Federal Court  Cour fédérale

Date: 20211220

Docket: T-1329-19

Citation: 2021 FC 1438

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 20, 2021

PRESENT: Madam Justice St-Louis

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

HYDRO-QUÉBEC

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] In accordance with the provisions of subsections 231.2(2) and (3) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the Act], the Minister of National Revenue [the Minister] is seeking the Court's authorization to serve on the respondent, Hydro-Québec, a notice based on subsection 231.2(1) of the Act to require the provision of information and the production of

documents regarding a group of unnamed persons (requirement for information, or RFI), namely, Hydro-Québec's Rate G and Rate M commercial customers [the 2019 RFI].

[2] To allow the Minister's application, the Court must be satisfied that the pre-conditions for judicial authorization set out in paragraphs 231.2(3)(a) and (b) of the Act are met, namely, that (a) the group is ascertainable; and (b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act. Subsection 231.2 of the Act is set out in the appendix to these reasons.

[3] The 2019 RFI is not the first RFI submitted to the Court by the Minister under subsection 231.2 of the Act that concerns Hydro-Québec and, essentially, the same group of its customers, because in 2017, the Minister submitted an initial RFI [the 2017 RFI]. At the time, Hydro-Québec did not object to the Minister's RFI, nor did it appear, so it did not submit representations.

[4] However, on June 15, 2018, the Court, per Justice Roy, refused to grant the Minister the authorization it sought (*Canada (National Revenue) v Hydro-Québec*, 2018 FC 622 [*Hydro-Québec 2018*]). The Court found that the 2017 RFI did not meet the statutory requirements because it did not provide an ascertainable group within the meaning of paragraph 231.2(3)(a) of the Act, and that the information sought did not have a sufficiently strong connection to the Act, within the meaning of paragraph 231.2(3)(b), to allow an audit. The Court added that even if it had found that the statutory conditions set out in subsection 231.2(3) of the Act had been met, it would "still refuse judicial authorization given the extent of the intrusion requested by the

Minister" (*Hydro-Québec 2018* at paragraph 84). In the 2018 decision, the Court noted the absence of a challenge from Hydro-Québec and, in light of this absence, exercised the necessary vigilance in respect of *ex parte* applications.

[5] The Minister did not appeal *2018 Hydro-Québec*, which then became *res judicata*.

[6] Moreover, in 2020, the Federal Court of Appeal issued its decision in *Roofmart Ontario Inc. v Canada (National Revenue)*, 2020 FCA 85 [*Roofmart*]. In that decision, it dismissed *Roofmart*'s appeal against the Federal Court decision granting the authorization sought by the Minister. The Federal Court of Appeal addressed, among other issues, the application of the clear and unambiguous wording of a provision of the Act (*Roofmart* at paras 20–21) and *Hydro-Québec 2018* relating to the ascertainable group requirement (*Roofmart* at paras 36–42). It is not necessary to detail the Federal Court of Appeal's findings at this stage, except to point out that some findings refute my colleague's proposals in *Hydro-Québec 2018*. Thus, since I am required to follow the teachings of the Federal Court of Appeal (*stare decisis*), it is reasonable to believe that my decision on the 2019 RFI would be different from that of my colleague on the 2017 RFI.

[7] However, as Hydro-Québec argues, before assessing the merits of the 2019 RFI, it is necessary to determine whether *Hydro-Québec 2018* is *res judicata* between the parties, thereby terminating the 2019 RFI. After some hesitation, the parties confirmed to the Court that this matter should be reviewed in accordance with the doctrine of *res judicata* codified in article 2848 of the *Civil Code of Québec*, rather than in accordance with the doctrine of estoppel in common law (concepts of *res judicata*, also called cause of action estoppel, and of issue

estoppel, or *préclusion découlant d'une question déjà tranchée* in French: see *Timm v Canada*, 2014 FCA 8 at para 25). I agree with the parties and agree with the position set out by Hydro-Québec at paragraphs 17–20 of its additional written submissions. I will therefore not consider the arguments previously raised by the parties relating to the doctrine of estoppel in common law (*Commission scolaire de Victoriaville v Canada* [2002] TCJ No 208 [*Victoriaville*]).

