Federal Court  Cour fédérale

Date: 20180615

Docket: T-1838-17

Citation: 2018 FC 622

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 15, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

HYDRO-QUÉBEC

Respondent

ORDER AND REASONS

[1] The Attorney General, on behalf of the Minister of National Revenue, is issuing a requirement pursuant to section 231.2 of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) [ITA] and section 289 of the *Excise Tax Act* (R.S.C., 1985, c. E-15) [ETA] for which a judicial authorization is required. As we will see, a binding judicial authorization relates to cases involving an unnamed person and may even pertain to more than one person insofar as an ascertainable group of unnamed persons is defined. Given that subsections 231.2(3) and 289(3),

which deal with this judicial authorization, refer to subsection 1 of these respective sections, I am reproducing the text of section 231.2 in its entirety:

***Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.)**

Requirement to provide documents or information	**Production de documents ou fourniture de renseignements**
231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,	**231.2 (1)** Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord international désigné ou d'un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :
(a) any information or additional information, including a return of income or a supplementary return; or	**a)** qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;
(b) any document.	**b)** qu'elle produise des documents.
Unnamed persons	**Personnes non désignées nommément**
(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection 231.2(1) to provide	**(2)** Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents

information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).	prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).
Judicial authorization	**Autorisation judiciaire**
(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") if the judge is satisfied by information on oath that	**(3)** Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou la production de documents prévues au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément — appelée « groupe » au présent article —, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :
(a) the person or group is ascertainable; and	**a)** cette personne ou ce groupe est identifiable;
(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.	**b)** la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;
(c) and (d) [Repealed, 1996, c. 21, s. 58(1)]	**c) et d)** [Abrogés, 1996, ch. 21, art. 58(1)]
(4) to (6) [Repealed, 2013, c. 33, s. 21]	**(4) à (6)** [Abrogés, 2013, ch. 33, art. 21]

As the text of section 289 of the *Excise Tax Act* is identical, it is reproduced in Appendix I to these reasons. Unless stated otherwise, the analysis applies to section 289 of the ETA.

I. Requirement

[2] If the requirement is authorized, it will be addressed to Hydro-Québec. Hydro-Québec is a legal person created under a law of Quebec, the *Hydro-Québec Act* (1983 c. 15 a. 1. (c. H-5)) [HQA]. It is an agent of the State. Its authorized capital is divided into 50 million shares allotted to the Quebec Minister of Finance. Hydro-Québec enjoys broad powers conferred by the HQA in order to fulfil its mandate, the parameters of which are themselves broad. I reproduce sections 22, 22.1, 23 and 24:

22. The objects of the Corporation are to supply power and to pursue endeavours in energy-related research and promotion, energy conversion and conservation, and any field connected with or related to power or energy.	**22.** La Société a pour objets de fournir de l'énergie et d'œuvrer dans le domaine de la recherche et de la promotion relatives à l'énergie, de la transformation et de l'économie de l'énergie, de même que dans tout domaine connexe ou relié à l'énergie.
[…]	[…]
22.1 To attain its objects, the Corporation shall estimate, in particular, the needs of Québec in energy and the means of meeting them within the scope of the energy policies that the Government may otherwise establish.	**22.1**Pour la réalisation de ses objets, la Société prévoit notamment les besoins du Québec en énergie et les moyens de les satisfaire dans le cadre des politiques énergétiques que le gouvernement peut, par ailleurs, établir.
The Corporation may implement energy conservation programs; to that end, it may grant technical or financial assistance.	La Société peut mettre en œuvre des programmes d'économie d'énergie; à cette fin elle peut accorder une aide technique ou financière.
23. The Corporation shall supply electric power to every municipality in whose territory	**23.** La Société est tenue de fournir de l'électricité à toute municipalité dans le territoire

it does not distribute such power, that wishes to distribute such power itself, and that complies with the Act respecting municipal and private electric power systems (chapter S-41), unless the Corporation is not at that time in a position to serve the territory economically.	de laquelle elle n'en distribue pas, qui est désireuse d'en faire elle-même la distribution et qui se conforme à la Loi sur les systèmes municipaux et les systèmes privés d'électricité (chapitre S-41), à moins que la Société ne soit pas alors en mesure de desservir économiquement ce territoire.
It shall likewise, subject to the same proviso, in any territory wherein it does not distribute electric power, supply such power to any electricity cooperative applying to it therefor.	Elle doit également, sous la même réserve, dans un territoire où elle ne distribue pas d'électricité, en fournir à toute coopérative d'électricité qui lui en fait la demande.
The Corporation shall supply all information required for consideration of the project to any municipality wishing to avail itself of the provisions of the first paragraph of this section.	La Société doit fournir à toute municipalité qui désire se prévaloir des dispositions du premier alinéa du présent article tous les renseignements requis pour l'étude du projet.
24. The Corporation shall maintain its power rates at a sufficient level to defray, at least,	**24.** La Société doit maintenir ses tarifs d'énergie à un niveau suffisant pour défrayer au moins:
(1) all operating expenditures;	1° tous les frais d'exploitation;
(2) the interest on its debt;	2° l'intérêt sur sa dette;
(3) the amortization of its fixed assets over a maximum period of fifty years.	3° l'amortissement de ses immobilisations sur une période maximum de cinquante ans.

[3] Despite the style of cause, Hydro-Québec is not the target of the requirement. It is not a taxpayer from whom information pertaining to the ITA is being sought. It is a third party in that the persons with respect to whom the Minister wants to receive information held by Hydro-

Québec are unnamed persons. In other words, the targets are those persons. Hydro-Québec has information that the applicant deems useful and is requesting.

[4] Hydro-Québec offered no objection and reiterated its intention to comply after the Court expressed reluctance to issue the authorization requested on February 23, 2018, obtaining new written submissions in April 2018 and a supplementary denunciation. It stated not just once but twice that it [TRANSLATION] "agrees to comply with the requirement for information formulated by the applicant" (letter of May 1, 2018; a letter to the same effect had been sent to the Judicial Administrator of the Federal Court on January 18, 2018).

[5] Despite this cooperation, judicial intervention is required owing to subsection 231.2(2). In the end, no weight can be assigned to the lack of objection from the respondent as to the conditions required for obtaining judicial authorization. Thus, in its second denunciation, the deponent sought to find support on the absence of a challenge by Hydro-Québec that the class of persons in respect of whom Hydro-Québec information is being requested is an ascertainable group (denunciation #2, paragraph 6). The supplementary memorandum of fact and law seeks to make the same argument (paragraph 32). I give this no weight. The persons targeted by the requirement are in no way represented. It is therefore up to the Court to consider their interests. Considering that the application in their regard is *ex parte* and that no subsequent revision to the ITA has been foreseen since 2007, the application for leave will be reviewed with the necessary vigilance in respect of the *ex parte* applications. This is presumably the purpose of the judicial intervention decreed by Parliament where one or more persons are unnamed.

[6] But then, what is being sought from Hydro-Québec? The applicant wants information. It wants information on Hydro-Québec’s customers. As a matter of fact, it wants information on a large number of customers.

[7] The understanding from the two denunciations is that the applicant is seeking information on business customers, with some exceptions. Therefore, "large-power" customers (e.g., ore mining companies or processing plants) will be excluded, as will federal, provincial and municipal government agencies. The second denunciation specifies in that regard that these entities are exempt from tax. It is not apparent how entities exempt from tax are subject to a requirement seeking, by definition, the administration of the ITA.

[8] If the target is business customers, then customers who pay a residential rate, that is, the rate that “generally applies to domestic, or household use . . ." [emphasis added] (denunciation #2, paragraph 12) will also be excluded. But this may not be that simple. This excerpt is taken from Exhibit 2 of the second denunciation, a Hydro-Québec web page that provides information on Rate D (Rate for residential and farm customers). Yet, under the heading "Other cases in which Rate D applies," the web page states "[p]ortion of electricity used for purposes other than habitation (installed capacity 10 kW or less)." This suggests that someone running a business from their home, but who has an installed capacity greater than 10 kW, would be asked to pay a rate other than Rate D. In other words, a home is not automatically included in Rate D, which of course implies that another rate will apply.

[9] No information is provided on other rates. Neither the initial nor the supplementary denunciation indicates how someone qualifies for any of the rates referred to in the denunciation.

The denunciation provides a few pages from a website attributed to Hydro-Québec in exhibits 1 and 2 of the supplementary denunciation as the only evidence. Exhibit 1 reveals that Hydro-Québec has 4.3 million customers. No indication is provided as to who operates a business or works from home. In fact, we know nothing about Hydro-Québec's business customers other than that they may be natural or legal persons.

[10] Nowhere in the record does it explain what comprises the "business customers" category other than perhaps the fact that they are not "large-power" customers or customers who pay the residential rate. It might be suspected that anyone running a business from their home may be charged the business rate. Not only are the characteristics used to define who is a business customer unknown, but there is also no mention of the number of such customers, among the 4.3 million, on the territory served by Hydro-Québec.

[11] The applicant therefore claims that this is an ascertainable group, presumably because not all of the province's electricity consumers are targeted. Without further explanation in the denunciation, it is stated that by targeting [TRANSLATION] "only certain Hydro-Québec customers carrying on a trade or business," we have an ascertainable group within the meaning of the ITA (supplementary denunciation, paragraphs 14 and 15). How some customers carrying on a trade or business become an ascertainable group is not explained.

