

e-document	T-1542-20-ID 1
F I L E D	FEDERAL COURT COUR FÉDÉRALE December 21, 2020 21 décembre 2020 Bernadette Rousseau
TOR	1

FEDERAL COURT

B E T W E E N :

NADER GHERMEZIAN

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court in Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date

Issued
by:

(Registry Officer)

Address of local
office:

TO:

1. Deputy Attorney General of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
2. Minister of National Revenue
7th Floor
555 MacKenzie Avenue
Ottawa, ON K1A 0L5

Application (For a Judicial Review)

This is an application for judicial review in respect of:

The act, matter, or decision of Mr. Hanif Amlani, CRA Audit Manager to issue a requirement for information ("RFI") dated November 19, 2020 purporting to require the Applicant, under subsection 231.2(1) of the Income Tax Act ("ITA"), to provide extensive information and documents, including foreign-based information and documents, relating to unnamed persons for a period of time spanning approximately 23 years, all within 30 days.

The matter was communicated to the Applicant on: November 23, 2020.

The Applicant makes application for:

1. A writ of certiorari.
2. An order quashing the RFI dated November 19, 2020.
3. A declaration that the information and documents demanded in the RFI relate to unnamed persons and information and documents that are located outside Canada.
4. A declaration that the information and documents demanded in the RFI are not relevant to the administration or enforcement of the ITA in relation to any person who meets the conditions of section 2 of the ITA which is a prerequisite for the Minister to have jurisdiction over the person.
5. A writ of prohibition and an order of injunction prohibiting the Minister of National Revenue (the "**Minister**") from subsequently making any similar demands against the Applicant relating to the information and documents referenced in the RFI.
6. If necessary, an interim order pursuant to section 18.2 of the Federal Courts Act staying the RFI and prohibiting and restraining the Minister from taking any steps to enforce the RFI until 120 days following final disposition of this application for judicial review.
7. Costs of this application.

8. Such further or other relief as this Court may permit.

The grounds for the application are:

9. On November 19, 2020 Mr. Hanif Amlani, Audit Manager, Canada Revenue Agency (“CRA”) issued the RFI requiring the Applicant to provide extensive information and documents, including foreign-based information and documents, relating to unnamed persons for a 23-year period of time dating back to December 31, 1996.
10. Among other things, the RFI demanded the Applicant to provide the following information and documents:
- (i) the entire accounting system database containing accounting entries for any period ending after December 31, 1996, regardless of the contents of the database and regardless of the fiscal periods included in the database;
 - (ii) for each database, to also provide all explanations and all information and documents required for the Minister to:
 - a. understand each database;
 - b. to confirm the integrity of each database; and
 - c. to trace an amount on a tax or information return, if any was filed, through the database to the original source documents.
 - (iii) various technical specifications and explanations regarding the software system used to maintain the database;
 - (iv) internal business glossary that defines the terms and conventions used by the Applicant and its affiliates; and
 - (v) where accounting entries are maintained in a synoptic or spreadsheet instead of, or in addition to, being maintained in an accounting system, provide an electronic copy of each such synoptic and spreadsheet.
11. The Minister is obliged to comply with the statutory conditions under section 231.2 of the ITA, but has failed to do so in this case.

12. The RFI was not initiated, issued and signed by a person with proper delegated authority under subsection 220(2.01) of the ITA to exercise powers or perform the duties of the Minister.
13. The Minister acted without jurisdiction or beyond her jurisdiction in serving the RFI on the Applicant.
14. The RFI relates to persons who do not meet the conditions of section 2 of the ITA.
15. The Applicant is not the target of the RFI. Instead, the RFI attempts to impose upon the Applicant (i.e., a third party) an obligation to provide information and documents relating to one or more unnamed persons; further, the identities of those persons are unknown to the Minister. In the circumstances, the Minister was obliged to obtain judicial authorization under subsections 231.2(2) and (3) of the ITA but failed to do so. Indeed, the decision-maker failed to consider the application of those provisions.
16. Prior to issuing the RFI, the Minister was aware that the that the information and documents sought were available or located outside Canada and were thus “foreign-based information or documents” within the meaning of subsection 231.6(1) of the ITA. Further, the Minister was also aware that the statutory scheme of the ITA does not permit her to require production of foreign-based information through subsection 231.2(1). Nonetheless, the Minister unreasonably attempted to exercise her powers extra-territorially. The decision-maker failed to consider that the general provisions of subsection 231.2(1) must yield to those of the specific provisions of section 231.6 (i.e., *generalia specialibus non derogant*).
17. The Minister has improperly circumvented the taxpayer protections provided under subsection 231.2(2) and (3), and section 231.6 of the ITA. She has attempted to do indirectly what she cannot do directly.
18. The decision-maker failed to consider or apply the CRA’s administrative policies and procedures relating to the exercise of the Minister’s requirement powers under sections 231.2 and 231.6 of the ITA.
19. Contrary to the CRA’s established policies, the decision-maker failed to demonstrate that he actually requires the information sought and that the RFI relates to specific

compliance matters. The policies warn that if such precautions are not taken, then the RFI may be challenged on this basis.