[8] Therefore, and for the reasons set out below, I find that the Minister, in her 2019 RFI, is asking the Court to decide a case identical in its object, cause, and parties to that which was submitted to Justice Roy and decided in *Hydro-Québec 2018*. I therefore conclude that the 2019 RFI must be denied on the ground of *res judicata*.

[9] In short, I am first satisfied that the Court's judgment in *Hydro-Québec 2018* issues from a t decision maker of competent jurisdiction and decides a contentious matter, even though Hydro-Québec did not object to it, and that it is final. Second, I am also satisfied that the *Hydro-Québec 2018* judgment and the 2017 RFI have the three identities required by article 2848 of the *Civil Code of Québec*, because they involve the same parties in relation to the same object and the same cause.

II. *Res judicata*

A. Article 2848 of the *Civil Code of Québec*

[10] Article 2848 of the *Civil Code of Québec* provides that *res judicata* is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same

cause and is between the same parties acting in the same qualities and the thing applied for is the same. This is a means of proof, and once the conditions for applying it have been met, its effect is absolute and cannot be rebutted by evidence to the contrary.

[11] As Hydro-Québec points out, *res judicata* maintains public order while protecting private interests. This presumption prevents the renewal and continuation of disputes, ensures the stability of social relations, and prevents contradictory judgments (Catherine Piché and Jean-Claude Royer, *La preuve civile*, 6th ed, Cowansville, QC, Yvon Blais, 2020 at para 980). For its part, the Supreme Court of Canada has noted that "[t]he rationale for this irrebuttable legal presumption of validity of judgments is anchored in public social policy to ensure the security and stability of relations in society. The converse would be anarchy, with the possibility of endless trials and contradictory judgments" (*Roberge v Bolduc*, [1991] 1 SCR 374 at p 402 [*Roberge*]).

[12] As noted by Justice Roussel in *Arial v Canada*, 2017 FC 1124 [*Arial*] at paragraphs 24 and 25, "[i]n *Roberge v. Bolduc*, [1991] 1 SCR 374 [*Roberge*], the Supreme Court of Canada interpreted the scope of the principal [*sic*] of *res judicata*. In order for the principle of *res judicata* to apply, two (2) types of conditions are needed: first, conditions pertaining to the judgment and, second, conditions pertaining to the action. As for the judgment, 'the court must have jurisdiction over the matter, the judgment must be definitive, and it must have been rendered in a contentious matter' (*Roberge*, at page 404). As for the action, it must have a triple identity, that is, "the identity of parties, object, and cause" (*Roberge*, at page 409). When all

these conditions are met, the authority of *res judicata* is an 'absolute' presumption under article 2848 of the CCQ."

[13] In his *Précis de la preuve*, Professor Ducharme notes that article 2848 of the *Civil Code of Québec* deals with a particular absolute presumption (Léo Ducharme, *Précis de la preuve*, 3rd ed., Montréal, Wilson & Lafleur, 1986). Thus, the final judgments of a court with civil jurisdiction in Quebec and issued in contentious matters benefit from the absolute presumption of *res judicata*. Professor Ducharme tells us that a [TRANSLATION] "judgment in a contentious matter is one in which a judge decides a point disputed by two or more opponents" and that judgments in non-contentious matters do not have force of *res judicata* (*Précis de la preuve* at para 596). Moreover, in *Roberge*, the Supreme Court of Canada states that a judgment, even one issued by default, may have been rendered in contentious matters. The fact that the respondent did not make representations does not make it a non-contentious matter.

