Date: 20071102

Docket: A-435-06

Citation: 2007 FCA 346

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

GREATER MONTRÉAL REAL ESTATE BOARD

Respondent

Hearing held at Montréal, Quebec, on October 9, 2007.

Judgment delivered at Ottawa, Ontario, on November 2, 2007.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

The facts and the proceeding

[1] The Minister of National Revenue (MNR) is appealing a decision by Madam Justice Johanne Gauthier (the judge) dated September 6, 2006. This decision set aside an earlier order dated June 28, 2005, which was made *ex parte* under subsection 232.2(3) of the *Income Tax Act*, R.S.C. 1985 (5th supp.), c. 1 (the Act). That order authorized the MNR to impose a requirement on

the Greater Montréal Real Estate Board (the GMREB) to provide information and documents relating to a group of unnamed taxpayers.

[2] The GMREB is a non-profit organization whose primary mission is to promote and protect the professional interests of its members. In the course of operating an inter-agency service, it collects various information about its members and the properties they are selling.

[3] In the autumn of 2004, the Canada Customs and Revenue Agency serving the Montérégie/Rive-sud area set out to verify whether the real estate agents and licensed brokers living or carrying on business in that area were complying with the Act. This investigation was intended to determine, *inter alia*, whether the agents and brokers had completed their income tax returns properly and whether they had reported the commissions they had earned.

[4] In order to carry out this investigation relating to the administration and enforcement of the Act, the MNR required authorization from a judge under subsection 231.2(3). Section 231.2 states:

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, 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 et l'exécution de la présente loi, y compris la perception d'un montant payable par une personne en vertu de la présente loi, 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

(*b*) any document.

déclaration supplémentaire;

b) qu'elle produise des documents.

Unnamed persons

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

Personnes non désignées nommément

(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) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

Judicial authorization

(3) On *ex parte* application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") where the judge is satisfied by information on oath that

(*a*) the person or 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.

(*c*) and (*d*) [Repealed, 1996, c. 21, s. 58(1)]

Autorisation judiciaire

(3) Sur requête *ex parte* du ministre, un juge peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou production de documents prévue 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) cette personne ou ce groupe est identifiable;

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) et *d*) [Abrogés, 1996, ch. 21, art. 58(1)]

Service of authorization

(4) Where an authorization is granted under subsection 231.2(3), it shall be served together with the notice referred to in subsection 231.2(1).

Signification ou envoi de l'autorisation

(4) L'autorisation accordée en vertu du paragraphe (3) doit être jointe à l'avis visé au paragraphe (1).

Review of authorization

(5) Where an authorization is granted under subsection 231.2(3), a third party on whom a notice is served under subsection 231.2(1) may, within 15 days after the service of the notice, apply to the judge who granted the authorization or, where the judge is unable to act, to another judge of the same court for a review of the authorization.

Révision de l'autorisation

(5) Le tiers à qui un avis est signifié ou envoyé conformément au paragraphe (1) peut, dans les 15 jours suivant la date de signification ou d'envoi, demander au juge qui a accordé l'autorisation prévue au paragraphe (3) ou, en cas d'incapacité de ce juge, à un autre juge du même tribunal de réviser l'autorisation.

Powers on review	Pouvoir de révision
(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs 231.2(3)(*a*) and 231.2(3)(*b*) have been met and the judge may confirm or vary the authorization if the judge is satisfied that those conditions have been met.	(6) À l'audition de la requête prévue au paragraphe (5), le juge peut annuler l'autorisation accordée antérieurement s'il n'est pas convaincu de l'existence des conditions prévues aux alinéas (3)*a*) et *b*). Il peut la confirmer ou la modifier s'il est convaincu de leur existence.
NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 231.2; 1996, c. 21, s. 58; 2000, c. 30, s. 176.	NOTE: Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. L.R. (1985), ch. 1 (5^{e} suppl.), art. 231.2; 1996, ch. 21, art. 58; 2000, ch. 30, art. 176.

