Federal Court Cour fédérale

**Date: 20240612**

**Dockets : T-252-19**
**T-254-19**
**T-258-19**
**T-259-19**
**T-261-19**
**T-262-19**

**Citation: 2024 FC 892**

**Ottawa, Ontario, June 12, 2024**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**Docket: T-252-19**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**NADER GHERMEZIAN**

**Respondent**

**AND BETWEEN:**

**Docket: T-254-19**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**MARC VATURI**

**Respondent**

**AND BETWEEN:**

**Docket: T-258-19**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**GHERFAM EQUITIES INC**

**Respondent**

**AND BETWEEN:**

**Docket: T-259-19**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**PAUL GHERMEZIAN**

**Respondent**

**AND BETWEEN:**

**Docket: T-261-19**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**RAPHAEL GHERMEZIAN**

**Respondent**

**AND BETWEEN:**

**Docket: T-262-19**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**JOSHUA GHERMEZIAN**

**Respondent**

# ORDER AND REASONS

## I. Overview

[1] This Order and Reasons adjudicates costs in these six applications. For the reasons explained below, I am awarding the Applicant lump sum costs of $41,000 in each of these applications, for a total costs award of $246,000.

## II. Background

[2] These proceedings involve six applications by the Minister of National Revenue [the Minister], seeking compliance orders under s 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the Act]. The Respondents are five individuals, all members of the Ghermezian extended family, and a related corporation, Gherfam Equities Inc. Each of the Minister's applications seeks to compel the relevant Respondent to provide documents and/or information previously sought by the Minister under s 231.1 and/or s 231.2 of the Act.

[3] On February 23, 2022, the Court released its Judgment and Reasons [Judgment] in these applications. The Judgment granted the Minister's applications, subject to certain remaining steps outlined therein for applying the Court's conclusions surrounding the Respondents' success in some of their defence arguments to the development of the form of compliance order in each application. Following completion of those steps, the Court issued the compliance orders on July 8, 2022 [Compliance Orders]. The Compliance Orders were accompanied by Supplementary Reasons of the same date, explaining the Court's conclusions on the principal outstanding disputes between the parties, related to the form of the compliance orders in the six applications, as identified in written submissions provided by the parties following the issuance of the Judgment [Supplementary Reasons].

[4] The Respondents appealed the Judgment, and the Minister cross-appealed. The Respondents also appealed the Compliance Orders, once issued. On July 20, 2022, upon consent of the parties, the FCA issued an Order consolidating the appeals and staying the Compliance Orders pending the hearing and disposition of the appeals.

[5] On September 1, 2023, the Federal Court of Appeal [FCA] issued its decision in *Ghermezian v Canada (National Revenue)*, 2023 FCA 183 [*Ghermezian FCA*], dismissing the Respondents' appeals but allowing the Minister's cross-appeals. In allowing the cross-appeals, *Ghermezian FCA* held that, pursuant to requests issued under s 231.1(1) of the Act, the Minister is authorized not only to compel the provision of documents but also to compel the provision of previously undocumented information (at paras 14-42). The FCA remitted these applications to

this Court, so that the parties would have an opportunity to seek revised compliance orders reflecting the point that had been determined on the cross-appeals (at para 68).

[6] On October 6, 2023, the Court conducted its first Case Management Conference [CMC] following the release of *Ghermezian FCA*, to canvas with the parties their positions on the process the Court should adopt to complete these proceedings and re-determine the Compliance Orders in accordance with the FCA's reasons. As the parties took diverging positions, the Court subsequently issued directions obliging them to provide written submissions on the procedural issues identified at the CMC, to be followed by oral argument on those issues at another CMC to be held on November 6, 2023.

[7] The Court heard the parties' arguments at that CMC, and on November 8, 2023, the Court issued its Order and Reasons, prescribing steps and timelines for the completion of these proceedings, culminating with the adjudication of costs [CMC Order]. Pursuant to those steps, the parties provided their respective written submissions on the proposed form of each re-determined Compliance Order. On March 25, 2024, the Court issued the re-determined Compliance Orders [Re-determined Orders], in the forms proposed by the Minister, accompanied by Reasons explaining the adjudication of the principal disputes identified in the parties' written submissions (*Canada (National Revenue) v Ghermezian*, 2024 FC 463 [Re-determination Reasons]).

