Federal Court  Cour fédérale

Date: 20191210

Dockets: T-1492-18
T-1491-18
T-388-18
T-389-18

Citation: 2019 FC 1583

Ottawa, Ontario, December 10, 2019

PRESENT: The Honourable Mr. Justice Pamel

Docket: T-1492-18

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

CHARLES FRIEDMAN

Respondent

Docket: T-1491-18

AND BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

CLAIRE FRIEDMAN

Respondent

Docket: T-388-18

AND BETWEEN:

CHARLES FRIEDMAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-389-18

AND BETWEEN:

CLAIRE FRIEDMAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is a series of four related cases concerning Canada Revenue Agency's [CRA] Requests for Information [RFI] letters to Mr. Charles Friedman and his wife, Mrs. Claire Friedman, dated February 1, 2018. The CRA requested that both Mr. and Mrs. Friedman

complete a questionnaire as part of an audit of the couple's potential offshore holdings, which, according to the CRA, may not have been disclosed in taxation years 2010 through 2016.

[2] The Friedmans have refused to provide the requested information, arguing in their written submissions that sections 231.1 and 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], are unconstitutional because they violate their rights as guaranteed by the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter], specifically those protected by sections 7, 11 and 13.

[3] Before me, counsel for the Friedmans limited the Charter challenges to sections 7 and 13, having recognized that there was nothing to suggest that the RFIs were anything other than evidence of a civil tax audit, and not a disguised criminal investigation of his clients by the CRA. This concession alone should also be sufficient to deal with the section 13 of the Charter challenge.

[4] These four files—two applications for judicial review of the CRA's RFIs from Mr. and Mrs. Friedman respectively, and two applications for summary judgment to issue an order of compliance from the CRA for each of the Friedmans—were consolidated on February 26, 2019.

I. **Facts**

[5] The Friedmans are a married couple, both over 80 years old. Their personal income tax returns and those of other related or associated entities were selected for audit by the CRA

Offshore Compliance Specialized Team. The CRA is reviewing for any possible foreign assets, income, and foreign reporting requirements to determine if the Friedmans complied with their duties and obligations under the ITA. The Friedmans have not filed any T1135s nor reported any income from foreign sources to the CRA for these taxation years.

[6] On February 1, 2018, a CRA auditor sent a RFI Letter to Mr. and Mrs. Friedman respectively pursuant to section 231.1 of the ITA. The letter requested that the Friedmans provide information related to the audits and to answer the Offshore Questionnaire attached to the request within 30 days from the date of the letters.

[7] On February 27, 2018, the Friedmans filed and served their applications for judicial review of the RFIs.

[8] On August 8, 2018, the Minister of National Revenue [Minister] filed a notice for summary application asking this Court to compel Mr. and Mrs. Friedman to provide them with the books, records, documents and information requested on February 1, 2018.

[9] As of the current date, the Friedmans have not responded to the RFIs.

[10] In short, the matter before me centers on the CRA's power to conduct audits of taxpayers to ensure that Canada's self-assessing and self-reporting tax system functions correctly. Sections 231.1 and 231.7 of the ITA empower the CRA to request information from taxpayers. The relevant sections of these provisions are as follows:

231.1(1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

[…]

231.7(1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

231.1(1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois :

a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

[…]

231.7(1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :

a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à

	leur égard.
[…]	[…]
(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.	(4) Quiconque refuse ou fait défaut de se conformer à une ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.
[…]	[…]

[11] The Friedmans contend that the above provisions violate their right to protection from self-incrimination. They also contend that the RFIs themselves are defective, as they do not meet the requirements of the ITA. The manner in which the RFIs are addressed and phrased is of importance to the arguments of both parties; as such, I have reproduced the CRA's letter below:

> Mr. Charles Friedman
> ***Address removed***
>
> Dear Sir:
>
> **Re: Mr. Friedman, Taxation Years 2010-01-01 to 2016-12-31**
>
> Your personal income tax returns and any other related or associated entities have been selected for audit for the above noted period. The Canada Revenue Agency (CRA) is in possession of information that has led us to determine that you may have offshore holdings that you have failed to disclose as required by the Income Tax Act. All individuals, corporations, trusts or partnerships are required to complete and file form T1135 with their tax return (or, if a partnership, with their partnership information return) if at any time in the year the total cost amount of all specified foreign property owned or held in a beneficial interest was more than $100,000.
>
> In order to expedite and facilitate our audit, we will require a clear understanding of all entities with which you had a connection or affiliation during the taxation years noted above.

