.2 as a "Requirement", and I will employ the term "Demands" to encompass generically both Requests and Requirements.

[4] As explained in the Judgment, the Minister was largely successful in resisting the defence arguments raised by the Respondents in these applications. However, I accepted the

Respondents' imprecision arguments in relation to particular portions of a small number of Requests. More significantly, the parties met with divided success on an issue surrounding statutory interpretation of the scope of s 231.1(1). In brief, I found that the Respondents are correct in their position that, when issuing Requests under s 231.1 of the Act, the Minister is authorized to compel the provision of documents but not to compel the provision of written answers to questions.

[5] It is therefore necessary for the Court to decide how the conclusions on the statutory interpretation issue apply to individual items in the Requests or portions thereof and, as a result, which items are valid because they represent a demand for documentation and which are not valid because they represent a demand for undocumented information. To that end, the Judgment provided the parties an opportunity to confer in an effort to reach agreement on a proposed form of compliance order for each of the six applications, capturing the items required to be provided by the relevant Respondent. Failing such agreement, the parties to each application were required to file their proposed forms of compliance order, accompanied by written submissions identifying all remaining areas of disagreement and their positions on those disagreements.

[6] While this process appears to have resulted in some narrowing of the areas of disagreement, the parties did not reach full agreement on the form of the compliance orders. As such, the Minister provided proposed forms, accompanied by written submissions dated May 4, 2022, and the Respondents provided "black lined" versions of those same forms, showing additions and deletions proposed by the Respondents, accompanied by written submissions dated May 18, 2022.

III. **Issues**

[7] Based on my review of the parties' written submissions, the following issues represent the principal areas of disagreement on the form of the compliance orders:

A. Precision of language surrounding documentation versus information;

B. Intensity of obligation to procure information and documents;

C. Timeframe for the Respondents' compliance with the compliance orders;

D. Issues specific to the application involving Marc Vaturi (T-254-19)

E. Issues specific to the application involving Gherfam Equities Inc. (T-258-19)

F. Issues specific to the applications involving Nader and Raphael Ghermezian (respectively, T-252-19 and T-261-19)

IV. **Analysis**

A. *Precision of language surrounding documentation versus information*

[8] As noted above, one of the principal issues adjudicated in the Judgment involved statutory interpretation of the scope of s 231.1(1). Under this section of the Act, the Minister is authorized to compel the provision of documents but not to compel the provision of written answers to questions. Related to this issue, the Respondents have now raised concern that some of the language of the compliance orders proposed by the Minister is ambiguous and potentially

inconsistent with the Court's ruling. The Respondent asks for changes to the Minister's proposed orders to make it abundantly clear that, in response to Requests under s 231.1(1), the Respondents are required to provide only documents that are already in existence.

[9] By way of example, the Respondents refer to demands for the production of "lists" and "organizational charts". The Respondents submit that, when the Minister issued the Requests for such items, they were not limited to existing documents, as the Minister then believed that she had the authority under s 231.1(1) to compel written answers to questions and therefore envisioned that the Respondents would create the requested lists and organizational charts in response to the Requests. The Respondents do not dispute that the Minister may demand production of lists and organizational charts to the extent that such documents exist. However, as the Requests were originally drafted without taking that qualification into account, the Respondents submit that the compliance orders, which will incorporate the Requests as appendices, should contain language clarifying this point.

[10] I find merit to this submission. I would not necessarily subscribe to a general view that compliance orders issued under s 231.1(1) must contain a qualification to capture the principle that only pre-existing documents can be compelled under that provision. However, in the particular context of the applications at hand, involving Requests that were not drafted in contemplation of this principle, I consider the Respondent's proposal, that the portions of the compliance orders related to s 231.1(1) include the language "if they exist", to be an appropriate addition, consistent with the reasons in the Judgment.

[11] Related to this point, the Respondents are concerned that the Minister's proposed language refers to them being compelled to provide "documents and documented information" under s 231.1(1). The Respondents question the meaning of "documented information" in that context and are concerned that it could be interpreted as creating a category of compulsion, distinct from documents, under s 231.1(1).

[12] Again, I find merit to this submission. In explaining the Court's analysis on the statutory interpretation issue, the Judgment draws a distinction between documented and undocumented information, the former being compellable under s 231.1(1) but not the latter. However, I cannot identify a benefit in the compliance orders referring to compulsion of documented information as distinct from documents. To the extent the Minister may envision any such distinction, that point should be left for adjudication in a future matter with the benefit of fulsome argument.