[5] This provision clearly states that the *ex parte* order will be made if the person or group referred to is ascertainable and if the information or documents are required to verify compliance with any duty or obligation under the Act.

[6] In the order at issue, the judge upheld her initial finding that the group referred to by the MNR in its *ex parte* application constituted an ascertainable group within the meaning of paragraph 231.2(3)(*a*). She also set aside her previous order and determined that the "Minister has not established that, at this stage of the project, the request for information is intended to determine whether each and every one of the GMREB members (real estate agents and brokers) has complied with the Act by reporting all of their income": paragraph 58 of the order.

The issues

[7] The analysis of section 231.2 of the Act and its application to the facts of this case are at the heart of the dispute, as evidenced by the parties' submissions. The MNR contends that the first judgment is erroneous in that the judge found that there was no "genuine and serious inquiry" about

the agents and brokers referred to in the request for information. For its part, the GMREB argues that the judge erred in finding that the group was ascertainable.

[8] I therefore propose to examine each of the issues beginning with the GMREB's submission.

The identifiable group

[9] The judge was correct in finding that the group referred to in the application was ascertainable under paragraph 231.2(3)(*a*) of the Act.

[10] The GMREB argues that a group is ascertainable when the persons in the group have done something specific together in the pursuit of a common objective, which is not the case here [TRANSLATION] "because there is no reason to believe that there is a common link related to the administration of the Act": respondent's memorandum, paragraph 52. The GMREB refers to the decisions in: *Canada (M.N.R.) v. National Foundation for Christian Leadership*, 2004 FC 1753 (appeal dismissed: 2005 FCA 246), [*Christian Leadership*]; *Artistic Ideas Inc. v. Canada (Customs and Revenue Agency)*, 2005 FCA 68, [*Artistic Ideas*]; *M.N.R. v. Sand Exploration Ltd. et al.*, [1995] 3 FC 44, [*Sand Exploration*]; and *Fédération des caisses populaires Desjardins du Québec, No: 200-00-000001-94*, [1997] 2 C.T.C. 159 (Sup. Ct.), [*Fédération des caisses*].

[11] These judgments are of no assistance in this case and do not support the GMREB's position on "ascertainable group". The reasons in these cases must be read with caution, bearing in mind the particular context of the legislation in effect at the time they were written since section 231.2 of the

Act was significantly amended in 1996. The other legislative provisions on which the reasons were based must also be considered.

[12] Accordingly, in *Fédération des caisses*, the MNR made an arbitrary identification based on the nature of the transactions and not on the persons making those transactions. In that case, the individuals or companies had transferred sums of money out of Canada through the Fédération or one of the Caisses affiliated with it for a given period. This case required the analysis of section 231.2 prior to its amendment.

[13] In *Artistic Ideas*, our Court authorized the MNR to obtain the names of charitable organizations involved in "art flips" under subsection 231.2(1), not subsections (2) or (3). The Court ruled that there was no evidence that the MNR wanted to obtain the names of the charities to verify their compliance with the Act. In fact, their names were necessary solely for the Minister's investigation of the third party *Artistic Ideas*.

[14] The *Sand Exploration* and *Christian Leadership* cases also do not support GMREB's argument that the pursuit of a common objective is a prerequisite for a group to be ascertainable.

[15] Last, the GMREB contends that the group is not ascertainable because it numbers close to 2,000 people: respondent's memorandum, paragraph 52. This argument is not convincing. In *All Saints Greek Orthodox Church v. Canada (MNR)*, 2006 FC 374, at least 1300 donors made up the ascertainable group within the meaning of the Act.

[16] In this case, the audit involves the group composed of real estate agents and brokers living or carrying on business in the area served by the Canada Revenue Agency's Montérégie/Rive-Sud Tax Services Office. Gauthier J. correctly concluded that this was an ascertainable group for purposes of section 231.2 of the Act.

[17] I will now deal with the arguments about a genuine and serious inquiry.