[14] The Supreme Court of Canada states the following at page 407 of *Roberge*:

> Even *ex parte* and default judgments can be "definitive," since they arrive at a conclusion and decide the case. Nadeau, in "L'autorité de la chose jugée" (1963), 9 McGill L.J. 102, sets out this proposition at p 107
>
> > [TRANSLATION] They [definitive judgments] may have been rendered after argument and counter-argument or even by default, provided the opposing party has been served. . . .
>
> *Royer, op. cit*, asserts, at No. 770, p. 284:
>
> > [TRANSLATION] It [a definitive judgment] may also be rendered by default where the party has failed to appear or make submissions, if the defendant has been duly served.

[15] The Minister has not persuaded me that the judgment in *Hydro-Québec 2018* was rendered in a non-contentious matter because Hydro-Québec did not object to her RFI or that Justice Roy referred to an *ex parte* proceeding.

[16] A triple identity is required between the first judgment and the subsequent RFI: identity of parties, cause, and object.

[17] One of the effects of *res judicata* is to prevent the grounds raised in a demand in a proceeding that has been dismissed from being raised again in a subsequent demand (*Précis de la preuve* at para 604). Unlike what prevails when the Court applies the doctrine of estoppel in common law, the Court cannot use its discretion to refuse to apply the principle of *res judicata* provided for in the *Civil Code of Québec* if the conditions are met because said principle is codified (*Timm v Canada*, 2014 FCA 8 at paras 25–27; *Arial* at para 25).

[18] In the case at hand, there is no dispute that the parties are the same and that it is therefore for the Court to determine whether there is the same identity of object and the same identity of cause.

B. *Identity of object*

(1) Principles

[19] The object of an action is the immediate legal benefit that is sought in bringing the action, that is, the right sought to be enforced. This is the right that the litigator exercises, the immediate legal benefit that they want to have recognized (*Roberge* at pp. 413–14; *Arial* at para 30). To

determine the "object" of an action, both the nature of the right sought to be enforced and the remedy or intended goal must be examined (*Roberge* at p 414).

[20] According to Professor Ducharme and his book, the *Précis de la preuve*, the thing applied for must be the same in both cases. The object of an action is the right sought to be recognized. Identity of object does not have to be absolute. It is sufficient that the right sought in a first action is understood as a necessary part of the second action (*Roberge* at p 414; *Rocois Construction Inc. v Québec Ready Mix Inc*., [1990] 2 SCR 440 [*Rocois Construction*]).

[21] At page 414 of *Roberge*, the Supreme Court considered *Pesant v Langevin* (1926), 41 BR 412 [*Pesant*] as the leading case on the issue of identity of object. The Supreme Court cited Justice Rivard, who wrote the following at paragraph 37 in *Pesant*:

> [TRANSLATION]
>
> The object of an action is the benefit to be obtained in bringing it. Material identity, that is identity of the same physical thing, is not necessarily required. This perhaps forces the meaning of "object" somewhat, but an abstract identity of right is taken to be sufficient. "This identity of right exists not only when it is exactly the same right that is claimed over the same thing or over one of its parts, but also when the right which is the subject of the new action or the new exception, though not absolutely identical to that which was the subject of the first judgment, nevertheless forms a necessary part of it, is essentially included in it, as by being a subdivision or a necessary sequel or consequence." In other words, if two objects are so related that the two arguments carried on about them raise the same question regarding performance of the same obligation between the same parties, there is *res judicata*. [References omitted.]

[22] Thus, the Supreme Court has specified that there is identity of object if the object of the second action is similar to or the necessary consequence of the first action, and it is necessary to

consider not only the form of the demand but also its substance (see also *Ungava Mineral Exploration Inc c Mullan*, 2008 QCCA 1354 [*Ungava*]).

[23] It is therefore necessary to identify the object of the *Hydro-Québec 2018* judgment and the object of the 2019 RFI.

(2) Positions of the parties

[24] The Minister submits that the object of the 2019 RFI, that is, the immediate right or the benefit she wishes to claim, is to obtain information on Hydro-Québec's Rate G and Rate M customers in 2021, to check whether these customers filed their income tax returns in 2020. On the other hand, the Minister argues that the object or benefit sought by the Minister in her 2017 RFI was to obtain information on Hydro-Québec's customers in 2018, to check whether they had filed their income tax returns in 2017 (*Victoriaville* at para 107).

