

**Date: 20050609**

**Docket: A-46-04**

**Citation: 2005 FCA 218**

**CORAM: DESJARDINS J.A.  
NADON J.A.  
PELLETIER J.A.**

**BETWEEN:**

**SAIPEM LUXEMBOURG S.A.**

**Appellant**

**and**

**THE CANADA CUSTOMS AND REVENUE AGENCY**

**Respondent**

Heard at Montréal, Quebec, on December 8, 2004.

Judgment delivered at Ottawa, Ontario, on June 9, 2005.

**REASONS FOR JUDGMENT BY:**

**PELLETIER J.A.**

**CONCURRED IN BY:**

**DESJARDINS J.A.  
NADON J.A.**

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**REASONS FOR JUDGMENT**

**PELLETIER J.A.**

**INTRODUCTION**

[1] In the course of assessing Saipem Luxembourg S.A.'s (Saipem) liability for income tax, the Canada Customs and Revenue Agency (the Agency) served upon it a notice of requirement (the Requirement) pursuant to subsection 231.6(2) of the *Income Tax Act*, R.S.C. 1985, c. 1, (5<sup>th</sup> Supp.) as amended from time to time (the Act). The Requirement demands that Saipem produce

for the Agency's inspection the whole of its corporate records for its fiscal years ending July 31, 1999 and 2000. The issue in this appeal is whether the Requirement is so broad as to be unreasonable and therefore liable to be set aside pursuant to subsection 231.6(5) of the Act.

### **FACTS AND PROCEDURAL HISTORY**

[2] Saipem is incorporated under the laws of Luxembourg and maintains its head office in that country. It owns and operates very specialized vessels which are used for marine construction. In 1998 and 1999, Saipem contracted to employ one of its vessels, the S7000, the most powerful heavy lift vessel in the world, in the procurement, transportation and installation of the Venture, Thebaud, and Triumph jackets and topsides for the Sable Offshore Energy Project (the Sable Project). The 1998 work was done pursuant to a contract dated August 4, 1998, between Saipem and Saipem UK Limited, a related company, which had in turn contracted with the owners of the Sable Project, Mobil Oil Canada Properties. The work itself was done over a period of 53 days in September and October 1998. At the completion of the contract, the S7000 left Canadian waters to carry out contracts in other parts of the world.

[3] The contract for the work done in 1999 is dated December 14, 1998. The work itself was done in Canadian waters between August 15, 1999 and September 16, 1999. Given Saipem's July 31 fiscal year end, the 1998 work fell into the fiscal year ending July 31, 1999, and the work done in 1999 fell into the fiscal year ending July 31, 2000, hence the notice of requirement to produce documents for those two fiscal years.

[4] The Canada-Luxembourg Tax Convention provides that a resident of one contracting state is not liable to pay tax on business income earned in the other contracting state, unless the business in question is carried on through a permanent establishment in the other state. Saipem filed income tax returns for each of the taxation years in which it had business income in Canada, but claimed that since it had no permanent establishment, it was not taxable on its Canadian business income. The Minister has not yet issued notices of assessment in respect of those taxation years, insisting that he is unable to do so until he can make an independent determination as to whether or not Saipem had a permanent establishment in Canada during the relevant period.

[5] Saipem has offered to produce to the Agency all of the documents relevant to its Canadian operations. The Agency's position is that this makes Saipem the judge of the relevance of the documents it produces. It argues that it has no means of verifying information provided by Saipem other than by carrying out an audit of Saipem's books and records. In its Memorandum of Fact and Law, the Agency says:

29. ...the Minister seeks information in order to carry out a general audit of the Appellant's affairs for 1999 and 2000 with a view to determining its Canadian tax liability, if any.

[6] Saipem also offered to have the Tax Court of Canada decide whether it had a permanent establishment in Canada. Section 173 of the Act authorizes the Tax Court of Canada to decide any question of fact, law or mixed fact and law as a preliminary proceeding. The Agency

rejected Saipem's offer on the basis that it does not have the necessary facts to submit such a question to the Court.