The genuine and serious inquiry

[18] The judge accepted the GMREB's submission that the MNR was not conducting a genuine and serious inquiry about one or more individuals in the identified group. She ruled that a genuine and serious inquiry was a condition precedent for judicial authorization under subsection 231.2(3) of the Act.

[19] The judge suggested that any new application for authorization by the MNR would have to specify "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": paragraph 59 of the order. Consequently, she was not satisfied with the evidence, ruling that the MNR was only conducting an audit project, and she set aside her previous order, concluding that there was no genuine and serious inquiry.

[20] The statutory provision under review does not mention "genuine and serious inquiry." This expression, which originated in *The Canadian Bank of Commerce v. The Attorney General of Canada*, [1962] S.C.R. 729, [*Canadian Bank of Commerce*] and resulted from a simple admission

by the parties (*ibidem*, p. 733), has since been repeated and argued as if it were an established legal principle.

[21] In my view, whether a "genuine and serious inquiry" exists is not the appropriate test in considering an application under subsection 231.2(3) of the Act. The question is not whether the MNR began a genuine and serious inquiry, let alone one involving every unnamed person of the group. Rather the question is: was the applications judge satisfied that the information or documents relating to one or more unnamed persons (forming an ascertainable group) was required to verify compliance with the Act?

The Richardson and Canadian Bank of Commerce decisions

[22] Over the years, the provision under review has been the subject of legislative amendments that must be borne in mind when analyzing the cases cited by the parties to support their arguments. I will spend more time discussing *Richardson (James Richardson & Sons) v. the Department of National Revenue*, [1984] 1 S.C.R. 614, [*Richardson*], which, together with *Canadian Bank of Commerce*, is cited as the leading case on the concept of serious and genuine inquiry.

[23] In *Richardson*, the Supreme Court of Canada reviewed the facts in light of section 231 of the Act [1970-71-72 (Can.), c. 63]; the relevant parts at that time read as follows:

231. …	**231.** …
(3) The Minister may, for any purposes related to the administration or enforcement of this act, by registered letter or by a demand served personally, require from any person (a) any information or additional information, including a return of	(3) Pour toute fin relative à l'application ou à l'exécution de la présente loi, le Ministre peut, par lettre recommandée pou par demande à personne exiger de toute personne: *a)* tout renseignement ou tout renseignement supplémentaire, y

income or a supplementary return, or (b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents. within such reasonable time as may be stipulated therein.	compris une déclaration de revenu ou une déclaration supplémentaire, ou *b)* la production ou la production sous serment de livres, lettres, comptes, factures, états (financiers ou autres) ou autres documents. Dans le délai raisonnable qui peut y être fixé.
(4) Where the Minister has reasonable and probable grounds to believe that a violation of this act or a regulation has been committed or is likely to be committed, he may, with the approval of a judge of a superior or county court, which approval the judge is hereby empowered to give on ex parte application, authorize in writing any officer of the Department of national Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things that may afford evidence as to the violation of any provisions of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.	(4) Lorsque le Ministre a des motifs raisonnables pour croire qu'une infraction à cette loi ou à un règlement a été commise ou sera probablement commise, il peut, avec l'agrément d'un juge d'une cour supérieure ou d'une cour du comté, agrément que le juge est investi par ce paragraphe, du pouvoir de donner sur la présentation d'une demande *ex parte*, autoriser par écrit tout fonctionnaire du ministère du Revenu national ainsi que tout membre de la Gendarmerie royale du Canada ou tout autre agent de la paix à l'assistance desquels il fait appel et toute autre personne qui peut y être nommée, à entrer et à chercher, usant de la force s'il le faut, dans tout bâtiment, contenant ou endroit en vue de découvrir les documents, livres, registres, pièces ou choses qui peuvent servir de preuve au sujet de l'infraction de toute disposition de la présente loi ou d'un règlement et à saisir et à emporter ces documents, livres, registres, pièces ou choses et à les retenir jusqu'à ce qu'ils soient produits devant la cour.
(5) An application to a judge under subsection (4) shall be supported by evidence on oath establishing the facts upon which the application is based.	(5) Une demande faite à un juge en vertu du paragraphe (4) sera appuyée d'une preuve fournie sous serment et établissant la véracité des faits sur lesquels est fondée la demande.
[Emphasis added]	[Je souligne]

The section referred to the commission of a violation and authorized certain persons to enter and search for evidence of the violation.