> The word “entities” in this letter refers to companies, trusts, partnerships, limited partnerships, joint ventures, superannuation funds, establishments, foundations, anstalts, stiftungs, societies, associations, charitable bodies or funds and any other body or organization of any kind, whether incorporated or not, whether resident or non-resident of Canada.
>
> The words “connection” or “affiliation” in this letter are to be given their ordinary meaning versus any restricted definitions set out in the *Income Tax Act.*
>
> Please send us back the attached questionnaire fully completed within 30 days from the date of this letter. We will contact you to schedule an appointment for an initial interview.

[12] An identical version of the above letter was addressed to Mrs. Friedman.

II. **Issues and Discussion**

[13] The Friedmans raise three main issues:

- Are the RFIs clearly addressed to Mr. and Mrs. Friedman, or is it unclear whether the CRA is auditing the Friedmans or their related entities?
- Are the Friedmans’ Charter rights infringed by sections 231.1 and 231.7 of the ITA?
- Should this Court issue a declaratory judgment, which will circumscribe the use of evidence in possible criminal proceedings?

A. *Standard of Review*

[14] Though neither of the parties addressed the standard of review for the RFIs from the CRA in their pleadings, the standard of review for a “discrete and special administrative regime

in which the decision-maker has special expertise" is that of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 55). The auditing powers granted by the ITA are an administrative regime in which designated decision-makers and officers have special expertise. The officer who issued the RFI in the present case is a member of the Offshore Compliance Specialized Team—the title of his team itself implies a level of specialization, which calls for a measure of deference on the part of this Court.

[15] Additionally, questions about whether an administrative decision-maker's exercise of discretion have violated Charter rights are also reviewed under a standard of reasonableness (see *Doré v Barreau du Québec*, 2012 SCC 12; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32).

B. *Preliminary issues*

[16] There are two preliminary issues to consider, the first being whether I should strike the CRA from the style of cause in files T-388-19 and T-389-19, and the second being whether I should allow the Friedmans to amend their pleadings to add an argument in support of their position on the appropriateness of the RFIs.

[17] As to the first issue, there was no opposition expressed by counsel for the Friedmans. I think Rule 303 of the *Federal Courts Rules*, SOR/98-106, is clear. As such, the CRA will be removed as a Respondent in the style of cause in files T-388-19 and T-389-19.

[18] As to the second preliminary matter, in a letter to this Court dated September 13, 2019, the Friedmans requested permission to amend their pleadings to include a line of argumentation which was approved in a recent case, *Canada (Minister of National Revenue) v Lin*, 2019 FC 646 [*Lin*], which also focuses on the CRA's Requests for Information. The Friedmans contend in this request that, according to this Court's decision in *Lin*, the RFIs sent to them by the CRA do not meet the prescribed test for obtaining a compliance order from the Court under section 231.7 of the ITA.

[19] Rule 75(1) of the *Federal Courts Rules* permits amendments to a document at any time "on such terms as will protect the rights of all parties". The proper analysis to decide whether or not to allow an amendment is guided by a multi-part assessment laid out in several cases and aptly summarized in *Janssen Inc v Abbvie Corp*, 2014 FCA 242 at paragraph 3, citing *Continental Bank Leasing Corp v R*, [1993] TCJ No 18:

> [...] I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits. No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately, it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.
>
> [Emphasis added].

[20] The Friedmans submit that the prescribed test for obtaining a compliance order, which is essentially laid out in section 231.7, has been applied in *Canada (Minister of National Revenue) v SML Operations (Canada) Ltd*, 2003 FC 868 [*SML*], and affirmed in *Canada (Minister of National Revenue) v Chamandy*, 2014 FC 354 [*Chamandy*].

