Federal Court  Cour fédérale

Date: 20211109

Docket: T-904-21 and T-945-21

Citation: 2021 FC 1203

Toronto, Ontario, November 9, 2021

PRESENT: Mr. Justice Andrew D. Little

BETWEEN:

NEWAVE CONSULTING INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

[1] These reasons concern a motion by the applicant for interim remedies against the respondent, the Minister of National Revenue, and the Minister's motions to strike two Notices of Application filed by the applicant.

[2] The applicant is Newave Consulting Ltd. ("Newave"). The Minister of National Revenue is responsible for Canada Revenue Agency ("CRA").

[3] Starting in 2018, CRA conducted an audit of Newave's GST/HST filed returns for the three years from 2017 to 2019. The audit concluded that Newave was not carrying on a commercial business but instead was engaged in fraudulent activities designed to deprive the Minister of tax revenue under the *Excise Tax Act*, RSC 1985, c E-15.

[4] Earlier this year, CRA auditors (on behalf of the Minister) advised Newave by letter that they proposed to reassess the three years of GHT/HST returns, which would result in Newave owing approximately $72 million in tax and penalties.

[5] Newave demanded disclosure CRA's internal analysis and supporting documents, and more time to make submissions. CRA agreed to additional time but did not provide the requested disclosure. After the additional time expired and after a call between CRA and Newave's counsel, CRA issued Reassessments. CRA deregistered Newave's GST/HST accounts and is in a position to start the process to collect the reassessed amounts.

[6] In June 2021, Newave filed two Notices of Application for judicial review in this Court. The applications purport to challenge CRA's decisions on June 2, 2021, not to provide disclosure and additional time for submissions, and its decision to issue Reassessments.

[7] By Notices of Motion dated June 25, 2021, the Minister moved to strike out the Notices of Application. The Minister argues that the applications for judicial review are bereft of any hope of success.

[8] By Notice of Motion dated July 27, 2021, Newave moved for interim relief under the *Federal Courts Act*, RSC 1985, c F-7 for the following remedies, effective until it receives a decision on its pending judicial review applications:

- a stay of any action by CRA to collect on the amounts owing in the Reassessments
- a stay of the deregistration of its GST/HST account, and
- an Order for *mandamus* requiring the Minister to register Newave with CRA's GST/HST program.

[9] The motions were heard together in a day-long hearing.

[10] For the reasons that follow, the applicant's motion for interim remedies is dismissed and the Minister's motions to strike the Notices of Application are allowed.

I. **Events Leading To These Motions**

[11] Newave provided a chronology of the events leading to this motion, including correspondence between the parties, in an affidavit from Mr. Franklin Vilchez, a legal assistant employed by counsel for Newave. That affidavit also made statements on information and belief from two sources. One source was an unnamed person who was apparently a lawyer previously associated with Newave's counsel. The other source was one of the corporate directors of Newave, Mr Olaitan Omidiran. I will return to this "evidence" below.

[12] Newave's telecommunications business involves the resale of wholesale international voice-over-Internet protocol ("VOIP") call traffic. It provides services to individuals and companies. It has operated since 2006.

[13] On December 13, 2018, the Canada Revenue Agency ("CRA") commenced an audit of Newave. Between December 2018 and June 2020, CRA requested information from the applicant for the audit and the applicant responded.

[14] By registered letter dated March 16, 2021, CRA auditors advised Newave that it had completed its review of the GST/HST returns for the period January 1, 2017, to December 31, 2019 (the "audit period"). CRA proposed three things: to adjust Newave's returns; to deregister its GST/HST program account; and to impose penalties. CRA would reassess Newave on that basis.

[15] CRA's letter dated March 16, 2021, proposed changes to Newave's returns, which were set out in an attached summary. CRA proposed adjustments in input tax credits ("ITCs") claimed by Newave during the audit period, that would cause ITCs to be reduced by approximately $54.5 million.

[16] CRA explained its legal and factual position in the March 16 letter itself and in schedule E to the letter. CRA advised that its audit review of Newave's GST/HST returns could not find enough evidence to establish that Newave was involved in a commercial activity during the audit period. As a result, CRA proposed to deregister the GST/HST program account effective

December 31, 2020 under section 240 of the *Excise Tax Act*. In addition, CRA did not consider Newave to have been a registrant at any time during the audit period.

[17] Schedule E to CRA's March 16 letter described CRA's assessing positions, which I will summarize briefly:

- First, CRA audit identified a sham, through evidence of an intentional deceit and an element of false appearance. The intentional deceit was the creation of fictitious Call Detail Records, which CRA Audit concluded were contrived to create an illusion of commercial activity. CRA Audit determined that Newave, its customers and suppliers had colluded to create artificial supplies of call minutes using a computer program that routed the fictitious calls through each customer's and supplier's computer servers. The scheme was designed to divert tax revenue from the Minister by creating fictitious ITCs or to disappear with the GST/HST funds collected.

- Second, CRA audit concluded that the VOIP telecommunications minutes for which invoices were issued did not exist.

- Third, CRA audit concluded that Newave was complicit in a carousel scheme, the sole purpose of which was to deceive the Minister and benefit from diverted GST/HST. CRA Audit alleged that the two principals of Newave personally benefited by having corporate amounts paid into their personal bank accounts.

- Fourth, there were insufficient supporting documentation for the ITCs.

[18] CRA proposed to apply penalties on the adjustments to Newave's returns of approximately $12.7 million.

[19] CRA advised that Newave had 30 days to send representations or explanations in response to its proposals, which CRA would consider before reassessing Newave's returns and deregistering its GST/HST account. CRA advised that if it did not hear from Newave before April 16, 2021, CRA would send out the reassessment based on the proposed changes and deregister Newave's account.

[20] By letter dated April 12, 2021, counsel for Newave advised that they had been recently retained to represent Newave during the audit. The same correspondence requested an extension of 60 days until June 15, 2021, to make comprehensive submissions.

[21] By letter dated April 14, 2021, CRA advised that it was willing to extend the proposal deadline to May 17, 2021, in order to allow counsel to submit representations or explanations for CRA's consideration. CRA advised that the deadline would not be extended past May 17, 2021.

[22] By letter dated May 6, 2021, counsel for the applicant advised CRA that the extension of 30 days was "inappropriate and unprofessional" because: the CRA was making serious allegations of fraud and proposed to impose over $60 million in tax payable; the taxpayer was cooperative and timely in answering CRA's audit queries; and the COVID-19 pandemic had slowed down turnaround times for everyone, not just the CRA. Counsel for the applicant requested information alluded to in schedule E of the March 16, 2021 letter, as follows:

1. a copy of CRA's Call Detail Records and analysis;
2. the companies that CRA says that the taxpayer colluded with to create artificial supplies of minutes;

3. the name of the computer software that CRA says the taxpayer and the companies used to create fake call traffic;
4. specifics of what CRA says are questions surrounding the legitimacy of both Newave's supplies and customers, direct and indirect;
5. the amount of the GST/HST, if any, that the CRA says was misappropriated as a result of the taxpayer's alleged involvement in the alleged carousel scheme.

[23] In the May 6, 2021, letter, Newave's position was:

> all documents reviewed or relied upon by CRA audit must be disclosed (even if they disclose third-party information). A taxpayer cannot reasonably be expected to make fulsome submissions, or be treated fairly, if they are unaware of the full scope of CRA's case against them.