[24] In that case, the MNR had decided that it was necessary to verify whether traders in the commodities futures market were complying with the Act. In order to do so, the Minister had asked Richardson to provide its clients' commodity monthly statements so that the information could be processed on a test basis. Richardson had supplied the information but with clients' account numbers only and no means of identifying them. The MNR had asked for additional information, including a complete list of customers and personal information about them. Richardson had refused, alleging, *inter alia*, that the MNR's demands were for "information returns respecting . . . [a] class of information" required in connection with assessments. Richardson added that these demands fell instead within the ambit of paragraph 221(1)(*d*) and section 233 of the Act, which provided:

221. (1) The Governor in Council may make regulations	**221.** (1) Le gouverneur en conseil peut établir des règlements
(d) requiring any class of persons to make information returns respecting any class of information required in connection with assessments under this Act;	*d)* enjoignant à toute catégorie de personnes de faire des déclarations renfermant des renseignements en ce qui concerne tout genre de renseignements requis relativement aux cotisations sous le régime de la présente loi,
233. Whether or not he has filed an information return as required by a regulation made under paragraph 221(1)(d), every person shall, on demand from the Minister, served personally or by registered mail, file with the Minister, within such reasonable time as may be stipulated in the demand, such prescribed information return as is designated therein.	**233.** Qu'elle ait produit ou non une déclaration renfermant des renseignements requise par un règlement établi selon l'alinéa 221(1)*d)*, toute personne doit, sur demande émanant du Ministre faire par personne ou par poste recommandée, produire auprès du Ministre la déclaration prescrite renfermant les renseignements qu'indique la demande, dans le délai raisonnable que celle-ci peut fixer.

[25] Richardson was successful before the Supreme Court of Canada, which confirmed that a demand could only be made for information relative to the tax liability of a person or persons under the former subsection 231(3) of the Act if a genuine and serious inquiry was being conducted into the tax liability of such person or persons. The section did not authorize a general survey of compliance by a class of taxpayers. The MNR was invited to use paragraph 221(1)(*d)* to "obtain a regulation . . . requiring all such traders to file returns of their transactions in the commodities futures market" (*ibidem*, p. 625).

[26] The *Richardson* decision must be read and applied with caution. In *Artistic Ideas*, Mr. Justice Rothstein, writing for the Federal Court of Appeal, was reserved about *Richardson* and *Bank of Commerce*. Rothstein J.A. wrote:

> [9] …These authorities pre-date subsections 231.2(2) and (3), although it is apparent that their enactment was prompted, at least in part, by the *Richardson* case. While they provide useful background, the relevant legislation is different today than at the time of those decisions.

[27] In fact, subsection 231.2(1), as it currently reads, is the former subsection 231(3) *supra*, to which, in 1986, Parliament added the terms "notwithstanding any other provision of this Act" and "subject to subsection 2". This amendment to section 231.2 did not substantially change the earlier wording.

[28] At the same time, Parliament added subsections 231.2(2) to (6), which, in 1995, led Rothstein J., as he then was, to state that compliance with the procedure in subsections 231(2) and (3) of the Act addressed the "mischief" identified in *Richardson* (*Sand Exploration, supra*).