[8] The CMC Order prescribed a process for the parties to provide written submissions on their respective positions on costs, pursuant to which the Minister filed submissions dated April

9, 2024, supported by affidavit material, the Respondents filed submissions dated May 13, 2024, supported by affidavit material, and the Minister filed reply submissions dated May 21, 2024.

## III. **Issues**

[9] The sole issue for the Court's determination is the adjudication of costs in each of the six applications.

## IV. **Analysis**

[10] The Minister urges the Court to award costs on a lump sum basis of $50,000 for each application, totaling $300,000. The Minister recognizes that this request exceeds the quantification of costs in accordance with Tariff B, having filed a Bill of Costs based on Column V of the Tariff that calculated total fees and disbursements of $152,078.66. The Minister has also filed affidavit evidence attesting to solicitor-client costs of $819,780 having been incurred in connection with litigation of the six compliance applications. The Minister's costs claim represents approximately 36.6% of that solicitor-client figure. In reliance on *Nova Chemicals Corp v Dow Chemical Co*, 2017 FCA 25 [*Nova Chemicals*] at paragraph 17, the Minister submits that, where increased costs have been granted in the form of a lump sum award, such awards tend to range between 25% and 50% of actual fees.

[11] The Minister argues that an award of increased costs is appropriate in the case in hand, in keeping with factors identified in Rule 400 of the *Federal Courts Rules*, SOR/98-106 [Rules] and in particular the result of the proceedings (Rule 400(3)(a)), the amount of work (Rule

400(3)(g)), any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding (Rule 400(3)(i)) and whether any step in the proceeding was improper, vexatious, unnecessary, or taken through negligence, mistake or excessive caution (Rule 400(3)(k)). The Minister emphasizes her substantial success in the compliance applications and the objective of deterring what the Minister describes as uncooperative and abusive conduct on the part of the Respondents in their defence of the applications, contributing to the adjudication of these proceedings having taken over five years following their commencement.

[12] The Respondents dispute the Minister's allegations of inappropriate conduct and argue that it was delays on the part of the Minister that contributed to the length of time taken to adjudicate these proceedings. The Respondents take issue with components of the Minister's solicitor-client costs calculation, as well as aspects of the Minister's Bill of Costs under Column V. The Respondents also argue that the Minister's proposed approach to costs fails to account for the different facts, issues and complexities in the individual applications against the different Respondents. As each Respondent is separately responsible to satisfy the compliance order and costs award issued against him/it, the Respondents take the position that the costs award against each Respondent should be referred for taxation, so as to tailor it to the unique circumstances of the relevant application.

[13] *Nova Chemicals* canvases principles applicable to lump-sum awards of costs (at paras 10-13). As a first principle in the adjudication of costs, Rule 400(1) gives the Court full discretionary power over the amount and allocation of costs, and Rule 400(4) expressly contemplates an award of costs in a lump sum in lieu of an assessment pursuant to Tariff B. For

good reason, lump-sum awards have found increasing favour with courts, in that they save the parties time and money, avoid granular analyses, and prevent a costs adjudication from becoming an exercise in accounting. Further, there are circumstances in which costs calculated even at the high end of Column V of Tariff B bear little relationship to the objective of making a reasonable contribution to the costs of litigation. Nevertheless, a party seeking increased costs bears the burden of demonstrating that their particular circumstances warrant such an award, which circumstances must extend beyond its fees being significantly higher than the Tariff amounts.

[14] In the case at hand, the Minister's costs calculated on a solicitor-client basis ($819,780) clearly exceed significantly the costs figure generated by application of even Column V of Tariff B ($152,078.66). Indeed, the Respondents take issue with aspects of the Minister's Column V calculation, including the units and effective counsel rates claimed for certain items, as well as arguing that the Minister has improperly used the current unit value of $180 in the context of litigation that has extended over several years. If the Court were to accept any of these arguments, the Column V figure would be further reduced and the gap between that figure and the Minister's actual costs widened.