[7] According to subsection 231.6(4) of the Act, the person who has been served with a notice of requirement may, within 90 days, apply to a judge of the Federal Court for a review of the requirement. Subsection 231.6(5) authorizes the judge to confirm, vary or, if the judge is satisfied that it is unreasonable, set aside the notice of requirement. Saipem brought such an application. In a decision reported at (2004) D.T.C. 6068, 2004 FC 113 (*Saipem Luxembourg S.A. v. Canada (Customs and Revenue)*), Mr. Justice Rouleau of the Federal Court dismissed Saipem's application, relying on the decision of the Federal Court in *Merko v. Canada (Minister of National Revenue - M.N.R.) (T.D.)*, [1991] 1 F.C. 239 (*Merko*).

[8] Rouleau J. found that the test to be applied is not whether the information requested will be relevant in determining the applicant's liability to pay tax in Canada, but rather whether the information is relevant to the administration of the Act. He concluded that the Agency's duty to verify Saipem's tax liability necessarily required the production of its books and records:

[24] In the present case, the respondent seeks information in order to carry out a general audit of the applicant's affairs for the 1999 and 2000 fiscal years with a view to determining its Canadian tax liability. It is trite law that one of the purposes of an audit is to verify information. The fact that some information has been provided by the taxpayer or may be available from another source is irrelevant.

[25] It is the CCRA's duty to verify the applicant's tax liability which necessarily requires the production of the applicant's books and records. If, after being examined, they have no impact on Canadian tax liability and if some information gleaned from the audit proves to be irrelevant it shall be treated as such but, before such a determination can be made, the books and records must be made available.

[26] In conclusion one need only refer to the summary of *Merko v. Canada (Minister of National Revenue-M.N.R.)*, *supra*:

"Parliament intended to give the Minister far-reaching powers under section 231.6 to obtain information available outside of Canada. The Minister need only show that it is relevant to the administration or enforcement of the Act. The taxpayer is protected from abusive use of the provision through the power of a judge to review the requirement. The respondent's requirement was not an abuse of the process nor was the request unreasonable."

Accordingly, the learned applications judge dismissed the application.

[9] Saipem appeals from the decision of the Federal Court.

### **THE SCHEME OF THE ACT**

[10] It is helpful to situate the notice of requirement in its statutory context. Subsection 230.(1) requires every person carrying on business in Canada to maintain books and records at its place of business:

230.(1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

230.(1) Quiconque exploite une entreprise et quiconque est obligé, par ou selon la présente loi, de payer ou de percevoir des impôts ou autres montants doit tenir des registres et des livres de comptes (y compris un inventaire annuel, selon les modalités réglementaires) à son lieu d'affaires ou de résidence au Canada ou à tout autre lieu que le ministre peut désigner, dans la forme et renfermant les renseignements qui permettent d'établir le montant des impôts payables en vertu de la présente loi, ou des impôts ou autres sommes qui auraient dû être déduites, retenues ou perçues.

[11] As a person carrying on business in Canada, Saipem was under an obligation to maintain, at its place of business in Canada, the books and records required to enable the Minister to determine its liability for tax. The Agency can take advantage of this obligation by attending at the taxpayer's premises and conducting an inspection of those books and records. Thus, the Agency is in a position to independently verify, at the taxpayer's place of business, the taxpayer's income and expenses, and thus his or her liability for income tax.

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

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

(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

and for those purposes the authorized person may

(c) subject to subsection 231.1(2),

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

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

b) examiner les biens à porter à l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;

à ces fins, la personne autorisée peut :

c) sous réserve du paragraphe (2),

enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

(d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres;

d) requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin, requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

[12] The Minister can also issue a notice of requirement pursuant to subsection 231.2(1):

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,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection (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 (3).