[29] I do not believe that *Richardson* and *Canadian Bank of Commerce* pose an obstacle to the MNR's submission in this case. In *Richardson*, as I indicated earlier, the MNR requested information in order to process it on a test basis. Furthermore, the judgment in *Canadian Bank of Commerce* was premised on the fact, acknowledged by the parties, that the requirement in that case was made in good faith and that it involved a genuine and serious inquiry about specific persons. Mr. Justice Cartwright wrote on page 738:

> … it appears to be common ground, (i) that the requirement addressed to the appellant relates to a genuine and serious inquiry into the tax liability of some specific person or persons …
>
> [Emphasis added]

[30] With respect, and unlike Madam Justice Wilson who wrote for the Court in *Richardson*, I do not believe that Cartwright J. thereby "makes it clear that his judgment is premised on that prerequisite being there" (*ibidem*, p. 624), that is, that the requirement must relate to a genuine and serious inquiry.

[31] But there is more. Prior to 1996, subsection 231.2(3) of the Act required that the application for authorization be supported by information on oath addressing the following four conditions:

231.2 (3) …	**231.2** (3) […]
(a) the person or group is ascertainable;	*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) it is reasonable to expect, based on any grounds, including information (statistical or otherwise) or past experience relating to the group or any	*c)* il est raisonnable de s'attendre -- pour n'importe quel motif, notamment des renseignements (statistiques ou

other persons, that the person or any person in the group may have failed or may be likely to fail to provide information that is sought pursuant to the requirement or to otherwise comply with this Act; and	autres) ou l'expérience antérieure, concernant ce groupe ou toute autre personne – à ce que cette personne ou une personne de ce groupe n'ait pas fourni les renseignements exigés ou ne les fournisse vraisemblablement pas ou n'ait pas respecté par ailleurs la présente loi ou ne la respecte vraisemblablement pas;
(d) the information or documents is not otherwise more readily available.	*d)* il n'est pas possible d'obtenir plus facilement les renseignements ou les documents.

[32] In 1996, the conditions in paragraphs (*c*) and (*d*) of subsection (3), i.e., reasonable grounds to believe that there has been non-compliance with the Act and the difficulty in obtaining the information otherwise, were repealed.

Section 231.2 of the Act currently in effect

[33] According to the judge, the MNR had to establish that each and every one of the members of the GMREB identified in the application was the subject of a genuine and serious inquiry. Otherwise, the Minister was conducting a fishing expedition, which is prohibited by *Richardson*. I do not agree. This finding perpetuates the reasoning in *Canadian Bank of Commerce* and *Richardson* without distinguishing the facts of the case and the statutory provision currently in effect.

[34] Generally, the MNR's powers of investigation and audit in the Act are the consideration for a self-reporting and self-assessing tax system that depends upon the honesty and integrity of taxpayers for its success (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627).

[35] It is recognized that the audit powers in section 231.2 of the Act are an intrusive measure affecting the right to the protection of private information and must be construed restrictively (*Sand Exploration, supra*, p. 52).

[36] These general principles are not being challenged, but it is nonetheless necessary to give meaning to the legislative amendments. Commenting on the 1995 Budget Papers, tax expert David M. Sherman wrote the following about the conditions in paragraphs (*c*) and (*d*)*:*

> These restrictions [231.2(3)(*c)* and (*d)*], which make it difficult for Revenue Canada to obtain timely information in order to verify compliance with the Act, are being eliminated. This proposed measure will improve Revenue Canada's ability to verify compliance with the self-assessment system with respect to transactions where no information reporting is required. [*The Practitioner's Income Tax Act*, 32nd ed. (Toronto: Carswell, 2007)].

[37] I believe that removing conditions (*c*) and (*d*) from the former subsection 231.2(3) shows Parliament's intention to ease the MNR's burden of proof in the sense suggested by tax expert Sherman because the MNR no longer has to establish reasonable grounds for believing that a violation has been committed or demonstrate that the information is not otherwise more readily available.

[38] While I recognize that a strict interpretation is required, it must not have the effect of adding another condition to the provision—which occurs if we accept the respondent's argument—that is, that the MNR must prove that he or she is conducting a genuine and serious inquiry relating to unnamed persons referred to in the application. Nor can the provision be interpreted in such a way as to re-insert the conditions in paragraphs (*c*) and (*d*).

