Federal Court  Cour fédérale

Date: 20220720

Docket: T-1632-19

Citation: 2022 FC 1077

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 20, 2022

PRESENT: Madam Justice Walker

BETWEEN:

GARY FORD

Applicant

and

THE CANADA REVENUE AGENCY

Respondent

ORDER AND REASONS

I. Overview

[1] The applicant, Gary Ford, is appealing an order issued by Prothonotary Molgat (now Associate Judge Molgat) on June 9, 2021 ("the Order"), granting the respondent's motion to strike the application for judicial review on the basis that the doctrines of res judicata and abuse of rights apply. The application for judicial review in question concerns a decision of the Canada Revenue Agency ("the CRA") dated September 5, 2019, denying, after a second review, the

applicant's request for relief in respect of the 2000, 2001 and 2002 taxation years ("the 2000–2002 taxation years") under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("the Act").

[2] The applicant brought his appeal by motion under subsection 51(1) of the *Federal Courts Rules*, SOR/98-106 ("the Rules").

[3] For the reasons set out below, the appeal is allowed.

II. **Background**

A. Relevant facts, 2003–15

[4] The applicant is a Canadian citizen who moved to the United States for business reasons. He returned to Canada in June 2001. The relevant facts began on December 17, 2003, when the applicant filed income tax returns in respect of the 2000–2002 taxation years under the CRA's Voluntary Disclosure Program ("the VDP"). In the returns, the applicant stated that he resided in Ontario during those tax years and that he had claimed significant rental expenses related to his former rental property, which was located in the United States. The events leading up to 2015 are set out in the decision of Justice St. Louis of this Court (*Ford v Canada (Attorney for Canada)*, 2015 FC 1057 (*Ford 2015*), aff'd 2016 FCA 128 (*Ford FCA 2016*)).

[5] In short, in 2004, the CRA assessed the applicant in respect of the 2000–2002 taxation years on the basis of the information provided under the VDP. After receiving a request for adjustment in respect of Mr. Ford's 2001 tax return, the CRA issued a reassessment and waived the late filing penalties on the basis that the applicant had filed his tax returns under the VDP.

[6] Because of the large amount of rental expenses claimed, the CRA conducted an audit and requested clarification and supporting documents on several occasions in 2005. On January 9, 2006, having received no news from the applicant or his representative, the CRA reassessed the tax years in question. The applicant did not object to the reassessments.

[7] On November 22, 2010, the applicant submitted a request for relief to the CRA, under subsection 152(4.2) of the Act, seeking reassessments in respect of the 2000–2002 taxation years. Initially, no supporting documents were filed to support the request. In May 2011, the CRA requested that the applicant provide the required supporting documents, as requested in 2005. No documents were supplied, and the CRA denied the request on June 28, 2011. The applicant submitted his request for relief for a second-level review in June 2012. He attached some documents to that request, but the CRA denied the request on August 20, 2014.

[8] On December 29, 2014, the applicant filed an application for judicial review of the CRA's second-level decision ("the Previous Application"). On September 10, 2015, Justice St. Louis dismissed the Previous Application because the applicant had left out the bulk of the requested information, as well as the nature and the context of the expenses (*Ford 2015* at paras 57–59). The scope of my colleague's decision in *Ford 2015* is a key issue in this appeal, and I will return to it in my analysis.

B. Request for relief under subsection 220(3.1) of the Act

[9] The applicant hired new legal representation. His new representatives contacted Ian Demers, the counsel in charge of the respondent's case before the Federal Court and the Federal Court of Appeal, to try to settle the case out of court, to no avail.

[10] In March 2017, the applicant's counsel submitted an access to information request; they received documents in response to the request on July 24, 2017. The documents included (1) documents received by the VDP from the CRA in November and December 2004 relating to rental expenses claimed by the applicant for the 2000–2002 taxation years ; (2) a letter from the VDP stating that the applicant's disclosure file had been forwarded to the CRA's audit branch for review of the documents submitted and verification of the completeness of his disclosure; and (3) a second letter from the VDP stating that the disclosure file had been accepted. This letter also returned to the applicant the documents he had submitted in November and December 2004.

[11] On December 4, 2017, the applicant filed a request for relief under subsection 220(3.1) of the Act, asking the Minister to exercise her discretion to cancel the penalties and interest imposed for the 2000–2002 taxation years. The CRA denied the applicant's request at the first level on February 23, 2018.

[12] On February 4, 2019, the applicant submitted his request for relief under subsection 220(3.1) for a second-level review.