[12] The type of information sought is presented in paragraph 12 of the first denunciation. The said paragraph is reproduced in its entirety below:

> [TRANSLATION]
> To determine whether the legal or natural persons who are part of the targeted Group complied with the provisions of the ITA and

> the ETA, it is necessary and relevant for Hydro-Québec to supply to the Minister of National Revenue:
>
> - The given name of the natural person;
> - The surname of the natural person;
> - The name of the legal person;
> - The Québec Enterprise Number (NEQ), if available;
> - The full billing address;
> - The full address of each place of consumption;
> - The telephone number(s);
> - The billing start date for each contract;
> - The billing end date for the contract, if applicable;
> - An indication as to whether the customer received a late payment notice in the 24 months preceding the data extraction date, if applicable;
> - An appended explanation and/or definition of any abbreviation or symbol that may appear in the information supplied by Hydro-Québec.
>
> The whole in an electronic file (for example, Access), to be submitted to the CRA in accordance with the security standards of both parties.

[13] Nowhere in the two denunciations with their exhibits, the only evidence before the Court, is there any reference to the applicant having suspicions about Hydro-Québec's group of business customers. No financial information or information pertaining to the situation of Hydro-Québec's customers is requested.

[14] The denunciations do not provide extensive details as to what the applicant might do with the information thus collected from Hydro-Québec. Use of the information sought is presented succinctly in paragraphs 13 to 15 of the first denunciation as a review of [TRANSLATION] ". . . the tax status of the legal or natural persons whose identity and contact information will have enabled the enterprise number or social insurance number to be tracked down . . ." (paragraph 13). They are therefore looking to identify those who seem to be carrying

on a business but failed to file all the required income tax returns. But there is more. The denunciations state that the information obtained is shared with other groups within the Canada Revenue Agency [CRA], which will in turn examine [TRANSLATION] "whether the individuals and companies complied with their obligations under the ITA and the ETA" (paragraph 15).

[15] The second affidavit does not shed a clearer light on the use. Thus, there is no mention of the scope of the collection of the information, since the number of persons targeted, which could be considerable, is unknown, or of the use, analysis or permitted retention of the information. However, I note that at the end of paragraph 12 of the first denunciation, reproduced in paragraph 12 of these reasons, the CRA requires that the data be in an electronic file. The same is required in the draft requirement. One might think that the applicant's and the respondent's respective databases will be used and cross-referenced.

[16] I add that the draft requirement submitted in support of the first denunciation includes a very broad-brush, practically bare-bones description of the ascertainable group. Its text reads as follows:

> [TRANSLATION]
> To Whom It May Concern:
>
> The Canada Revenue Agency (CRA) wishes to obtain from Hydro-Québec a list of all the legal or natural persons identified as business customers who are charged a general rate, excluding legal or natural persons subject to residential rates and (federal, provincial and municipal) government agencies (hereinafter the customer list).

II. Position of the applicant

[17] The applicant clearly sees a virtually unlimited authority in subsection 231.2(3) of the ITA to obtain information from third parties for use for its own purposes. Attempts are made to justify the scope of the application due to the principles of self-reporting and self-assessment, which require broad verification, inquiry and inspection powers.

[18] The applicant is therefore trying to read subsections 231.2(1) and (3) to their full extent; it only states that it wants the respondent to supply information or produce documents. The information and documents themselves do not have to be related to the ITA, it seems, since the nature of the information sought pertains to the consumption of electricity at a business rate, whether this consumption occurs in a home or on typical business premises. The same can be read from the authorization issuance conditions. The group is ascertainable insofar as large hydro users and domestic rate users are eliminated. There is no further definition of the group which, by all accounts, could comprise several tens of thousands of hydro users in Quebec. The second condition, meanwhile, is met because hydro use at the business rate is required to verify compliance with the duties and obligations set out in the ITA. In that respect, the evidence is quite sparse, as we have seen.

[19] In its initial memorandum, the applicant claimed that once the conditions of subsection 231.2(3) are met, the Court must grant the authorization sought. Based on what the applicant stated, these two conditions are easily met. Thus, an ascertainable group is, quite simply, a group that can be identified or limited. Because the group consists of legal or natural persons not subject to the large-power or domestic rate, [TRANSLATION] "the definition of this group is sufficiently limited to be consistent with the scheme of the ITA and the ETA" (paragraph 37). No other explanation is provided; it is hard to understand why a list of

4.3 million Hydro-Québec customers could not be requested. This would be an even better defined group, since the applicant did not establish who the group consists of other than through reference to other groups whose parameters are unknown.

[20] The supplementary memorandum of fact and law offers little clarification. Added to that is the fact that the number of business customers is limited and that they form a sub-group of all Hydro-Québec customers. While the Court had requested clarifications on the nature of the "ascertainable group" concept during the initial hearing, the supplementary memorandum provides none. We are left with an ascertainable group being one that can be identified or limited, nothing more. Its composition remains unknown. There is a sort of circularity.

[21] The same circularity is perhaps present in respect of the second criterion, according to which information is provided to verify compliance with the duties and obligations set out in the ITA in the case of unnamed persons. The applicant states that it wants to check whether business customers are complying with their duties and obligations and, to do this, it must have a list of these business customers from Hydro-Québec. The applicant is of the opinion that it can request any information [TRANSLATION] "because the information targeted by the [requirement] is part of a tax audit conducted in good faith in order to verify a duty or an obligation imposed by these two acts" (paragraph 41, first memorandum of fact and law). This could hardly be more general.

[22] In other words, the applicant is claiming that for essentially an entire group that it labels in one manner or another, with no limit as to its size, composition or characteristics, it can request information from a third party only insofar as it decides to potentially begin an unspecified tax audit. It will then be able to use the information requested as it sees fit, passing it

along to various sections of the CRA. The applicant can therefore obtain judicial authorization on the sole basis that it may request information, of any kind as it were, whenever it might decide to conduct a large-scale tax audit. This, to me, seems to be the very definition of a fishing expedition.

[23] Since the Court expressed doubts about the applicant's claim that once both conditions are met, authorization should be granted, the applicant was asked to share its representations concerning judicial discretion to refuse to grant judicial authorization. If the conditions for granting judicial authorization are as sweeping as the applicant claims and if, what is more, there is no judicial discretion, then what good is judicial authorization? What is the purpose of such a measure?

[24] Surprisingly, the applicant had little to say about judicial discretion other than to note it. If I understand correctly, discretion is limited to cases where a tax audit would merely be contrived in order to achieve another goal, such as intimidate a given industry or use it to initiate potential criminal proceedings. But then, the audit would no longer be in good faith, invalidating the second condition which would no longer be present, thus preventing the granting of authorization not through the exercise of discretion, but rather because the conditions for granting authorization are not present. The applicant seems to see little room for the exercise of judicial discretion.

III. Analysis

[25] The issue before the Court is to determine whether a judicial authorization should be granted even though the requirement for information could be virtually limitless based on the applicant's use of subsections 231.2(2) and (3). Three sub-issues arise:

- Is there an ascertainable group within the meaning of the ITA?
- Is the information to be provided and the documents to be produced required to verify whether this ascertainable group complied with the duties and obligations set out in the ITA?
- Even if the conditions could be met by interpreting them in the broadest sense, should the Court exercise its discretion to refuse to grant the judicial authorization?

[26] In my opinion, the applicant wants to do too much with the otherwise vague text of section 231.2. Not only is the group not ascertainable, but the information sought does not in itself make it possible to verify compliance with the Act. This information comes before any obligation or duty. It precedes a tax audit when we examine the genuine factual basis. It allows for nothing more than establishing a correlation between the databases of two government and quasi-government agencies. The use of subsections 231.2(2) and (3) would strip it of its meaning.

[27] To begin, I agree that the government needs to have powerful means by which to enforce the law when a taxpayer self-reports and self-assess own income (*R v. McKinlay Transport Ltd.*,

[1990] 1 SCR 627 [*McKinlay*], p. 648). But, I cannot bring myself to find that the aggressive use now being advocated by the applicant is consistent with Parliament's intent. My review of the case law on the subject for more than 50 years does not convince me that this is the correct interpretation of section 231.2.

[28] Undoubtedly, given the exorbitant nature of the common right of this measure, that is, the right of everyone to be left alone by the State, the interpretation of such provisions must be strict (*Canada (National Revenue) v. The Greater Montréal Real Estate Board*, 2007 FCA 346; [2008] 3 FCR 366 [*GMREB-FCA*], paragraphs 35 and 38, *McKinlay*, page 642) without trying to introduce additional extraneous conditions into the text of the Act.

[29] Here, Parliament provided for judicial intervention when the request is made to someone, a third party, in respect of unnamed persons (subsection 231.2(2) of the ITA). The judicial intervention sought by Parliament is, at the very least, to play the traditional role held by the courts of deciding between competing rights: to reiterate the analysis in *Hunter et al v. Southam Inc.*, [1984] 2 SCR 145 [*Hunter*], the Court is ultimately aiming to determine whether the State's right is more important than that of individuals to not be bothered by the government.

[30] Clearly, Parliament chose the judicial arbiter who, virtually by definition, acts in a judicial manner where a judge acts in a fair, neutral and impartial manner, without prejudice and without the influence of considerations extraneous to the issue to be decided. Since the targets of the information gathering are unnamed, and therefore unknown, persons, judicial authorization may be conferred only after careful examination. In addition, Parliament introduced judicial intervention by indicating that the judge must be convinced, which carries with it the need to

have unsterilized criteria and a standard of proof greater than the usual standard of reasonable grounds to believe.

A. *Jurisprudential developments*

[31] A review of the earlier case law could shed some light on the scope of subsection 231.2(3), a fairly recent creation.