[24] Newave's counsel asked CRA to provide a list of the documents that the CRA refused to produce and its basis for refusal, so Newave could "determine whether it was necessary to bring an application for judicial review with respect to the CRA's refusal to make full and fair disclosure".

[25] Having not received an immediate response, counsel for Newave wrote to CRA by letter dated May 17, 2021, seeking an answer and reaffirming its position that it needed CRA's documents and more time to make substantive submissions.

[26] CRA did not respond in writing, but instead scheduled a call with counsel on June 2, 2021.

[27] The Vilchez affidavit filed on the applicant's motion for interim relief stated that Mr. Vilchez was "advised and verily believe[d]" that on June 2, 2021, CRA "advised counsel for the Applicant verbally that it would refuse to provide documentary disclosure" of CRA's Call Detail Records analysis on which its assessing position was based, a list of the entities which CRA alleges Newave colluded with, the computer software that CRA alleges Newave used to manipulate the CDRs, the quantum of any GST/HST CRA alleges was misappropriated, and any other documents, working papers or information containing third-party information that the CRA relied upon to reach its conclusions. Counsel requested a further 30-day extension to make submissions.

[28] Mr. Vilchez's affidavit stated, again on information and belief from the unnamed counsel, that the CRA Audit team leader advised counsel "verbally multiple times" that no further extension would be provided because there was "nothing that the taxpayer can provide that will change our mind".

[29] On June 7, 2021, Newave filed an application for judicial review in Federal Court file number T-904-21. It also faxed the Notice of Application for judicial review to CRA.

[30] By letter dated June 7, 2021, CRA advised Newave and its counsel of CRA's decision with respect to the proposals in its March 2021 letter and that Newave would be deregistered from its GST/HST account as of March 31, 2021. The Vilchez affidavit advised that this letter "was only received on June 16, 2021".

[31] CRA issued Notices of Reassessment dated June 10, 2021. The Reassessments provided that Newave owes CRA approximately $72 million.

[32] On June 11, 2021, Newave filed a second Notice of Application for judicial review in Federal Court file number T-945-21.

[33] By letter dated June 28, 2021, counsel for Newave wrote to CRA requesting that CRA postpone collection action. CRA has not responded to this letter.

[34] Also by letter dated June 28, 2021, counsel for Newave wrote to CRA requesting that CRA exercise its discretion to refrain from deregistering Newave from GST/HST. CRA has not responded to this letter.

[35] On July 26 and 27, 2021, Mr. Vilchez followed up these letters by telephoning CRA's business inquiries line. Neither agent with whom he spoke could provide an answer to the two letters dated June 28, 2021. In the second call, a CRA agent stated that there was a note on Newave's file at CRA stating that the GST/HST account cannot be opened and "please do not reopen as it was determined as non-commercial".

II. **Newave's Motion For Interlocutory Orders**

[36] The applicant has commenced two applications for judicial review of decisions made by CRA. The Court has jurisdiction under section 18.2 of the *Federal Courts Act*, to grant interim

orders pending the final determination of an application for judicial review. Section 18.2 provides:

Jurisdiction of Federal Court **Interim orders** **18.2** On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.	**Compétence de la Cour fédérale** **Mesures provisoires** **18.2** La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

A. The Applicant's Motion for Stays

[37] The applicant seeks a stay of any collection action by CRA and an Order staying the deregistration of Newave from its GST/HST account, both pending the disposition of the applications for judicial review.

[38] On this motion, the parties agreed that the Court should apply the three-stage approach in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. The three elements in the analysis are: (i) on a preliminary assessment of the merits of the applicant's case, there is a serious issue to be tried (in the sense that the applicant's claim is not frivolous or vexatious); (ii) the applicant would suffer irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting or denying the stay, based on an assessment of which party would suffer greater harm from the granting or refusal of the stay, pending a decision on the merits. See *Canada (Attorney General) v Bertrand*, 2021 FCA 103, at para 5; *Arctic Cat Inc v Bombardier Recreational Products Inc*, 2020 FCA 116, at para 10; *Newbould v Canada (Attorney General)*, 2017 FCA 106, [2018] 1 FCR 590, at para 14.

Stage One: Preliminary Assessment of the Merits

[39] The first stage of the *RJR-MacDonald* framework involves a preliminary assessment of the strength of the merits of the applicant's claims. In this case, as is typical, the standard is low – it requires a serious issue to be tried, meaning that the claim must not be frivolous or vexatious: *RJR-MacDonald*, at p. 337.

[40] The applicant submitted that the two Notices of Application raise issues about the "severe and egregious violation" of Newave's procedural rights by CRA. The applicant submitted that CRA refused to conduct an audit of the applicant in good faith, refused to provide "basic documentary disclosure" at the audit stage and "refused to entertain any substantive submissions" from Newave. While the audit was conducted without allowing input from the applicant and its directors, CRA issued reassessments in excess of $72 million but without providing any meaningful disclosure to show its basis for assessment and without providing the applicant with an opportunity to make substantive submissions.

[41] At the hearing, the applicant referred to principles of procedural fairness and natural justice, both related to the need for disclosure of the basis for CRA's Proposal dated March 16, 2021, in order to make meaningful submissions to CRA at the audit stage. The applicant did not point to any provision in the *Excise Tax Act*, or to case law, or to any express promise made by CRA to Newave during the audit, to support the position that CRA was required to disclose the documents Newave requested at the audit stage.

[42] The applicant situated its submissions in the statutory context of provisions in the *Excise Tax Act*. Newave submitted that in order to file a Notice of Objection to the Reassessments as a "specified person" under *Excise Tax Act* subsection 301(1.2), it must (a) reasonably describe each issue to be decided, (b) specify in respect of each issue the relief sought, and (c) provide the "facts and reasons relied on … in respect of each issue". According to the applicant, disclosure from CRA is required in order to comply with the third requirement. Newave alleged that its objection rights could be curtailed if it could not provide the facts and reasons relied upon in respect of each issue. The applicant noted the consequence of failing to comply with *Excise Tax Act* subsection 301(1.2) as set out in subsection 301(1.4).

[43] The applicant confirmed at the hearing that it would be filing an objection under section 301 of the *Excise Tax Act* by the statutory deadline (which was the day after the hearing).

[44] The applicant also acknowledged at the hearing in this Court that it could ask for disclosure at the objection stage and again before the Tax Court. However, Newave argued that it needed to have the ability to challenge CRA at all stages, including at the audit stage and then at the Objection and Tax Court stages.

[45] The applicant also relied upon the Taxpayer Bill of Rights and referred to the doctrine of legitimate expectations.

[46] The applicant submitted that the CRA's decision to reassess, the decision to deregister and the decision to take collection action were all discretionary decisions made by CRA that are

subject to judicial review. The applicant referred to *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250, [2014] 2 FCR 557 and *Chrysler v Canada*, 2008 FC 727 (Aalto P.) for judicial review of discretionary decisions, and to *Walker v Canada*, 2005 FCA 393 with respect to judicial review of collection actions.