C. CRA's second-level decision - decision under review

[13] On September 5, 2019, the CRA denied the applicant's second-level request for relief. This is the decision under review. In the decision, the CRA acknowledged that the applicant had submitted supporting documents to the VDP:

> As per the Federal Court judgment dated September 10, 2015, it is stated that the supported documentation was requested by the Audit Section multiple times to you and your representative, and we obtained no answer. Even if the documentation was previously submitted to the Voluntary Disclosure Program, it was returned to

> you. The Audit Section needed the documentation as well as other supporting documents to accept the tax returns modifications asked by you. The documentation was again asked for the relief and the second relief requests, again we received no answer from you or your representative. Since no documentation was provided as requested by the CRA to support your claims, the modifications were denied.
>
> In addition, our records show that multiples letters and contacts were made by the Collection Section; however, no significant payment was made in regards to your CRA debt. Collections letters regarding tax arrears were sent to you between June 23, 2004, and August 8, 2017.

[14] Accordingly, the CRA determined that there was no basis for concluding that circumstances beyond the applicant's control had prevented the applicant from meeting his tax obligations and complying with the requests.

D. Applicant's application for judicial review

[15] On October 7, 2019, the applicant filed this application for judicial review of the second-level decision ("the 2019 Application"). He argues that the decision is unreasonable in light of the circumstances of the case, including his submission of the necessary supporting documents to the VDP in 2004. According to the applicant, the CRA is attempting to deny the seriousness of its conduct by arguing before the Federal Court and the Federal Court of Appeal that it never received the supporting documents. The applicant is requesting that this Court set aside the second-level decision and refer the matter back to the CRA for reconsideration, with instructions to cancel the interest and penalties imposed in respect of the notices of assessment for the 2000–2002 taxation years issued in 2006.

E. Respondent's notice of motion to strike out application for judicial review

[16] On February 14, 2020, the respondent filed a motion to strike the 2019 Application on the basis of res judicata and abuse of rights. The respondent submits that the request for relief under subsection 220(3.1) sought the same remedy as the December 29, 2014, request under subsection 152(4.2). According to the respondent, the applicant is seeking acknowledgment in this 2019 Application that he did indeed provide the CRA with the supporting documents as part of his subsection 152(4.2) request. The respondent submits that the 2019 Application is therefore res judicata in light of the decision in *Ford 2015* (aff'd *Ford FCA 2016*). The respondent also argues that the 2019 Application is improper because it alleges without evidence that the CRA and its counsel at the time misled the Court at the trial before Justice St. Louis.

[17] On August 17, 2021, the applicant filed his reply record to the motion to strike, including an affidavit with numerous supporting exhibits.

III. **Order - decision under appeal**

[18] The Associate Judge issued her order on June 9, 2021, granting the respondent's motion for summary dismissal and thereby setting aside the 2019 Application. In her deliberations, she concluded that the applicant's affidavit was not admissible in respect of the motion.

[19] The Associate Judge began by observing that an application for judicial review can fail at the preliminary objections stage on the grounds of res judicata, issue estoppel, or abuse of process, setting out the criteria for res judicata to apply. She was satisfied that the conditions pertaining to the judgment had been met in this case: the Court had jurisdiction, the judgment

rendered in *Ford 2015* was definitive, and it was rendered in a contentious matter. Whether the judgment was res judicata therefore ultimately depended on the conditions pertaining to the action: those of "triple identity", that is, "the identity of parties, object, and cause".

[20] The Associate Judge drew the following conclusions:

- There is identity of parties because the parties were acting in the same qualities as in *Ford 2015*.
- Regarding identity of object, subsections 152(4.2) and 220(3.1) of the Act are part of the taxpayer relief provisions. To the extent that it seeks to have the interest and penalties imposed for the 2000–2002 taxation years cancelled or reduced on the basis of supporting documents concerning the applicant's rental expenses, the benefit the applicant was seeking in making the 2019 Application was the same as in *Ford 2015*. Moreover, the request under subsection 220(3.1) and the previous request for relief were based on substantially the same facts and were in effect attacking the same error, [TRANSLATION] "which is that of the existence and sufficiency of the supporting documents submitted to the CRA by the applicant".
- Identity of cause was also met because the facts and allegations regarding the supporting documents underlying the second request for relief and the previous request for relief were substantially the same.

[21] The Associate Judge therefore accepted the respondent's argument that Justice St. Louis's decision in *Ford 2015* rendered any challenge to the sufficiency of the supporting documents res judicata. Accordingly, she concluded that it was [TRANSLATION] "plain and obvious" that the 2019 Application was bereft of any reasonable possibility of success (*David Bull Laboratories (Canada) Inc. v Pharmacia Inc*., [1995] 1 FC 588 (CA) (*David Bull*)).

[22] Finally, the Associate Judge was persuaded that the 2019 Application was essentially intended to reopen the issue of the sufficiency of the supporting documents, which had already been decided, and to call into question the judgment of Justice St. Louis. Given the language used in the 2019 Application, she concluded that the application was improper.

[23] The applicant filed his notice of motion to appeal the Order on June 21, 2021, and the respondent replied, filing its record on March 3, 2022.