20. For the RFI to be valid, the Minister must establish that it was issued for a purpose related to the administration or enforcement of the ITA. This is an objective test; the subjective opinion of the auditor is not determinative. The Minister failed to satisfy the test in this case. Among other things, the RFI did not particularize any non-compliance by the targets under investigation nor provide fair notice of the purpose for which the Minister purported to exercise her powers, nor that the RFI was issued in good faith. Indeed, the Minister was less than forthright in her representations as to the purpose of the RFI. Consequently, the Minister failed to establish a rational connection between the information sought and the administration and enforcement of the ITA.
21. Furthermore, the RFI also contravened the CRA's policies against the issuance of broad, indiscriminate and duplicative requirements on taxpayers. Indeed, a duplicative RFI was previously issued to the Applicant (and several others) on October 15, 2020 by Mr. David Leblanc, CRA Audit Manager. Further, the RFI offered no justification for its unreasonably broad scope (i.e., demands for all accounting entries for any period ending after December 31, 1996, etc.) and its lack of pragmatic limits.
22. The Minister is using the RFI to engage in an impermissible "fishing expedition". The Minister issued an unreasonably broad requirement for information and documents in the hope that something relevant might be found, which might enable her to develop a case that was unknown to her at the outset.
23. Contrary to the CRA's established policies, the decision-maker did not attempt to collect the required information directly from the persons under investigation. Indeed, the decision-maker did not give any notice to the targets of the RFI, and they are not represented in this proceeding. The decision-maker failed to consider that the targets of the RFI are entitled to have their privacy protected to the extent provided by law.
24. Notably, section 230 of the ITA imposes a specified limitation period for keeping tax records. It would defeat the purpose of the statutory limitation period if the Minister could require a taxpayer to undertake an expensive, time-consuming and labour-intensive process to retrieve and produce records that were no longer required to be retained.

25. The RFI demanded that the information and documents be delivered within 30 days from November 19, 2020. The Minister has not demonstrated that the deadline reflected a reasonable amount of time for compliance with the RFI. Among other things, the Minister failed to consider the volume of materials demanded, their extra-territorial nature, the unreasonable breadth of the request, the age of the information, and the other complexities of the matter.
26. The RFI warned that failure to comply could lead to legal proceedings being initiated by the Department of Justice against the Applicant for a compliance order under section 231.7 of the ITA. It further notified that “failure to comply with such an order could lead to a finding of contempt of court”; thereby improperly intimidating the Applicant by threatening penal consequences.
27. The decision-maker acted without jurisdiction or acted beyond his jurisdiction because his act or decision failed to comply with the applicable statutory provisions of the ITA and also contravened the CRA’s established administrative policies. He erred in law in making his decision and also acted contrary to law. Thus, the RFI is *ultra vires* and invalid *ab initio*.
28. The act or decision to issue the RFI was not reasonable because, among other things, it lacked justification, transparency and intelligibility. It did not fall within a range of possible, acceptable outcomes which are defensible in light of the relevant facts and law.
29. Further the action or decision was made in a perverse or capricious manner without regard for the facts or the law, and made with the knowledge and/or understanding that it would result in prejudice to the Applicant. To protect the Applicant from any further prejudice in the future, the Minister ought to be prohibited from subsequently making any similar demands in relation to the information and documents referenced in the RFI.
30. The Applicant asks the Respondent to consent to extend the time for compliance with the RFI until 120 days following final disposition of this application for judicial review. If the Respondent refuses, then the Applicant seeks an interim order pursuant to section 18.2 of the Federal Courts Act staying the RFI and prohibiting and restraining the Minister from taking any steps to enforce the RFI until 120 days following final disposition of this application for judicial review.

31. The Applicant relies upon sections 18, 18.1 and 18.2 of the Federal Courts Act, and sections 230, 231.2, 231.6, and 231.7 of the ITA.

This application will be supported by the following material:

32. An affidavit, if any, to be sworn or affirmed.
33. With leave of the Court, the *viva voce* testimonies of Mr. Hanif Amlani and Mr. Andrew Bowe at the hearing of the application (as per Rule 316 of the Federal Court Rules).
34. Such further and other evidence as counsel may advise and this Court may permit.

Dated at Toronto this 18th day of December, 2020.



Stephen S. Ruby and Bobby J. Sood
Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Tel: (416) 863-5515 (SSR)
(416) 367-6929 (BJS)

Fax: (416) 863-0871

Counsel for the Applicant