[13] Before leaving this issue, I note that the Minister's submissions focused substantially on what she considered to be a dispute as to whether electronic records qualify as documents that are compellable under s 231.1(1). However, the Respondents' submissions confirm that they do not dispute that such records are compellable.

B. *Intensity of obligation to procure information and documents*

[14] The Respondents submit that much of the documentation and information to be produced relates to third parties, requiring the Respondents to take steps to procure this material. They therefore argue that the compliance orders should expressly identify the intensity of the effort

they must employ. The Respondents propose that the orders require them to exercise due diligence in this regard.

[15] The Minister opposes language of this sort, arguing that the Judgment does not provide for any such qualification of the obligations that the compliance orders will impose on the Respondents. The Minister submits that whether the Respondents exercised reasonable efforts to comply with the orders is a matter to be determined in future contempt proceedings, if any, at which time the Respondents can adduce evidence on this issue.

[16] On this point, I agree with the Minister's position. The intensity of the compliance obligation was not raised as an issue in the main hearings of these applications and is therefore not addressed in the Judgment. I do not consider that issue to be part of the remaining adjudicative scope before the Court in settling the form of the compliance orders in these applications.

C. *Timeframe for the Respondents' compliance with the compliance orders*

[17] The Minister proposes that the compliance orders afford the Respondents 30 days, from the date of the orders, for compliance. The Minister argues that that the Respondents have had years to gather the relevant documents and information and that they have provided no evidence as to the state of the records or how they are maintained that would support a conclusion that they need more than 30 days to comply. The Minister also notes that portions of the

documentation and information the Respondents will be required to provide are the same in certain of the applications.

[18] Noting that the Judgment is under appeal, the Respondents advise that they would consider a 30-day period acceptable if it were to commence from the date of the final disposition of the appeal and cross-appeal. They explain that they applied to the Federal Court of Appeal for a stay of the Judgment, which was declined on the grounds that it was premature and that the Federal Court should be permitted to complete its processes. The Respondents submit that it is a well-established practice for compliance orders to be stayed pending appeal, typically with the consent of the Minister. In the alternative, the Respondents seek 120 days from the date of the compliance orders, arguing that the Demands require production of voluminous amounts of documentation and information.

[19] The Respondents have not convinced me that, in the absence of consent by the Minister, there is any basis for this Court to provide what would amount to a *de facto* stay of the compliance orders pending the outcome of the appeal. Nor is there an evidentiary basis for the Court to conclude that the Respondents require more than 30 days to comply. Most significantly, I note that the Respondents have known the outcome of the Judgment since February 23, 2022, and the remaining areas of dispute as to the form of the compliance orders, which are being adjudicated in these Supplementary Reasons, are relatively narrow. As such, the Respondents have for some time had substantial and increasing visibility on the production they would be required to make. I consider 30 days from issuance of the compliance orders to represent a reasonable time to complete that process.

D. *Issues specific to the application involving Marc Vaturi (T-254-19)*

[20] The Respondents submit that the Minister's proposed compliance order in the application involving Marc Vaturi (T-254-19) includes at paragraph 1(d) information that, while originally included in Request A-MV-0144, was no longer being sought by the Minister by the time of the hearing of this application. The record before the Court supports the Respondents' position that, by the time of the hearing, in relation to Request A-MV-0144, the Minister was seeking only limited outstanding information in response to questions #1 and #8 of that Request. I agree with the Respondent that the Minister's draft compliance order is broader and that paragraph 1(d) of the Minister's draft is comparable to question #8 as originally drafted. I will issue a compliance order that excludes paragraph 1(d).

[21] However, the Respondents also seek to include, in relation to the portion of the compliance order applicable to Request A-MV-0144, language which restricts the production obligation by reference to a letter to Mr. Vaturi dated March 20, 2020, that identified documentation then outstanding. With the elimination of paragraph 1(d), I see no need for this additional language.

[22] In relation to the portion of the compliance order applicable to Requirement A-MV-0137, the Respondents request the deletion of the introductory words "for the Gibraltar entities managed and controlled by Nader Ghermezian and Marc Vaturi, either alone or jointly with any other person". I agree with the Respondents' position that this language is extraneous to the Requirement as originally formulated, is unnecessary, and should therefore be deleted.

E. *Issues specific to the application involving Gherfam Equities Inc. (T-258-19)*

[23] The Minister's proposed compliance order in the application involving Gherfam (T-258-19) includes, in relation to Request GEI-20 and particularly to certain named accounts, language compelling provision of "…a summary of all transactions posted to these accounts (i.e., the general ledger account summary) …" for a prescribed period of time. The Respondents request deletion of this and related language, presumably on the basis that it seeks to compel provision of information rather than documentation. The Minister takes the position that this language specifies a particular document, the general ledger account summary. I agree with this position and, because of the inclusion of the Respondents' requested "if it exists" language (explained earlier in these Reasons), there is no risk of the compliance order being interpreted as requiring the creation of a document.