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) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu'elle produise des documents.

(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).

[13] If the Minister proposes to issue a Requirement with respect to unnamed persons, he or she must obtain the prior approval of a judge. See subsection 231.2(2).

[14] Where a non-resident taxpayer is carrying on business in Canada, the Minister may require it to produce documents or records which are located outside Canada:

231.6(1) For the purposes of this section, "foreign-based information or document" means any information or document that is available or located outside Canada and that may be relevant to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person.

(2) Notwithstanding any other provision of this Act, the Minister may, by notice served personally or by registered or certified mail, require that a person resident in Canada or a non-resident person carrying on business in Canada provide any foreign-based information or document.

231.6(1) Pour l'application du présent article, un renseignement ou document étranger s'entend d'un renseignement accessible, ou d'un document situé, à l'étranger, qui peut être pris en compte 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.

(2) Malgré les autres dispositions de la présente loi, le ministre peut, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne résidant au Canada ou d'une personne n'y résidant pas mais y exploitant une entreprise de fournir des renseignements ou documents étrangers.

[15] The person who is subject to the obligation to produce foreign-based information or document may challenge the notice of requirement's reasonableness before the Federal Court:

231.6(4) The person on whom a notice of a requirement is served under subsection 231.6(2) may, within 90 days after the service of the notice,

231.6(4) La personne à qui l'avis est signifié ou envoyé peut, dans les 90 jours suivant la date de signification ou d'envoi, contester, par requête à un

apply to a judge for a review of the requirement.	juge, la mise en demeure du ministre.
(5) On hearing an application under subsection 231.6(4) in respect of a requirement, a judge may	(5) À l'audition de la requête, le juge peut :
(a) confirm the requirement;	a) confirmer la mise en demeure;
(b) vary the requirement as the judge considers appropriate in the circumstances; or	b) modifier la mise en demeure de la façon qu'il estime indiquée dans les circonstances;
(c) set aside the requirement if the judge is satisfied that the requirement is unreasonable.	c) déclarer sans effet la mise en demeure s'il est convaincu que celle-ci est déraisonnable.

[16] If the person in question does not produce the foreign-based information or document when required to do so, then no use may be made of that information by the person in any subsequent proceedings:

231.6(8) If a person fails to comply substantially with a notice served under subsection(2) and if the notice is not set aside by a judge pursuant to subsection (5), any court having jurisdiction in a civil proceeding relating to the administration or enforcement of this Act shall, on motion of the Minister, prohibit the introduction by that person of any foreign-based information or document covered by that notice.	231.6(8) Si une personne ne fournit pas la totalité, ou presque, des renseignements ou documents étrangers visés par la mise en demeure signifiée conformément au paragraphe (2) et si la mise en demeure n'est pas déclarée sans effet par un juge en application du paragraphe (5), tout tribunal saisi d'une affaire civile portant sur l'application ou l'exécution de la présente loi doit, sur requête du ministre, refuser le dépôt en preuve par cette personne de tout renseignement ou document étranger visé par la mise en demeure.
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[17] By way of contrast, if a person fails to comply with a Requirement issued pursuant to section 231.2, the Minister may apply to a judge for a compliance order pursuant to section 231.7 which, in the event of non-compliance, may give rise to contempt proceedings.

## **ISSUE**

[18] The issue to be decided is whether the Minister's notice of requirement which requires Saipem to produce all of its corporate books and records for the 1999 and 2000 fiscal years is unreasonable.

## **ANALYSIS**

[19] After dealing with the issue of standard of review, I propose to begin by examining the limited jurisprudence on section 231.6 to see if it provides any guidance as to what constitutes an unreasonable notice of requirement. As we shall see, it provides very little assistance. In the absence of such guidance, I propose to apply the test of reasonableness found in the recent Supreme Court decision, *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20 (*Law Society of New Brunswick*), in assessing whether the notice of requirement in this case is reasonable.