[32] The obligation to supply tax information dates back to the *Income Tax War Act*, 1917 (S.C. 1917, c. 28) (*R v. Jarvis*, 2002 SCC 73; [2002] 3 SCR 757 [*Jarvis*], paragraph 54). The first decision worthy of attention is *Canadian Bank of Commerce v. Attorney General (Canada),* [1962] SCR 729 [*Canadian Bank of Commerce*]. A requirement had been issued to the Canadian Bank of Commerce regarding the activities of a customer, The Union Bank of Switzerland, with which it did business. The Canadian Bank of Commerce was not suspected of misappropriation. The text of the Act enabling a requirement for information was worded as follows:

126(2) The Minister may, for any purpose related to the administration or enforcement of this Act, by registered letter or by a demand served personally, require from any person	**126(2)** Pour toute fin connexe à l'application ou à l'exécution de la présente loi, le Ministre peut, par lettre recommandée ou par demande formelle signifiée personnellement, exiger de toute personne
(a) any information or additional information, including a return of income or a supplementary return, or	**a)** tout renseignement ou tout renseignement supplémentaire, y compris la déclaration supplémentaire, ou
(b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents, within such	**b)** la production ou la production sous serment de livres, lettres, comptes, factures, états (financiers ou autres) ou d'autres documents,

reasonable time as may be stipulated therein.	dans le délai raisonnable qui peut y être fixé.

The requirement pertained to transactions for a given period, among other things, and would have revealed information about the activities of other persons, some of them residents and others not.

[33] The Court refused to consider a requirement as having to be limited to the tax liability of the Canadian Bank of Commerce. In terms of both the diversity of the five judges and that of the four others, the need for the requirement to be made for a purpose related to the administration or enforcement of the ITA was met because it was agreed that the requirement is a function of the "genuine and serious inquiry into the tax liability of some specified person or persons." In other words, notwithstanding subsection 126(2), which had a very broad scope, the parties agreed that, at the very least, the requirement should relate to a genuine and serious inquiry in respect of some specific persons for the administration or enforcement of the Act.

[34] Perhaps it is more the decision in *James Richardson & Sons, Ltd. v. Minister of National Revenue et al.*, [1984] 1 SCR 614 [*Richardson*] that is the modern source of the analysis of the power to issue a requirement. James Richardson & Sons was a commodities futures market broker, and the Minister wanted to check on traders in the commodities futures market. In that matter, the Minister therefore asked Richardson for the "magnetic tape file of their clients' commodity monthly statements for 1977" (page 617). Since this was on a test basis, Richardson supplied the information without identifying the clients other than by account number. It is thus that the subsequent requirement "that this information . . . be delivered on magnetic tape" (i.e. a complete listing of office locations and a complete listing of clients with addresses and account

numbers) "together with details of all monthly transactions in 1977 as used in the preparation of clients' commodity statements" (page 617) was addressed to James Richardson & Sons Ltd. Similar demands were made with respect to 1978 and 1979. In 1971, subsection 126(2) became subsection 231(3) (the word "connexe" was replaced by the word "relative" in the French version; the English version remained unchanged).

[35] The Federal Courts (Trial Division and Court of Appeal) found that the requirements were appropriate. At trial, in examining whether the request for information related to the administration or enforcement of the ITA, the judge found that this represented a serious inquiry into a specific tax liability because it was sufficient if they were so described as to be readily ascertainable. Customers or clients in the "commodities securities market" during the three years in question represented an appropriately ascertainable group. The Court of Appeal, meanwhile, rejected the judgment in *Canadian Bank of Commerce*, so to speak. I reproduce here the passage from the Court of Appeal decision found in *Richardson* at pages 619 and 620:

> The judgment rendered in *Canadian Bank of Commerce* was based on the fact, recognized by the parties, that the requirement in this case related to a genuine and serious inquiry into the tax liability of some specific person or persons, but I do not interpret this judgment as meaning that this was the only valid purpose pursuant to what is now subsection 231(3). In any case, I am far from certain that the facts in the matter at hand are truly different from those on which the majority of the Supreme Court based its finding. In the majority view of Justice Cartwright (that was his title at the time), the expression "some specific person or persons" clearly meant not the persons named, but simply existing persons that could be identified. The listing of all of the appellant's clients who are traders in commodities futures falls within the meaning of this expression.

[36] The six judges involved in the Supreme Court judgment do not accept such a broad interpretation of power and align with *Canadian Bank of Commerce* to overturn the lower courts.

It appears clear to me that the Court found that a genuine and serious inquiry was required. As the Minister claims, it is not enough to want "to verify the accuracy of income tax returns made by the appellant's customers who were traders in commodities futures" (page 623). The Minister also stated that it was sufficient to target a specific class of taxpayers; in that case, the class consisted of customers "who trade on the commodities futures market" (page 625). It is the opinion of the Court that the requirement cannot be used to this end; it is a "fishing expedition", in other words, a general survey seeking to determine whether these traders are complying with the Act. If such information gathering can be done, the Minister must obtain a regulation under paragraph 221(1)(d) of the ITA. This provision, which is still in effect, requires any class of prescribed persons to make information returns required in connection with assessments under the ITA. It appears that the Court makes a genuine inquiry a prerequisite for valid use of the requirement. The end of the only full paragraph on page 625 reads as follows:

> . . . Having obtained such a regulation, he is then in a position to demand such returns at large without regard to whether or not any specific person or persons are currently under investigation. The very presence of those provisions in the Act serves, in my view, to support the approach taken in the *Canadian Bank of Commerce*case that s. 231(3) is only available to the Minister to obtain information relevant to the tax liability of some specific person or persons if the tax liability of such person or persons is the subject of a genuine and serious inquiry.
>
> [Emphasis added]

[37] In my opinion, the Court demonstrates its reluctance to accept the fishing expedition by making the existence of a genuine inquiry into specific persons an essential condition for the valid issuance of a requirement to a third party. The need for a genuine and serious inquiry may not have proved its worth in *Canadian Bank of Commerce* because it stemmed from a concession of the parties, but it did in *Richardson*. The concession of the parties in *Canadian Bank of*

Commerce became the chosen condition in *Richardson*. While the decision in *Canadian Bank of Commerce* was not clear, the Court made it very clear in *Richardson*:

> The respondent acknowledges that neither the appellant nor any of its customers is a person whose tax liability is under investigation within the meaning of the *Canadian Bank of Commerce* case. It submits however, that that is only one of the purposes contemplated by s. 231(3). The purpose in this case is to verify the accuracy of income tax returns made by the appellant's customers who were traders in commodities futures. This also, it submits, is a purpose related to the administration or enforcement of the Act.
>
> I have some difficulty with the respondent's submission in relation to the *Canadian Bank of Commerce* case. If, indeed, the ratio of that case is that a demand for information which meets the test of being related to a genuine and serious inquiry into the tax liability of some specific person or persons is a demand made for purposes of the administration or enforcement of the Act, how can it be said, consistent with that decision, that a demand which does not meet such a test is also for a purpose related to the administration or enforcement of the Act? If this is so, it was pointless for the Court in the *Canadian Bank of Commerce* case to make a genuine and serious inquiry into the tax liability of some specific person or persons a prerequisite of the validity of the requirement in that case. Yet Mr. Justice Cartwright makes it clear that his judgment is premised on that prerequisite being there. After referring to certain paragraphs in the stated case he states at p. 738, that it is common ground "that the requirement addressed to the appellant relates to a genuine and serious inquiry into the tax liabilitity [*sic*] of some specific person or persons." He then makes the point that the fact that the answer to the requirement may disclose private transactions involving a number of persons who are not under investigation and may not be liable to tax will not invalidate the requirement. He reiterates the purpose of the requirement at p. 739:
>
> > The purpose of the requirement, then, is to obtain information relevant to the tax liability of some specific person or persons whose liability to tax is under investigation; this is a purpose related to the administration or enforcement of the Act.
>
> Accordingly, while I agree with Le Dain J. that the Court in the *Canadian Bank of Commerce* case did not say that the purpose in that case, namely the obtaining of information relevant to

> someone's tax liability, was the only purpose for which a requirement could validly be made under s. 231(3), it did nevertheless insist on a prerequisite to that particular purpose, namely that the someone's tax liability be the subject of investigation, and it is that prerequisite which the appellant submits is missing in this case.
>
> [Emphasis added]
>
> (*Richardson*, pages 623–624)

[38] The case should not end there. It is the authority's constitutional right to issue a requirement, which was considered in 1990 in *McKinlay*. The issue in that case was the tax audit of two companies; having refused to comply with requirements that had been addressed to them by name, they were charged under subsection 238(2) of the ITA. The constitutionality of subsection 231(3) was challenged. In Provincial Court, the subsection was found to be unreasonable. Both the High Court and the Court of Appeal of Ontario found that the requirement can be issued to conduct a "fishing expedition" without conducting a genuine inquiry into the liability for tax. These courts also found that subsection 231(3) does not authorize a seizure within the meaning of section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

[39] Justice Wilson, who wrote the reasons in *Richardson*, provides the most detailed reasons in *McKinlay*. At the outset, she establishes that the authority conferred by subsection 231(3) does not have the vast scope that one might read into it. She confirms *Canadian Bank of Commerce* and *Richardson* and, on this basis, seeks to determine whether, with a limited scope, subsection 231(3) constitutes an unreasonable seizure. Justice Wilson reiterates the findings in *Richardson*

(page 639) and finds that the application of subsection 231(3) constitutes a seizure because the expectations in terms of privacy protection are violated. In doing so, Justice Wilson relies on two reasons:

> . . . First, subsection 231(3), even construed narrowly in accordance with prior authority, envisages the compelled production of a wide array of documents and not simply those which the state requires the taxpayer to prepare and maintain under the legislation. Second, the legislation contemplates that parties who are not the subject of an investigation or audit can be compelled to produce documents relating to another taxpayer who is the subject of such investigation or audit. Thus, compelled production reaches beyond the strict filing and maintenance requirements of the Act and may well extend to information and documents in which the taxpayer has a privacy interest in need of protection under s. 8 of the *Charter*, although it may not be as vital an interest as that obtaining in a criminal or quasi-criminal context.
>
> [Emphasis added]
>
> (*McKinlay*, page 642)

Not only does the decision confirm that a strong connection to the ITA is necessary to satisfy the requirement that the request be for either the administration or enforcement of the ITA, but the ITA's strict interpretation is also upheld and preferred. Thus, with the restricted scope attributed to the Act, the Court finds that this is a seizure within the meaning of section 8 of the *Charter* that is not unconstitutional because, "[in] my opinion, s. 231(3) provides the least intrusive means by which effective monitoring of compliance with the *Income Tax Act*can be effected" (p. 649).