[24] The Minister's proposed compliance order in relation to Request GEI-28 includes language compelling provision of:

A. "…all other investments held by Regent International Fund, LLC";

B. "terms, rights, and characteristics of the shares/bonds purchased and/or sold"; and

C. "…contact information for the fund and fund manager…"

[25] The Respondents request deletion of this language, presumably on the basis that it seeks to compel provision of information rather than documentation. The Minister takes the position that, if this information exists in electronic form, the Minister can request its production in that

form. As previously noted, the Respondents do not object to the provision of records that exist in electronic form. In my view, the issue with the disputed language in relation to Request GEI-28 is that, when issued, it did not seek to compel documentation in any form, whether hard copy or electronic. Rather, that language sought information and, consistent with the statutory interpretation conclusions in the Judgment, should not be included in the relevant compliance order.

[26] The Minister's proposed compliance order in relation to Request BUST-21 includes language compelling provision of certain account extracts, bank statements and other documentation, including language indicating that the purpose of providing this material is "…to show that these amounts are not related to Royce Holdings LLC …". I agree with the Respondents' position that this language should be deleted, as it does not serve to expand, limit or otherwise clarify the scope of the documentary demand.

F. *Issues specific to the applications involving Nader and Raphael Ghermezian (respectively, T-252-19 and T-261-19)*

[27] In the Minister's proposed compliance order in the application involving Nader Ghermezian (T-252-19), the Respondents propose changes related to Request A-NG-0125. In paragraph a(vi), they propose a drafting change, to reference another paragraph of the order, and propose replacing the words "a detailed trial balance" with "the trial balance". I approve of those changes, as well as similar changes the Respondents propose in relation to Requests NUST-22 and NUST-23 in T-252-19 and in relation to RUST-22 and RUST-23 in T-261-19 involving Raphael Ghermezian.

[28] More substantively, in paragraph a(xviii) related to Request A-NG-0125 in T-252-19, the Respondents propose deletion of the words "…as required to be filed with 97GFT's return of income for its first taxation year as described in subparagraph (b)(i) of that definition and all supporting documentation for any such election(s)". The Respondents take the position that this language should be deleted, as it does not serve to expand, limit or otherwise clarify the scope of the documentary demand. I disagree, as this language assists in identifying the documentation to be provided.

[29] The Minister's proposed compliance order in relation to Request BUST-21 (in both T-252-19 and T-261-19) includes language compelling provision of certain account extracts, bank statements and other documentation, including language indicating that the purpose of providing this material is "…to show that these amounts are not related to Royce Holdings LLC …". I agree with the Respondents' position that this language should be deleted, as it does not serve to expand, limit or otherwise clarify the scope of the documentary demand.

[30] In relation to Request GG-24 (in T-252-19 and T-261-19), the Respondents propose replacing the words "identify each such arrangement by providing" with the word "provide", presumably to reflect that the obligation is to provide documentation, not information. I agree with this change.

[31] In relation to Requests NUST-22 and NUST-23 (in T-252-19 related to Nader Ghermezian) and RUST-22 and RUST-23 (in T-261-19 related to Raphael Ghermezian), the Respondents propose deleting from the Minister's paragraph a(i) language that does not in any

way helpfully modify the obligation to provide certain financial statements. I agree with this change.

[32] In relation to Request NUST2-01 (in T-252-19 related to Nader Ghermezian) and RUST2-01 (in T-261-19 related to Raphael Ghermezian), the Respondents identify a number of instances where the Requests sought details, for instance related to compensation, and the paragraphs in the Minister's proposed compliance orders seek to compel documentation of such details. I agree with the Respondents' position that, in circumstances where the relevant Request clearly sought information rather than documentation, the Minister cannot in reliance on that Request compel provision of documentation that may contain such information. In relation to the same Requests, the Respondents propose deleting language that certain documents be provided on a taxation year basis. I agree with this change, as the taxation year language appears related to the manner in which the Minister wished responses to information requests to be organized by the Respondents.

[33] In relation to the portion of the compliance order applicable to Requirement A-NG-0127 involving Nader Ghermezian, the Respondents request the deletion of the introductory words "for the Gibraltar entities managed and controlled by Nader Ghermezian and Marc Vaturi, either alone or jointly with any other person,". I agree with the Respondents' position that this language is extraneous to the Requirement as originally formulated, is unnecessary, and should therefore be deleted.