[21] Although *SML* and *Chamandy* were known to the Friedmans' counsel well before their motion to amend their pleadings, they argue that *Lin* takes the test a step further and is more consonant with the present case. They point out that in *Chamandy* and *SML*, the CRA's letters were addressed to individuals in their capacity as heads of a corporation; in *Lin*, as in the current case, the letters are only addressed to the individuals but reference their connected entities. The conclusion in all three cases—that the Court refuses to issue a compliance order—is the same, but the focus is different, and, according to the Friedmans, *Lin*'s facts more closely align with the present case.

[22] Additionally, the Friedmans contend that they are allowed to cite new, relevant jurisprudence as respondents to an application, and that it would not make sense not to allow them to cite this recent jurisprudence in the present consolidated file.

[23] For its part, the Minister opposes the amendment because, it says, it introduces a completely new ground of argumentation. Given that similar arguments were available in both *Chamandy* and *SML*, and given that *Lin* was decided by this Court in May 2019, the Minister contends that the Friedmans' motion for an amendment comes too late and unfairly prejudices them.

[24] I would allow the amendment. Though it was filed informally, and arguably somewhat late, it was timely enough that both parties were able to submit arguments on the issue, and it was not complex enough so as to delay the hearing in these matters, complicate the factual matrix, or require additional evidence to be submitted (*Francoeur v Canada* [1992] 2 FC 33 at p 337; *Canderel Ltd v Canada*, [1994] 1 FC 3; *Nidek Co v Visx Inc* (1998), 234 NR 94 (Fed CA); *Teva Canada Ltd v Gilead Sciences Inc*, 2016 FCA 176 at para 29).

[25] *Lin* allows the Court to consider the full breadth of possible arguments raised against the RFI letters from the CRA. It is therefore in the interest of justice that the Court allow the amendment in order to fully consider the arguments made by both parties in relation to the clarity of the CRA letters.

(1) Are the RFI letters clearly addressed to Mr. and Mrs. Friedman, or is it unclear whether the CRA is auditing the Friedmans or their related entities?

[26] As explained by this Court in *Chamandy*, *Lin* and *SML*, in order for the Court to issue an order for compliance with a CRA RFI, the following three criteria must be met:

(1) The person against whom the order is sought must be clearly identified as required to provide the requested information;

(2) The person was required to provide the information or documents to the Minister, but did not do so;

(3) The information or documents sought are not protected from disclosure by solicitor-client privilege.

[27] Under subsection 231.7(1) of the ITA, the CRA may seek a compliance order from this Court in order to obtain information from taxpayers. However, as mentioned above, the test for when the Court can issue a compliance order to enforce a RFI requires that the Court first be "satisfied that the person against whom the order is sought was required under sections 231.1 or 231.2 to provide the access, assistance, information or document sought by the Minister" (see paragraph 231.7(1)(a)).

[28] I should mention that there is no affidavit evidence to indicate how Mr. and Mrs. Friedman understood the RFIs that were sent to them. In any event, their counsel contends that the person being audited in each of their cases is not clearly identified in the RFIs; therefore, the first requirement of subsection 231.7(1) is not met. Although the letters from the CRA were each addressed individually to Mr. Friedman and Mrs. Friedman, counsel for the Friedmans contends that the RFIs sought both their personal income tax returns *and* any information regarding their "related or associated entities".

[29] This wording is identical to the wording in the CRA letter at issue in *Lin*, where this Court found that it was not clear to whom the RFIs were directed and thus declined to issue a compliance order to the taxpayers. The Friedmans contend that the logic applied in *Lin* applies equally in the present case.

[30] The Friedmans also say that the second paragraph of the letters, which read "[i]n order to expedite and facilitate our audit, we will require a clear understanding of all entities with which you had a connection or affiliation during the taxation years noted above", changes the scope of

the motion, as the CRA is asking for documents from all of the Friedmans' related entities. They also point to the wide scope of the RFI questionnaire—specifically, questions 6.1 and 6.2, which ask for information about entities controlled directly or indirectly by family members of the Friedmans—as being overly broad and including entities related to the Friedmans and their family.