[25] Therefore, according to the Minister, the object of the 2019 RFI is new, as the Minister is claiming an identical right, but over a different thing (*Roberge* at p 413); *Nu-Pharm Inc c Trudel*, 2002 CanLII 25078 (QC CS) at paras 6–7; *Chaput c Cour du Québec*, [1997] JQ no 5575 at paras 10–11; *Trois-Rivières-Ouest (Ville) c Damphousse*, [1993] RDJ 307 (QC CA) [*Damphousse*], *Dominique-Legault c Service de police de la Ville de Montréal*, 2019 QCCAI 254). The Minister adds that since Hydro-Québec's customers in 2021 are different from those in 2017, there is no *res judicata* as they are two different groups. The Minister points out that counsel for Hydro-Québec has acknowledged that the group constantly changes and varies over time, and that the 2019 RFI has a greater scope than the 2017 RFI, as each day

customers enter into service contracts while others terminate them. In addition, the Minister notes that the residential sector was excluded from the 2017 RFI whereas it now requires information on this sector for rates G and M in the 2019 RFI. Finally, the Minister points out that the group covered by the RFI is not an implicit object because the group is an object in flux.

[26] In response, Hydro-Québec submits that the object of the 2019 RFI is to obtain information on a group of unnamed persons—here, Hydro-Québec's Rate G and Rate M customers—and that the object of the 2017 RFI was the same, that is, to obtain information on a group of unnamed persons: Hydro-Québec's commercial customers. Thus, according to Hydro-Québec, the object of the two RFIs is the same because although the group was formed at another time, it is by its nature the same. As indicated in its record, Hydro-Québec notes that the group, although named differently, is the same in both RFIs, and the information requested is also the same, with a few exceptions. Hydro-Québec alleges that the Minister is therefore seeking the same right regarding the same object, namely, the right to obtain information in respect of the unnamed persons in the group. She states that the material composition of the group (i.e., [TRANSLATION] "the identity of the specific customers that compose it") has no bearing on the issue to be decided and that this information is not in evidence. As a result, Hydro-Québec notes that there is no evidence that the nature of the group, in an abstract way, changed between the Minister's two RFIs. It is the same group, not two separate groups, at a different time (*Doyon c Régie des marchés agricoles et alimentaires du Québec*, 2007 QCCA 542 [*Doyon*]; *Pesant*).

[27] Finally, Hydro-Québec adds that the object does not have to be "absolutely identical," but that the object of the new RFI must at least form [TRANSLATION] "a necessary part of the judgment" (*Deschênes c Agence du revenue du Canada*, 2019 QCCA 446). Hydro-Québec clarifies that in the case at hand, it is clear that the object of the 2019 RFI is a necessary part of the judgment issued in *Hydro-Québec 2018* and that this finding is valid even though the scope of the 2019 RFI has been extended, as is the case here, to obtain the Rate G and Rate M *residential* customers.

(3) Decision

[28] The parties agree that the object of each of the Minister's RFIs at least includes obtaining information on a group of unnamed persons, generally Hydro-Québec's business customers.

[29] However, the Minister adds that the object of each RFI covers a particular year, to obtain, in a way, a snapshot of said group at a particular time. According to the Minister, this is what makes it possible to distinguish the object of the 2018 judgment from that of the 2019 RFI.

[30] For the following reasons, I find that the object of each of the RFIs is, as set out by Hydro-Québec, to obtain information on a group of unnamed persons, generally Hydro-Québec's business customers. Based on the evidence in the record, the object of the 2017 RFI, on which the Court ruled in *Hydro-Québec 2018*, cannot be distinguished from the object of the 2019 RFI now before the Court.

[31] In its memorandum of facts and law, Hydro-Québec provides a comparative table of the 2017 RFI and the 2019 RFI. It must be concluded that the group of unnamed persons referred by the Minister and the information she requests are substantially the same in both RFIs.