[20] What is the standard of review? This Court is sitting in appeal of a decision of an applications judge whose task it was to determine whether the notice of requirement issued to Saipem is reasonable. The role of this Court is as described by the Supreme Court of Canada in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19:

[43] ...The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is

dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in *Housen, supra*, apply. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge.

[21] In this case, the standard of review to be applied by the reviewing judge is defined by the statute: reasonableness. It is only if the reviewing judge has made a palpable and overriding error in the application of that standard, that this Court is entitled to intervene.

[22] Before turning to the applications judge's reasons, a brief review of the jurisprudence is in order. The jurisprudence dealing with subsection 231.6(5) is not extensive, but nonetheless provides some examples of notices of requirement which the Courts have found to be reasonable. On the other hand, it provides little guidance as to the basis on which a court might find a notice of requirement unreasonable. The first case to consider the issue was *Merko* where the notice of requirement was served on the taxpayer after his notice of objection had been filed. The documents which it required Merko to produce related to certain investments in respect of which he had claimed large losses. The major issue in the case was whether the serving of a notice of requirement after a notice of objection had been filed was an abuse of process. Cullen J. held that there was no temporal limitation on when a notice of requirement could be served and dismissed the abuse of process claim. The learned judge then turned to the question of reasonableness:

[24] Is the demand reasonable? Parliament, through the wording of the Act, leaves no room for doubt that the demand for the foreign-based information or document is *prima facie* reasonable given the far-flung nature of the business of the limited partnership and the large loss claimed by this applicant. The applicant must clearly make an attempt to secure the foreign-based information or document unless it is his contention that the request/demand is unreasonable in which case a procedure is in place to make his case, and hence the application to this Court. I cannot find the request unreasonable. *There is no requirement that any information or document be*

*provided but there is the sanction of subsection 231.6(8) i.e., the taxpayer, if he withholds any such required information or document, cannot use it at a subsequent civil proceeding.* The requirement puts the taxpayer on notice about the kind of information being sought, not only from him but others. He can choose to seek out all the data possible, and tender it to National Revenue or he can indicate that some or all of the information sought cannot be produced, or will not be produced. If he takes the latter position, there is the sanction of subsection 231.6(8) mentioned earlier.

[25] Accordingly, there being no abuse of the process provided in the Income Tax Act, and in the circumstances here the requirement is reasonable, I will confirm the said requirement. The respondent is entitled to its costs of this motion in any event of the cause.

[*Merko* at p. 249-250]

[Emphasis added.]

[23] The learned judge said two things about the reasonableness of the notice of requirement. He began by commenting that the language of the legislation left no doubt that the requirement was *prima facie* reasonable given the far-flung nature of the limited partnership and the large losses claimed by the taxpayer. If the judge was saying that it was not unreasonable for the Minister to request further information, given the large losses claimed, there is little with which to quarrel. Presumably, the learned judge was not saying that the language of the legislation made every notice of requirement *prima facie* reasonable.

[24] The learned judge also concluded that the notice of requirement was reasonable because it did not compel the taxpayer to produce any information. It simply stipulated the consequences of non-production of the information. With respect, this is an erroneous reading of the legislation. Subsection 231.6(2) clearly empowers the Minister to demand production of foreign-based documents. Furthermore, the recipient of a notice of requirement is not free to choose

which of the documents demanded he will produce, as suggested in the learned judge's reasons. Subsection 231.6(8) is explicit that if the notice of requirement is not "substantially complied with", the court may make an order which "prohibit[s] the introduction by that person of *any foreign-based information or document covered by that notice*" [emphasis added]. Consequently, even if the taxpayer partially complies with the Requirement, the court can order that none of the material covered by the notice can be tendered, not even those documents which have been produced. Thus, the broader the demand, the more drastic the consequences of non-compliance.

[25] There have been few other cases which have considered the question of reasonableness in the context of subsection 231.6(5) of the Act. In *Bernick v. Her Majesty The Queen*, 2002 D.T.C. 7167 (Ont. S.C.J.) (*Bernick*), the taxpayer challenged a notice of requirement which called upon him to disclose the names and partnership interests of other members of an offshore partnership of which he was a member. Bernick refused to provide the information on the ground that the Minister should have proceeded under subsection 231.2(3) which requires the Minister to obtain court authorization before issuing a notice of requirement relating to "one or more unnamed persons". Swinton J. decided that subsection 231.2(3) did not apply as the Minister was not investigating the unnamed persons; he was investigating Bernick. Citing *Merko*, the learned judge went on to find that the notice of requirement was reasonable as the Minister was seeking information about the operation of the partnership from those involved in it in an effort to determine whether Bernick was entitled to claim partnership losses. I take this to mean that the learned judge was satisfied that there was a rational connection between the information sought and the issue in respect of which the information was sought.

[26] *Merko* and *Bernick* appear to apply a body of jurisprudence dealing with a notice of requirement issued pursuant to section 231.2 (or its predecessor) which holds that a notice of requirement which seeks to obtain information relevant to the tax liability of some specific person or persons whose liability to tax is under investigation is a purpose related to the administration or enforcement of the Act. See *Canadian Bank of Commerce v. Canada (Attorney General)*, [1962] S.C.R. 729 (*Canadian Bank of Commerce*), per Cartwright J. This is so even if much of the information requested turns out to be irrelevant. *Canadian Bank of Commerce* per Kerwin C.J. Since foreign-based document is defined as information or a document which is maintained outside Canada and “that may be relevant to the administration or enforcement of this Act”, this test is, to that extent, relevant to a notice of requirement issued pursuant to subsection 231.6(2).

[27] The element which is present in section 231.6, and which is lacking in section 231.2, is the availability of judicial review of the notice of requirement on the ground of unreasonableness. Such a review lacks any substance if a notice of requirement is reasonable simply because the information requested is, or may be, relevant to the administration and enforcement of the Act. Given that Parliament took the trouble to provide for a review on the basis of reasonableness, I conclude that Parliament intended that a notice of requirement in respect of a foreign-based document must not only relate to a document which is relevant to the administration and enforcement of the Act but that it must also not be unreasonable.

[28] When one turns to the decision of the Federal Court in this case, one notes that the issue of reasonableness is not addressed. The judge takes care to point out that the verification of the taxpayer's information is a purpose relevant to the administration and enforcement of the Act:

[23] Thus, the test to be applied is not whether the information requested will be relevant in determining the applicant's Canadian tax liability, but rather whether the information is relevant to the administration of the Act.

[29] This is the test which is applied in the cases dealing with a notice of requirement delivered under section 231.2 of the Act which contains no provision for review of the notice of requirement on the basis of reasonableness. The judge goes on to cite the Federal Court Reports head note from *Merko*:

...The taxpayer is protected from abusive use of the provision through the power of a judge to review the requirement. The respondent's requirement was not an abuse of the process nor was the request unreasonable.

[30] The learned judge never does say why he found the notice of requirement in this case reasonable. To the extent that he adopted the reasoning in *Merko*, the difficulty is that there is no issue of abuse of process in this case, as there was in *Merko*. If he meant to say that a notice of requirement is reasonable if it is not otherwise an abuse of process, I must say, with respect, that he conflated the two issues in *Merko* into a single issue and, to that extent, he failed to appreciate the test to be applied under subsection 231.6(5), and consequently, he did not apply it. This is a palpable and overriding error, as a result of which this Court is called upon to apply the proper test.



[31] What does “reasonable” (and by extension, “unreasonable”) mean in these circumstances? In *Law Society of New Brunswick*, the Supreme Court said at paragraph 47:

The standard of reasonableness basically involves asking "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?"

Given that the reviewing Court under subsection 231.6(5) is reviewing a decision (the content of the notice of requirement) on a standard of reasonableness, I find that this is an appropriate statement of the test to be applied. To apply that standard to this case, one needs some understanding of the extent of the demand and the reasons for which it is made.

[32] In *Merko and Bernick*, the notices of requirement called for the production of records relating to a specific transaction in respect of which the taxpayer was claiming a tax benefit. The link between the documents whose production was sought and the individual’s tax liability is obvious and reasonable. In this case, the notice of requirement requires Saipem to produce the whole of its corporate documentation for two fiscal years. The link between the documents to be produced and Saipem’s liability for tax is more remote.

[33] The Agency justifies the breadth of the notice of requirement on the basis that it requires production of all of Saipem’s documents in order to conduct an audit for the purpose of verifying information submitted by Saipem. This position is well summarized at paragraph 29 of the Agency’s Memorandum of Fact and Law:

In the present case the Minister seeks information in order to carry out a general audit of the Appellant’s affairs for 1999 and 2000 with a view to determining its

Canadian tax liability, if any. As stated in *McKinlay*, one of the purposes of an audit is to verify information. The fact that information has been provided by the taxpayer or is possibly available from another source is irrelevant. It is the CCRA's interest in verifying the Appellant's tax liability that compels the production of the Appellant's books and records. All of the Appellant's books and records are relevant to an audit even if some of them only serve to verify, after being examined, that they have no impact on its Canadian tax liability.

[34] The issue before the reviewing Court is not the reasonableness of the Agency's intention to conduct an audit, but the reasonableness of the notice of requirement in light of the Agency's determination that an audit is required. Saipem's argument that the Agency could have obtained the documents it seeks by issuing a notice of requirement with respect to specific classes of documents seeks to question the reasonableness of conducting an audit. In the absence of some evidence of bad faith or other improper motive, the appropriateness of an audit is outside the mandate of the Court under subsection 231.6(5).

[35] The question therefore is whether the Agency's intention to conduct an audit of Saipem supports the need for a notice of requirement in respect of the whole of Saipem's corporate records. A "somewhat probing examination" leads to an inquiry as to whether one can truly conduct an audit solely on the basis of material provided by the person being audited, without the possibility of verification that no further records exist. In practice, the issue seldom arises as I have no doubt that most businesses confronted with a notice of requirement of the sort in issue here, accept the Agency's offer to treat their consent to an on-site audit as sufficient compliance with the notice of requirement. But the reasonableness of the notice of requirement is to be assessed according to its terms, not according to some alternate method of compliance.

[36] It is the Agency's prerogative as to whether it will conduct an audit, and what form that audit will take. Given that the records in question are, by definition, maintained outside Canada, the Agency can do little more to gain access to the records than issue the notice of requirement which it issued here. If the result is an audit which does not meet the Agency's usual standards, it is nonetheless the best audit the Agency can conduct in the circumstances. As a result, I conclude that the Agency's determination to conduct an audit supports the scope of the notice of requirement served upon Saipem by the Minister.

[37] For those reasons, applying the test which the applications judge should have applied, I find that the notice of requirement issued to Saipem is not unreasonable, and therefore, I would dismiss the appeal with costs and, pursuant to paragraph 231.6(5)(a) of the Act, confirm the notice of requirement.

“J.D. Denis Pelletier”

J.A.

“I concur  
Alice Desjardins J.A.”

“I agree  
M. Nadon J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-46-04

**STYLE OF CAUSE:** *SAIPEM LUXEMBOURG S.A. v. THE CANADA CUSTOMS AND  
REVENUE AGENCY*

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** December 8, 2004

**REASONS FOR  
JUDGMENT:** PELLETIER J.A.

**CONCURRED IN BY:** DESJARDINS J.A.  
NADON J.A.

**DATED:** June 9, 2005

**APPEARANCES:**

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