[31] It is contended by the Minister that the letters are each addressed to one person, and that the questionnaire further supports the assertion that the RFIs are directed at the Friedmans individually. It is contended that this is the common-sense interpretation of the letter and questionnaire, as it is commonly understood that taxpayers are required to provide information related to their nuclear families to the extent they are aware of such information, and that they are audited with regard to their interests in related entities. As such, the Minister says that the alleged lack of clarity the Friedmans claim is not based on facts.

[32] Thus, although section 231 of the ITA bestows upon the CRA broad discretion to request information from an individual regarding his or her own finances as well as the finances of their connected entities to the extent he or she is aware of such information, the case law is clear: the CRA must be specific about who it is auditing.

[33] As regards the RFIs, Mr. Justice Boswell wrote in *Lin*:

> [31] In my view, the Letters are addressed to both the individuals and their connected entities. The entities are not specified, and it is not clear who is being audited - the individual Respondents or unnamed entities.
>
> [Emphasis added].

[34] The Friedmans are correct that the letter in *Lin* is phrased identically to the letters addressed to them. I accept that Mr. Justice Boswell was of the view that the letters before him were confusing. However, I do not know what other documents were before him in *Lin*, in particular whether the letters were accompanied by questionnaires or any other information.

[35] As to assessing specifically who is being compelled to provide the requested information, it seems to me that it depends on the facts. It is open to this Court to make a different assessment, especially in the light of the arguments and evidence presented before the Court in any given case. Upon close examination of the RFIs and, in particular, the accompanying questionnaires, I am satisfied that, unlike in *Chamandy* and *SML*, the CRA is clearly directing its questions to Mr. and Mrs. Friedman in their personal capacity as taxpayers. In addition, as opposed to how matters were assessed in *Lin*, the CRA is specifically directing those questions to the Friedmans in respect of their personal tax situation.

[36] Firstly, if we look at the top of the letters, they are addressed to "Mr. Charles Friedman" and "Mrs. Claire Friedman" respectively, at their home address, and both begin "Dear Sir" and "Dear Madam". The letters are also titled "Re: Mr./Mrs. Friedman, Taxation Years 2010-01-01 to 2016-12-31". It seems quite clear that the focus of the inquiry is the Friedmans in their individual capacity and not as directors or officers of a corporation or other entity.

[37] Secondly, the first line of the letters reads "Your personal income tax returns and any other related or associated entities have been selected for audit for the above noted period"

[emphasis added]. There can be no doubt from this line that the focus of the audit are the personal taxes of the Friedmans.

[38] Thirdly, the questions included in the questionnaire are clearly directed towards the Friedmans as individuals. The only questions about other entities are questions 6.1, 6.2, 7.1, 7.2, and 7.3. However, those questions specify in their footnotes that the respondent does not have to include "any company that for the years under review has filed income tax returns in Canada …" nor "any company that is a subsidiary of a company whose existence has been disclosed under section 3 of this questionnaire".

[39] Additionally, the questionnaire states that "if financial statements are not prepared for this entity, provide a list of the cost amount of the property held by the entity and the liabilities of the entity as at the end of each fiscal year of the entity ending in the years under review." These qualifications suggest that a complete and detailed picture of the entities' financial information is not what is sought, but rather a full picture of the Friedmans' financial situation as it relates to these entities.

[40] Counsel for the Minister confirmed during the hearing that if the Friedmans were not aware of their direct family members' related entities or did not have the necessary documentation, they would be expected to answer the questionnaire as such, thereby prompting the CRA to follow up with them as needed should it require more information.

[41] It appears that the Friedmans have conflated the *subjects* of the inquiry—Mr. and Mrs. Friedman, respectively—with the *nature* of the inquiry, which is a request for documents related to the Friedmans and their connected entities, as such relates to Mr. and Mrs. Friedman's own personal income tax returns.