[39] Section 231.2 of the Act must be interpreted by considering all of its parts, including the headings and sub-headings, which are also part of the statute (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Carswell: Scarborough, 2000) p. 79; *R. v. Lucas*, [1998] 1 S.C.R 439, 463). Headings may help to situate a provision within the general structure of the statute and determine the intention of Parliament.

[40] What about section 231.2 of the Act? This section is found in Part XV of the Act, entitled "Administration and Enforcement," under the heading "General". Subsections 231.1(1) and 231.2(1) explicitly state that they are intended to be used for "the administration and enforcement" of the Act.

[41] This general expression, which introduces the provision under consideration, allows us to situate section 231.2 of the Act in context; the section refers to the MNR's audit powers, as opposed to its investigative powers. As the Supreme Court of Canada pointed out in *R. v. Jarvis*, [2002] 3 S.C.R. 757 at 761, "a distinction can be drawn between the audit and investigative powers" under the Act.

[42] Administrative policy and interpretation, while not binding, can also be an important factor where there is doubt as to the meaning of legislation (*R. v. Nowegijick*, [1983] 1 S.C.R. 29). In the case before us, the respondent is relying on Information Circular IC71-14R3, entitled *The Tax Audit*, to establish that an "audit project" relating to certain members of the GMREB is not an audit within the meaning of the Act.

[43] This argument is without merit. On the one hand, I find that there was, in this case, an audit within the meaning of the Act. On the other hand, the circular describes the role, policies and practices of the tax audit; the audit project is only one of the methods available to the MNR in its "selection of files for audit" process (*ibidem*).

[44] In this case, 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. The fact that the MNR was just beginning the audit in no way precludes the application of paragraph 231.2(3)(*b*). Clearly, the MNR cannot argue that each and every one of the members were the subject of a "genuine and serious inquiry", which was what the judge criticized: those members are still not identified. Imposing such a requirement on the MNR neutralizes the utility of subsections 231.2(2) and (3) of the Act, which permit, under judicial authorization, verification of the honesty of a tax return.

[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*).

The applicable test

[46] Despite its penal sanctions, the Act is essentially and primarily regulatory and administrative. The MNR's audit powers, including the powers described in subsection 231.2(3), are necessary to achieve the objectives of the Act and to ensure compliance with it (*McKinlay*, *supra*; *Thomson Newspaper Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission*, [1990] 1 S.C.R. 425).

[47] In a tax system based on the principle of self-reporting and self-assessment, the MNR must be given broad powers to audit taxpayers' returns and inspect all records that may be relevant to the preparation of these returns (*Bisaillon et al v. The Queen*, 99 D.T.C. 5695 (FCA)).

[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 was conducted in good faith, that it had a genuine factual basis and that its objective was to ensure compliance with the Act.

[50] In this case, the MNR received documents from the GMREB in March 2005 while auditing a real estate agent who was a member of the organization. Several months later came the *ex parte* application at issue involving certain unnamed members of the GMREB. The affidavit in support of the application expressly states the objective: [TRANSLATION] "to determine whether the brokers who earned commissions following the sale of immovable property complied with all the duties and obligations under the Act" (appeal book, p. 39). The MNR therefore satisfied the requirements in the Act and, more specifically, those in section 231.2.

[51] Last, at the hearing and in the event that the Court were to find in favour of the MNR, counsel indicated that they had reached agreement on the method of exchange of documents and information. The MNR asks that this agreement be homologated. The Court cannot accede to this request because the agreement was not filed and the parties made no submissions about its contents.

[52] Accordingly, I propose to allow the appeal and to set aside the order made by the Federal Court on September 6, 2005, with costs before both courts.

"Johanne Trudel"
J.A.

"I concur.
Gilles Létourneau J.A."

"I concur.
J.D. Denis Pelletier J.A."

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-435-06
STYLE OF CAUSE:	MNR v. Greater Montréal Real Estate Board
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 9, 2007
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. PELLETIER J.A.
DATED:	November 2, 2007

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