[15] The Respondents also take issue with aspects of the Minister's solicitor-client costs calculation, focusing in particular on the volume of hours incurred in relation to: (a) the Minister's unsuccessful opposition to a motion by the Respondents to compel production of unredacted T2020s (documents that record communications between the Canada Revenue Agency [CRA] and a taxpayer) [T2020 Motion]; (b) preparation for and attendance at the

January 25-27, 2022 hearing of the applications that resulted in the February 23, 2022 Judgment; and (c) preparation of the six virtually identical Notices of Summary Application [NOSA] and supporting affidavits.

[16] Both parties' cost submissions focus significantly on the T2020 Motion. The Respondents emphasize that it was successful on that motion. The Minister responds that the hours to which the Respondents refer include the Minister's counsel's costs to review, redact and produce the voluminous T2020 documents prior to the motion and to review, un-redact, colour-code and reproduce a set of those documents after the motion was granted. The Minister also emphasizes that, as the Respondents ultimately did not rely on the T2020 documents in their responding application records, the T2020 Motion and the resulting production work were wholly unnecessary. The Minister argues that such conduct in bringing an unnecessary motion and creating unnecessary work should be deterred.

[17] The Minister also notes that, although Case Management Judge [CMJ] Aalto granted the T2020 Motion in an Order dated September 20, 2021 [T2020 Order], he declined to award costs to the Respondents based on what the Minister characterizes as obstructionist conduct in the course of the cross-examination of the Minister's affiant. I will return shortly to the allegations of obstructionist conduct to which the T2020 Order refers.

[18] I find no basis to impugn the Respondents' decision to bring the T2020 Motion. I do not read the T2020 Order as impugning that decision. Rather, CMJ Aalto concluded that, with one exception related to settlement discussions, the Minister's redactions of the T2020 were

overbroad and not justified. Nor is there a basis to conclude, from the fact that the Respondents ultimately chose not to include the T2020 documents in their application records following their production, that the Respondents were wasting the time of the Minister or the Court. The Court recognized in the T2020 Order the likelihood that a large number of the redactions would ultimately be determined by the Respondents to be irrelevant, but it concluded that the scope of the redactions was such that relevance could not at that stage be determined.

[19] That said, there is also no basis to conclude that the work performed by the Minister's legal team in preparing the T2020 documents for production, pursuant to the Respondents' request and the T2020 Order, was unnecessary or excessively protracted, such that it would be inappropriate to take the associated cost into account in considering the Minister's actual costs incurred in successfully pursuing these compliance applications.

[20] I similarly find no basis to impugn the costs incurred by the Minister's counsel in the course of preparation for and attendance at the January 25-27, 2022 hearing or their earlier preparation of the NOSAs and supporting affidavits. As the Minister emphasizes, the Respondents have not introduced evidence as to their own legal costs to support a conclusion that the time docketed by the Minister's counsel was excessive in comparison.

[21] Moreover, having now twice adjudicated these applications (both before and after the Minister's successful appeal in *Germezian FCA*), this Court is conscious of the complexity of these proceedings, including the number of applications, the number of issues raised by the Respondents in resisting them, and the legal and factual complexity of some of the issues. I find

no basis to conclude that the Minister's actual legal costs are excessive. In my view, the combination of the Minister's substantial success in these applications and the level of costs incurred in pursuing them favours a lump-sum award of costs in excess of a Tariff B calculation.

[22] In assessing whether to award a lump-sum figure based on the requested 36.6% of the Minister's actual costs, I have also considered the parties' respective arguments that the other was responsible for obstruction and delay in the advancement of this litigation. In advancing its position, the Minister has the benefit of certain previous determinations by the Court. As referenced above, CMJ Aalto concluded in the T2020 Order that the Respondents' cross-examination of the Minister's affiant was out of proportion to the issues and that much of it was irrelevant, based on which the CMJ deprived the Respondents of the costs of that motion. Similarly, in an Order dated March 30, 2021, the CMJ granted a motion by the Minister seeking leave to amend its NOSAs and to introduce supplementary affidavit material and made comments that can only be described as critical of the Respondents' approach to its opposition of that motion. As the Minister emphasizes, CMJ Aalto referred to and rejected a "vigorous litany of arguments in opposition by the Respondents."