[34] Finally, in relation to both T-252-19 and T-261-19, the Respondents raise concern about the Minister's proposed forms of compliance orders expressly requiring the production of legal opinions. In relation to one of the Requests relevant to each application (for Nader and Raphael Ghermezian, respectively, NUST2-01 and RUST2-01), the draft order refers to the production of all documents associated with the wind up/cessation of a particular trust, including legal opinions.

[35] As explained in the Judgment, consistent with the language of s 231.7(1) of the Act, the points of which the Court must be satisfied before granting a compliance order include that the document or information sought by the Minister is not protected by solicitor-client privilege (see *Minister of National Revenue v Lee*, 2016 FCA 53 at para 6). However, privilege factors into the analysis only if raised by a respondent, who then bears the burden on that issue (see *Redhead Equipment Ltd v Canada (Attorney General)*, 2016 SKCA 115 at para 31; *Minister of National Revenue v Atlas Tube Canada ULC*, 2018 FC 1086 at para 32).

[36] At the hearing of the applications, the Respondents raised limited privilege arguments in relation to particular language in particular Demands. However, I found that there was no evidence to support a conclusion that there was privileged documentation that would be responsive to those Demands. I also explained that I was not convinced that any orders issued in these matters should include language intended to expressly tailor the orders to a defence argument surrounding privilege that has not been made out on the evidence before the Court.

[37] NUST2-01 and RUST2-01 were not among the Demands about which the Respondents previously raised privilege concerns. However, they raise the concern at this juncture in the context of language that the Minister proposes be inserted in the body of the compliance order itself. Unlike the privilege points previously advanced unsuccessfully by the Respondents, the Court does not require evidentiary support for a conclusion that a legal opinion is protected by solicitor- client privilege. Such a document is, on its face, privileged and should not be the subject of a compliance order. As such, the words “legal opinions” will be excised from the form of order proposed for the applications involving Nader and Raphael Ghermezian.

V. **Costs**

[38] The Judgment reserved the disposition of costs, affording the parties an opportunity to attempt to reach agreement on costs with the benefit of knowing the outcome of the substantive issues adjudicated in the Judgment. The written submissions subsequently provided by the parties explained that they have not reached agreement.

[39] The Minister takes the position that she was either entirely or substantially successful in each of the applications and therefore should be awarded costs in each matter. The Minister seeks an opportunity to serve and file costs submissions after issuance of the compliance orders.

[40] The Respondents argue that the six applications should be treated collectively for the purpose of determining costs and that, overall, the parties met with divided success. Based on that and other arguments, the Respondents take the position that no costs be awarded. In the alternative, they argue:

A. that a single set of costs be awarded to the Minister in the applications involving Paul Ghermezian and Joshua Ghermezian, as these matters were virtually identical and were briefed and argued together;

B. that no costs be awarded in the applications involving Gherfam, Raphael Ghermezian and Nader Ghermezian, based on their divided success; and

C. that costs be awarded against the Minister in the application involving Marc Vaturi, based on the Minister having abandoned the vast majority of the content of that application on the eve of the hearing and as a sanction related to the Supplementary Affidavit of the Minister's affiant, Andrew Bowe, described in the Judgment as misleading.

[41] The Judgment recognized that, if agreement on costs could not reached, the parties may wish to make submissions thereon after knowing the determination of any disagreements on the form of the compliance orders. The Respondents have provided substantive submissions on their position on whether, or to whom, costs should be awarded, but no submissions on quantification. Other than identifying her position that she should be awarded costs on all applications, the Minister has made no substantive submissions on costs or their quantification and has proposed timelines for further submissions by both parties. Given that the Judgment provided that the parties would have an opportunity to make further submissions on costs, following issuance of the compliance orders, I will not presently rule on either the award of costs or their quantification.

[42] Each compliance order will provide for the parties to serve and file brief written submissions on costs, with any supporting material. In the interests of bringing these matters to a conclusion expeditiously and taking into account the constraints of the Court's schedule, the timeline for such submissions will be somewhat accelerated in comparison to that proposed by the Applicants. The Court's expectation is that the parties' submissions will speak to both entitlement to costs and their quantification. The parties are encouraged to propose, and provide jurisprudential support for, lump-sum amounts for any costs that are ultimately awarded.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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

PURSUANT TO WRITTEN SUBMISSIONS

SUPPLEMENTARY JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JULY 8, 2022

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