[40] This approach was not recanted in *Jarvis* where, this time, the Court sought to define the powers that can be used, providing that it involves a criminal investigation or an audit:

> This Court examined the scope of requirement powers in *Canadian Bank of Commerce v. Canada* (Attorney General), [1962] SCR 729, and *James Richardson & Sons v. M.N.R.*, [1984] 1 SCR 614. At page 625 of *Richardson*, Justice Wilson finds that this provision cannot be used to conduct a "fishing expedition" and that it "is only available to the Minister . . . to obtain information relevant to the tax liability of some specific person or persons if the tax liability of such person or persons is the subject of a genuine and serious inquiry."

Allow me to make two observations. First, *Jarvis* considered the text of subsection 232.1(1) of the ITA as it currently exists. Then, the Court was concerned about the difference between an audit ("vérification") and a criminal investigation. Never have we considered a situation prior to an audit, before an audit, so to speak, in the case where no audit has even been initiated.

B. *Development of the text of the Act*

[41] As already noted, for our purposes, it is enough to note that the ITA of 1952 provided a series of powers for "any purpose related to the administration or enforcement of this Act", including the requirement at subsection 126(2). Its text is found at subsection 231(3) of the Act of 1971, the sole exception being that the French word "connexe" has been replaced with the French word "relative", with the English version remaining the same.

[42] The year 1986 saw the appearance of the version that, amended over time essentially to reduce the conditions for issuing a requirement with judicial authorization, would become the text whose scope we must define.

[43] In 1986 and still today, subsection 231.2(1) gave the Minister power to administer and enforce the ITA, to require that any information be provided, including a tax return and the

production of documents. But the ITA breaks new ground. In its subsection 231.2(2), it stipulates that if the Minister wants to obtain information or documents, according to subsection 231.2(1), regarding unnamed persons, he must first obtain the authorization of a judge. Thus, the requirement addressed to a third party but relating to one or more unnamed persons requires the prior intervention of a judge.

[44] In 1986, this judicial authorization had to satisfy several conditions of which the judge had to be convinced. At the time, there were four such conditions:

a) the person or group is ascertainable;

b) the provision of information, including the income tax return, and the production of documents are required to verify compliance with any duty or obligation under the ITA;

c) it is reasonable to expect that the ascertainable persons or group may have failed (or may be likely to fail) to provide the information that is sought or to comply with the ITA;

d) the information or documents is not otherwise more readily available.

[45] Moreover, the ITA would then allow the judicial authorization to be challenged *ex post facto* because the authorization was issued on the basis of an *ex parte* application. The review could be requested by the recipient of the Court-approved requirement. Also added in 1986 was the Court's option to issue an order mandating compliance with the requirement to provide or

produce in the case where a person had been found guilty of failing to comply with the requirement (section 231.7).

[46] The original text of section 231.2 was struck out by a series of amendments. The first was section 231.7, which was repealed in 1988. There was some uncertainty in the mid-1980s with respect to the possibility of issuing more than one requirement once a refusal to produce was noted (*R c Filteau*, [1984] C.A. 272; (1984) 17 CCC (3rd) 570; [1985] 1 CTC 19; 85 DTC 5249 permission to appeal to the SCC denied [1984] 2 SCR IX). This vacillation was eliminated by *R v. Grimwood*, [1987] 2 SCR 755 in the Minister's favour. Subsection 231.2(7) no longer had its rationale.

[47] The other amendments resulted more from choice of policy. Thus, conditions (c) and (d) of subsection 231.2(3) were repealed by the Act of 1996. After an amendment to subsection 231.2(6) was also made in 1996, the option to have the judicial authorization reviewed was simply repealed in 2013. Of the plan created in 1986 with its seven subsections (subsections 231.2(1) to (7)), only subsections 231.2(1) to (3) remain, and again, two of the four conditions for granting judicial authorization were, by virtue of subsection 231(3), repealed as well.

[48] Finally, the text preceding the paragraph of subsection 231.2(1) was amended in 2000, 2007 and 2013 without changing the elements that must be considered in this case. Thus, in 2000, we added that the administration and enforcement of the ITA includes the collection of an amount payable under the ITA. In 2007, we added that the requirement must be not only for the administration and enforcement of the ITA, but also possible on the basis of a general agreement to share tax information (became "listed international agreement" in a 2013 amendment) or a tax

treaty with another country. As for subsection 231.2(3), the power to give judicial authorization was specifically granted to the Federal Court by an amendment in 2013.

C. *Jurisprudential developments since Canadian Bank of Commerce, Richardson, McKinlay* and*Jarvis*

[49] Were it left only to the Supreme Court of Canada's case law, we might have thought that the absence of a genuine and serious inquiry would have terminated an application for judicial authorization under subsection 231.2(3) of the ITA. At least that is what this Court believed in *Canada (National Revenue) v. The Greater Montréal Real Estate Board*, 2006 FC 1069 [*GMREB*].

[50] In this case heard by virtue of a now-repealed provision that allowed for the *ex post facto* review of the authorization granted, the authorization issued was cancelled by the Federal Court judge. The Greater Montréal Real Estate Board [GMREB] is a not-for-profit organization whose purpose is to promote and protect its members' professional and business interests. GMREB was one of the 12 real estate boards in Quebec and had 8,500 members, 71% of whom were real estate brokers. Of its members, 21% had their place of business in the Montérégie/Rive-Sud region. GMREB kept information on its members and on 63% of the properties sold in Quebec.

[51] The requirement thus targets only GMREB members who had a place of business in the Montérégie/Rive-Sud region and were included in a "project to audit." Section 6 of the Federal Court decision states that "[t]he purpose of this project was to determine . . . , whether the commissions received or receivable from the sale of properties were indeed being reported, and thus to assess whether the taxpayers concerned had complied with their duties and obligations

under the ITA." The target group was limited to and made up of real estate agents and brokers who were GMREB members with a place of business within certain postal codes. The requirement called for the name, date of birth, address, telephone number, member code, certificate number, social insurance number and the list of properties sold by each targeted member for 2002 to 2004.

[52] It was the judge's opinion that there was an ascertainable group within the meaning of the ITA. However, she was not satisfied that there was a genuine and serious inquiry, which she believed had been required since *Richardson*. According to the evidence, it was unclear whether a genuine and serious inquiry of the identified group had been conducted. She wanted more ample evidence in which the Minister "will explain that a genuine audit is under way in regard to each and every one of the members of this group and not only an investigation or project aimed at selecting the members of the group who are to be audited later" [emphasis added] (paragraph 59).

[53] We can clearly see that the concern since *Canadian Bank of Commerce*, which was crystallized in *Richardson*, is the abuse. In *Canadian Forest Products Ltd. v. Canada (National Revenue)*, [1996] FCJ No. 1147 [*Canadian Forest Products*], Associate Chief Justice Jerome noted that the four conditions in subsection 231.2(3) were intended to protect against abusive investigations. Justice Rothstein, then of this Court, took up the same theme in *M.N.R. v. Sand Exploration Ltd.*, [1995] 3 FCR 44 [*Sand Exploration*]. He agreed that *Richardson* was the subject of a legislative response because section 231.2, and in particular subsections (2) and (3), was different from subsection 231(3) of *Richardson*. But the new subsection 231.2(3) included the four conditions. He writes at pages 51 and 52, with respect to the difficulties identified in

Richardson that, in his opinion, sought to reduce the prejudicial aspects of a broadly worded provision:

> Counsel for the Minister submits, and I accept, that section 231.2 was enacted to address these difficulties. By contrast with subsection 231(3), subsections 231.2(2) and (3) expressly provide a process with which the Minister must comply in order to require third parties to provide information or documents relating to unnamed taxpayers. A ministerial requirement to third parties to provide information about another person's tax affairs now requires a court authorization. Pursuant to subsection 231.2(3), there must be evidence on oath that: the person is ascertainable; the purpose is to verify the person's compliance with the Act; it is reasonable to expect, on any grounds, non-compliance with the Act; and that the information is not otherwise more readily available. Forcing the Minister to comply with this procedure addresses the mischief identified in *Richardson*, and was intended to prevent fishing expeditions.
>
> [Emphasis added]

The information to be obtained concerns individuals' tax affairs. Unreasonable inquiries and fishing expeditions were to be proscribed, and the new subsection 231.2(3), with its four conditions, addresses these difficulties. At page 53, Justice Rothstein found that:

> Intrusion into the privacy of individuals is always a sensitive matter, especially when third parties, who themselves may have valid reasons for not wanting to disclose, are required to provide the information. Undoubtedly this is the reason Parliament saw fit to require the Minister to obtain court authorization for such intrusion upon satisfying the court of the matters specified in subsection 231.2(3).. But provided the requirements of this subsection are met, such intrusion is authorized. There is no absolute prohibition from obtaining the names of taxpayers from third parties and indeed section 231.2 now provides a procedure for obtaining such information.
>
> [Emphasis added]

[54] The concern remains. But the jurisprudential developments did not end there. This Court's decision in *GMREB* should have been overturned in *GMREB-FCA*. The Court of Appeal has a different opinion concerning the absence of a genuine and serious inquiry.