[32] I have reproduced below a part of the comparative table provided by Hydro-Québec: [TRANSLATION]

	First RFI	Current RFI
Scope	"The list of all corporations or individuals identified as commercial or business customers under a general service rate"	"The list of all legal or natural persons identified as Rate G and Rate M business customers, excluding customers under these two rates identified in the institutional sector (the targeted group)."
Exclusion	"excluding legal or natural persons under the 'large power' rate, legal or natural persons under domestic rates, and government agencies (federal, provincial and municipal)"	"legal or natural persons under to the domestic rate, legal persons under the 'large power' rate, and government agencies (federal, provincial, and municipal) are not covered by this requirement"

[33] This table highlights the same three exclusions: legal or natural persons under the "large power" rate, those under the domestic rate, and government agencies (federal, provincial, and municipal).

[34] In the 2017 RFI, [TRANSLATION] "commercial or business customers under a general service rate" are the same customers as those defined in the 2019 RFI as [TRANSLATION] "Rate G and Rate M business customers". The general rates are rates G, M, and LG. Rate LG is a large

power rate. Since large power rates are excluded from the 2017 RFI, only rates G and M remain, as is the case in the 2019 RFI.

[35] The 2019 RFI has an additional exclusion, namely, Rate G and Rate M customers listed in the institutional sector. “Institutional” customers are synonymous with government entities broadly, such as cities, school boards, hospitals, and schools.

[36] The wording of the Minister’s 2019 RFI and the evidence do not reveal anything about the year the group was formed, or the specific fiscal year the Minister wishes to audit.

[37] There is no indication that the object of the 2019 RFI is to obtain information on Hydro-Québec’s Rate G and Rate M customers in 2021 to check whether these customers filed their income tax returns in 2020, or that the object or benefit sought by the Minister in her 2017 RFI was to obtain information about Hydro-Québec’s customers in 2018 to check whether they filed their income tax returns in 2017. Since the distinction made by the Minister is missing from the RFIs, she cannot persuade me that the objects of the two RFIs are different on this basis.

[38] Even assuming that the composition of the group actually changed at least in part from one RFI to another, I cannot agree with the Minister’s position that there is no identity of object because the material composition of the group is likely to have changed between the two RFIs.

[39] First, since this is a requirement for information under subsection 231.2(3) of the Act, the individuals in the group are unnamed persons, and the identity of the persons in the case at hand, customers of Hydro-Québec, was not in evidence before Justice Roy, nor is it before me. The identity of the persons or the composition of the group is not an issue, and the RFI is based on the generic description of the "group". However, this description is essentially the same in both RFIs, as noted above.

[40] Second, in the Quebec Court of Appeal's decision in *Damphousse* at paragraph 12, cited by the Minister, Justice Fish noted that the two applications were not identical, that the most recent one contained new elements, and that some of these new elements were sufficient to conclude [TRANSLATION] "that there is no identity of cause between the two applications". He did not deal with identity of *object*, so this decision is not useful to us in determining identity of object.

[41] *Rocois Construction* and *Doyon*, cited by Hydro-Québec, appear to be more useful in providing us with clarification in the case at hand. In the first decision, the nature of the object remained the same even though the amounts claimed were different. In the second decision, while the appellant argued that there could be no identity of object because [TRANSLATION] "the marketing agreements were not the same", the Quebec Court of Appeal emphasized the following principles:

> [TRANSLATION]
>
> In this respect, the following excerpt from *Pesant v Langevin*, cited above, is relevant:
>
> > In other words, if two objects are so closely related that the two debates in their respect raise the same

> question relating to the same obligation, between the same parties, there is *res judicata*. [TRANSLATION] That is why there are cases "where the word "object" refers to the issue debated in the trial rather than to the consequence upon which the final judgment is made; where this issue is identical in two applications, the diversity of consequences does not prevent *res judicata*." Identity of issue can therefore compensate for the lack of corporeal identity of the object, where the intimate connection between the two proceedings is such that the judge could foresee, in deciding the issue a first time, the consequence about which it is raised a second time.