IV. **Standard of review and issues on appeal**

[24] The standard of review applicable to appeals from discretionary orders by associate judges is set out in *Hospira Health Care Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paragraphs 66 and 79. Such orders must be reviewed against the civil appellate standard (*Housen v Nikolaisen*, 2002 SCC 33), as follows: (1) the standard of correctness applies to questions of law and questions of mixed fact and law where there is an extricable legal principle at issue; and (2) palpable and overriding error applies to findings of fact and to questions of mixed fact and law.

[25] The issues on appeal are the following:

1. Is it possible to argue res judicata in the context of an application for judicial review?

2. Did the Associate Judge err in concluding that the applicant's affidavit was not admissible on the motion to strike?

3. Did the Associate Judge err in concluding that it was [TRANSLATION] "plain and obvious" that the 2019 Application has no reasonable chance of success and that the motion to strike should be granted?

4. Did the Associate Judge err in concluding that the 2019 Application was improper?

V. **Analysis**

A. Is it possible to argue res judicata in the context of an application for judicial review?

[26] The applicant submits that the very nature of judicial review makes it inconceivable that the principle of res judicata or issue estoppel would apply to an application for judicial review where a second administrative decision maker dealt with different documents and information from those submitted to the first administrative decision maker. The applicant claims that the case law submitted by the respondent and adopted by the Associate Judge does not apply to applications for judicial review.

[27] I do not agree with the applicant's argument and find that the Associate Judge did not err in law in concluding that an application for judicial review may be struck out at the preliminary objections stage on the grounds of res judicata or abuse of process. In *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paragraph 36 (*Wenham*), Justice Stratas held that an application can be doomed to fail at the preliminary objections stage, including when the objections are based on res judicata and abuse of process.

B. Did the Associate Judge err in concluding that the applicant's affidavit was not admissible on the motion to strike?

[28] In his record opposing the motion to strike, the applicant filed an affidavit consisting of over 430 pages and numerous exhibits, including correspondence and emails between either the applicant or his representatives and either CRA officials or Mr. Demers, the Department of Justice's counsel. The Associate Judge concluded that the affidavit was [TRANSLATION] "not

admissible on the motion in that it relates to the merits of the application for judicial review and adds information that is not part of the grounds set out to support the application".

[29] The admissibility of an affidavit is a question of law to which the standard of correctness must be applied (*Canada (Attorney General) v Iris Technologies Inc.*, 2021 FCA 223 at para 20). The applicant submits that the Associate Judge erred because the entering of the affidavit and its attachments in evidence is necessary in the interest of justice. He notes that the strict rule of an affidavit being inadmissible on motions to strike and allegations of abuse of process is not intended to require the Court to make its decision at the preliminary stage without evidence.

[30] The Federal Court of Appeal has stated that, as a general rule, "affidavits are not admissible in support of motions to strike applications for judicial review" (*JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 at para 51 (*JP Morgan*)). This general rule is based on the principle that in a motion to strike, the facts alleged in the notice of application are taken to be true, which generally obviates the need for an affidavit (*JP Morgan* at para 52, citing *Chrysler Canada Inc. v Canada*, 2008 FC 727 at para 20; aff'd on appeal, 2008 FC 1049). The Court of Appeal noted that an applicant "must set out a 'precise' statement of the relief sought and a 'complete' and 'concise' statement of the grounds intended to be argued" in a notice of application (*JP Morgan* at para 38; paragraphs 301(d) and 301(e) of the Rules).

[31] However, there are some exceptions to the general rule against admitting affidavits on motions to strike, including "where a document is referred to and incorporated by reference in a notice of application" (*JP Morgan* at para 54; see also *Ghazi v Canada (National Revenue)*, 2019 FC 860 at paras 11–12). In addition, this Court recognizes the admissibility of an affidavit in

motions to strike where the moving party has added abuse of process as a supplementary ground. In these circumstances, the moving party may file documents to prove the alleged abuse, and the applicant may file any evidence to refute those allegations (*Turp v Canada (Foreign Affairs)*, 2018 FC 12 at para 21 (*Turp*)).

[32] The applicant's affidavit deals in large part with evidence relating to facts not alleged in the notice of application presumed to be true. I agree with the respondent and the Associate Judge that an exception made for a document referred to and incorporated by reference in the notice of application cannot render an affidavit as voluminous as the one the applicant submitted admissible. I recognize that, objectively speaking, some of the documents attached to the affidavit, including the applicant's request for relief under subsection 220(3.1) and the two CRA decisions, are referred to and incorporated by reference in the notice of application. However, the contents of the request for relief are not necessary to dispose of the motion to strike and both decisions are included in the respondent's motion record.

[33] The respondent alleges in its notice of motion that the 2019 Application is improper because it alleges without evidence that the CRA and its counsel misled the Court in the case dealing with the Previous Application in 2014–15. The Associate Judge agreed with the respondent. The applicant attached to his affidavit the correspondence between his counsel and Mr. Demers relating to their efforts in November 2016 to resolve the differences between the two parties. The correspondence from Mr. Demers mentions the possibility of a second request for relief under subsection 220(3.1) of the Act. Solely in connection with the allegations that the 2019 Application is improper, I find that this correspondence is admissible.