[55] According to the Court of Appeal, in *Richardson* should not have based itself on *Canadian Bank of Commerce* to find that an essential condition was the existence of a genuine and serious inquiry because in *Canadian Bank of Commerce* this condition is based on a concession on the part of the parties (paragraph 30). The Court does not discuss the fact that *Richardson* uses "the genuine and serious inquiry" to satisfy the requirement that the request is for a purpose related to the application or enforcement of the ITA. As well, in *McKinlay*, Justice Wilson spoke of the narrowed scope of subsection 231(3) regarding its constitutionality as "a result of the common law rules relating to statutory interpretation" (page 646). It was no longer a question of a concession on the part of the parties in *Richardson*. The interpretation of the law prevailed. Despite it all, the result of the Federal Court of Appeal's decision is to eliminate the need for a genuine and serious inquiry.

[56] The Court of Appeal is of the opinion that the repeal of paragraphs (c) and (d) of subsection 231.2(3) which, if we rely on the decisions in *Sand Exploration and Canadian Forest Products*, help avoid the abuses of fishing expeditions, is an argument showing Parliament's intention to lighten the Minister's burden of proof (paragraph 37) and allow for a type of fishing expedition. The Court states at paragraph 45:

> [45] Regardless of what the GMREB says on this point, it appears to me that in removing paragraphs (*c*) and (*d*) from subsection 231.2(3), Parliament permitted a type of fishing expedition, with the authorization of the Court and on conditions

> prescribed by the Act, all for the purpose of facilitating the MNR's access to information. It seems to me that the strict approach adopted by the judge in this case is not appropriate for the provision under review. This approach, borrowed from *Richardson*, was necessitated by the scope of the former statutory provision which, if interpreted too broadly, left open the possibility of abuse by tax enforcement officials (*Sand Exploration, supra*).

There can be no doubt that the burden is thus eased. But the Court of Appeal does not specify what constitutes the "type of fishing expedition" now permitted.

[57] However, the Court of Appeal does not leave subsection 231.2(3) without guidelines or limitations, which could have created the abuses that the Supreme Court sought to avoid. It seems that the Court of Appeal is replacing the genuine and serious inquiry with the need for a tax audit done in good faith and having a foundation in fact and the judicial authorization that could thus avoid abuses. We read at paragraphs 48 and 49:

> [48] It follows from my reading of paragraph 231.2(3)(*b*) that the MNR's *ex parte* application will be granted if the applications judge is satisfied that the information or documents are required for a tax audit conducted in good faith. This good faith guarantees that the MNR will act judiciously in the exercise of its audit power under section 231.2 to ensure the administration and enforcement of the Act.
>
> [49] Having thus defined the applicable test on an application for judicial authorization under subsection 231.2(3), it is my view, based on the MNR's *ex parte* notice of application, supported by the affidavit of auditor Christiane E. Joly, that the tax audit in this case <u>was conducted in good faith, that it had a genuine factual basis and that its objective was to ensure compliance with the Act</u>.
>
> [Emphasis added]

[58] The decision is a based on the facts in the case. The Court emphasizes that the Minister had received documents from GMREB while auditing a member realtor. We were seeking to "to determine whether the brokers who earned commissions following the sale of immovable property complied with all the duties and obligations under the Act" (paragraph 50). We thus had an ascertainable group, namely the brokers and real estate agents who were GMREB members on Montréal's South Shore, who became the subjects of an audit conducted in good faith. Moreover, we were seeking financial information about them. To reiterate the words of Justice Rothstein in *Sand Exploration*, information about tax affairs was being requested. Thus, the Court of Appeal notes in paragraph 44 that "the MNR asked the respondent to provide a list of its members in a given geographic area in order to compare the data with the information it already had." In fact, we understand that the Court of Appeal does not agree with the trial judge according to whom there should have been a genuine and serious inquiry on each and every member of the ascertainable group. Such a requirement would have rendered subsections 231.2(2) and (3) useless because the targeted individuals were unnamed persons. No one whose identity is manifestly unknown can be the subject of a genuine and serious application. In other words, should this have been the interpretation of these subsections, Parliament would have spoken needlessly because the plan created would have little effect.

[59] This court is bound by the decision in *GMREB-FCA*. This obligation is particularly strengthened because a different panel of the Federal Court of Appeal refused to dissociate itself from the decision in *GMREB-FCA* despite the argument that *GMREB-FCA* is incompatible with the Supreme Court's prior case law. The Court of Appeal writes in *Ebay Canada Limited v. Canada (National Revenue)*, 2008 FCA 348, [2010] 1 FCR 145 [*eBay*]:

> [61] Even if judges of this Court are not bound to follow colleagues' decisions which they are satisfied are manifestly wrong on grounds not listed in *Miller*, I am not persuaded that *GMREB* is such a case, even though, in the view of one commentator, "[it] may [have] come as a surprise to many tax practitioners" (see Margaret Nixon, "The Minister's Power to Issue Requirements: *Minister of National Revenue v. Greater Montréal Real Estate Board*" (2008), 15 *Tax Litigation*, 954).
>
> . . .
>
> [68] In short, even if more than one view may reasonably be held on the issue decided by *GMREB*, this is an insufficient basis for the Court to re-examine it. Considerations of both judicial economy, and certainty and stability in the law indicate that we should depart from our previous decisions only when they are manifestly in error.

The Court of Appeal decision binds this Court not just once but twice.

[60] As well, *eBay* is in line with the case law with respect to the scope of the requirement. In fact, the Minister was seeking judicial authorization for an information request related to the identification of Canadian "PowerSellers" who had sold on eBay in excess of a specific amount. The information was found on servers located abroad.

[61] The department clearly wanted information identifying these PowerSellers, who had an address in Canada, but also the gross sales for 2004 and 2005. The PowerSellers program, which provides benefits in terms of services offered by eBay and recognition, is offered by eBay and thus one can become one of its members. In the view of the Federal Court of Appeal, whether we use the criterion of the tax audit conducted in good faith or that of the genuine and serious inquiry, judicial authorization would have been granted.

[62] As noted, requests for information target persons who are unnamed but who are certainly ascertainable or are members of an ascertainable group for tax purposes. Moreover, we are seeking financial information directly related and pertinent to income generated by these people who owe taxes (beyond a certain threshold). In *GMREB-FCA*, the brokers and real estate agents on Montréal's South Shore are targeted to monitor the commissions received on the immovable properties sold. The group of brokers and agents could include about 2,000 people. The Federal Court of Appeal informs us that the audit of a real estate agent in March 2005 aroused the interest of the Minister, who wanted to know more about the income generated by commissions. In *eBay*, information was being sought about the PowerSellers' business volume; the information was on servers in the United States and, at the time, it was estimated that the Canadian PowerSellers program had about 10,000 participants. In *Sand Exploration*, it was individuals who had purchased an interest in certain seismic data (a number that was estimated at 12) that led to a tax benefit as a result of inflated prices (p 54). In *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46; [2008] 2 SCR 643 [*Redeemer Foundation*], attention was drawn by students' parents who made donations to reduce their children's tuition. It was the audit of the Redeemer University College Foundation that had created this attention regarding "donors" who had benefited from tax credits. In *Canada (Customs and Revenue Agency) v. Artistic Ideas Inc.*, 2005 FCA 68, Justice Rothstein, this time as an appellate judge, was satisfied that donors in what was suspected to be "art flips" (successive purchases and sales of artworks) and for which inappropriate tax deductions were claimed constituted an ascertainable group (paragraph 10). In the end, we studied a given group whose characteristics rendered the individuals ascertainable with the specific financial information requested to be certain of the reasonableness of the application.

D. *Consideration of the application in the case*

(1) The conditions of issue in subsection 231.2(3)

[63] However, the issue in this case seems to be of a different nature. While indexed case law deals with obtaining information on the tax status of these taxpayers, whom we can see as members of an ascertainable group of taxpayers, and while the information sought is directly related to these taxpayers' tax status because it is financial in nature, the authorization requested here concerns an undefined group and, strictly speaking, the information requested has nothing to do with tax status. In fact, a type of fishing expedition is inherent in the fact that the people targeted by the requirement are unnamed persons. Full-scale fishing expeditions should not, however, be permitted upon judicial authorization. This is not what subsection 231.2(3) allows.

[64] The fear of abuse since *Canada Bank of Commerce* motivated the courts. Parliament restricts the search to what it calls an "ascertainable group." This can only be by design. Nothing suggests that the right to privacy falls completely in the face of the State's desire to use the power granted in subsection 231.2(3). The requirement is a seizure because "it violates the taxpayers' reasonable expectation of privacy" according to the Supreme Court in *McKinlay* (p. 642). If the requirement letter is constitutional in *McKinlay*, it is because the expectation of privacy is lower than it is in other contexts and the scope of subsection 231(3) at the time (which corresponds to the current subsection 231.2(1)) was restricted in *Richardson* through compliance with the rules of statutory interpretation. We arrive at this result because of the strict interpretation recommended by the higher courts, which takes into account the text, context and subject of the law, even when it is the *Income Tax Act* (*Canada Trustco Mortgage Co. v.*

Canada, 2005 SCC 54; [2005] 2 SCR 601). In my opinion, this way of interpreting the current text is still necessary and nothing in the case law suggests otherwise.

[65] It would be hazardous to find that the result in *McKinlay* is solely the function of the necessity to conduct a genuine and serious inquiry before issuing the requirement, which today corresponds to subsection 231.2(1) of the ITA. The Court's ruling is not as clear as that. But, admittedly, the Supreme Court took the provision as interpreted in *Richardson* to read into it a power that does not engender an abusive seizure within the constitutional meaning of the term. I therefore find that the requirement must have limitations.