[42] In the case at hand, the immediate legal benefit that the Minister wants to have recognized in her 2019 RFI is to be provided with information about more than one unnamed person under subsection 231.2(3) of the Act, namely, Hydro-Québec's business customers.

[43] The immediate legal benefit that the Minister sought to have recognized in her 2017 RFI, which was the subject of a judgment by the Court in 2018, was to be provided with information concerning Hydro-Québec's business customers (*Hydro-Québec 2018* at paras 6 and 7).

[44] I find that the object of *Hydro-Québec 2018* is identical to the object of the 2019 RFI currently before the Court.

C. *Identity of cause*

(1) Principles

[45] Quoting Professor Ducharme, the Quebec Court of Appeal succinctly defined the cause as the [TRANSLATION] "juridical or material fact which constitutes the direct and immediate basis of the right claimed" (*Ungava* at para 57).

[46] At pages 454 to 456 of *Rocois Construction*, the Supreme Court noted that the concept of identity of cause is extremely difficult to define. The Court cites various doctrinal definitions of cause and emphasizes the one developed in *La preuve civile*, that is, that cause is the principal act or fact that is the direct or immediate basis for the creation, alteration or extinction of an obligation (*Rocois Construction* citing Jean-Claude Royer, *La preuve civile*, Cowansville, QC, Yvon Blais, 1987).

[47] The Supreme Court also notes the following definitions at pages 416–17 of *Roberge*:

> The definitions of "cause" proposed by the various authors fall along a spectrum ranging from the raw facts to the potentially applicable abstract rule of law. The phrases "principal . . .fact which is the direct . . . basis" for the right, "legal fact which gave rise to the right claimed," "origin of or principle giving rise to the right claimed" or "legal source of the obligation" are attempts to capture in words the elusive idea of "cause," on the bridge linking the body of facts to the legal rule in legal reasoning.
>
> First, it is clear that a body of facts cannot in itself constitute a cause of action. It is the legal characterization given to it which makes it, in certain cases, a source of obligations. A fact taken by itself apart from any notion of legal obligations has no meaning in itself and cannot be a cause; it only becomes a legal fact when it is characterized in accordance with some rule of law. The same body of facts may well be characterized in a number of ways and give

> rise to completely separate causes. For example, the same act may be characterized as murder in one case and as civil fault in another. In *Essai sur l'autorité de la chose jugée en matière civile* (1975), Daniel Tomasin expressed this very clearly. At page 201, he wrote:
>
> > [TRANSLATION]
> >
> > It may be that under one or more provisions certain facts can be characterized differently. If the characterization chosen to attain a result has been rejected in one judgment, can a party then seek to attain the same result in reliance on a different characterization? Judging from article 1351 C.C., the answer must be in the affirmative as there is an absence (of identity) of cause between the two actions.
>
> As a general rule, the same body of facts can thus give rise to as many causes of action as there are legal characterizations on which a proceeding can be based.
>
> It is equally clear that a rule of law removed from the factual situation cannot be a cause of action in itself. The rule of law gives rise to a cause of action when it is applied to a given factual situation; it is by the intellectual exercise of characterization, of the linking of the fact and the law, that the cause is revealed. It would certainly be an error to view a cause as a rule of law regardless of its application to the facts considered. Accordingly, the existence of two applicable rules of law as the basis of the plaintiff's rights does not lead directly to the conclusion that two causes exist.
>
> Of course, the existence of two rules of law applicable to a factual situation in practice gives rise to a duality of causes in the vast majority of cases, because separate rules generally require different legal characterizations. However, it is not the fact that there are two applicable rules which is conclusive in itself: it is the duality of legal characterizations which may result therefrom. <u>When the essence of the legal characterization of the facts alleged is identical under either rule, it must follow that there is identity of cause.</u> [Emphasis added.]