[47] The respondent's position was that the applicant had not raised a serious issue because it was essentially seeking prohibition against the Minister's statutory authority to collect tax that is payable following a Reassessment under *Excise Tax Act* subsection 315(2). The respondent emphasized that, distinct from the *Income Tax Act*, RSC 1985, c 1 (5th Supp), Parliament had chosen under section 315 that there would be no stay on collection of tax payable. In the respondent's submission, the applicant also has a satisfactory alternative remedy because on request, the Minister has discretion to suspend collection action upon request under subsection 315(3).

[48] The respondent also submitted that the applicant had not raised a serious issue with respect to the GST/HST registration, because the applicant has an adequate alternative remedy. The applicant could ask the Minister to be registered again under *ETA* subsection 241(1). If that discretion is exercised improperly, it could be judicially reviewed but only if proper grounds are alleged.

[49] I conclude that, on a preliminary basis, the applicant's position on the merits is weak with respect to its allegations related to disclosure and submissions on the basis of procedural fairness,

the deregistration of its GST/HST registration under the *Excise Tax Act* and its allegations related to collection actions under section 315 of the *Excise Tax Act*.

[50] The applicant alleged a breach of procedural fairness or natural justice, but it is hard to find a legal basis for such a violation in the law cited by the applicant. The applicant claimed that it had no opportunity to make submissions to CRA, but that is not supported by the correspondence in the record; it had more than 75 days to do so after CRA's March 16, 2021. Its real submission must be that it had no meaningful opportunity to make submissions because it had to have disclosure of all of CRA's supporting analysis and documents first.

[51] However, the applicant made no submissions as to the nature of its procedural fairness rights on the factors in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 22-27, and did not refer to any decided cases that support its alleged right to such disclosure at the audit stage (i.e., before the objection process in the *Excise Tax Act* or an appeal to the Tax Court), including after CRA makes a proposal to a taxpayer by letter. The principal case relied upon by the applicant concerned disclosure at the Notice of Objection stage: *Scott Slipp Nissan Ltd v Canada (Attorney General)*, 2005 FC 1477 (Phelan J), at paras 1, 25 and 49-54.

[52] The applicant submitted that it needed disclosure in order to file a Notice of Objection, owing to the requirement *ETA* subsection 301(1.2), that it provide the "facts and reasons relied on … in respect of each issue". This submission does not point to a legal right to disclosure under the statute or at common law, but may be a factual circumstance that could be taken into

account in assessing *Baker* factors to support a disclosure right – if the applicant had made any such submissions and the respondent had the opportunity to respond.

[53] The applicant referred to the Taxpayer Bill of Rights and the doctrine of legitimate expectations. The applicant did not provide any evidence of specific representations made to it by CRA to ground its submission about disclosure under the Taxpayer Bill of Rights, or a clear, unambiguous and unqualified representation from CRA to support its position on a legitimate expectation of the requested disclosure: *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, at para 68. The Taxpayer Bill of Rights refers generally to providing "complete, accurate, and timely information in plain language explaining the laws and policies that apply to your situation" but does not, on its face, provide for specific disclosure of CRA's analysis or supporting documents at the audit stage.

[54] I note also that in *JP Morgan*, the Federal Court of Appeal held that procedural defects committed by the Minister in making the assessment are not, themselves, grounds for setting aside the assessment and that if the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal in the Tax Court is an adequate, curative remedy: *JP Morgan*, at para 82. By extension, the same reasoning applies to the alleged procedural defect of non-disclosure at the audit stage—it can be remedied by disclosure from CRA at the objection or appeal stage.

[55] I will also consider the merits of the applicant's arguments related to the bases for the interim relief requested—the GST/HST registration and collection issues under the *Excise Tax Act*.

[56] The decision to deregister the applicant from the GST/HST program was discretionary, in the sense that it was a decision made under a statutory provision that provides that the Minister "may" take action: see *Excise Tax Act*, subsection 242(1) (the "Minister may, after giving a person who is registered under this Subdivision reasonable written notice, cancel the registration of the person if the Minister is satisfied that the registration is not required for the purposes of this Part"). That decision was an adjunct to the Reassessments that have been issued. The applicant's GST/HST registration has already been cancelled. As such, there is nothing to stay at this time. To achieve a result for the applicant, the Minister would have to be ordered to do something, either by mandatory order (which the applicant did not request and in any event attracts a higher standard at this first stage: *R. v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196, at para 15) or by *mandamus* (which is addressed below in a separate section and cannot be sustained).

[57] With respect to collection actions by the Minister, the applicant correctly submitted that in *Walker*, the Federal Court of Appeal held that an application for judicial review may be made to this Court to challenge the legality of collection measures taken by the Minister to collect taxes allegedly due: *Walker*, at para 15. Further, Stratas JA held in *JP Morgan* that an application may be commenced to review conduct during collection that is not acceptable or defensible on the facts and the law: *JP Morgan*, at para 96, citing *Walker*.

[58] The applicant's position in this motion is not that any collection action taken to date, or any specific threatened collection action, was or will be unlawful or an abuse. Instead, the

applicant's position was that all collection action that could be taken by the Minister should be stayed until the applicant's judicial review application is determined.

[59] In the *Excise Tax Act*, subsection 315(1) provides that the Minister "may not take any collection action under sections 316 to 321 in respect of any amount payable or remittable by a person that may be assessed under this Part, other than interest, unless the amount has been assessed." In this case, an amount has been reassessed and notices of reassessment have been sent: *Johnson v Canada (National Revenue)*, 2015 FCA 51, at para 59. In law, the decision to reassess is not a discretionary decision, as the applicant contended. The Minister generally has no discretion to exercise, or abuse, in making an assessment: *JP Morgan*, at paras 77-78. In addition, assessments are legally conclusive and binding of tax liability unless and until set aside by the Tax Court: *Iris Technologies Inc v Canada (National Revenue)*, 2020 FCA 117, at para 50. Subsection 299(3) deems an assessment to be valid and binding, subject to being reassessed or vacated because of an objection or appeal.

[60] The *Excise Tax Act* does not expressly restrict the Minister's ability to take collection action after an assessment (or reassessment) has been issued; the statute requires in subsection 315(2) that if the Minister sends a notice of assessment to a person, "any amount assessed then remaining unpaid is payable forthwith by the person to the Receiver General" [emphasis added].

[61] The Minister relied on *Mason v Canada (Attorney General)*, 2015 FC 926, in which Justice Strickland declined to enjoin collection action by the Minister after issuing notices of assessment for GST, pending an appeal to the Federal Court of Appeal. Strickland J agreed with

and adopted an earlier finding of Justice Gleason in the same matter, who concluded that Mason's application for judicial review did not raise a serious issue as it was clear under subsection 315(2) that the Minister was entitled to enforce GST assessments while appeals were pending: *Mason*, at para 23.

[62] In my view, given subsection 315(2), similar reasoning applies here. The Notices of Reassessment may be subject to challenge through the objection or appeal process, but the applicant has not identified a substantive basis in the statute or the case law to apply for judicial review in relation to collection actions by the Minister at this moment.

[63] In addition, by letter dated June 28, 2021, the applicant requested that the Minister postpone collection under subsection 315(3). There is a statutory mechanism to obtain a stay, which the applicant has triggered. It has not yet run its course.

[64] I also note that the present case is different from *Iris Technologies Inc v Canada (National Revenue)*, 2021 FC 874 (Sadrehashemi J), which was at a later stage by the time that decision was made and cognizable administrative law claims had already been recognized by this Court: paras 35 and 37.