[66] Section 231.2 of the ITA is found in Part XV of the Act entitled "Administration and Enforcement." It includes the Minister's duties and powers. Naturally, it deals with the collection of tax debts, the keeping of accounts and records. It includes criminal offences and penalties. Investigative powers are listed in section 231. Thus, section 231.1 allows for, among other things, the entrance into any premises to examine the taxpayer's books, records and other documents. If access is requested for a dwelling-house, a warrant may be issued *ex parte* by a judge (Superior Court or Federal Court).

[67] The production of documents or the provision of documents upon request is outlined in section 231.2. The requirement requires judicial intervention only when the request made to a third party involves unnamed persons.

[68] It is obvious upon examination of the context in which subsections 231.2 (2) and (3) are found that Parliament wanted to limit the scope of the Minister's powers, extensive as they are.

The purpose of the provision is to limit the scope of requests for information that can be issued. Thus, the fear of abuse that could be generated by the case law of *Canadian Bank of Commerce*, *Richardson*, *McKinlay* and *Jarvis* is seen in the obligation of judicial intervention in the case where the targeted individuals cannot be identified by name. Parliament wants to protect unnamed persons *ex ante*, so as to avoid undue invasions and not to remedy them later. The protection that Parliament wants to grant is based on a request made to administer or enforce the Act, which case law had interpreted as requiring a genuine and serious inquiry in the case of previously identified individuals, but especially, in the case of people who cannot even be named, that they be identifiable and that we want to verify whether this unnamed but identifiable person has respected duties and obligations outlined in the ITA. It is clear that Parliament is seeking a certain specificity if a request related to people who are unnamed may be targets. In this case, we are searching in vain for a criterion connected to the ITA that would turn the group into an ascertainable group for the purpose of administering or enforcing the Act and for which it would be permissible to seek information to thereupon verify compliance with the Act.

[69] According to the terms of subsection 231.2(1), the requirement must be for the administration or enforcement of the ITA. This necessity applies equally to the judicially authorized requirement, given that Parliament specifies at subsections 231.2 (2) and (3) that it always deals with the provision of information and the production of documents outlined in subsection (1). It is hard to imagine that the requirement in subsection (1), without judicial authorization, is limited to the administration and enforcement of the ITA and that the still more sensitive one, which targets unnamed persons, can be for any other purpose. Thus, the group must be ascertainable on the basis of the administration and enforcement of the ITA. The identification itself must be related to the Act’s administration and enforcement. A group with no

connection to the ITA could be hard to ascertain within the framework of a power granted for the administration and enforcement of the ITA.

[70] In this case, the Minister wants to know the identity of Hydro-Québec's business customers. Unlike the people targeted in *eBay* and *GMREB-FCA*, or *Redeemer Foundation* and *Sand Exploration* or even *Canadian Bank of Commerce* and *Richardson*, whose tax status (commissions and sales, undue tax benefits, donations to a charitable organization, tax deduction) was of direct interest, there is nothing of the sort in this case. Therefore, I am not convinced that an audit in good faith has been conducted as yet. It is yet to come. To reiterate the words of the Federal Court of Appeal in *GMREB-FCA*, there must be a "tax audit . . . conducted in good faith, that it had a genuine factual basis and that it is intended to ensure compliance with the Act" [emphasis added] (paragraph 49). We are still in a preliminary phase where the Minister could try to determine who should be included in the audit conducted in good faith and having a basis in fact. The group is not ascertainable within the meaning intended by the ITA.

[71] In fact, if I understand the applicant's argument, an audit is in good faith only insofar as the CRA decides that it wants to find taxpayers without providing any parameters whatsoever related to the ITA, who will be the subject of an inquiry once their identity has been revealed. While *GMREB-FCA* concedes that a type of fishing expedition is permitted because unnamed persons can be targeted, the applicant is seeking to expand, with no true limit, an already considerable power. This would be to ignore the text of the Act, the context in which it is found and its purpose; this would neutralize it.

[72] The applicant’s reasoning is circular or, at the very least, renders null and void the conditions for obtaining judicial authorization by removing their entire impact. The identity of business customers (which includes legal persons and natural persons) who are designated as an ascertainable group is requested for the sole reason that they are labelled. Because the request comes from the CRA, it becomes a request required to verify compliance with the ITA, according to the applicant, even if the information is not of a financial nature or related to the income, deductions and credits of these business customers. Only the identity of individuals so labelled is sought. This label is assigned and this would seem to be enough to satisfy the two conditions because providing the identity of members of the labelled group constitutes, in itself, the provision of information to verify compliance with duties and obligations.

[73] In addition, the denunciations in no way indicate how the designation "business customer" is attributed. This, in itself, makes it difficult to find that a group is ascertainable without knowing its composition. To a certain extent, this determination is left in the hands of Hydro-Québec which, in itself, moves us away from an ascertainable group whose parameters are presented by the Minister and that the Court can evaluate.

[74] The Federal Court of Appeal chose to depart from the need for a genuine and serious inquiry. But it did not choose to depart completely from a link between the information requested and the ITA. The Court must be convinced that the information and documents "are required for a tax audit conducted in good faith" (*GMREB-FCA*, paragraph 48). This condition must, in my opinion, be strictly met. Seeking the identity of a public utility’s business customers is not the same thing as obtaining information and documents within the framework of the tax audit of taxpayers.

[75] Subsection 231.2(3) requires the judge to be convinced that the group is ascertainable. This condition must be read with the requirement that the requested documents be part of a tax audit conducted in good faith, with a genuine factual basis. At a certain level of aggregation, we can always find a common denominator that renders the group ascertainable within the general meaning of the term: Do we have an ascertainable group within the meaning of the ITA if the requirement targets all residents of Montréal? I was unable to find any case law from a superior court where the ascertainable group is quite simply a group whose scope would be similar to that of any person having a business-rate account with a public utility. In my opinion, expanding the notion of ascertainable group, whose trace can be found in *Richardson* (“appropriately identifiable group" or in French, “groupe facilement identifiable", at page 618), goes well beyond that which case law has accepted, broadens the scope of the section created to protect the public against the State’s intrusion, and delegates the choice of defining an entire class to another actor.

[76] In fact, the only decision I could find where reasons are given regarding the considerable ascertainable group, albeit less considerable than the one in this case, that could be considered to have similar characteristics is *Fédération des Caisses Populaires Desjardins de Québec v. Ministre Revenu National*, 1995 CarswellQue 207, [1997] 2 CTC 159 [*Fédération des Caisses*], a decision of the Quebec Superior Court. The unnamed persons were individuals or corporations that had sent Canadian or foreign currency out of the country using credit unions affiliated with the Fédération. After the authorization was issued, the Superior Court, as was possible prior to the repeal of subsection 231.2(6), reviewed the authorization to conclude that the necessary conditions in subsection 231.2(3) had not been met. There were four conditions at the time, but here we are interested only in the first: Was there an ascertainable group?

[77] The Superior Court found that the group in question did not meet the criterion in paragraph 231.2(3)(*a*). Having noted, like Rothstein J. in *Sand Exploration*, that requirements are intrusive and that the restrictive approach mandated in *Richardson* must be a guide, the Court considers the identification to be arbitrary, based on the nature of the transactions rather than the persons who conducted the transactions. It is not a group that is identified but rather transactions, which are in no way governed by the ITA. These are groups of unnamed persons that must be specified. The identification of a group was not demonstrated to the Court's satisfaction. The search for documents regarding certain types of transactions (currency sent out of the country through credit unions affiliated with the Fédération) could not, according to the Superior Court, be the basis for defining the ascertainable group.

[78] I agree with the Superior Court that the Minister would render the concept of "ascertainable group" meaningless if, in the context of the ITA, she may claim that any group is an ascertainable group. If any person who has a business account with Hydro-Québec for their electricity, which has nothing to do with the *Income Tax Act*, is an ascertainable group, then the meaning of the words "ascertainable group" is lost. The condition in paragraph 231.2(3)(*a*) ceases to exist. In that case, a resident of Quebec, or even a resident of Canada, becomes an ascertainable group. The ascertainable group referred to in paragraph 231.2(3)(*a*) is the same ascertainable group for which Parliament requires under paragraph 231.2(3)(*b*) that the search for information and documents be performed to verify compliance with the duties or obligations under the Act. When the group is generic and has no connection to the ITA, and information can be requested outside the scope of the ITA (such as identifying the business clients of a public utility), there is no longer any limit on the fishing expedition. That could well be the abuse the

courts have feared since *Canadian Bank of Commerce*. The invasion of privacy, the right to be left alone by the state (*Hunter*, page 159), is no longer governed.

[79] I also find that the second condition in paragraph 231.2(3)(*b*), considered in isolation, is not met. The information sought by the Minister, that is, the corporations or individuals subject to the business rate, does not correspond, in itself and according to a strict interpretation, with the production of information or documents "to verify compliance by the person or persons in the group with any duty or obligation under this Act." The contact information of Hydro-Québec's business clients is, at best, outside the scope of the information needed to verify compliance with the ITA.