[23] The Minister also refers to a more recent interlocutory proceeding, following the issuance of *Germezian FCA*, in which the Respondents sought to stay the applications pending an application for leave to appeal to the Supreme Court of Canada and sought an opportunity to adduce new evidence in the course of the Court's redetermination of the Compliance Orders. In an Order and Reasons dated November 8, 2023 (*Canada (National Revenue) v Ghermezian*, 2023 FC 1488), this Court rejected the Respondents' request for a stay (at para 25) and found no

basis for the process for re-determination of the Compliance Orders to include further evidence (at para 30). By way of example, the Respondents had raised the possibility of introducing evidence that certain Respondents were not Canadian residents, which they argued would affect the Court's jurisdiction to issue the compliance orders (see para 29). The Court rejected this argument as follows (at para 30):

> 30. I agree with the Minister that the Respondents have identified no basis for the process for re-determination of the compliance orders to include further evidence. Issues such as whether the Respondents are Canadian residents, which required an evidentiary foundation, were previously raised by the Respondents, argued by the parties, and addressed in the Judgment. Such issues were no longer before the Court when it issued the Supplementary Reasons and the original Compliance Orders, and nothing in *Ghermezian FCA* has conferred upon the Court a mandate to reconsider such issues.

[24] I agree with the Minister's characterization of the Respondents' position as an improper effort to raise arguments that had previously been argued and rejected by the Court.

[25] However, I am not persuaded by all the Minister's arguments in support of her position that the Respondents have unnecessarily complicated or delayed these proceedings. The Minister refers to the Respondents having brought a baseless motion regarding cross examinations two days before the hearing of the applications, thereby delaying the hearings by an additional seven weeks.

[26] In support of this argument, the Minister relies on the affidavit dated April 9, 2024, of Kristina Anderson, a legal assistant who works with the Minister's counsel. The referenced paragraphs of Ms. Anderson's affidavit include a statement that, by Order dated November 29,

2021, the hearing of the applications was rescheduled to allow the Respondents to bring a motion regarding cross-examination, a motion that was subsequently adjourned on the basis that the issues raised should form part of the submissions on the merits of the applications. However, the November 29, 2021 Order refers to the hearing being adjourned not only because of the Respondents' motion but also because the parties had not yet filed application records.

[27] The Minister also argues that, in their written submissions on their proposed form and content for the re-determined Compliance Orders, the Respondents raised unfounded allegations against the Minister's counsel, suggesting that the Minister's counsel purposefully misled the Court in their own submissions. Having previously adjudicated the parties' respective submissions that resulted in the Re-determined Orders, I do not interpret the Respondents as having argued that the Minister's counsel purposefully misled the Court. Moreover, in the Re-determination Reasons, I agreed with one of the Respondents' complaints, that the Minister had proposed Re-determined Orders containing some changes that had not been expressly flagged for the Respondents' or the Court's scrutiny, a shortcoming that created extra work for the Respondents and for the Court (at para 30).

[28] As previously noted, the Minister also refers to the T2020 Motion as an unnecessary or improper motion, a position that the Court has rejected.

[29] The Respondents have also raised the following arguments to the effect that it is the Minister that bears the responsibility for delay in the progress of these applications to conclusion:

> A. The Minister caused delay by unilaterally requesting that the six applications be case managed, as a result of which the

Minister's supporting affidavits were not served and filed until close to six months following the filing of the NOSAs on February 7, 2019;

B. The Minister's affiant refused to attend for cross-examination for more than four months in relation to the application in Court file T-258-19 and for more than 27 months in relation to the other applications;

C. The Minister delayed more than four months, without explanation, in responding to their request for production of the T2020 documentation and, following the Respondents' filing of the T2020 Motion, the Minister did not file her responding motion record for 85 days;

D. On April 7, 2021, more than 790 days after filing her original NOSAs, the Minister filed amended NOSAs, particularizing the information being requested from the Respondents.