[48] In *Roberge*, the Supreme Court also agreed that, as the Minister notes, the characterization will depend on the choice made between a more general concept of cause (i.e.,

abstract or general concept of cause) and a narrower concept (i.e., concrete or special concept of cause). The Supreme Court thus appears to favour the concrete concept, which is considered more rational and less likely to be confused with the object (*Roberge* at p 418).

[49] The adoption of the narrow concept of cause has the consequence of restricting the application of *res judicata* and has the [TRANSLATION] "advantage of not depriving a litigant of the right to exercise a valid remedy" (*Victoriaville* at para 89 citing Jean-Claude Royer, *La preuve civile*, 2nd ed, Cowansville, QC, Yvon Blais, 1995 at p 502).

(2) Positions of the parties

[50] The Minister argues for a narrow concept of the cause, as opposed to a broad, abstract concept, and argues that this is the narrow concept that the Supreme Court of Canada has adopted (*Roberge* at p 418; *Rocois Construction* at pp 454–56).

[51] The Minister draws an analogy to *Roberge* and submits that although the 2019 RFI may cover in part the same customers and that it was served on the responding party, there is no *res judicata* as the 2019 RFI was made in order to carry out her duty to perform an audit for another fiscal year. This is therefore, according to the Minister, a second separate, severable, and unique RFI from the first one, although similar in appearance.

[52] The Minister therefore submits that there is no identity of cause, as the 2019 RFI does not meet the same goals as the 2017 RFI. In fact, the RFIs are driven by different obligations arising from the respective application of the law in 2017 and 2020 and by different causes of action

(*Damphousse*). The Minister submits that when the civil law's narrow test for identity of cause is applied to the facts, *Hydro-Québec 2018* cannot have force of *res judicata* over the 2019 RFI. She states that this truth is even more obvious in the context of tax law, as the Act requires each taxpayer to file an income tax return each year (subsection 150(1) of the Act) and Parliament has granted the Minister (who is required to administer and enforce the Act under subsection 220(1) of the Act) the authority, each year, to require information from taxpayers and thus to apply for authorization under subsection 231.2(3) of the Act. According to the Minister, the causes of action cannot be identical because the conditions for applying subsection 231.2(3) of the Act depend on the time at which the RFI is made.

[53] Therefore, the Minister submits that the cause of the 2019 RFI is the need to check Rate G and Rate M customers' information of in 2021 to check whether they filed their income tax returns for 2020, while the cause of the 2017 RFI was entirely different. The cause was to fulfil the Minister's duty to perform an audit for fiscal year 2017 through information on Hydro-Québec's business customers in 2018.

[54] Hydro-Québec responds that in the case at hand, the 2019 RFI is not unique; it is inseparable from the 2017 RFI. Hydro-Québec notes in this regard that the Minister states that she took note of the Court's judgment in 2018 and considered it in preparing her evidence in the case at hand. Hydro-Québec compares some elements of each RFI and argues that the goal is the same. It submits that the goal of both RFIs is to obtain information on Hydro-Québec's commercial customers to check whether they have complied with their obligations under the Act and that it is wrong for the Minister to claim that the RFIs covered specific fiscal years. In

addition, Hydro-Québec replies that this case does not concern the fulfilment of a taxpayer's tax obligations for a specific year. It is more a matter of establishing whether the two criteria set out in the Act are met. The issue of the year has no bearing. Hydro-Québec adds that the fact that the Minister is making changes to her evidence does not allow circumventing the application of *res judicata*.

(3) Decision

[55] As the Supreme Court points out, the concept of identity of cause is difficult to define. In the case at hand, adopting the narrow, or restricted, concept suggested by the Minister, I must find that Hydro-Québec has established that the year does not constitute an element that would distinguish the two RFIs or dissociate them. If the cause of the RFI is the *performance of the duty to audit*, as submitted by the Minister, there is no indication that the RFIs cover a particular fiscal year.

[56] I agree with Hydro-Québec's position in this regard, as set out in paragraphs 30 to 34 of its additional written submissions. I am also satisfied that the case law established in relation to the recurring application of the Act is not useful to us in the case at hand.

[57] As Hydro-Québec points out, this case deals with the issue of whether the two criteria set out in the Act are met, in order for the Minister to obtain information necessary for the performance of her duty to audit. In her RFIs, the Minister did not present the fiscal year as a factor. The essence of the legal characterization of the alleged facts in the two RFIs is identical, and it must be concluded that there is identity of cause.

[58] The Minister further submits that if, hypothetically, the 2017 RFI had been authorized, the Court should still consider the 2019 RFI to check whether the Minister meets the statutory conditions in light of the composition of the group in 2019 and the Minister's auditing needs.

[59] In this regard, I believe it is necessary to distinguish (1) the statutory obligation imposed on the Minister to obtain the Court's authorization to require third parties to provide information on unnamed persons in accordance with subsection 231.2(3) of the Act; and (2) the Court decision that determines whether the two statutory conditions have been met.

[60] Therefore, I agree that, had the 2017 RFI been authorized, the Minister would not have been exempted from the statutory obligation to seek leave from the Court to require, again from Hydro-Québec, the provision of information concerning the same group of business customers. In light of my finding in the case at hand, I am of the opinion that the Court hearing the second RFI would have been bound by the Court's findings on the first RFI as to the two statutory conditions to be met. The Minister would be required to resubmit an RFI to the Court because she could not require the information without the Court's leave. However, the doctrine of *res judicata* on the merits of the criteria and facts submitted would then prevent the Court from re-opening the previous decision.

D. *Finding on force of* res judicata

[61] I find that the conditions relating to *res judicata* in the *Civil Code of Québec* are met, as the Court has jurisdiction and the judgment is final and has been issued in a contentious matter.

[62] As noted above, the parties agree that there is identity of parties, and I find that there is identity of object and identity of cause.

[63] The presumption under article 2848 of the *Civil Code of Québec* applies and therefore terminates the Minister's 2019 RFI.

III. Additional evidence and abuse of rights

[64] The Minister submits that the decisive new evidence submitted by both sides in this RFI distinguishes it from the first RFI but does not specify how or whether this finding has an impact on the application of *res judicata*. I note in passing that this additional evidence would have in fact been useful in assessing the merits of the 2019 RFI had this assessment been completed. However, there is no indication that it would prevent the application of the absolute presumption under article 2848 of the *Civil Code of Québec*.

[65] I agree with Hydro-Québec's position with respect to the Court's discretion to ensure that the Minister does not abuse her right to require information. The fact that this power exists to punish abuse does not prevent the Court from applying *res judicata* when the criteria are met.

IV. Conclusion

[66] The Minister's application to serve on Hydro-Québec the requirement for information attached to the proposed order submitted in Tab K of the Minister's record is dismissed.

[67] Costs will be awarded to Hydro-Québec.

JUDGMENT in T-1329-19

THIS COURT'S JUDGMENT is as follows:

1. The Minister's application is dismissed.

2. Costs are awarded to Hydro-Québec.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles

[68] Subsection 231.2 of the Act provides as follows:

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 sent or served in accordance with subsection (1.1), 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 ou envoyé conformément au paragraphe (1.1), 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.
Notice	Avis
(1.1) A notice referred to in subsection (1) may be	(1.1) L'avis visé au paragraphe (1) peut être :
(a) served personally;	a) soit signifié à personne;
(b) sent by registered or certified mail; or	b) soit envoyé par courrier recommandé ou certifié;
(c) sent electronically to a bank or credit union that has provided written consent to receive notices under subsection (1) electronically.	c) soit envoyé par voie électronique à une banque ou une caisse de crédit qui a consenti par écrit à recevoir les avis visés au paragraphe (1) par voie électronique.
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 information or any	(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1)

document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).	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]

[Emphasis added.]

FEDERAL COURT
SOLICITORS OF RECORD

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