[80] The applicant seems to be seeing the authority granted in the broadest possible sense. Any information the Minister may consider directly or indirectly useful would qualify. In my opinion, a stricter reading of the text leads to the conclusion that the information and documents that may be required are those that shed light on compliance with the Act of an ascertainable group within the meaning of the ITA. The mere identity of the business clients of a public utility does not meet that requirement. There must be a strong relation to the ITA, in terms of both the definition of an ascertainable group and the quality of the information sought. After all, the information is used to "verify compliance." It is the thing itself, that is, the information and documents, that is examined [TRANSLATION] "in order to determine whether it is consistent with what it is supposed to be, whether it functions correctly" according to a definition of the word "*vérifier*" in the *Grand Robert de la langue française*. It is also defined as [TRANSLATION] "examining the value of something by considering the facts or to test internal consistency." The English version of the Act uses the word "verify", which has the same meaning according to *The*

Oxford English Dictionary ("to ascertain or test the accuracy or correctness of (something), esp. by examination or by comparison with known data, an original or some standard; to check or connect in this way"). Here, the knowledge of who has a business account with Hydro-Québec does not meet the requirement of a more direct connection between the information and documents and compliance with the Act.

[81] The Minister's proposition suggests no guideline, much less a limit. She is thus trying to discredit subsection 231.2(3) of the ITA by interpreting it as allowing her to request any information about any group. The conditions do not make it possible to limit the desire for information even though the purpose of these conditions is to set limitations. This seems to run counter to the rule that Parliament does not adopt provisions that will have no effect. The decision *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, perhaps the most frequently cited case regarding the modern approach to statutory interpretation, reads as follows at paragraph 27:

> . . . It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

This is, in my view, the effect of the interpretation the applicant is trying to make of subsection 231.2(3), a provision that is intended to limit the applicant's power.

[82] The potential abuse of a text that had resulted in the Attorney General of Canada admitting, in *Canadian Bank of Commerce*, 56 years ago, that the requirement related to a genuine and serious inquiry would resurface if the Minister's claim were accepted. Anything would become an ascertainable group, in the sense that it can be labelled, and anything could become the administration and enforcement of the law with no direct relation to the ITA. A text intended to limit the use of a requirement against vulnerable individuals, such as unnamed persons, would lose its purpose.

[83] It is true that in *GMREB-FCA* the Federal Court of Appeal accepted that subsection 231.2(3) allows some form of fishing expedition, with the Court's authorization. That goes without saying, since the group is comprised of unnamed persons, the exact number of which is very likely unknown. In my opinion, this case does not involve a form of fishing expedition but rather a full-fledged fishing expedition, even though the conditions set out in subsection 231.2(3) cannot be met if they are given a strict interpretation, as recommended by all the courts, in order to seek certain limits to an intrusive power. Moreover, while *GMREB-FCA* requires that the tax audit have "a genuine factual basis" (paragraph 49), this was not demonstrated to the Court's satisfaction. An ascertainable group that is not considered one within the meaning of the Act, and information that does not verify whether the groups are complying with their tax duties and obligations, cannot be granted judicial authorization.

(2) Exercise of discretion

[84] Counsel for the Minister initially argued that if the conditions of subsection 231.2(3) are met, the judge must grant authorization. With all due respect, that argument is incorrect.

Therefore, even if I did find that the conditions were met, I would still refuse judicial authorization given the extent of the intrusion requested by the Minister.

[85] There does not seem to be any doubt about the existence of judicial discretion and its utility. In *Canada (National Revenue) v. Derakhshani*, 2009 FCA 190; 400 NR 311 [*Derakhshani*], the same argument initially presented in this case was posed: if the two conditions are met, the judge issues authorization. The argument was short-lived:

> [19] It is useful to recall that the existence of judicial discretion is essential to the constitutional validity of this type of provision, which is comparable to a seizure even when used in a regulatory (or even non-criminal) context (*McKinlay Transport Ltd.*, above, at page 642). It is this discretion, conferred upon an independent judge, which protects individuals from the damaging use of this kind of power and brings it in line with the requirements of section 8 of the *Canadian Charter of Rights and Freedoms* (*Baron v. Canada*, [1993] 1 S.C.R. 416, at page 443). In this case, the wording of subsection 231.2(3), according to which the judge ". . . may, subject to such conditions as the judge considers appropriate . . ." authorize the requirement ". . . where the judge is satisfied . . ." that the prescribed conditions are met, leaves no doubt as to the existence of this discretion.

[86] In that case, the trial judge refused to grant judicial authorization. According to the appeal decision, the trial judge's refusal, for which reasons had not been given, was apparently made on the following basis taken from the reasons of the Court of Appeal:

> [3] The reasons delivered from the bench were not entered in the minutes. According to counsel for the Minister, the judge made the following comments in the course of the proceedings (Appellant's Memorandum, at paragraph 10):
>
> - The CRA could not justify an extensive audit of the tax returns prepared by Mr. Derakhshani solely on the basis of the results of audits on three taxpayers' returns;

- The audit would likely involve the returns of taxpayers who are blameless.

[87] It appears that there was an audit of taxi drivers. The respondent was preparing tax returns for others, including three taxi drivers, that were apparently "without the necessary documentation and based on an estimation of earnings and expenditures" or "without supporting documentation on income and by estimating expenditures from receipts." The identity and number of the respondent’s clients being unknown, a requirement would have enabled the Minister to conduct audits and establish assessments and penalties. The Court of Appeal panel was obviously aware of *GMREB-FCA* and even referenced it at paragraph 18. Nevertheless, the Court confirmed that the trial judge was justified in refusing authorization, noting that the judge did not receive "a single piece of information regarding the requirement to provide information that he is being asked to authorize" (paragraph 27). That is certainly the case here.

[88] *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 NR 378 [*RBC*] elaborates on the judicial discretion regarding judicial authorization under subsection 231.2(3) of the ITA. Once again, the Minister was trying to limit judicial discretion by arguing that if there is discretion when judicial authorization is issued under subsection 231.2(3), it disappears during judicial review under subsection 231.2(6), as was the case in that decision. While this argument cannot be made today because Parliament repealed subsection 231.2(6), this appears to show that procedural protections are less present, which necessitates utmost vigilance at the only stage where judicial intervention is required. Judicial oversight is said to be necessary, based on the decision in *Sand Exploration*:

> [22] Together, subsections 231.2(3) and 231.2(6) express this dual purpose. Subsection 231.2(3) empowers the Minister to obtain authorizations in certain circumstances. But judicial oversight pervades the process, both at the initial *ex parte* stage, and later if there is a review under subsection 231.2(6). Judicial oversight is necessary because authorizations can intrude on third parties' privacy interests:
>
> > Intrusion into the privacy of individuals is always a sensitive matter, especially when third parties, who themselves may have valid reasons for not wanting to disclose, are required to provide the information. Undoubtedly this is the reason Parliament saw fit to require the Minister to obtain Court authorization for such intrusion upon satisfying the Court of the matters specified in subsection 231.2(3). (*M.N.R. v. Sand Exploration Limited* (1995), 95 D.T.C. 5358 (F.C.T.D.) at page 5362, per Rothstein J. (as he then was).)
>
> [Emphasis added]

There is no need to elaborate at length on the fact that the invasion of privacy in the present case is considerable given the number of people indiscriminately included in the requirement for which authorization of the Court is being sought. In fact, the Court cannot even determine which individuals are included since the group is defined by what Hydro-Québec considers to be its commercial or business clients. Nor do we know the number, even approximate, of people involved.

[89] The requirement specifically requests that Hydro-Québec send the information to the applicant [TRANSLATION] "in electronic format (such as Access)." The denunciation refers to [TRANSLATION] "electronic files." The second denunciation is more explicit in that it reveals that the intention is to compare the databases (paragraphs 17 to 22) of Hydro-Québec and of the applicant. This demands even more vigilance about the extent of the invasion.

[90] More than 45 years ago, the Government of Canada already had serious concerns about the impact computers may have on privacy. A task force composed of officials in the departments of Justice and Communications and academics studied the emerging situation. The task force was led by Alan Gotlicb and Gérald LaForest, later appointed a Supreme Court of Canada justice.

[91] It is not my intent to discuss the report produced, *Privacy and Computers* (Information Canada, 1972). It is sufficient to note that as early as 1972, it was found that there was a complex network for collecting and disseminating information linking the public and private sectors. The concerns this raised are presented in the preface:

> [TRANSLATION] The emergence of a number of highly efficient information banks is raising widespread fear of invasion of privacy. That is why in 1971 the departments of Justice and Communications created the Task Force on Privacy and Computers. This report is the result of the work of that task force, whose mandate can be found in the appendix.
>
> The simplest explanation for the concerns about privacy raised by automated information systems is also the most evident: the growing need for information—personal or otherwise—in today's complex society and the increasing expectations of individuals and groups.
>
> Computers, namely because they are equipped with extensive memory, have expanded the possibilities for collecting and centralizing personal data to a point previously unimaginable. In the past century, few people were known outside their immediate circles. Now, we all have detailed and complex records: academic, credit, social assistance, insurance, tax and police records. Simply obtaining a passport or purchasing a car will leave a trail of information: from birth to death, our footprints are increasingly clear and numerous.

These fears have not eased with time. The courts have the role of preventing unreasonable seizure following a request for authorization prior to a seizure. As Justice La Forest stated in *R. v. Dyment*, [1988] 2 SCR 417, protection against unreasonable seizure means avoiding violations rather than attempting to remedy them *ex post facto*. By requiring judicial authorization, the Court is called upon to play that role.

[92] It is no more reassuring that the applicant chose not to restrict the use she could make of the large quantity of information she received. At the second denunciation, it was confirmed that the information obtained will be transferred to other sectors of the CRA, which could use it to determine whether there was compliance with obligations and duties. In other words, the informant was completely forthcoming in saying that there are also no limits on how the information is used.