[42] Taking the letters as a whole, including the questionnaires that were sent with them, it is not difficult to see that they are directed at the Friedmans in their individual capacities, nor is it difficult to understand why the CRA would request such information regarding a taxpayer's related entities in the course of an audit into their foreign assets.

[43] As such, I find that the RFIs are clearly directed to Mr. and Mrs. Friedman respectively, and were issued in respect to the audit of their own personal income tax returns.

[44] The other two criteria of the *Chamandy* are also met: the Friedmans have been required to provide the information or documents to the Minister, but did not do so; and the information and documents sought are not protected from disclosure by solicitor-client privilege. Therefore, the RFIs are sufficiently clear, and this Court is able to issue an order of compliance.

(2) Are the Friedmans' constitutional arguments regarding their Charter rights valid?

[45] The Friedmans argue that the conduct of the CRA violates their rights and freedoms guaranteed by the Charter, because the Agency is conducting what they call a disguised criminal investigation in the guise of a civil audit. They also argue that the ITA provisions in question, sections 231.1 and 231.7, are unconstitutional as they violate the Charter.

[46] The relevant provisions of the Charter are as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
[…]	[…]
11. Any person charged with an offence has the right	11. Tout inculpé a le droit :
[…]	[…]
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;	c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;
[…]	[…]
13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.	13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

[47] As for the Minister, it is contended that the Friedmans' constitutional arguments are not supported by any evidence and are merely speculative.

(a) *Was the CRA conducting an alleged covert criminal investigation in the guise of a civil audit, and if so, did such conduct violate the Charter?*

[48] I will address this argument first as it is the least controversial.

[49] Although argued extensively to the contrary in their written material, counsel for the Friedmans conceded during the hearing before me that there is no evidence at this time of any ongoing or contemplated criminal investigation by the CRA against his clients.

[50] How the CRA's auditing and investigative functions are distinguished from one another, and when Charter protection is triggered in the event of a CRA audit or investigation are issues that were thoroughly canvassed by the Supreme Court in *R v Jarvis*, 2002 SCC 73 [*Jarvis*]. In *Jarvis*, the Supreme Court applied the "predominant purpose" test to determine whether a CRA inquiry is, in fact, trying to determine a taxpayer's penal liability, or whether it is truly focused on tax liability. The Minister applies the test to the present facts to determine when this threshold from civil to criminal, which the Supreme Court calls the "Rubicon", has been crossed.

[51] Using the *Jarvis* criteria, it seems to me that the CRA is not looking at this time to institute criminal or penal proceedings against the Friedmans. There is no evidence that a decision has been made to proceed with a criminal investigation, nor is any conduct by the CRA consistent with such an investigation. In addition, there is no evidence that the tax auditor transferred his file to the investigative branch of the CRA, or that the auditor was being used by the investigative branch to collect information in support of criminal charges.

[52] I am therefore satisfied that the Minister is not pursuing a criminal investigation against Mr. and Mrs. Friedman at this time. Therefore, section 11 of the Charter does not apply in the present case.

(b) *Does an administrative proceeding such as a CRA audit and the answers provided pursuant to that audit, constitute "any proceedings" to attract section 13?*

[53] The Friedmans cite *BC Securities Commission v Branch*, [1995] 2 SCR 3 [*Branch*], in support of the proposition that a person who is compelled to testify in a regulatory or administrative proceeding is protected under the Charter and may receive evidentiary immunity in return.

[54] What the Friedmans are looking for is comfort, or at least confirmation by way of a declaratory order from the Court that the evidence that they may be compelled to provide to the CRA will receive evidentiary immunity so as not to be used against them in "any other proceedings" the CRA might seek to initiate.

[55] I should first mention that this issue is not one which would normally be relevant in the context of an application for judicial review. However, the issue is also raised in the context of the Minister's summary application for an Order compelling the Friedmans to provide the answers to the RFIs. As such, I will address it here.

[56] The Friedmans focus on the wording of section 13 of the Charter:

13. A witness who testifies <u>in any proceedings</u> has the right	13. Chacun a droit à ce qu'aucun témoignage

not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.	incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.
[Emphasis added.]	[Je souligne.]

[57] They contend that the ITA's administrative process is a "proceeding" under section 13, although there is no case law confirming section 13 protection for testimony given in CRA civil audits or administrative processes more generally.

[58] In *Campbell v Canada (Attorney General)*, 2018 FC 683 [*Campbell*], Justice Grammond discussed arguments similar to those being argued before me in this case. In *Campbell*, the applicant, Mr. Campbell, was concerned with the application of the phrase "any other proceedings". He sought a declaratory order from this Court to the effect that the documents to be produced in response to a requirement made under section 231.1 of the ITA are protected by sections 7, 11 and 13 of the Charter and thus cannot be used against him "in another proceeding of any nature, object or kind whatsoever" (*Campbell* at para 15).

[59] Justice Grammond declined to issue the said declaration for the reasons set out at paragraphs 16 to 18 of the decision:

> [16] It is not appropriate to issue such an order now as there is presently no live controversy concerning the eventual use of the information Mr. Campbell is asked to provide. Mr. Campbell is not now charged with any offence. The remedy sought by Mr. Campbell is in the nature of a declaratory judgment. In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 CSC 12 (CanLII) at para 11, [2016] 1 SCR 99 [*Daniels*], Justice Rosalie

> Abella of the Supreme Court of Canada outlined the circumstances in which it is appropriate to issue a declaratory judgment:
>
> > […] The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties […].
>
> [17] In this case, there is no indication that CRA intends to use the information sought from Mr. Campbell for the purposes of laying criminal charges. There is simply no practical need to determine the scope of the protection that the Charter will afford if and when charges are laid against Mr. Campbell. Indeed, if I were to do so, I would be usurping the role of the court of criminal jurisdiction hearing Mr. Campbell's case. That court could hear a motion to exclude evidence based on section 24(2) of the Charter. As there is an alternative remedy, a declaratory judgment is not appropriate.
>
> [18] Mr. Campbell invokes *Seth*, in which Justice Robert Décary observed that "[t]he use of compelled testimony […] is protected in subsequent criminal proceedings by section 13 of the Charter." However, the Court of Appeal did not issue any declaratory judgment to that effect. The statement quoted formed part of the reasons for which the Court declined to stay administrative proceedings in which the applicant would be compelled to testify. The approach I adopt in the instant case is compatible with that of the Federal Court of Appeal in *Seth.*

[60] Here, the Friedmans are concerned with the application of the word "proceeding" and seek confirmation that the audit function of the CRA constitutes a "proceeding" as set out in section 13 of the Charter, so that the answers they are to provide stemming from the RFIs will not be used against them by the CRA in any penal or criminal proceedings in the future.

[61] However, it seems to me that the reasoning of Justice Grammond applies equally here. As in *Campbell*, there is no live issue in this case in respect of the eventual use of the information the Friedmans are being asked to submit to the CRA.

[62] I do not believe it is the role of this Court to prejudge matters so as to encroach on the domain of a subsequent criminal or court which might be called to answer that very question. As mentioned by Mr. Justice Grammond in *Campbell*, such a declaratory judgment would be tantamount to "usurping the role of the court of criminal jurisdiction."

[63] I also agree with Justice Grammond in pointing out in *Campbell* that subsection 24(2) of the Charter, which provides for the exclusion of evidence obtained in violation of the Charter, is available to those who feel that evidence adduced in such "other proceedings" has been wrongfully obtained.

[64] Consequently, I see no need for a declaratory order as sought by the Friedmans, and none will be issued.

(c) *Are sections 231.1 and 231.7 of the ITA unconstitutional as conflicting with sections 7, 11, and 13 of the Charter?*

[65] The Friedmans take the view that sections 231.1 and 231.7 of the ITA are overly broad in that they do not offer taxpayers sufficient protection from self-incrimination, and are thus in conflict with the principles of fundamental justice.

[66] As discussed already, the challenge under section 11 of the Charter was not pursued during the hearing. Clearly, the Friedmans have not been charged with any criminal offence, thus section 11 is not engaged in this case.

(d) *Section 13 of the Charter*

[67] In order for sections 231.1 and 231.7 of the ITA to be constitutional, the Friedmans argue that these sections must include a provision stating that the CRA cannot rely on information collected during a civil audit as evidence in later criminal or penal proceedings.

[68] As was the case in *Campbell*, I do not believe that section 13 of the Charter is relevant at this stage.

[69] Section 13 of the Charter applies when testimony is used to incriminate a person in "other proceedings". There are no such "other proceedings" at present, and section 13 would only be engaged if and when the Friedmans are charged with a criminal offence.

(e) *Section 7 of the Charter*

[70] Mr. and Mrs. Friedman specifically argue that section 7 of the Charter is engaged because a failure to comply with sections 231.1 and 231.7 of the ITA may result in imprisonment for a term of up to 12 months (see section 238 of the ITA). However, I find that their concerns are premature.

[71] The Friedmans concede in their written arguments that "at the stage of the Requirement for Information, [they] probably [do] not benefit from a general right to remain silence [*sic*] pursuant to section 7 of the Charter if the predominant purpose for the said Requirement for Information at the time of its issuance was administrative and not criminal or penal".

[72] I agree with the Minister that the letters and accompanying questionnaires are clearly for the purposes of a civil audit, and I have already found that there is no evidence that a criminal or penal investigation into the Friedmans is underway or forthcoming.

[73] With no evidence of a pending criminal investigation or reason to believe that the Friedmans face imprisonment—certainly not at this stage of the CRA's inquiry into their offshore holdings—concerns over how their rights may or may not be affected are merely speculative.

[74] Justice Grammond in *Campbell* dealt with the application of section 7 of the Charter and ruled that the provisions of sections 231.1 and 231.7 did not conflict with that section. In comparison with section 13 of the Charter, he stated at paragraph 12 of that decision:

> Section 7, however, affords a broader protection against self-incrimination, which extends beyond the specific situations contemplated by sections 11(c) and 13. Protection against self-incrimination is considered a principle of fundamental justice, which brings it under section 7 if someone's liberty is in jeopardy (*R v S (RJ)*, [1995] 1 SCR 451). The Supreme Court of Canada addressed the application of section 7 outside the criminal context in *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3. That case involved a challenge to the validity of a provision of British Columbia's *Securities Act* that requires the directors of issuers to answer questions under oath and to produce documents. The Court decided that section 7 may apply either at the time where testimony is compelled or at the time it is used in subsequent proceedings. At the time of compulsion, however, immunity will rarely be granted. The rule is that the person must testify. An exception will be made only where it is shown that the real purpose of requiring the person to testify is to incriminate the person. Where the purpose is related to the application of a regulatory scheme, testimony may be compelled and the person will benefit from use immunity in subsequent criminal proceedings. Thus, the provision of the *Securities Act* did not breach section 7.

[Emphasis added].

[75] Additionally, the case law on the use of section 7 to protect a witness's right not to self-incriminate makes it clear that it is a remedy used only in exceptional circumstances. In *Haywood Securities Inc v Inter-Tech Resource Group Inc*, [1986] 2 WWR 289 (BC CA), a case where a criminal investigation was actually underway, which is not the case here, Macfarlane J.A. emphasized that section 7 does not offer absolute protection:

> I agree that if the sole aim and purpose of the proceeding was to obtain evidence to support a charge or to assist the criminal prosecution of the witness, it might be arguable that the witness ought not to be compelled to divulge information which might lead to his conviction. But, in my view, such a result would follow only if the proceedings in which such evidence was given were so devoid of any legitimate public purpose and so deliberately designed to assist the prosecution of the witness that to allow them to continue would constitute an injustice. In such circumstances, the continuance of the proceedings could be said to constitute a violation of the principles of fundamental justice.
>
> The appellants submit that ss. 11(c) and 13 do not exhaust the protection of rights in this area, which are fundamental to our system of justice, and they resort to s.7. I agree that there may be cases and circumstances where the legislation or the procedure is so designed and the results are so unjust that to compel a person to testify might offend the basic sense of fairness which underlies the principles of fundamental justice, and violate s.7. Such situations may involve testimonial compulsion and self-incrimination but it does not follow that s.7 contains an unwritten rule against all testimonial compulsion and all cases involving self-incrimination.
>
> […]
>
> The effect of those cases is that there is no absolute right to have civil proceedings stayed in the face of criminal proceedings, but there is a protection, available on a discretionary basis, in extraordinary or exceptional circumstances. To elevate that limited protection to the status of a fundamental right is not justified. In cases where protection is clearly required, the discretion will be exercised on the basis that a fair trial of the accused and a just determination of criminal charges cannot be made unless proceedings are stayed (at paras 18-25).

[76] The ITA's legitimate purpose in allowing the CRA to audit taxpayers—to ensure compliance with our taxation system—must thus be balanced against the section 7 rights invoked by the Friedmans, with the consideration that the sole object of section 7 is to offer protection in "extraordinary or exceptional circumstances" when the impugned legislation is unjust. I do not believe that a routine civil taxation audit rises to that level, especially when weighed against the overall purpose of sections 231.1 and 231.7 in the larger context of our self-reporting and self-assessing taxation system.

[77] I am thus not convinced that a theoretical future criminal proceeding is sufficient to allow the Friedmans not to provide the information sought by the CRA in this case. Here, sections 231.1 and 231.7 fulfill a legitimate purpose under the scheme of the ITA. Consequently, I agree with Justice Grammond that those provisions are not in conflict with section 7 of the Charter.

III. **Conclusion**

[78] Mr. and Mrs. Friedman's applications for judicial review are dismissed, and the Minister's applications for an Order under section 231.7 of the ITA are allowed, the whole with costs against Mr. and Mrs. Friedman as regards the applications that affect them.

JUDGMENT in T-1492-18, T-1491-18, T-388-18 AND T-389-18

THIS COURT'S JUDGMENT is that:

1. The style of cause in files T-388-18 and T-389-18 are amended as to remove the Canada Revenue Agency as a respondent;
2. The applications for judicial review of both Mr. and Mrs. Friedman in files T-388-18 and T-389-18 are dismissed;
3. The Minister of National Revenue's summary application pursuant to section 231.7 of the *Income Tax Act* in files T-1491-18 and T-1492-18 are granted;
4. Mr. Friedman is ordered to provide to a person authorized by the Minister of National Revenue certain documents and information required in the Requirement for Information addressed to him and dated February 1, 2018;
5. Mrs. Friedman is ordered to provide to a person authorized by the Minister of National Revenue certain documents and information required in the Requirement for Information addressed to her and dated February 1, 2018;
6. Mr. Friedman is ordered to pay the costs of the application for judicial review in file T-388-18, and the notice of summary application in file T-1492-18;
7. Mrs. Friedman is ordered to pay the costs of the application for judicial review in file T-389-18, and the notice of summary application in file T-1491-18.

"Peter G. Pamel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1492-18, T-1491-18, T-388-18 AND T-389-18
DOCKET:	T-1492-18
STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE v CHARLES FRIEDMAN
AND DOCKET:	T-1491-18
STYLE OF CAUSE:	MINISTER OF NATIONAL REVENUE v CLAIRE FRIEDMAN
AND DOCKET:	T-388-18
STYLE OF CAUSE:	CHARLES FRIEDMAN v THE ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-389-18
STYLE OF CAUSE:	CLAIRE FRIEDMAN v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 2, 2019
REASONS FOR JUDGMENT AND JUDGMENT:	PAMEL J.
DATED:	DECEMBER 10, 2019

APPEARANCES:

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Me Louis Frédérick Côté Me Martin Bédard	FOR THE RESPONDENTS CHARLES FRIEDMAN AND CLAIRE FRIEDMAN

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