[34] Despite the applicant's arguments, aside from my finding regarding the November 2016 correspondence between the two lawyers, he has not demonstrated an error of law in the Associate Judge's finding that the affidavit is inadmissible.

C. Did the Associate Judge err in concluding that it was [TRANSLATION] "plain and obvious" that the 2019 Application has no reasonable chance of success and that the motion to strike should be granted?

1. The criteria for motions to strike

[35] The Associate Judge correctly summarized the law governing the criteria for motions to strike. Only in very exceptional cases will the Court summarily strike out an application for judicial review where it is plain and obvious that it has no possibility of success (*David Bull*; *JP Morgan* at para 47). This is a high threshold to meet, as the Court does not have all the relevant facts and law before it on a motion to strike.

[36] The threshold required to strike out an application is not different from that required to strike out a motion (*Wenham* at para 33, citing *JP Morgan*):

> [33] . . . In motions to strike applications for judicial review, this Court uses the same threshold. It uses the "plain and obvious" threshold commonly used in motions to strike actions, sometimes also called the "doomed to fail" standard. Taking the facts pleaded as true, the Court examines whether the application:
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> > …is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at

> paragraph 6; *cf. Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> (*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 47.)

[37] Thus, to use the evocative words of Justice Stratas, an application will only be struck where there is a "show stopper" or a "knockout punch" striking at the root of this Court's power to entertain the application (*JP Morgan* at para 47, citing *Donaldson v Western Grain Storage By-Products*, 2012 FCA 286 at para 6).

2. Summary of the 2019 Application

[38] As I mentioned, the facts an applicant alleges in a motion to strike are presumed to be true. In his notice of application for judicial review bringing the 2019 Application, the applicant requested the following:

1. That the decision rendered by the CRA in its letter dated September 5, 2019, be set aside; and

2. That the matter be referred back to the CRA with instructions to cancel the interest and penalties imposed on the notices of assessment issued for the 2000, 2001 and 2002 taxation years.

[39] The substantive allegations set forth in the notice of application can be summarized as follows:

A. In 2010, the applicant attempted to challenge the assessments made by the CRA in 2006 in respect of the 2000–2002 taxation years, in a request for relief under subsection 152(4.2) of the Act. He applied to this Court and the Court of Appeal for judicial review of the denial of his second-level request (see *Ford 2015* and *Ford FCA 2016*).

B. The CRA was able to persuade both courts that the supporting documents and information required to allow the applicant's rental expenses had never been submitted (*Ford 2015* at para 57). However, the CRA misled the Courts because

the applicant subsequently discovered that the CRA had received the documents and the information that it insisted it had not received.

C. As a result, the applicant applied to the CRA for relief, this time under subsection 220(3.1). The CRA denied the request on both the first and second review. The second-level decision is the subject of this judicial review.

D. The CRA made the decision, despite acknowledging that it had received the information and the documents. The CRA suggested in its decision that the applicant had been negligent in communicating with the institution, but this claim is contradicted by the facts. The applicant had retained professionals to represent him before the CRA.

E. The decision demonstrates a blatant disregard for fairness and the law by the CRA. The CRA attempted to deny the seriousness of its conduct before the Courts. As a result, the decision is unreasonable in light of the circumstances of the case, which warrant a directed verdict.

3. 2019 Application's essential character

[40] In considering a motion to strike, the Court must read the notice of application for judicial review with a view to understanding the real essence of the application (*JP Morgan* at paras 49–50). In order to make this analysis, the Court "must gain 'a realistic appreciation' of the application's 'essential character' by reading it holistically and practically without fastening onto matters of form" (*JP Morgan* at para 50; *Barbe v Canada (Attorney General)*, 2020 FC 973 at para 3).

[41] The Associate Judge correctly identified the test applicable to her analysis. She then concluded that the 2019 Application substantially concerns the same facts and the same general legal characterization as the Previous Application and that both applications relate [TRANSLATION] "to the same shortcoming, the existence and sufficiency of the supporting documents submitted by the applicant".

[42] The respondent submits that the applicant is essentially challenging the sufficiency of his receipts to support his rental expenses in the 2000–2002 taxation years. It points to the many factual similarities between the previous request for relief under subsection 152(4.2) and the request under subsection 220(3.1). In addition, the respondent argues that the discovery in 2017 of the applicant's 2004 filing of supporting documents with VDP officers is not truly a new fact because it could have been discovered previously, through due diligence. It adds that the applicant could also have re-sent the supporting documents as requested by the CRA, but he failed to do so.

[43] My holistic and practical reading of the notice of application for judicial review leads me to a different assessment of the essential character of the 2019 Application than that of the Associate Judge. In my view, the 2019 Application (1) presents the same facts as well as an additional fact and these facts are of a different legal characterization than in the Previous Application; and (2) concerns the existence of the supporting documents and their filing in 2004 under the VDP rather than their sufficiency in justifying the rental expenses incurred by the applicant in the 2000–2002 taxation years. This different assessment is the basis for my analysis of the Associate Judge's findings regarding the two aspects of the principle of res judicata at issue here.

4. Analysis of the principle of res judicata

[44] The Associate Judge faithfully identified the strict conditions established for the principle of res judicata:

> [TRANSLATION]
> **CONSIDERING**, on the one hand, the criteria for the principle of res judicata to apply to the judgment—(i) that the court has

> jurisdiction; (ii) that the judgment is "definitive"; and (iii) that it was rendered in a contentious matter—and, on the other hand, the conditions pertaining to the action: "triple identity", that is, "identity of parties, object, and cause": *Roberge v Bolduc*, [1991] 1 SCR 374 [*Bolduc*] at 405–9; *Arial v Canada*, 2017 FC 1124 [*Arial*] at para 24[.]

[45] Further, she committed no error in concluding that the conditions pertaining to the judgment had been met. The Court had jurisdiction in docket T-2628-14 dealing with the dismissal of the Previous Application, the judgment in *Ford 2015* was definitive, and the judgment was rendered in a contentious matter. As to the conditions pertaining to the action, that is, the issue of "triple identity", the Associate Judge's conclusion that there is identity of parties in that the applicant and respondent were acting in the same qualities in both cases is also correct.

[46] The disagreement between the parties is limited to identity of object and identity of cause.

i. Identity of object

[47] Notwithstanding that the two requests for relief were made under different provisions of the Act, the Associate Judge determined that subsections 154(4.2) and 220(3.1) are part of the taxpayer relief provisions that allow for the cancellation of interest and penalties; they are governed by the same administrative policy (Information Circular IC07-1R1 - *Taxpayer Relief Provisions*) ("the Circular")). In the Associate Judge's view, to the extent that the 2019 Application seeks to cancel or reduce the interest and penalties assessed for the 2000–2002 taxation years [TRANSLATION] "on the basis of the supporting documents for the applicant's rental expenses", by filing this application, the applicant is proposing to obtain the same benefit

as in the Previous Application. Accordingly, she concluded that there was identity of object between the *Ford 2015* judgment and the 2019 Application.

[48] The Associate Judge did not err in her explanation of the principle of identity of object. Identity of object is defined as the immediate legal benefit sought (*Roberge v Bolduc*, [1991] 1 SCR 374 at 413–4 (*Roberge*); *Arial v Canada*, 2017 FC 1124 at para 30 (*Arial*)).

[49] To determine the object of an application, the Court must look both at the nature of the right sought and the remedy or the purpose for which it is sought. It must ask whether the object of the second action (in this case, the second application for judicial review) is implicitly included in the object of the first (*Canada (National Revenue) v Hydro-Québec*, 2021 FC 1438 at paras 20–21 (*Hydro-Québec*), citing *Roberge* at p 414):

> [20] According to Professor Ducharme and his book, the *Précis de la preuve*, the thing applied for must be the same in both cases. The object of an action is the right sought to be recognized. Identity of object does not have to be absolute. It is sufficient that the right sought in a first action is understood as a necessary part of the second action (*Roberge* at p 414; *Rocois Construction Inc. v Québec Ready Mix Inc.*, [1990] 2 SCR 440 [*Rocois Construction*]).
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> [21] At page 414 of *Roberge*, the Supreme Court considered *Pesant v Langevin* (1926), 41 BR 412 [*Pesant*] as the leading case on the issue of identity of object. The Supreme Court cited Justice Rivard, who wrote the following at paragraph 37 in *Pesant*:
>
> > [TRANSLATION]
> >
> > The object of an action is the benefit to be obtained in bringing it. Material identity, that is identity of the same physical thing, is not necessarily required. This perhaps forces the meaning of "object" somewhat, but an abstract identity of right is taken to be sufficient. "This identity of right

> exists not only when it is exactly the same right that is claimed over the same thing or over one of its parts, but also when the right which is the subject of the new action or the new exception, though not absolutely identical to that which was the subject of the first judgment, nevertheless forms a necessary part of it, is essentially included in it, as by being a subdivision or a necessary sequel or consequence." In other words, if two objects are so related that the two arguments carried on about them raise the same question regarding performance of the same obligation between the same parties, there is *res judicata*. [References omitted.]

[50] It is therefore necessary to identify the object of the *Ford 2015* judgment and the object of the 2019 Application. In doing so, the Court will examine not only the form of the 2019 Application, but also its substance.