[93] In *RBC*, the Court of Appeal concluded that discretion is essential in order to decide whether the circumstances justify granting authorization. The Court of Appeal went so far as to say that information to be disclosed to the Court issuing authorization may be relevant to the exercise of discretion, though irrelevant to the two preconditions. Non-disclosure could cast relevant taxpayers in a worse light than they deserve. The Court adds that "the Minister could misinform the judge about the inconvenience and cost to persons who will be subject to the authorization" (paragraph 30). This obviously assumes that these are appropriate, if not important, considerations in the exercise of discretion. The applicant makes little of this. In her original memorandum, she readily stated that once the two conditions are met, the Court must grant authorization (memorandum of fact and law, paragraphs 29 and 31). There is nothing justifying a refusal, but the applicant gives no consideration to the scope of the request, the

inherent invasion of privacy, the limited use that could be made of the information obtained or the harm that could be caused to taxpayers. Everyone has the right to be left alone by the government. Everyone has the right to be protected against unreasonable seizure.

[94] However, the Court expressed serious concerns about the exercise of its discretion, the notion of "ascertainable group" and the existence of a genuine factual basis during the original hearing on February 23, which resulted in a supplementary denunciation and a supplementary memorandum. No indication is given of the scope of the requirement other than that the "ascertainable group" is not Hydro-Québec's 4.3 million customers. That is not enough.

[95] Ultimately, the group is ascertainable because it does not include the large hydro consumers and those with residential rates. We still do not know who is included, but we do know that there are individuals. It is possible to infer from the limited information provided that residences may be charged at the business rate. No indication is given of the group's composition.

[96] Moreover, it is impossible to see why the "ascertainable group" would not be hydro consumers, all hydro consumers. According to the applicant's logic, that would be an ascertainable group. If that is the case, the need to identify a group, to delineate it, is artificial. If that is the scope of subsection 231.2(3), judicial intervention is required to prevent such an invasion of the privacy of many people in Quebec. In my opinion, it is to prevent such an invasion that judicial authorization is required in cases where targeted individuals are unnamed persons. Some form of fishing expedition may be allowed, but judicial authorization, with its inherent discretion, exists to limit and govern it. I consider it essential when the fishing

expedition is of unprecedented magnitude and the information being sought is far from serving to verify compliance with the Act. By creating the power in subsection 231.2(3), Parliament intended that, at the very least, the courts prevent unreasonable seizure. To do this, and as the Federal Court of Appeal noted in *RBC*, the Court would need much more information on the scope of the requested authorization. This was not given.

IV. Conclusion

[97] The Minister is trying to broaden the scope of a requirement beyond anything that has been allowed in the jurisprudence of superior courts. This is an invitation that this Court must decline. Since *Canadian Bank of Commerce* in 1962, the Courts have feared the abusive use of the requirement. In my view, this case is a manifestation that this fear still exists. The requirement for which Court authorization is being sought is to identify the business clients (which are undefined and of unknown, though considerable, number) of a public utility with 4.3 million customers.

[98] Indiscriminately, the applicant is creating a group with no genuine factual basis in terms of the application or enforcement of the ITA for this group. It is unclear why all of Hydro-Québec's customers, or even all residents of Quebec, would not be an ascertainable group. In short, the ascertainable group criterion loses all meaning.

[99] The same applies to the production of information or documents, since what is being requested here is information with no direct, or even indirect, connection with the information that might be required to verify whether the members of the ascertainable group have complied

with their duties and obligations under the ITA. Identifying the business clients of a public utility is well outside the scope of a tax audit conducted in good faith. The genuine and serious inquiry of a taxpayer has been replaced with the tax audit conducted in good faith with a genuine factual basis, the audit serving to confirm compliance with the Act (*GMREB-FCA*). These criteria are necessary for the requirement to be intended to serve the application and enforcement of the Act.

[100] This request for authorization illustrates the danger of the reading of subsections (2) and (3) of section 231.2 the applicant is proposing. That reading enables an unlimited invasion of privacy. It is accepted that there is a very low expectation of privacy in business and tax records. But what about hydro consumption by "business" clients of a public utility, which may well include tens of thousands of customers, including residences? I will say it again. *McKinlay* recognized the constitutionality of the requirement under the former subsection 231(3) (which is essentially the current subsection 231.2(1)) thanks, in good measure, to the limited scope of subsection 231(3) in the application of common law rules on statutory interpretation by requiring that the application or enforcement of the Act be demonstrated by the existence of a genuine and serious inquiry. The Federal Court of Appeal replaced that requirement with the tax audit conducted in good faith with a genuine factual basis, the audit serving to confirm compliance with the Act. In my view, these requirements must be strictly followed. The sole fact of the applicant being interested in an ordinary phenomenon, such as the transfer of currency abroad (*Fédération des Caisses*) or the underground market is not a tax audit. Perhaps there could be a genuine tax audit conducted in good faith eventually. However, it would be a mischaracterization of the tax audit and would eliminate the conditions in subsection 231.2(3) to pretend that it may include a list of business clients of a public utility.

[101] In the end, what the applicant is seeking is an interpretation where the conditions in subsection 231.2(3) would become non-existent. An ascertainable group would then be composed of any individuals and the information that could be required is that which the applicant considers potentially useful. The invasion of privacy would be unlimited. If that is the case, it was not communicated to the Court. Any person in Quebec paying the business rate to Hydro-Québec could be intruded upon by the state. This interpretation would render useless the judicial involvement that Parliament nevertheless considered necessary to be convinced that the preconditions have been met.

[102] In addition to the requirement failing to meet the two criteria required for judicial authorization to be granted, I do not hesitate to exercise judicial discretion in the face of the practically unlimited scope of such a request and a complete lack of consideration for the invasion of privacy and the consequences for all taxpayers involved in the request.

[103] The Federal Court of Appeal recently acknowledged again that Parliament granted judicial discretion (*RBC*) that has been recognized since *Derakhshani* in 2009. In that case, the requirement was considerably more specific than in this case. However, the Court of Appeal said it was concerned that no information was provided on the scope of the requirement to be authorized. When the ITA was amended in 1996 to remove the obligation to satisfy the Court that there is no easier means of obtaining the information (paragraph 231.2(3)(*d*)), the Court stated that "[t]he fact that it may be possible to obtain the information using other means does not exclude the possibility that a requirement might be authorized, but that is information that must be provided to the judge. A judge must not be left in the dark on such an important point" (*Derakhshani*, paragraph 29). Therefore, both the scope and extent of the requirement and the

availability of information are pertinent in exercising the judicial discretion to grant authorization.

[104] *RBC* also provides indications on the considerations for a judge deciding on a motion for authorization, who conducts the "[j]udicial oversight . . . necessary because authorizations can intrude on third parties' privacy interests" (paragraph 22). The light in which taxpayers are cast is relevant. The inconvenience and cost to persons who will be subject to the authorization is also important (*RBC*, paragraph 30). The only information provided is that the applicant may choose to transmit the database within the CRA. Nothing is said about the scope of the proposed search, including the number of residences that may be included. Moreover, there is no indication whether there will be an expiry date on the retention of all that information. Clearly, no consideration was given to the invasion of privacy of a very large number of people. Nevertheless, it is astonishing that the collection and retention of information is governed when investigations are led into threats to national security in Canada (*X (Re)*, 2016 FC 1105; [2017] 2 FCR 396), but no sensitivity is shown when it comes to the collection and retention of tax information. The collection is broad, and the information is used.

[105] While the power to issue a requirement must be strictly interpreted, and it must be recognized that judicial intervention was considered necessary to limit this vast power, the applicant is interpreting subsection 231.2(3) in such a manner as to render it useless, making the protection deceptive in practice.

[106] With respect, the circumstances of this case require that the judicial oversight needed to prevent undue invasion of the privacy of many people be exercised. I respectfully decline to authorize the requirements presented under subsection 231.2(3) of the *Income Tax Act* and subsection 289(3) of the *Excise Tax Act*.

ORDER

THIS COURT ORDERS that:

1. The motion to obtain judicial authorization for a requirement presented under subsection 231.2(3) of the *Income Tax Act* and subsection 289(3) of the *Excise Tax Act* is dismissed.

2. Since this motion was filed *ex parte*, costs will not be awarded.

"Yvan Roy"
Judge

APPENDIX I

Excise Tax Act, R.S.C. (1985), c. E-15

Requirement to provide documents or information	**Présentation de documents ou de renseignements**
289 (1) Despite any other provision of this Part, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of a listed international agreement or this Part, including the collection of any amount payable or remittable under this Part by any person, by notice served personally or by registered or certified mail, require that any person provide the Minister, within any reasonable time that is stipulated in the notice, with	**289 (1)** Malgré les autres dispositions de la présente partie, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution d'un accord international désigné ou de la présente partie, notamment la perception d'un montant à payer ou à verser par une personne en vertu de la présente partie, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :
(a) any information or additional information, including a return under this Part; or	**a)** qu'elle lui livre tout renseignement ou tout renseignement supplémentaire, y compris une déclaration selon la présente partie;
(b) any document.	**b)** qu'elle lui livre des documents.
Unnamed persons	**Personnes non désignées nommément**
(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection (1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the	**(2)** Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la livraison de renseignements ou de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par

authorization of a judge under subsection (3).

un juge en vertu du paragraphe (3).

Judicial authorization

Autorisation judiciaire

(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this subsection referred to as the "group") if the judge is satisfied by information on oath that

(3) Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la livraison de renseignements ou de documents prévue au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément — appelée « groupe » au présent paragraphe —, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :

(a) the person or group is ascertainable; and

a) cette personne ou ce groupe est identifiable;

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Part.

b) la livraison est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente partie.

(4) to (6) [Repealed, 2013, c. 33, s. 46]

(4) à (6) [Abrogés, 2013, ch. 33, art. 46]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1838-17
STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE v. HYDRO-QUÉBEC

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	ROY J.
DATED:	JUNE 15, 2018

WRITTEN REPRESENTATIONS BY:

Martin Lamoureux	FOR THE APPLICANT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT