A-280-17

2019 FCA 67

Minister of National Revenue (*Appellant*)

v.

Cameco Corporation (*Respondent*)

INDEXED AS: CANADA (NATIONAL REVENUE) V. CAMECO CORPORATION

Federal Court of Appeal, Rennie, Woods and Laskin JJ.A.—Toronto, November 28, 2018; Ottawa, April 3, 2019.

Income Tax — Administration and Enforcement — Appeal from Federal Court decision dismissing appellant's summary application seeking compliance order under Income Tax Act, s. 231.7(1) directing respondent to comply with Canada Revenue Agency's (CRA) request to interview respondent's employees regarding audit CRA conducting — Audit to determine whether respondent complying with transfer pricing rules set out in Act, s. 247 during respondent's 2010, 2011, 2012 taxation years — CRA thus requesting employees of respondent to attend interviews, answer orally questions that CRA considering relevant to audit — Respondent refusing but offering to respond to questions in writing — Appellant of view that words "inspect, audit or examine" in Act, s. 231.1(1)(a) broad, encompassing authority to ask questions of taxpayer or employees of taxpayer — Whether appellant can require employees of corporation to attend for interviews, compel oral answers to questions posed by CRA auditors — Per Rennie J.A. (Laskin J.A. concurring): Act, s. 231.1(1)(a) cannot be interpreted so as to permit appellant to compel oral interviews of taxpayer or its employees concerning its tax liability — Focus of powers in Act, s. 231.1(1)(a),(b) squarely on appellant's ability to access information that is documented, or ought to be documented, in taxpayer's books, records — Power referred to in those paragraphs is to "inspect, audit or examine" — Neither "inspect" nor "examine" suggesting power to compel person to answer questions — Where Parliament intending to compel person to provide oral answers to questions in response to government inquiry, does so expressly, not by implication — Purpose of provision to facilitate appellant's unencumbered, immediate access to all books, records, information of taxpayer — Appeal dismissed — Per Woods J.A. (concurring): Federal Court not making any reviewable error in concluding that application should be dismissed on facts of particular case; in denying compliance order sought based on factual circumstances — Not necessary to consider scope of appellant's audit powers more generally in present appeal — While true that some of Federal Court's reasons not withstanding scrutiny, these aspects of reasons not crucial to its decision — Facts amply supporting that appellant's application overreaching on particular facts of this case.

This was an appeal from a Federal Court decision dismissing the appellant's summary application seeking a compliance order under subsection 231.7(1) of the *Income Tax Act* directing the respondent to comply with the Canada Revenue Agency's (CRA) request to interview the respondent's employees regarding the audit the CRA was conducting. The audit was to determine whether the respondent complied with the transfer pricing rules set out in section 247 of the Act during its 2010, 2011 and 2012 taxation years. The CRA thus requested employees of the respondent, including those of its foreign subsidiaries, to attend interviews and to answer orally various categories of questions that the CRA considered relevant to its audit. The respondent refused but offered to respond to questions in writing. The Federal Court concluded that the

appellant's interpretation of paragraph 231.1(1)(a) was inconsistent with a textual and contextual reading of that provision. It also concluded that a power to compel oral interviews would, in effect, allow the appellant a pre-emptive discovery of the taxpayer and thereby circumvent the procedures under the *Tax Court of Canada Rules (General Procedure)* (Tax Court Rules), and possibly prejudice the respondent's position in ongoing and prospective litigation with the appellant.

The thrust of the appellant's interpretation of paragraph 231.1(1)(a) of the Act was that the words "inspect, audit or examine" are broad and encompass, on their own, the authority to ask questions of a taxpayer or employees of a taxpayer, including the employees of its overseas subsidiaries, and to require that they be answered orally. The appellant argued that paragraphs 231.1(1)(c) and (d) do not *limit* her authority to ask questions under paragraph 231.1(1)(a) but rather *expand* that authority. In response, the respondent contended, in particular, that what the appellant effectively sought was an implicit summons power that has no basis in the text of subsection 231.1(1) and that, had Parliament intended to confer such broad authority, it would have done so in no uncertain terms.

The issue was whether the appellant can require employees of a corporation to attend for interviews and compel oral answers to questions posed by auditors of the CRA.

Held, the appeal should be dismissed.

Per Rennie J.A. (Laskin J.A. concurring): Applying the modern approach to statutory interpretation, paragraph 231.1(1)(a) of the Act cannot be interpreted so as to permit the appellant to compel oral interviews of a taxpayer or its employees concerning its tax liability. Neither the text, context nor legislative history of paragraph 231.1(1)(a) supported the appellant's position. What the appellant sought from the respondent were oral answers to oral questions relating to "the fact situation which existed during the 2008–2010 period" and the "development of [a] functional analysis" of a non-arm's length transaction between the respondent and its foreign subsidiary. It followed that the appellant's request for a compliance order under section 231.7 was not in respect of documents, records or information as to the location of those documents and the manner in which they were maintained but to facilitate her understanding of the respondent's potential tax liability.

The focus of the powers in paragraphs 231.1(1)(a) and (b) is squarely on the ability of the appellant to access information that is documented, or ought to be documented, in the books and records of the taxpayer. References to "books and records" and "documents" course consistently throughout section 231.1. The power referred to in those paragraphs is to "inspect, audit or examine". Neither "inspect" nor "examine" suggests a power to compel a person to answer questions. Oral examination is not the ordinary meaning of the word audit, particularly when the word is situated in its context of income tax liability. Reading the power in paragraph (a) in the context of paragraph (d), reinforces the intention of Parliament that the appellant has, at a minimum, full, unimpeded access to the records of the taxpayer.

Regarding the contextual analysis of section 231.1, where Parliament intends to compel a person to provide oral answers to questions in response to a government inquiry, it does so expressly and not by implication. The purpose of section 231.1 is to facilitate the appellant's unencumbered and immediate access to all books, records and information of the taxpayer and, in section 231.7, to provide recourse to the authority of the Court in the face of a refusal. Furthermore, paragraph 231.1(1)(a) is not the only source of the appellant's investigatory powers. The appellant may enter into the business premises of a taxpayer (paragraph 231.1(1)(c)), seek information and documents from third parties (section 231.2), examine any property, process or matter relating to the taxpayer or any other person (paragraph 231.1(1)(b)), etc. As to the appellant's power to compel oral answers during an audit, whether the power is necessary to ensure that the audit function is not undermined is a policy matter for the appellant and Parliament.

Paragraph 231.1(1)(a) (and section 231.1 as a whole) was the result of 1986 amendments to the Act that sought "to provide clear limits to Revenue Canada's enforcement powers." The elimination of the word "orally" from the duty to answer all proper questions "relating to the audit" as well as the elimination of the obligation to give answers under oath or by statutory declaration was telling. Equally significant was the concurrent introduction of the explicit powers of inquiry under section 231.4. Having regard to the legislative history, the appellant's submission that the word "audit" in paragraph 231.1(1)(a) itself confers a general power to compel oral answers with respect to tax liability was rejected. The result would be a power significantly broader than that set out in section 231.4, without any of its procedural safeguards, and would be contrary to Parliament's intention.

Per Woods J.A. (concurring): The appeal was to be dismissed but for different reasons. The Federal Court made no reviewable error in concluding that the application should be dismissed on the facts of this particular case. It was not necessary to consider the scope of the appellant's audit powers more generally in this appeal. The Federal Court centred its decision on the "unique and compelling" facts of this case, which were all relevant to the exercise of its discretion under section 231.7 of the *Income Tax Act*. The Federal Court made no reviewable error in denying the compliance order that was sought based on these factual circumstances. The compliance order is discretionary and this Court must "be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner". While true that some of the reasons of the Federal Court did not withstand scrutiny, these aspects of the reasons were not crucial to its decision. The facts amply supported that the appellant's application overreached on the particular facts of this case.

STATUTES AND REGULATIONS CITED

Aeronautics Act, R.S.C., 1985, c. A-2, ss. 8.7, 8.8.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 10.

Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3, s. 19.

Food and Drugs Act, R.S.C., 1985, c. F-27, s. 23.

Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, ss. 152(8), 225.1(7), 230, 231.1, 231.2, 231.4, 231.7, 247.

Income Tax Act, S.C. 1970-71-72, c. 63, s. 231.

Nuclear Safety and Control Act, S.C. 1997, c. 9, ss. 30, 36.

Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10, s. 45.65.

Tax Court of Canada Rules (General Procedure), SOR/90-688a.

CASES CITED

APPLIED:

BP Canada Energy Co. v. Canada (National Revenue), 2017 FCA 61, [2017] 4 F.C.R. 355; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

CONSIDERED:

Rona Inc. v. Canada (National Revenue), 2017 FCA 118, [2017] D.T.C. 5069; *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643; *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612.

REFERRED TO:

Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. He*, 2012 BCCA 318, 289 C.C.C. (3d) 184; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757; *R. v. Goulis* (1981), 233 O.R. (2d) 55, [1981] O.J. No. 637 (QL) (C.A.); *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715; *Saipem Luxembourg S.A. v. Canada (Customs and Revenue Agency)*, 2005 FCA 218, [2005] 3 C.T.C. 294, leave to appeal to S.C.C. refused, [2005] 3 S.C.R. vii; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867; *Sarmadi v. Canada*, 2017 FCA 131, [2018] 2 C.T.C. 99; *Toronto (City) v. Polai*, (1970) 1 O.R. 483, (1969), 8 D.L.R. (3d) 689 (Ont. C.A.); *Dreco Energy Services Ltd. v. Wenzel*, 2008 ABCA 290 (CanLII), 440 A.R. 273; *Morguard Residential v. Mandel*, 2017 ONCA 177; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 18 C.C.L.I. (5th) 263; *Cameco Corporation v. The Queen*, 2018 TCC 195, [2019] 1 C.T.C. 2001; *Quebec* (*Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478.

AUTHORS CITED

Le Petit Robert, 2011 ed., “ *vérifier* ”.

Sharpe, Robert J. *Injunctions and Specific Performance*, looseleaf. Aurora, Ont: Canada Law Book, 2018.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

Wilson, Michael. *Technical Notes to a Bill Amending the Income Tax Act and Related Statutes*, Ottawa: Dept. of Finance, 1985.

APPEAL from a Federal Court decision (2017 FC 763, [2018] 2 F.C.R. 524) dismissing a summary application by the appellant seeking a compliance order under subsection 231.7(1) of the *Income Tax Act*. Appeal dismissed.

APPEARANCES

Margaret McCabe and *Anne Jinnouchi* for appellant.

David Jacyk, *Al Meghji* and *Peter Macdonald* for respondent.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

Osler, Hoskin & Harcourt LLP, Ottawa, for respondent.

The following are the reasons for judgment rendered in English by

RENNIE J.A.:

I. Introduction

[1] The issue in this appeal is whether the Minister of National Revenue can require employees of a corporation to attend for interviews and compel oral answers to questions posed by auditors of the Canada Revenue Agency (CRA). The Minister says that paragraph 231.1(1)(a) of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (Act) provides her the authority to do so.

[2] In the course of an audit as to whether Cameco Corporation complied with the transfer pricing rules set out in section 247 of the Act during its 2010, 2011 and 2012 taxation years, the CRA requested employees of Cameco, including those of its foreign subsidiaries, to attend interviews and to answer orally various categories of questions that the CRA considered relevant to its audit. Cameco refused, but did offer to respond to questions in writing.

[3] The Minister then brought a summary application in the Federal Court, seeking a compliance order under subsection 231.7(1) [of the Act] directing Cameco to comply with the CRA's request.

[4] The Federal Court dismissed the application (2017 FC 763, [2018] 2 F.C.R. 524 [reasons], *per* McVeigh J.). The Court concluded that the Minister's interpretation of paragraph 231.1(1)(a) was inconsistent with a textual and contextual reading of that provision. The Court also concluded that a power to compel oral interviews would, in effect, allow the Minister a pre-emptive discovery of the taxpayer and thereby circumvent the procedures under the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (Tax Court Rules), and possibly prejudice Cameco's position in ongoing and prospective litigation with the Minister. The Minister appealed.

[5] Subsection 231.1(1) [of the Act] provides as follows:

> **Inspections**
>
> **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), 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.

[6] As in this case, where the taxpayer fails to provide the access, assistance, information or documents which the Minister demands, the Minister may seek a compliance order from the Federal Court pursuant to subsection 231.7(1) of the Act:

> **Compliance order**
>
> **231.7 (1)** On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that
>
> **(a)** the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and
>
> **(b)** in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

[7] The thrust of the Minister's interpretation of paragraph 231.1(1)(a) is that the words "inspect, audit or examine" are broad and encompass, on their own, the authority to ask questions of a taxpayer or employees of a taxpayer, including the employees of its overseas subsidiaries, and to require that they be answered orally. "Audit" in the Minister's conception, implies a right to seek information and carries with it a corresponding obligation to provide that which is requested. The Minister contends that this interpretation of paragraph (a) is consistent with the purpose of the provision which is to permit the Minister to verify taxpayers' information and ensure compliance with the Act, and with the broader public interest in supporting a self-assessment system of taxation.

[8] The Minister argues that paragraphs 231.1(1)(c) and (d) do not *limit* her authority to ask questions under paragraph 231.1(1)(a) but rather *expand* that authority to include the power to ask and obtain answers to oral questions of any person at the taxpayer's business premises. In considering the scope of the power in (a), the Minister stresses the inherent disadvantages faced by her in a self-reporting system, and that it is for the Minister, and not the taxpayer, to decide the breadth and scope of an audit.

[9] In response, Cameco contends that what the Minister effectively seeks is an implicit summons power that has no basis in the text of subsection 231.1(1). Had Parliament intended to confer such broad authority it would have done so in no

uncertain terms. Cameco also argues that, when situated in its context, the Minister's interpretation of paragraph 231.1(1)(a) is inconsistent with the scheme of the Act. It renders paragraph 231.1(1)(d) and the mid-amble of subsection 231.1(1) redundant, and undermines the protections established for the taxpayer by Parliament in the Minister's inquiry power under section 231.4.

[10] Relying on the plain and ordinary meaning of paragraph 231.1(1)(a) and the decision of this Court in *BP Canada Energy Co. v. Canada (National Revenue)*, 2017 FCA 61, [2017] 4 F.C.R. 355 (*BP Canada*), Cameco argues that the powers conferred under it are in respect of *documented* information, not *any* information. Finally, Cameco emphasizes that it has cooperated with the CRA over the course of its audit save for the request for oral interviews. This, in Cameco's view, is material to the exercise of the Federal Court's discretion whether to issue a compliance order under section 231.7.

II. Analysis

[11] It is well-established that the interpretation of specific provisions of the Act is a question of law (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at paragraph 44). The standard of review applicable to the applications judge's interpretation of paragraph 231.1(1)(a) is therefore correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 33.

[12] Applying the modern approach to statutory interpretation (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, (1998), 154 D.L.R. (4th) 193, at paragraph 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559), paragraph 231.1(1)(a) cannot be interpreted so as to permit the Minister to compel oral interviews of a taxpayer or its employees concerning its tax liability. Neither the text, nor the context nor the legislative history of paragraph 231.1(1)(a) supports the Minister's position.

[13] There is a caveat to this, and it arises from paragraph 231.1(1)(d). If records, of any sort, are the object of the auditor's interest, Parliament has made clear that questions may be asked, and the assistance of the Court sought, to compel answers as to the taxpayer's knowledge of their provenance and location. That is not what is sought in this case.

[14] What the Minister sought from Cameco, as evidenced by letters received from CRA auditors, were oral answers to oral questions related to "the fact situation which existed during the 2008–2010 period" and the "development of [a] functional analysis" of a non-arm's length transaction between Cameco and its foreign subsidiary. It follows that the Minister's request for a compliance order under section 231.7 was not in respect of documents, records or information as to the location of those documents and the manner in which they were maintained, but to facilitate her understanding of Cameco's potential tax liability.

A. *Text*

[15] The focus of the powers in paragraphs 231.1(1)(a) and (b) is squarely on the ability of the Minister to access information that is documented, or ought to be documented, in the books and records of the taxpayer. References to “books and records” and “documents” course consistently throughout the section. The Minister may also examine “property” or “processes” for the purpose of “ascertaining the information that is or should be in the books or records of the taxpayer”. In *BP Canada* Noël C.J. noted at paragraph 58, subsection 231.1(1) “could not have been drafted in broader terms” and encompasses documents “which ‘relate or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable under [the] Act’”. The focus of (a) on the review of books and records has also been recognized elsewhere (see: *R. v. He*, 2012 BCCA 318, 289 C.C.C. (3d) 184, at paragraph 60; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, at paragraph 53).

[16] The Minister says, however, that the word “audit”, in its origins, means “to hear” and in order to hear there must be something to listen to, namely an oral response to a question.

[17] I do not find this argument compelling.

[18] The power is to “inspect, audit or examine”. Neither “inspect” nor “examine” suggests a power to compel a person to answer questions. To the contrary, their ordinary meaning is one of self-directed inquiry, in this case in respect of “the book and records” of the taxpayer. When two or more words that are capable of analogous meaning are coupled together they take their colour from each other, the more general being restricted to a sense analogous to the less general: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. Markham, Ont.: LexisNexis, 2014) (Sullivan), at page 230, citing *R. v. Goulis* (1981), 233 O.R. (2d) 55, at page 61, [1981] O.J. No. 637 (QL) (C.A.).

[19] Oral examination is not the ordinary meaning of the word audit, particularly when the word is situated in its context of income tax liability. Nor does the French language text support the Minister (*Le Petit Robert*, 2011 ed., *s.v.* “ *vérifier* ”: *examiner la valeur de (qqch.), par une confrontation avec les faits ou par un contrôle de la cohérence interne*).

[20] The plain meaning of paragraphs 231.1(1)(c) and (d) confirms this conclusion as to the scope of (a). The authority in (c) and (d) is to enable the performance of the powers granted in (a) and (b). That is the effect of the words “for those purposes” in the mid-amble of this subsection. Thus, the focus of paragraph (c) is to provide access to the records of the taxpayer. It provides authority to “enter into any premise or place” or “any property” or business where “any books or records are or should be kept.”

[21] Paragraph (d) is instructive. It requires “the owner or manager” or “any other person on the premises” to provide “reasonable assistance” and to “answer all proper questions relating to the administration or enforcement of this Act”. Reading the power in paragraph (a) in the context of paragraph (d), reinforces the intention of Parliament that the Minister has, at a minimum, full, unimpeded access to the records of the

taxpayer. The taxpayer is not even required to be present—the obligation to provide reasonable assistance falls on the senior person on the premises of the business. The owner or manager is a person who can reasonably be in a position to assist and answer questions in locating documents and records kept on the business premises. In making this observation, I emphasize that the disposition of this appeal turns on the scope of the power in paragraph 231.1(1)(a). The extent to which paragraph 231.1(1)(d) serves as an independent power to compel attendance and answer questions of the nature proposed by the Minister in this case was not argued before us.

[22] Assistance in this context is distinct from responding to general questions with respect to tax liability or issues arising from the audit. In broad terms, the distinction is between an obligation to facilitate the auditor's access to documents, records, books and information which explain what the taxpayer did, and inquiries of the taxpayer directed to understanding the facts, assumptions and other considerations which it took into account in preparing its return. Drawing again on the guidance of this Court in *BP Canada*, although auditors are entitled under the authority of (d) to be provided with all reasonable assistance, "they cannot compel taxpayers to reveal their 'soft spots'" (at paragraph 82). Other federal inspection and audit schemes are structured similarly: see, e.g., *Food and Drugs Act*, R.S.C., 1985, c. F-27, section 23; *Aeronautics Act*, R.S.C., 1985, c. A-2, sections 8.7, 8.8; *Nuclear Safety and Control Act*, S.C. 1997, c. 9, sections 30, 36. The obligation to assist is in aid of the inspection, search, examination or review of records.

[23] I conclude on this point by returning to the Minister's position that the right to compel oral answers is implicit in the word "audit". If the requirement to answer questions was implied in (a) then the obligation in paragraph (d) and the express power to compel answers, would be unnecessary. Interpretations that render any portion of a statute meaningless or redundant should be avoided: *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at paragraph 45.

B. *Context*

[24] Of further significance is that section 231.1 immediately follows section 230, which imposes an obligation to keep books and records at the person's place of business. The purpose of the two provisions when taken together is to allow the Minister to independently verify, based on the records kept at the taxpayer's place of business, tax liability and compliance with the Act: *Saipem Luxembourg S.A. v. Canada (Customs and Revenue Agency)*, 2005 FCA 218, [2005] 3 C.T.C. 294 (*Saipem*), at paragraph 11, leave to appeal refused, [2005] 3 S.C.R. vii, 349 N.R. 200 (S.C.C.). Independent verification through an audit is different than compelling answers to questions.

[25] Continuing with the contextual analysis, where Parliament intends to compel a person to provide oral answers to questions in response to a government inquiry, it does so expressly, and not by implication. Section 231.4 is but one example, there are many others; see, *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3, section 19; *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10, section 45.65; *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, section 10.

Presumptions of coherence and consistency apply across all statutes enacted by Parliament: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at paragraph 30; Sullivan, at pages 422–424.

C. *Purpose*

[26] I now turn to the Minister's argument that the power to compel is consistent with a purposive examination of the provision.

[27] Crown counsel stressed the importance of the Minister's ability to ask questions of taxpayers to verify information received in the context of a self-reporting system. I agree that it is important. But this objective, however important, cannot replace the language of Parliament: Sullivan, at page 49. The purpose of section 231.1 is to facilitate the Minister's unencumbered and immediate access to all books, records and information of the taxpayer and, in section 231.7, to provide recourse to the authority of the Court in the face of a refusal.

[28] I also agree with the Minister that all taxpayers should fully cooperate with reasonable requests arising in the course of an audit. However, the fact that I have concluded that the Minister does not have the power to compel a taxpayer to answer questions at the audit stage does not mean that the audit power has been rendered toothless in the face of recalcitrant taxpayers. It remains open to the Minister to make inferences when no answer is given. The Minister is also free to make assumptions and to assess on that basis. The tax liability arising from the Minister's assessment is statutorily deemed to be valid and binding (subject to appeal or reassessment) (subsection 152(8)), and in any appeal in the Tax Court of Canada, the onus rests with the taxpayer to destroy any factual assumptions the Minister has made (*Sarmadi v. Canada*, 2017 FCA 131, [2018] 2 C.T.C. 99, at paragraph 31). The Minister may also demand that large corporate taxpayers such as Cameco pay 50 percent of the assessed tax immediately (subsection 225.1(7)).

[29] Further, paragraph 231.1(1)(a) is not the only source of the Minister's investigatory powers. The Minister may enter into the business premises of a taxpayer (paragraph 231.1(1)(c)), seek information and documents from third parties (section 231.2), examine any property, process or matter relating to the taxpayer or any other person (paragraph 231.1(1)(b)), enter a dwelling-house with a warrant (subsections 231.1(2), 231.1(3)), authorize a formal inquiry (section 231.4), and, if necessary, come to the Federal Court to compel the taxpayer to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 (section 231.7).

[30] In making these observations, I want to be clear that I am not saying that these powers are sufficient such that the Minister does not need the power to compel oral answers during an audit. Whether the power is necessary to ensure that the audit function is not undermined is a policy matter for the Minister and Parliament and one on which this Court has no view.

D. *Legislative History*

[31] While I am certain of the clarity of Parliament's intention with respect to the purpose of paragraph 231.1(1)(a), the legislative history of this provision removes any possible doubt.

[32] Paragraph 231.1(1)(a) (and section 231.1 as a whole) was the result of 1986 amendments to the Act that sought "to provide clear limits to Revenue Canada's enforcement powers": see Department of Finance, *Technical Notes to a Bill Amending the Income Tax Act and Related Statutes* [by M. Wilson] (November 1985), at page 133. The predecessor of the current subsection 231.1(1) (then section 231 [of the *Income Tax Act*, S.C. 1970-71-72, c. 63]) provided as follows:

> **231.** (1) Any person thereunto authorized by the Minister, for any purpose related to the administration or enforcement of this Act, may, at all reasonable times, enter into any premises or place where any business is carried on or any property is kept or anything is done in connection with any business or any books or records are or should be kept, and
>
> (*a*) audit or examine the books and records and any account, voucher, letter, telegram or other document which relates or may relate to the information that is or should be in the books or records or the amount of tax payable under this Act,
>
> (*b*) examine property described by an inventory or any property, process or matter an examination of which may, in his opinion, assist him in determining the accuracy of an inventory or in ascertaining the information that is or should be in the books or records or the amount of any tax payable under this Act,
>
> (*c*) require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance with his audit or examination and <u>to answer all proper questions relating to the audit or examination either orally or, if he so requires, in writing, on oath or by statutory declaration</u> and, for that purpose, require the owner or manager to attend at the premises or place with him, and
>
> (*d*) if, during the course of an audit or examination, it appears to him that there has been a violation of this Act or a regulation, seize and take away any of the documents, books, records, papers or things that may be required as evidence as to the violation of any provision of this Act or a regulation. [Emphasis added.]

[33] The elimination of the word "orally" from the duty to answer all proper questions "relating to the audit" as well as the elimination of the obligation to give answers under oath or by statutory declaration is telling. Equally significant is the concurrent introduction of the explicit powers of inquiry under section 231.4. This added provision

sets out a procedure for appointing a hearing officer before whom an inquiry will be held (subsection 231.4(2)), the powers of that hearing officer (subsection 231.4(3)), the rights of any person who gives evidence in an inquiry (subsection 231.4(5)), and the rights of a person whose affairs are being investigated (subsection 231.4(6)).

[34] Having regard to the legislative history, I do not agree with the Minister's submission that the word "audit" in paragraph 231.1(1)(a) itself confers a general power to compel oral answers with respect to tax liability. The result would be a power significantly broader than that set out in section 231.4, without any of its procedural safeguards, and would be contrary to Parliament's intention.

E. *Collateral Issues*

[35] There remain the reasons of the Federal Court which rejected the compliance order in part on the basis of certain discretionary considerations. Having found that subsection 231.7(1) did not grant the power to compel answers, the judge's reasons are, in this respect, *obiter dicta*. However, as they may be relied upon in the context of other requests for compliance orders, their consideration is warranted. I also wish to make observations on the reasons of my colleague, Justice Woods, who would dispose of the appeal on the basis that, assuming the Minister had the power to compel the attendance of Cameco officers, a compliance order should not issue in any event.

[36] My first observation is that where an issue is squarely engaged on a complete record, played a role in the result, and, as here, was fully argued before the Court by experienced counsel who are asking that the Court settle a question in dispute, the Court should not decline to decide the point, regardless of how difficult the decision might be. A minimalist approach is inconsistent with the direction of the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, that courts foster a litigation culture which best encourages the resolution of disputes in an efficient and principled matter. Here, the issue before us will surely return, given the nature of the question, the parties and what is at stake for each of them. Deciding the question before us will save wasteful, unnecessary litigation in the future and provide the necessary guidance to the parties and others.

[37] My second observation concerns the relevance of "clean hands" in the consideration whether a compliance order should issue. This concept has no role in determining whether a compliance order should issue. Clean hands is an equitable doctrine, under which a party may be disentitled to relief to which it was otherwise entitled as a consequence of past conduct or bad faith. Importantly, for past conduct to justify a refusal of relief, the conduct must relate directly to the very subject matter of the claim: *Toronto (City) v. Polai*, [1970] 1 O.R. 483, at pages 493–494 , (1969), 8 D.L.R. (3d) 689 (Ont. C.A.); *Dreco Energy Services Ltd. v. Wenzel*, 2008 ABCA 290 (CanLII), 440 A.R. 273, at paragraph 13; *Morguard Residential v. Mandel*, 2017 ONCA 177, at paragraph 18; Robert J. Sharpe, *Injunctions and Specific Performance* (looseleaf) Aurora, Ont.: Canada Law Book, 2018 (looseleaf updated November 2018), at §1.1030.

[38] The clean hands doctrine has no application in the context of a request by the Minister for an order under section 231.7. The doctrine could only apply to the Minister, the party seeking the discretionary relief under section 231.7. Even here, the jurisprudence of this Court is clear that the control over the Minister's requests lies in abuse of process, not in vague notions of equity: *Rona Inc. v. Canada (National Revenue)*, 2017 FCA 118, [2017] D.T.C. 5069, at paragraph 7; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 18 C.C.L.I. (5th) 263, at paragraph 36. Whether a request for a compliance order is an abuse of process or is oppressive cannot be defined with any precision in a vacuum. The contours of each are best left to the discretion of the Federal Court Judge, based on the evidence and argument arising in the particular case. However, they could include circumstances where the judge is satisfied that the documents are sought for a collateral or ulterior purpose or for a purpose that is inconsistent with CRA policy.

[39] In practical terms, as the auditor follows the audit trail, the audit will likely be more focused, and the requests more targeted to areas which may disclose a problem. The fact that a taxpayer may have previously cooperated in responding to a series of audit requests does not mean that a compliance order should not be issued for the next request. For the taxpayer to say, "well, now you are getting too close to the fire, I will cease to cooperate" and plead past cooperation as a defence against a compliance order could frustrate section 231.1. In sum, the doctrine has no part to play in considering whether an order should issue under section 231.7.

[40] I turn to the question whether compelling answers could compromise Cameco's position in on-going and prospective litigation in the Tax Court of Canada. This consideration weighed heavily in the Federal Court Judge's consideration of whether to grant the order.

[41] In the absence of a specific intersection between the *Income Tax Act* and the Tax Court Rules, the Rules as subordinate legislation do not assist the interpretation of the scope of the Minister's power under paragraph 231.1(1)(a). Additionally, whether questions posed in the course of an audit might have direct or collateral consequences on ongoing or prospective litigation is not a relevant discretionary consideration. The issue of the admissibility of evidence and any prejudice to the taxpayer arising from answers given in the course of an audit is to be dealt with by the Tax Court judge, under established substantive and procedural rules of evidence, and not at the audit stage.

[42] Similarly, I agree with the Minister that the principle of proportionality has no role in a request for a compliance order under section 231.7. Proportionality is an important principle in civil discovery, where requests for relevant documents are assessed against the burdens that their production may impose. This assessment takes place in the context of the pleadings which frame the parameters of relevance. The criteria by which documents are required to be produced in the course of audit are markedly different. The CRA should have access to documents "[r]egardless of whether or not there is a possibility or a probability" that the audit will lead to further investigation or reassessment: *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643, at paragraph 22.

[43] The Minister is entitled to determine the scope and manner of an audit, its course and direction; as noted in *BP Canada*, at paragraph 82, “auditors … must engage in extensive poke-and-check exercises, and are essentially left to their own initiative in verifying the amounts responded by the taxpayer.” Auditors are not bounded by strictures of pleadings or relevance. The course of an audit is directed by a multitude of factors, including the auditors’ experience, training, the state of the records, the tax history of the taxpayer as well as considerations external to the particular taxpayer.

[44] Finally, vagueness cannot be a relevant consideration on the record before us. Cameco offered to respond to the questions in writing. The questions cannot be sufficiently precise that they can be answered in writing, but too vague to be answered orally. I would also add that many of Cameco’s objections to the order anticipated difficulties in its implementation. These were premature, and speculative.

[45] I would therefore dismiss the appeal, with costs.

LASKIN J.A.: I agree.

The following are the reasons for judgment rendered in English by

[46] WOODS J.A. (concurring reasons): The Minister has appealed from a decision of the Federal Court which dismissed its application for a compliance order pursuant to section 231.7 of the Act. I agree with the disposition of the appeal proposed by my colleague Justice Rennie, but for different reasons. I am of the view that the Federal Court made no reviewable error in concluding that the application should be dismissed on the facts of this particular case. In my view, it is not necessary to consider the scope of the Minister’s audit powers more generally in this appeal.

[47] There is a preliminary issue involving mootness. According to Cameco’s memorandum, at the time of this decision all of the relevant taxation years would be statute barred. Accordingly, it seems likely that a compliance order would not be enforced by the CRA. The issue of mootness was raised by Cameco in the Federal Court, which concluded that it was not necessary to consider it in light of the application being dismissed on other grounds (reasons, at paragraph 51).

[48] It would have been helpful for this Court to have received submissions from counsel as to whether it should hear the appeal despite the apparent mootness. This did not happen. Accordingly, I will assume that it is appropriate for this appeal to be decided on the merits on the basis that the same audit issue is likely to continue in the future.

[49] I will now discuss why, in my view, the Federal Court did not err in dismissing the application.

[50] I begin with a description of the compliance order sought as it is central to this appeal. The Minister seeks to enforce two audit request letters that were issued to Cameco in 2013 and 2014 (appeal book, at pages 52–74). In general, the CRA requests that Cameco make available approximately 25 individuals for oral interviews. Further details of the requests are as follows:

- The interviews are to "facilitate the development of the functional analysis … the functions performed, assets used and risks borne".

- The 25 individuals who are the subject of the request are current employees of Cameco and of its U.S., European and Barbadian subsidiaries. The CRA reserved the right to make additions or deletions to this list as the interviews progress.

- The CRA also reserved the right to request that Cameco make available former employees, if they are available.

- Cameco is requested to provide the names of other relevant individuals to interview.

- The interviews are to be conducted in a location convenient to Cameco either in Canada, in the foreign offices, or by videoconference.

- The CRA acknowledges that the interview list is extensive and suggests that it may be desirable to have the interviews conducted in stages.

[51] Cameco submits that the order requested does not provide it with sufficient information "to know exactly what has to be done to comply with the order" (*Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at paragraph 24). Cameco raises a serious concern. Nevertheless, the issue was not considered by the Federal Court and it is not necessary to consider it for purposes of this appeal.

[52] The Federal Court centred its decision on the "unique and compelling" facts of this case. At the beginning of the Court's analysis, the Judge stated: "While I agree with the general interpretation of the law as presented by the Minister, when it is applied to the unique facts before me, those arguments must fail" (reasons, at paragraphs 34, 43).

[53] The Court specifically listed four "unique and compelling" facts:

- The transfer pricing issue involves many other taxation years;

- Cameco is "coming to court with clean hands having complied with all requests including a number of oral interviews in previous years" [at paragraph 43];

- The number of interviews proposed by the Minister and the compromise position of Cameco to answer questions in writing; and

- The Tax Court was hearing a transfer pricing appeal for previous taxation years.

[54] These circumstances are all relevant to the exercise of the Federal Court's discretion under section 231.7 of the Act.

[55] The first factor, that Cameco's transfer pricing is a longstanding issue, is important because it shows that the Minister likely already had considerable knowledge of the facts relevant to Cameco's transfer pricing. An appeal in the Tax Court on transfer pricing for prior taxation years was mammoth in size and resulted in a 282-page decision of the Tax Court ([*Cameco Corporation v. The Queen*], 2018 TCC 195, [2019] 1 C.T.C. 2001). The Minister was hardly starting from scratch in this audit, which suggests that requiring interviews of 25 employees may well be overreaching.

[56] The second factor, that Cameco had complied with all previous audit requests, including making several employees available for oral interviews, is also highly relevant. No doubt it bolstered the Court's view that Cameco had legitimate reasons for not wishing to submit to oral interviews in this case.

[57] The third factor, the number of interviews and Cameco's compromise of written questions, is also significant. As described above, the auditor himself acknowledged that the number of requested interviews was extensive. Further, since Cameco was already embroiled in transfer pricing litigation, the Minister likely had significant knowledge of Cameco's transfer pricing in general. It is not surprising that the Federal Court would conclude that Cameco's compromise of written questions "would provide the Minister with the information sought" (reasons, at paragraph 38).

[58] Finally, the fourth factor was also relevant at the time of the initial audit requests in 2013 and 2014, and at the time of the Federal Court hearing on April 18, 2017. It is understandable that Cameco would have a *bona fide* concern about this audit having an adverse effect on this litigation. I am not suggesting that an audit of the later taxation years is not appropriate. The point is that the Federal Court reasonably would be cautious not to permit the CRA to overreach.

[59] In my view, the Federal Court made no reviewable error in denying the compliance order that was sought based on these factual circumstances. The compliance order is discretionary and this Court must "'be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner'" (*Rona Inc. v. Canada (National Revenue)*, 2017 FCA 118, 2017 D.T.C. 5069 [cited above], at paragraph 7, citing *Quebec* (*Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, at paragraph 52).

[60] I agree with Justice Rennie that some of the Federal Court's reasons do not withstand scrutiny, but these aspects of the reasons are not crucial to the Federal Court's decision. The facts amply support that the Minister's application overreaches on the particular facts of this case.

[61] In my view, the Federal Court made no reviewable error in dismissing the application, and I would accordingly dismiss the appeal, with costs.