[51] The *Ford 2015* judgment responded to the Previous Application, namely, an application for judicial review of a denial of relief under subsection 152(4.2) of the Act. The subsection reads as follows:

Reassessment with taxpayer's consent	**Nouvelle cotisation et nouvelle détermination**
152 (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining — at any time after the end of the normal reassessment period, of a taxpayer who is an individual (other than a trust) or a graduated rate estate, in respect of a taxation year — the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this	152 (4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier (sauf une fiducie) ou succession assujettie à l'imposition à taux progressifs — pour une année d'imposition, le remboursement auquel le contribuable a droit à ce

Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is 10 calendar years after the end of that taxation year,	moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :
(a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and	a) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;
(b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3) or (3.001), 122.51(2), 122.7(2) or (3), 122.8(4), 122.9(2), 122.91(1), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.	b) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3) ou (3.001), 122.51(2), 122.7(2) ou (3), 122.8(4), 122.9(2), 122.91(1), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.

[52] The purpose of this subsection is to allow taxpayers to request that the Minister "reassess tax, interest or penalties payable" in respect of a taxation year (*Canada (Attorney General) v Abraham*, 2012 FCA 266 at para 9 (*Abraham*)):

> [9] Subsection 152(4.2) of the *Income Tax Act* is part of the taxpayer relief sections of the Act. As can be seen from the text of subsection 152(4.2), set out below, the Minister has the discretion to reassess an individual after the expiration of the normal reassessment period for a year, if the individual requests the reassessment to reduce the tax payable or permit a claim for a tax refund for that year. When the Minister exercises that discretion in the taxpayer's favour, the taxpayer is relieved from the usual requirement that a request for a reassessment can only be made within a particular period of time.

[53] Thus, the Minister has discretion to reassess one or more taxation years outside the normal period if she is satisfied "that such a refund or reduction would have been made if the return or request had been filed on time" (*Abraham* at para 31). This latter qualification was central to the *Ford 2015* judgment and to Justice St-Louis's conclusion (*Ford 2015* at para 57):

> [57] Mr. Ford did claim the rental expenses from the onset and it is thus not a situation where the claim was not presented. It is rather a situation whereby he did not submit any documents to support his claims and did not respond to CRA's numerous demands for documentation. In addition, he presented requests for adjustments that also remained unsubstantiated despite CRA's numerous requests for supporting documents.

[54] The Court found that the request for relief under subsection 152(4.2) constituted an objection to or an appeal from the CRA's 2006 assessment in respect of the 2000–2002 taxation years.

[55] In contrast, a request for relief under subsection 220(3.1) is necessarily limited to a waiver of all or any portion of any penalty or interest payable by a taxpayer in respect of a taxation year:

Waiver of penalty or interest	**Renonciation aux pénalités et aux intérêts**

220 (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	220 (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[56] The assessment in respect of the taxation year(s) covered by such a request is not at issue. Regardless of the outcome of the request for relief, the taxpayer is still likely to owe the tax assessed. The Minister's discretion extends only to a waiver of any penalty or interest payable by the taxpayer. I agree with the applicant that the remedy provided by subsection 220(3.1) is distinct from the remedy provided by subsection 152(4.2).

[57] The Associate Judge noted that both subsections are governed by the same Circular. The respondent argues that the exercise of the Minister's discretion under both subsections is focused on the existence of extraordinary circumstances resulting from circumstances beyond a taxpayer's control (Circular at paras. 25, 73.2). I agree with the respondent, but the Circular

provides additional and separate considerations for the Minister's analysis under the particular subsection at issue.

[58] I therefore conclude that the immediate benefits of the applicant's requests for relief under the two subsections are not identical. The question then becomes whether the object of the 2019 Application is implicitly included in the object of the *2015 Ford* judgment and the Previous Application (*Roberge* at 414-5).

[59] The respondent acknowledged at the hearing that the two subsections are designed for different purposes, but insists that these differences do not permit reconsideration of the application of receipts for expenses claimed by the applicant. This argument is relevant to the identity of cause analysis of the two judicial review applications, but does not persuade me that there is identity of object.

[60] The applicant's request for relief under subsection 152(4.2) requested that the Minister reassess taxes, interest and penalties in respect of the 2000–2002 taxation years. The request submitted under subsection 220(3.1) in December 2017 was to reduce only the interest and penalties imposed. In my view, the consequences of relief under subsection 152(4.2) of the Act do not call for a finding of identity of object between the Previous Application/*Ford 2015* and the 2019 Application, notwithstanding the obvious overlap. The primary benefit sought in the previous relief request was the reassessment of the 2000–2002 taxation years (*Ford 2015* at paras 41, 49, 57). If the Minister had granted the requested relief, the reassessments would have been issued, the taxes payable for those years would have been reduced and, consequently, the interest and penalties arising therefrom would have been reduced. On the other hand, the request

for relief under subsection 220(3.1) makes no mention of reassessments. The subsection does not provide for this. Although similar, the object of the second request for relief and the 2019 Application is not the necessary consequence of the earlier request for relief and *Ford 2015* even though there is identity of object between the two (*Roberge* at 415).

ii. Identity of cause

[61] Identity of cause is defined as the legal characterization of a body of facts (*Roberge* at 416; *Arial* at para 35; see Order at 5). Again, the Associate Judge did not err in law in her formulation of this requirement.

[62] The Associate Judge found that the facts and the applicant's allegations regarding the supporting documents underlying the 2019 Application and docket T-2628-14 are substantially the same. She found the two cases before the Court to have identity of cause and explained that the differences in wording did not affect the identity of cause, and [TRANSLATION] "that it was the applicant's responsibility to submit the supporting documents in a timely manner, that the applicant had them in his possession, and that he did not respond to the CRA's repeated express requests (see Ford 2015)".

[63] The respondent argues that the Associate Judge did not err in finding identity of cause since the legal characterization at issue is the same in both proceedings (*Ungava Mineral Exploration Inc. c Mullan*, 2008 QCCA 1354 at para 58). According to the respondent, the Associate Judge [TRANSLATION] "correctly identified identity of cause as 'the issue of the sufficiency of the supporting documents', thereby linking the factual issue (the fact that the

receipts were provided) to the legal issue (the sufficiency of the receipts to allow the CRA to award the rental expenses)".

[64] I am not persuaded by the respondent's arguments on the motion to strike. Having read the applicant's notice of application, I conclude that the resolution of the issue of identity of object is not plain and obvious, the threshold required to strike out a judicial review application (*Wenham* at para 65).

[65] The CRA's decision under review concerns the applicant's transmission of supporting documents and the VDP's sending of those documents. Nowhere in the decision does the CRA discuss the sufficiency of the documents. In denying the request under subsection 220(3.1), the CRA relies on the applicant's repeated failure to provide supporting receipts in response to requests from the Audit Section and to more recent requests from CRA officials considering the relief request. The respondent considers that the substantive issue in both requests for relief is whether the supporting documents submitted by the applicant could be accepted as a rental expenses within the meaning of the Act. In my view, the substantive issue in the second request for relief can fairly be said not to be the sufficiency of the documents to support the costs claimed, but the sufficiency of their submission in 2004 to support the request. The adequacy of the submission of the supporting documents, the VDP's sending of those documents, and the applicant's subsequent failures to respond to the CRA's requests are issues that are critical to the Court's analysis of the 2019 Application and to whether the second-level decision meets the requirements of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

[66] I recognize that the applicant insists in the first paragraph of his notice of application that his disagreements with the CRA regarding the 2000–2002 taxation years began when he [TRANSLATION] “was required by the CRA to pay taxes that he did not owe”. The respondent relies on this first paragraph as an indication that the sufficiency of the supporting documents is the basis for the 2019 Application, but this statement concerns neither the merits of the Application nor the benefit claimed.

[67] The respondent also argues that to claim that the facts alleged in the 2019 Application are different is a thinly veiled attack on the finality of what was decided in *Ford 2015*, but the applicant acknowledges that his request for relief under subsection 154(4.2) and the assessments in respect of the 2000–2002 taxation years made in 2006 are res judicata. The applicant does not argue that the Court erred, but that the CRA erred in stating that he never submitted supporting documents.

[68] The scope of Justice St. Louis’s decision in *Ford 2015* must be considered in light of the request for relief under subsection 152(4.2) and the condition for the Minister to exercise her reassessment powers. The Minister must be satisfied that a reduction in tax would have been granted if the taxpayer had filed a notice of objection on time (Circular at para 71). The purpose of this condition is to ensure that the taxpayer’s documentation underlying the request for relief is sufficient to reduce the taxes owing for the taxation year in question. While the sufficiency of documentation could be considered in an assessment of a request under subsection 220(3.1), it is not a condition precedent to the exercise of discretion under that subsection.

5. Conclusion of res judicata and motion to strike analysis

[69] The Associate Judge's ultimate conclusion with respect to the principle of res judicata is as follows:

> [TRANSLATION]
> **CONSIDERING** that the Court finds that *Ford* 2015 renders res judicata any challenge to the sufficiency of the supporting documents; that the fact that it was discovered that the supporting documents were sent to the CRA in 2004 does not allow the applicant to fight the effect of res judicata by arguing that *Ford* 2015 is erroneous in fact or in law, since it is an argument of fact that should have been advanced previously (see *Ungava* at para 117; *Werbin c Werbin*, 2010 QCCA 594 at para 8)[.]

[70] Accordingly, she concluded that it was plain and obvious that the 2019 Application was "bereft of any reasonable possibility of success" because of the application of res judicata (*David Bull* at 600; *JP Morgan* at para 47).

[71] In light of my analysis of the requirements of identity of object and identity of cause, and of the *Ford 2015* judgment and the 2019 Application, I cannot agree with the Associate Judge's conclusion. I conclude that she committed a palpable and overriding error in granting the respondent's motion to strike on the basis of res judicata. Although the applicant's notice of application for judicial review contains unusual references and there is notable overlap between the Previous Application, the 2019 Application, and the *2015 Ford* judgment, I cannot conclude that the 2019 Application is res judicata and, therefore, lacks any chance of success. As the applicant argues, again under *David Bull*, cases where it is appropriate to summarily strike out a request for judicial review must remain exceptional (*Hydro-Quebec* at para 49).

D. Did the Associate Judge err in concluding that the 2019 Application was improper?

[72] The Associate Judge correctly described the abuse of process doctrine as a flexible doctrine that allows the Court to terminate litigation on a preliminary basis if it is satisfied that the litigation seeks to misuse the Court's procedures so as to bring the administration of justice into disrepute (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 37; *Turp* at para 26; *Boily v Canada*, 2021 FCA 23 at para 44). The Associate Judge found that the 2019 Application essentially reopens the issue of the sufficiency of the supporting documents that has already been decided and calls into question the judgment in *Ford 2015*. She noted that the allegations in the notice of application were almost hyperbolic when the applicant referred to the events as a [TRANSLATION] "staggering" discovery and a [TRANSLATION] "scandal" perpetrated by the CRA by lying under oath.

[73] As I explained in the previous section, the 2019 Application was not intended to contradict Justice St. Louis and call into question the *2015 Ford* judgment. I also note the November 2016 correspondence between counsel for both parties in which Mr. Demers emphasized that [TRANSLATION] "the Agency will not revisit the request for relief that Mr. Ford made several years ago or revisit the details of that dispute." He correctly pointed out that the Federal Court of Appeal had definitively decided the dispute regarding the request for relief under subsection 152(4.2), and the applicant is not disputing this. However, Mr. Demers went on to state that the applicant [TRANSLATION] "remains free to file a request for relief from interest and penalties under subsection 220(3.1)".

[74] I recognize that the applicant included in his notice of application for judicial review very serious allegations regarding the CRA's actions in the federal courts. At worst, the applicant's discovery in 2017 that the supporting documents were submitted to the VDP in 2004 indicates that the CRA, or rather the CRA's Audit Section, made a mistake in its communications with the applicant and in its position that it never received the documents. Without evidence, this discovery does not indicate a course of action by the CRA or the Department of Justice counsel intended to knowingly mislead both courts. I strongly recommend that the applicant forego this inflammatory pleading.

[75] However, I find that the applicant's use of the Court's procedures to obtain judicial review of the CRA's September 5, 2019, decision does not bring the administration of justice into disrepute. I cannot conclude that the 2019 Application is improper and that it must therefore be struck. It follows that the Associate Judge made a palpable and overriding error in granting the motion to strike on the basis of the doctrine of abuse of process.

VI. **Is the respondent's motion to strike improper?**

[76] The applicant argues that the respondent's motion to strike is itself improper, and is claiming costs on a solicitor-client basis. He alleges that the respondent has already been warned by the Court not to seek to stop applications for judicial review by filing untenable motions that seek to short-circuit the hearing of the merits of applications (*Borel Christen v Canada (Revenue Agency)*, 2017 FC 1022).

[77] I do not consider the respondent's motion for summary dismissal to be improper in the circumstances. There is clearly a previous judgment dealing with a request for relief under the

Act that raised facts and issues that are related and similar to those at issue in this 2019 Application. The actions and steps of Mr. Demers and the CRA's first- and second-level decision makers, while relevant to the applicant's subsequent actions, did not preclude an assessment of the law and the respondent's pursuit of its motion to strike. The fact that the respondent was unsuccessful in its motion does not amount to a finding that the motion was improper.

VII. **Conclusion and costs**

[78] The applicant's appeal from the Order will be allowed, and the motion to strike will be denied.

[79] The time limits for the subsequent steps set out in Part 5 of the Rules will begin to run on August 22, 2022.

[80] The costs of this appeal will be awarded to the applicant. That said, I have considered the applicant's request for an award of costs on a solicitor-client basis in order to sanction the respondent for filing its motion to strike. Given my conclusion that the motion was not improper, I find that this request for costs is not appropriate. Although the applicant was successful in his appeal, and is entitled to costs, I do not see any exceptional circumstances that justify an award of costs on a solicitor-client basis (*Louis Vuitton Malletier S.A. v Wang*, 2018 FC 1198 at para 42).

ORDER in T-1632-19

THIS COURT ORDERS that:

1. The appeal by Gary Ford, the applicant, from Associate Judge Molgat's order rendered on June 9, 2021, is allowed, and the motion to strike is denied.

2. The time limits for subsequent steps under Part 5 of the *Federal Courts Rules* will begin to run on August 22, 2022.

3. Costs are awarded to the applicant, with the applicant's request that costs be awarded on a solicitor-client basis being denied.

"Elizabeth Walker"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1632-19
STYLE OF CAUSE:	GARY FORD v THE CANADA REVENUE AGENCY
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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ORDER AND REASONS:	WALKER J.
DATED:	JULY 20, 2022

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