[30] In response to these arguments, the Minister submits the following:

A. The Minister did not delay filing her affidavits. Rather, the CMJ was appointed on March 4, 2019, a first CMC was held on May 21, 2019, and the Court's resulting order directed the Minister to serve her affidavits by July 1, 2019, a deadline with which the Minister complied;

B. The Respondent's Direction to Attend [DTA] cross-examination issued to the Minister's affiant was improper, because it sought production of CRA's complete file. This necessitated a motion for relief from production. The Minister's affiant did not refuse to attend for cross-examination. Rather, the Respondents initially issued DTAs for dates they were aware that the Minister's counsel was not available, and the subsequent delay in conducting the cross-examination resulted from the Minister amending the NOSAs.

[31] Having considered the parties' respective submissions above, I am not satisfied that the Respondents have established that the Minister delayed the reasonable progress of these applications. In relation to the T2020 Motion, given the CMJ's observations and decision to deprive the Respondents of costs notwithstanding their success on that motion, I am not

convinced that the Respondents have a compelling argument arising from that stage of the litigation. Nor does the step taken by the Minister to particularize her requests through the amended NOSAs support a conclusion that she has delayed these applications.

[32] In conclusion, although I have rejected several of the Minister's arguments in support of her position that the Respondents have obstructed this litigation's progress (and have rejected similar arguments by the Respondents), I am satisfied that these applications were complicated and made somewhat more complicated and protracted by positions taken by the Respondents in the course of this litigation. Combined with the Minister's substantial success in the applications, a lump sum costs award in an amount exceeding Column V of the Tariff and in the range described in *Nova Chemicals* is warranted. As I have rejected several of the Minister's arguments, I will calculate this award based on 30% of the Minister's solicitor-client costs, not at the level in excess of 36% that she has claimed. Employing round figures, 30% of $820,000 generates an overall lump sum costs award of $246,000.

[33] Dividing that figure across the six applications, I will award the Minister costs of $41,000 in each of the applications. In arriving at that decision, I have considered the Respondents' position that the costs award in each separate application against the Respondent thereto should be referred for taxation, so as to tailor it to the unique circumstances of the relevant application.

[34] I appreciate that, as the Respondents submit, the facts, issues and arguments are not identical across all six applications. However, I agree with the Minister's submission that the applications are substantially similar, involved many of the same arguments, and were litigated

together. Moreover, the Respondents' submissions have not articulated how they suggest the differences between the applications should resonate in a different costs awards in each application.

[35] Against that backdrop, I am guided by the principles explained in *Nova Chemicals*, including the value of avoiding granular, accounting-based analyses. In my view, it would be unnecessarily complicated and burdensome to refer these matters to taxation as the Respondents suggest. As both parties emphasize, this litigation has been underway for over five years, and in my view it is time to bring it to a conclusion.

**ORDER in T-252-19, T-254-19, T-258-19, T-259-19, T-261-19, and T-262-19**

**THIS COURT'S ORDER is that** the Applicant is awarded costs in the all-inclusive lump sum amount of $41,000 against the Respondent in each of these applications, for a total all-inclusive lump sum costs award of $246,000.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKETS:** | T-252-19, T-254-19, T-258-19, T-259-19, T-261-19, AND T-262-19 |
| **STYLE OF CAUSE:** | MINISTER OF NATIONAL REVENUE v NADER GHERMEZIAN; MINISTER OF NATIONAL REVENUE v MARC VATURI; MINISTER OF NATIONAL REVENUE v GHERFAM EQUITIES INC; MINISTER OF NATIONAL REVENUE v PAUL GHERMEZIAN; MINISTER OF NATIONAL REVENUE v RAPHAEL GHERMEZIAN; MINISTER OF NATIONAL REVENUE v JOSHUA GHERMEZIAN |

**ADJUDICATED BASED ON WRITTEN SUBMISSIONS**

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| **ORDER AND REASONS:** | SOUTHCOTT J. |
| **DATED:** | JUNE 12, 2024 |

**WRITTEN SUBMISSIONS BY:**

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|---|---|
| Rita Araujo<br>Peter Swanstrom<br>Angelica Buggie | FOR THE APPLICANT |
| Bobby J. Sood<br>Stephen S. Ruby | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Attorney General of Canada<br>Toronto, Ontario | FOR THE APPLICANT |
| Davies Ward Phillips<br>& Vineberg LLP<br>Toronto, Ontario | FOR THE RESPONDENTS |