[65] On a preliminary assessment of the strength of the merits of the proposed applications for judicial review in this matter, I conclude that on the evidence and submissions made by the applicant, it has not raised serious issues that have substantive merit.

Stage Two: Irreparable Harm

[66] Many applications for interlocutory injunctions or stays turn on whether the party seeking the Order has demonstrated irreparable harm at the second stage of the analysis. An applicant must convince the Court that it will suffer irreparable harm if the injunction or stay is refused: *CBC*, at paras 12 and 18; *RJR-MacDonald*, at p. 348*f.*

[67] It is the nature or quality of the harm, rather than its magnitude, that must be "irreparable". Irreparable harm is harm that cannot be compensated or remediated by money damages, or otherwise cured, for example because one party cannot collect damages from the other: *RJR-MacDonald*, at p. 341*d*.

[68] A court considering evidence of allegedly irreparable harm must be sensitive to the nature of the harm, and the nature of the evidence, that is before it. In *Newbould*, at paragraph 29, Pelletier JA made the following distinction concerning the proof of different kinds of irreparable harm:

> In my view, the presence of two lines of cases such as these shows that the quality of the evidence – "clear and compelling" or something less – is a function of the nature of the irreparable harm being alleged. Where the harm apprehended is financial, clear and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence such as that set out at paragraph 17 of *Gateway City Church* [2013 FCA 126]. In the case of harm to social interests such as reputation or dignity, as in *Douglas [v. Canada (Attorney General)*, 2014 FC 1115], the occurrence of irreparable harm can be satisfied by inference from the whole of the surrounding circumstances.
>
> [Emphasis added.]

[69] To show irreparable harm, a moving party must adduce "clear and non-speculative" evidence of irreparable harm: see, for example, *Air Passengers Rights v Canada (Transportation Agency)*, 2020 FCA 92 at para 28. In *Janssen Inc v Abbvie Corporation*, 2014 FCA 112, Stratas JA stated at paragraph 24 that "… the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later". See also: *Western Oilfield Equipment Rentals Ltd v M-I LLC*, 2020 FCA 3, at paras 11-12; *Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102, at paras 25 and 30 (the "burden on a moving party seeking a stay is to adduce specific, particularized evidence establishing a likelihood of irreparable harm"); *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255, at para 31.

[70] For a recent example of a party failing to show concrete evidence of irreparable financial harm on the standard required by the Federal Court of Appeal, see *Iris Technologies Inc v Canada (National Revenue)*, 2021 FC 874 (Sadrehashemi J), esp. at paras 51-62.

[71] On this motion, the applicant submitted that, by virtue of the reassessments, Newave owes over $72 million to the Minister. It submits that there are no collection restrictions against the CRA once a reassessment is issued under the *Excise Tax Act*. Because Newave cannot pay this debt, CRA can also pursue the directors of Newave for the alleged debt. Newave submitted that any collection action would bankrupt it, and any exercise of CRA's collection power would severely impact Newave's ability to continue litigating the applications. The applicant submitted that collection action would cause severe and irreversible financial hardship to Newave's directors and reputational damage with its suppliers and clients. From the applicant's

perspective, after denying it procedural fairness at the audit stage, CRA would now be able to ensure that Newave would never be able to dispute CRA's audit position.

[72] With respect to deregistration, the applicant submitted that CRA had effectively shut down Newave's business by taking away its GST/HST registration. Without that registration, Newave is unable to collect GST/HST from its clients and cannot recover the amount of the ITCs it has already paid to its suppliers.

[73] The respondent submitted that Newave's allegations were unsupported by details, documentary evidence or third-party information. The respondent submitted that Newave filtered its allegations through a legal assistant, by having Mr. Vilchez swear an affidavit on information and belief from a director of Newave that any collection action would devastate its finances and shut down its business. Thus, according to the respondent, Newave shielded itself from appropriate cross-examination with respect to its actual financial condition.

[74] According to the respondent, the applicant's allegations of irreparable harm are merely bald assertions that fall well short of the type of proof required to demonstrate irreparable harm. The respondent observed that there was no evidence on this motion of any funds Newave may hold in bank accounts, any lines of credit it may hold, any valuable assets or existing liens or encumbrances on those assets, and any accounts receivable upon which it may be able to collect or accounts payable it must pay. There is no evidence such as bank accounts, title searches and audited financial statements to show that Newave has no ability to pay any of the amounts it owes to the Minister.

[75] With respect to registration for GST/HST, the respondent submitted that Newave had not made any recent claims for input tax credits. Accordingly, the evidence did not show that Newave actually requires GST/HST registration in order to continue operating its business and is not dependent on ITC claims in order to succeed.

[76] In my view, the applicant has not shown on this motion that it will suffer irreparable harm. On the evidence in the record, the applicant has not met the standard established by the Federal Court of Appeal for proof of irreparable harm, particularly to its financial status.

[77] The applicant's evidence on irreparable harm was essentially contained in Mr. Vilchez's affidavit, sworn on July 27, 2021 (and re-sworn on August 31, 2021 for technical reasons), at paragraphs 34 and 35:

> **Irreparable Harm as a result of Collection Action by the CRA**
>
> 34. I have spoken with the Applicant's director, Olaitan Omidiran on Tuesday, July 27, 2021 and verily believe it to be true that:
>
> a. the Applicant does not have the ability to pay anything remotely close to $72,004,358.32;
> b. any collection action against the Applicant will devastate its finances and shut down its business;
> c. any collection against the director of the Applicant will bankrupt the director;
> d. any collection against the Applicant will prevent the Applicant from arguing the First Application and the Second Application on its merits;
> e. any collection against the Applicant will prevent the Applicant from disputing the Reassessments.

Irreparable Harm as a result of Deregistering the Applicant from GST/HST

35. I have spoken with the Applicant's director, Olaitan Omidiran on Tuesday, July 27, 2021 and verily believe it to be true that:

a. the Applicant has no ability to operate without GST/HST registration;
b. the Applicant is in the business of purchasing wholesale VOIP minutes from suppliers and paying GST/HST thereon, and reselling VOIP minutes to its clients with a small markup;
c. without GST/HST registration, the Applicant must still pay HST, but cannot claim ITCs;
d. if the Applicant is unable to claim ITCs on the purchase of wholesale VOIP minutes, it has no ability to conduct business;
e. the Applicant has always remitted a small net HST and never claimed a refund; and,
f. the Applicant's relationships with its existing clients is being irreparably harmed, because it cannot provide the services that it used to provide. Attached at Exhibit "Q" is a copy of an email from a client on June 21, 2021.

[78] In my view, this evidence on the central issue of irreparable harm is unsatisfactory. First, this sworn statement comes from Mr. Vilchez, who is a legal assistant at the offices of counsel for the applicant. Mr. Vilchez does not have firsthand knowledge of any of the matters in paragraphs 34 and 35 of his affidavit. Rather, his affidavit advised that he had spoken with the director of Newave on July 27, 2021 and believed that the stated matters about Newave's and its director's financial status were true.

[79] Second, paragraphs 34 and 35 of the affidavit comprise two lists of sweeping, conclusory statements. There are no facts to support the statements (except the last point in paragraph 35). The affidavit attached no financial records or other documents to support these statements. There is no explanation how or why Newave's director came to these conclusions as advised to the

affiant – or even how the director has sufficient knowledge of the company's financial circumstances to be able to confirm these statements to Mr. Vilchez. Even if a person with apparent personal knowledge of the company's and the director's financial status had made these statements in a sworn affidavit, they would have been open to question on their face due to their level of generality and absence of supporting facts and evidence to support the assertions.

[80] The applicant did not suggest on this motion that it was not possible for Newave to provide firsthand evidence of the alleged harm it would suffer if the Minister is not restrained from taking collection action or if Newave were not registered for GST/HST. The circumstances of filing the affidavit were not so urgent that a knowledgeable person was not available. Nor did Newave contend that it had no alternative but to submit such conclusory statements to support its position.

[81] In fact, when the nature of this evidence arose at the hearing, counsel for Newave candidly admitted that Newave submitted the "evidence" in this manner in order to avoid an "aggressive" cross-examination by Department of Justice counsel of someone knowledgeable about Newave's financial situation, owing to the nature of the fraud allegations made by CRA Audit and the associated risks to the individual and the company of giving evidence. In this context, Newave submitted that direct evidence was not necessary as it was obvious, even on hearsay evidence, that it did not have $72 million to pay to the Minister and that the stay would be in place only a few months until the judicial review application would be heard.

[82] I do not accept the applicant's explanation for not producing someone knowledgeable about the financial affairs of Newave to prove irreparable harm. Newave cannot avoid tendering necessary evidence from a knowledgeable witness who is subject to cross-examination and, at the same time, expect to prove irreparable harm on the meagre, unsupported, hearsay evidence it has filed. As the respondent noted, Newave did not file documents such as financial statements, bank statements or other records with independently verifiable information that would disclose its current financial situation.

[83] I also decline to draw the inference that Newave implicitly requested—that on the evidence from the respondent's affiant about Newave's recent tax filings, the Court should infer that Newave does not have $72 million to pay the amounts in the Reassessments and that any collection action or GST/HST deregistration would result in irreparable harm. The evidence on this motion is insufficient to support that inference on the required legal standard. In addition, as is apparent, it is far from the best evidence that the applicant could have adduced.

[84] In my view, the evidence on this motion is insufficient to support conclusions about the company's financial status for irreparable harm purposes, including that it would not be able to litigate its applications for judicial review if collection action by the Minister is not restrained. Further, the statement of possible impact on the director is speculative as it depends on CRA actions that it has not taken, or threatened to take, against the director personally.

[85] Given this assessment of the evidence, it is unnecessary to draw an adverse inference under Rule 81(2) of the *Federal Courts Rules.*

[86] The Federal Court of Appeal has been clear in numerous decisions that irreparable harm must be demonstrated with clear and convincing evidence, particularly with respect to financial harm. The evidence on this motion is far from sufficient to discharge that onus.

Stage Three: Balance of (In)Convenience

[87] The third stage of the *RJR-MacDonald* framework is an assessment of which party would suffer greater harm from the granting or refusal of the stay, pending a decision on the merits. In the present circumstances, given my conclusions above, it is unnecessary to consider the balance of convenience.

[88] The conclusions at stages one and two are sufficient to dismiss the applicant's motion for stays. If it were necessary to do so, I would dismiss the applicant's motion for stays solely on the basis that it has not adduced evidence of irreparable harm.

[89] I therefore conclude that the applicant's motion for stays of proposed collection action by CRA and of deregistration from the GST/HST program should be dismissed.

B. The Applicant's Motion for Interim Relief: Mandamus

[90] The applicant made no written or oral submissions on the request in its Notice of Motion for an interim Order for *mandamus* to require the Minister to re-register it for a GST/HST account. The respondent made no submissions on this issue.

[91] This request for relief must be dismissed. The applicant has not identified a public duty in the *Excise Tax Act* or elsewhere that is capable of being enforced by *mandamus* on an interim or

final basis, nor that it has a right to performance of a duty at this time. Subsection 242(1) of the *Excise Tax Act* provides that the Minister "may" cancel a registration and the applicant did not point to any applicable provision that requires the Minister not to cancel the applicant's registration or to reinstate its registration. See *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (CA), at para 55, aff'd [1994] 3 SCR 1100; *Iris Technologies Inc v Canada (National Revenue)*, 2020 FCA 117, at paras 14, 35-36, 39 and 48; *Gagnon v Canada (Attorney General)*, 2019 FC 1661 (Gascon J), at paras 37 and 43-45; *Canada (Chief Electoral Officer) v Callaghan*, 2011 FCA 74, [2011] 2 FCR 80, at para 126; and subsection 242(1) of the *Excise Tax Act.*

III. **The Minister's Motions To Strike**

[92] The Minister submitted that the both of the applicant's Notices of Application should be struck. The applicant vigorously disagreed.

A. The Legal Test on a Motion to Strike

[93] The parties agreed that the test to be applied on a motion to strike a Notice of Application is whether the application is "so clearly improper as to be bereft of any chance of success": *Vancouver Fraser Port Authority v GCT Canada Limited Partnership*, 2021 FCA 183, at para 6, and *JP Morgan*, at para 47, both citing *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588, at p. 600 (CA).

[94] To be struck out, there must be an obvious, fatal flaw striking at the root of the Court's power to entertain the application: *JP Morgan*, at paras 47, 52, 66, 91 and 112. The threshold is high: such a conclusion must be clear and the Court must be certain: *JP Morgan*, at paras 48 and 91; *Canada (National Revenue) v Sifto Canada Corp*, 2014 FCA 140, at para 17.

[95] On a motion to strike, the facts alleged in the pleading are taken as true: *JP Morgan*, at para 54. No evidence is permitted on a motion to strike, other than documents specifically mentioned in a pleading: *JP Morgan*, at para 54.

B. The Parties' Positions

[96] In general, the Minister started from the position that the validity of assessments and reassessments under the *Excise Tax Act* is within the exclusive jurisdiction of the Tax Court of Canada and that this Court does not have jurisdiction to invalidate tax assessments, referring to subsection 12(1) of the *Tax Court of Canada Act*, RSC 1985, c T-2 and section 18.5 of the *Federal Courts Act*. The Minister also referred to subsection 299(3) of the *Excise Tax Act*, which effectively provides that an assessment shall be deemed to be valid and binding, subject to being reassessed or vacated as a result of an objection or appeal. Objections may be made to an assessment under section 301 of the *Excise Tax Act*. A person who objects to an assessment can appeal to the Tax Court of Canada as and when specified under section 306 of the *Excise Tax Act*. The principal provisions of the *Tax Court of Canada Act*, the *Federal Courts Act* and the *Excise Tax Act* are collected at Appendix "A" to these reasons. The Minister referred to numerous cases to support this position, including *JP Morgan; Iris Technologies Inc v Canada*

(National Revenue), 2020 FCA 117; *Peters First Band Council v Peters*, 2019 FCA 197; and *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713.

[97] The Minister submitted that the applicant has alternative remedies: the objection and appeal process in the *Excise Tax Act*; a request for production of CRA documents during the objection process; a request under subsection 315(2) that the Minister not take collection action in view of the dispute about the Reassessments; and a fresh application for GST/HST registration under section 241.

[98] The Minister further submitted that judicial review in the Federal Court is not available to control CRA's assessment processes or its treatment of evidence in auditing and assessing a taxpayer. On this view, matters of substantive tax law and issues of evidence fall within the jurisdiction of the Tax Court. The Minister referred to *Ghazi v Canada (National Revenue)*, 2019 FC 860 (Gagné ACJ).

[99] Newave submitted, at a general level, that the invalidation of the Reassessments was not at the heart of its first application for judicial review. It focused its argument on its allegations of non-disclosure of documents by CRA as part of a right to procedural fairness and natural justice at the audit stage. The applicant asserted that it could file an application for judicial review of the procedurally unfair decision(s) not to disclose the documents and not to provide the applicant with additional time to make submissions.

[100] In addition to her general position, the Minister submitted that the Notices of Application had many other defects.

[101] First, the Minister argued that the Court has no power to "stay" the Minister's decision to conclude an audit of a taxpayer, or to grant an order setting aside that decision and refer the matter back to different auditors. However, in any event, the Minister submitted that this ground of relief was moot because Newave admitted in the second Notice of Application that the audit was concluded and CRA issued Notices of Reassessment: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342. The Minister submitted that the Court could not grant an order that would have any practical effect because the Reassessments have been issued and the audit is complete, something that cannot be undone. There is therefore no live controversy remaining as to whether the audit should be closed.

[102] Newave contended that its requested remedy about the closing of the audit was required to give meaning to its challenge of CRA's decision not to provide documentary disclosure or an extension of time to make submissions. Newave observed that the Minister did not argue that CRA's decision to close an audit of a taxpayer prematurely and unfairly is not subject to judicial review. According to Newave, the Minister took steps purposefully to evade the judicial oversight of the Court by issuing the Reassessments, which it alleged was a "blatant abuse" of CRA's discretion. On mootness under *Borowski*, Newave submitted that an adversarial context continued to exist between the parties and judicial economy did not obviate the need for judicial review of CRA's conduct. Newave contended that the Court should exercise its discretion to hear

the matter given that the alleged mootness of the dispute arose as a direct result of CRA's actions in ignoring the first Notice of Application.

[103] Second, the Minister submitted that the Court does not have jurisdiction to enjoin the Minister from cancelling Newave's GST/HST registration or to compel the Minister to reregister Newave until its rights on objection or appeal have been exhausted. The Minister submitted that the right to cancel the registration is a discretionary power under subsection 242(1) of the *Excise Tax Act* that cannot be the subject of *mandamus* (either on an interlocutory motion or for a final Order). Alternatively, the Minister submitted that Newave has an adequate, alternative remedy because it can apply to the Minister to exercise a discretion to decline to cancel the registration.

[104] Newave's answer to this submission was that this Court has jurisdiction to review the Minister's exercise of a discretion, including under subsection 242(1) of the *Excise Tax Act*, relying on *JP Morgan*, at paragraph 96. In addition, it submitted that this Court is the only judicial authority that can review CRA's decision to deregister a taxpayer from GST/HST because the taxpayer has no right to appeal to the Tax Court of Canada in respect of a deregistration.

[105] Third, the Minister submitted that the Court cannot order compliance with the Taxpayer Bill of Rights because it is, "at best", an administrative policy that does not have the force of law. Newave responded that the Taxpayer Bill of Rights is CRA's own policy and that CRA itself brought it up in a letter dated June 7, 2021, in which it used that document to justify its decision not to make further disclosure or grant an extension of time.

[106] Fourth, the Minister contended that the Court cannot order documentary production as a standalone ground of relief during an application for judicial review. According to the respondent, the Minister is under no obligation at law independent of Rule 317 of the *Federal Courts Rules* to provide the requested documents to Newave. In response, Newave submitted that the Minister's position on documentary disclosure was not a "showstopper" to its position on the judicial review application. Newave referred to the importance of documentary disclosure in judicial review proceedings, citing *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268, [2016] 3 FCR 19, at paras 13-14. Newave also submitted that the Court should be guided by *Scott Slipp Nissan Ltd*, at paras 49, 50 and 71.

[107] With respect to the applicant's request for an interim order to prevent the Minister from collecting the amounts in the Reassessments, the respondent submitted that the Minister is entitled to collect and has the discretion to collect on the Reassessments under subsection 315(2) of the *Excise Tax Act*. The Minister submitted that the Court cannot order the Minister to refrain from collecting.

[108] The Minister further submitted that a declaration that an assessment is an abuse of process is a factual declaration that is not an available remedy on judicial review.

C. Analysis of the Motion to Strike: Legal Principles

(i) Characterization of the Pleadings

[109] In considering a motion to strike, the Court must read the Notice of Application to get a realistic appreciation of the essential nature or real essence of the application, while being mindful of whether the pleading is an artful, disguised attack on a matter outside of the Federal Court's jurisdiction, such as an assessment or reassessment by CRA: *Canada (Attorney General) v British Columbia Investment Management Corp*, 2019 SCC 63, at para 36; *JP Morgan*, at paras 49, 102 and 104-105; *Canada (Attorney General) v Valero Energy Inc*, 2020 FCA 68, at paras 37 and 44: *Iris Technologies Inc v Canada (National Revenue)*, 2020 FCA 117, at para 51.

[110] The Court is to read the Notice of Application holistically and practically without fastening on to matters of form: *JP Morgan*, at para 102; *Valero*, at para 44. The Court must not take a technical or microscopic reading: *Sifto Canada Corp*, at para 25.

(ii) Judicial Review in Tax Matters

[111] Justice Stratas held in *JP Morgan* that in tax matters, any of the following qualifies as an obvious, fatal flaw warranting the striking out of a notice of application:

> (1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
>
> (2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle; or
>
> (3) the Federal Court cannot grant the relief sought.

JP Morgan, at para 66.

[112] With respect to judicial review in tax matters, in *British Columbia Investment Management Corp*, the Supreme Court stated:

> [37] Any challenge to the correctness of a tax assessment under the ETA falls within the exclusive jurisdiction of the Tax Court: *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12(1); ETA, ss. 306, 309(1); [case citations omitted]
>
> [38] Even where a claim does not challenge an assessment, a superior court may decline to exercise its jurisdiction in recognition of the specialization of the Tax Court: *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793, at para. 11; […]. In *Addison*, this Court cautioned against allowing "incidental litigation" to circumvent the tax appeal mechanisms established by Parliament: para. 11. But this does not mean an otherwise valid claim cannot proceed in superior court simply because it may impact a Tax Court proceeding.

[113] The cited paragraph from *Canada v Addison & Leyen Ltd*, 2007 SCC 33, [2007] 2 SCR 793 reads as follows:

> 11 Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[114] A challenge to the correctness or validity of a tax assessment under the *Excise Tax Act* falls within the exclusive jurisdiction of the Tax Court: *Tax Court of Canada Act*, subsection

12(1); *British Columbia Investment Management Corp* at para 37; *JP Morgan*, at paras 81-82. Section 18.5 of the *Federal Courts Act* deprives the Federal Court of its administrative law jurisdiction for matters that can be resolved by an appeal to the Tax Court. Section 306 of the *Excise Tax Act* provides for an appeal to the Tax Court from assessments issued by the Minister: *Iris Technologies Inc v Canada (National Revenue)*, 2020 FCA 117, at para 50. The correctness or validity of an assessment means whether the facts and the applicable law support it: *JP Morgan*, at para 82.

[115] The Minister generally has no discretion to exercise, or abuse, in making an assessment: *JP Morgan*, at paras 77-78. The Federal Court of Appeal has also stated that the Court "cannot stop the Minister from carrying out his statutory duty under the *Excise Tax Act* … subsection 275(1) to assess GST payable by law merely because doing so will impose unfair and onerous obligations and financial hardships upon the taxpayer": *Canada Revenue Agency v Tele-Mobile Company Partnership*, 2011 FCA 89, at para 5.

[116] However, the mere fact that the Minister has issued an assessment does not deprive the Court of its jurisdiction under sections 18.1 or 18.2 of the *Federal Courts Act* to consider, for example, the Minister's exercise of discretion under the *Excise Tax Act*: *Iris Technologies Inc v Canada (National Revenue)*, 2020 FCA 117, at para 51; *JP Morgan*, at para 72.

[117] A key question is whether the taxpayer has adequate recourse elsewhere: *Addison*, at para 8; *JP Morgan*, at para 81-82. In *Johnson*, the Federal Court of Appeal held that the objection and appeal provisions in sections 301, 302 and 306 of the *Excise Tax Act* "constitute a complete

appeal procedure that allows taxpayers to raise in the Tax Court all issues relating to the correctness of the assessments" (quoting *JP Morgan,* at para 82). Webb JA stated that "[t]herefore, judicial review in the Federal Court is not available if Mr. Johnson, under the guise of seeking judicial review of the decision of the Minister to assess him, is in reality challenging the correctness of the assessment" (at para 23).

[118] Another situation for which there is an adequate remedy in the Tax Court concerns "[i]nadequate procedures followed by the Minister in making the assessment":

> Procedural defects committed by the Minister in making the assessment are not, themselves, grounds for setting aside the assessment: [citations omitted]. To the extent the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal under the General Procedure in the Tax Court is an adequate, curative remedy. In the Tax Court appeal, the parties will have the opportunity to discover and present documentary and oral evidence, and make submissions. Procedural rights available later can cure earlier procedural defects: [citations omitted].
>
> *JP Morgan,* at para 82.

[119] Although the Federal Court of Appeal's decision in *JP Morgan* considered assessments under the *Income Tax Act*, the analysis with respect to judicial review applications is equally applicable to the GST provisions of the *Excise Tax Act*: *Johnson,* at para 21.

D. Application of Legal Principles to the Pleadings

(i) Contents of the First Notice of Application

[120] *The decision at issue*: The first Notice of Application dated June 7, 2021, seeks judicial review of CRA's "decision" on June 2, 2021 by CRA audit staff not to provide documents or

information to support its audit position, not to provide an extension of time to make submissions, not to accept any submissions that might change CRA's mind and to conclude the audit in accordance with the proposal letter dated March 16, 2021. (At the hearing, the Minister's counsel recognized that the "decision" could be considered to be more than one decision for the purposes of Rule 302 of the *Federal Courts Rules*, but did not pursue the point on this motion.)

[121] *Grounds for Judicial Review*: The first Notice of Application pleaded that CRA's proposal letter dated March 16, 2021, proposed to deregister Newave's GST/HST program account, disallow input tax credits and assess gross negligence penalties. The applicant pleaded that it requested that CRA make documentary disclosure "to support its audit findings" because the proposal letter was "troublingly sparse in information or detail and [made] general allegations of 'sham' and 'carousel scheme', without any meaningful specifics or any evidence."

[122] After describing the information CRA declined to disclose, Newave pleaded the grounds for its application. It pleaded that the decision to withhold the documentary evidence, on which CRA was basing its proposal dated March 16, 2021 and its "ultimate assessing position", was unreasonable, because:

- the documents were necessary for the taxpayer to properly contest the proposal, and therefore, the administration and enforcement of the *Excise Tax Act*;
- the documents were necessary for the taxpayer to determine its liability for tax, interest and penalties under the *Excise Tax Act*;
- the documents must be disclosed by CRA to comply with its obligations under the *Excise Tax Act*;

- the CRA must disclose the documents that it is relying on to support its proposal and ultimate assessing position.

[123] In the same paragraph, Newave asserted that the CRA's decision was not transparent, justifiable and intelligible and that CRA had not outlined any comprehensible basis for denying its request for disclosure and an extension of time to make substantive submissions. Newave pleaded that the Minister had an "important and powerful responsibility to provide [Newave] with full information and complete documentation on what it relied upon in making the Proposal, which could bankrupt [Newave] and its directors."

[124] The first Notice of Application also pleaded that the decision not to accept any submissions was unreasonable, because it predetermined the results of the audit and rose to the level of "reprehensible, scandalous and outrageous" conduct, was highly prejudicial to Newave and revealed "actual bias" on the part of the CRA auditors, deprived Newave of the benefit of an entire stage of the tax dispute resolution system and was a "shocking violation" of Newave's right to procedural fairness.

[125] The first Notice of Application further pleaded a breach of paragraphs 18.1(4)(a), (b), (c), (d) and (f) of the *Federal Courts Act*, using the language of each provision. It then alleged a violation of the Taxpayer Bill of Rights, claiming that CRA did not provide Newave its right to a formal review under Article 4, did not treat Newave professionally, courteously and fairly in alleged violation of Article 5, and did not provide Newave with "complete, accurate, clear and timely information" in alleged violation of Article 6.

[126] *Remedies Sought*: The first Notice of Application requested:

- an Order directing CRA to provide "full disclosure of its audit file";
- an Order to prevent CRA from deregistering Newave from GST/HST, until its rights on objection and appeal have been exhausted;
- a direction that CRA comply with the Taxpayer Bill Of Rights;
- an interim Order to stay CRA's decision to close its audit; and
- an Order setting aside the decision and remitting the matter back to CRA and to different CRA auditors for redetermination.

(ii) Analysis of the First Notice of Application

[127] At the hearing in this Court, as discussed above, Newave focused principally on alleged violations of a right to procedural fairness and natural justice in the audit process. On its face, the first Notice of Application appears to identify possible administrative law concerns about procedural unfairness arising from non-disclosure and an opportunity to be heard.

[128] However, considering the first Notice of Application holistically and practically, it is my view that the first Notice of Application suffers from fatal flaws related to all three concerns described by Stratas JA in *JP Morgan*, at para 66.

[129] I begin with consideration of the nature of the proposed judicial review and the remedies requested (which *JP Morgan* addressed separately but in the present case, are conveniently analyzed together). In my view, the essential character of the first Notice of Application is

intimately bound up with the correctness of the Reassessments or, more precisely, with the applicant's attempt to impugn the correctness or validity of CRA's assessment position in its proposal letter, as later reflected in the Reassessments. This conclusion is based on the facts pleaded, the nature of the pleaded grounds for judicial review, the nature of the remedies requested, and the close connection among the correctness or validity of CRA's assessing position on the facts and evidence, CRA's proposal letter dated March 16, 2021, and the Reassessments.

[130] First, the first Notice of Application was concerned with the three elements of CRA's proposal letter dated March 16, 2021. By its own description of the proposal letter, the pleading is a challenge to the (then proposed) deregistration of Newave from the GST/HST program, the denial of certain input tax credits, and the assessment of penalties: see paragraph 12 of the first Notice of Application. These three elements are also elements of CRA's later position in the Reassessments.

[131] The applicant sought an Order for disclosure of CRA's analysis and documents (described in paragraph 20) that support CRA's conclusions concerning Newave's tax liability, interest and penalties or, as the Notice of Application states, CRA's "ultimate assessing position" that formed the basis of its March 16, 2021, proposal letter. Thus, the applicant seeks disclosure to attempt to undermine CRA's assessing position – which forms the basis for both the proposal letter and the Reassessments.

[132] In this context, it may be noted that CRA's proposal letter dated March 16, 2021, was likely not a "decision" that could be judicially reviewed as it did not determine the taxpayer's substantive or procedural rights: *Air Canada v Toronto Port Authority*, 2011 FCA 347, [2013] 3 FCR 605, at paras 26-28, 37 and 39; *Prince v Canada (National Revenue)*, 2020 FCA 32, at para 21.

[133] I note also the timing of the first Notice of Application. Newave filed it just after CRA audit personnel advised it that CRA be closing its audit "forthwith" in accordance with its proposal letter dated March 16, 2021 (meaning that CRA would now issue reassessments), but just before the applicant became aware that the Minister had in fact issued the Reassessments.

[134] Second, the first Notice of Application pleaded grounds for the alleged "unreasonableness" of CRA's decision. The basis for substantive judicial review is an allegation that an administrative decision is unreasonable: see *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65. While this standard does not apply to questions of procedural fairness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121), an "unreasonable" CRA decision on June 2, 2021, is what Newave pleaded.

[135] The pleaded "unreasonableness" of CRA's decision not to make the requested disclosure was tied directly to CRA's assessing position. The application alleged that CRA's decision to withhold documentary evidence "on which the CRA is basing its Proposal and ultimate assessing position … was unreasonable" because the documents in CRA's audit file were necessary for the applicant to "properly contest" the proposal in CRA's letter dated March 16, 2021 and for the

applicant to "determine its liability for tax, interest and penalties under the [*Excise Tax Act*]": see the introductory language in paragraph 26 and paragraphs 26(a) and 26(b). The other explanations for unreasonableness in paragraph 26 pleaded why it is important to the applicant to receive the disclosure (e.g. including to "support its Proposal and ultimate assessing position" in paragraph 26 (d)) and why CRA should do so, or they plead language from judicial review case law (see paragraph 26(e)).

[136] There was no allegation that CRA made the "Decision" (as defined), particularly the decision not to disclose all the documents in its audit file, for the kind of ulterior or improper purpose contemplated by the administrative law cases that could form the basis of an application for judicial review: see *Iris Technologies Inc v Canada (National Revenue)*, 2020 FCA 117, at para 51; *JP Morgan*, at paras 72-73.

[137] The first Notice of Application also pleaded that CRA's decision not to accept submissions was unreasonable, because: CRA auditors' actions in predetermining the results of the audit and rejecting the taxpayer's submissions before receiving them was reprehensible; the decision was highly prejudicial to Newave and revealed "actual bias" on the part of the CRA auditors; it deprived Newave of the benefit of an entire stage of the tax dispute resolution system and that its conduct was a "shocking violation" of Newave's right to procedural fairness.

[138] In my view, this pleading hints at a possible cognizable administrative law claim when viewed with the pleading that on June 2, 2021, CRA audit personnel advised that "there is nothing that the taxpayer can provide that will change our mind" (in paragraph 21). However, in

the context of CRA's March 16, 2021 proposal letter and the assessment position in it, as pleaded at paragraph 12, I note the following:

- because CRA provided Newave with an extension of time to make submissions and Newave decided not to do so before receiving its requested disclosure (see paragraphs 14-21), a judicial review of the decision not to accept submissions cannot stand on its own, independent of a proper claim concerning the decision not to make disclosure;

- with respect to alleged predetermination and actual bias, it cannot realistically and practically be claimed that as of June 2, 2021, more two months after delivering the proposal letter, CRA auditors must be completely impartial or without any opinion as to an assessment position.

[139] In that light, I find that this part of the first Notice of Application did not make a sufficient administrative law claim related to denial of an opportunity to be heard based on predetermination or actual bias of the CRA auditors. Rather, the weight of the applicant's pleading remains that CRA auditors failed to properly consider and apply the evidence they gathered when reaching an assessment position. See *Ghazi*, at paras 25-35.

[140] Third, turning to the remedies requested, the final (i.e., non-interim) remedies pleaded in the first Notice of Application include, in paragraph 9, an Order setting aside CRA's "Decision" and referring the matter back to the CRA and to different auditors for determination in accordance with the Court's directions. Together with the request for interim relief, this requested relief asks this Court to order that CRA not to close (or perhaps now, to re-open) its audit, with new CRA personnel as auditors, in order to review the evidence again with the

applicant's submissions, and come to fresh conclusions – again, about CRA's proposal and the validity of its assessment position.

[141] The applicant's other remedial request is (in paragraph 5) for an Order directing CRA to provide full disclosure of its audit file. This is a request for a substantive Order that CRA disclose specific documents and categories of documents at the audit stage (in addition to the pre-existing disclosure of CRA's position in its letter dated March 16, 2021). In my view, this disclosure issue is inextricably linked with the applicant's challenge to the validity of CRA's assessment position.

[142] At this point, it also bears repeating and emphasizing that the applicant did not provide a legal basis for the Court to order the requested disclosure, apart from general references to procedural fairness at the audit stage and natural justice. The applicant did not refer to any statutory provision or case law that supported its position that the Court could order disclosure on this judicial review application. It did not provide any analysis of *Baker* factors suggesting that procedural fairness at the audit stage, following a CRA proposal letter, required disclosure of the underlying CRA analysis and other documents. Nor did the applicant submit that such an Order would be the only just outcome of a judicial review of the non-disclosure decision by CRA: see *Vavilov*, at para 142. The applicant's pleadings on the Taxpayer Bill of Rights and legitimate expectations reveal no specific promises for disclosure of the audit file.

[143] I note that the only judicial review case relied upon by the applicant, *Scott Slipp Nissan Ltd*, is consistent with its ability to request (and on its own submissions, to obtain) disclosure at

the objection stage. There, CRA disclosed some information from its audit file but not everything requested by the taxpayer. Phelan J quashed the discretionary decision made by the Minister under a provision of the *Excise Tax Act*. In this case, both the applicant and the respondent confirmed that the applicant may seek disclosure at the objection stage. A negative decision by CRA could presumably be the subject of a proper application for judicial review, as in *Scott Slipp Nissan Ltd.*, or a later request to the Tax Court.

[144] In my view, the real goals of the applicant's first Notice of Application were not to remedy alleged procedural fairness concerns, but instead were to halt and attempt to control CRA's reassessment process. In particular, the goals were to challenge the factual and evidentiary basis for that assessment position before new audit personnel, and convince the new CRA auditors to take a different position before closing the audit and issuing a reassessment – actions Newave knew were imminent: see first Notice of Application, at paras 3, 4, 6, 9, 20 and 42; *Ghazi*, esp. at paras 25-26 (in which the requested remedies included replacing the auditors and preventing the Minister from assessing the applicant); and *General Motors of Canada Limited v Canada (National Revenue)*, 2013 FC 1219 (Mactavish J), at paras 80-85. In substance, the content of the pleading is an attempt to interfere with the Minister's statutory duty to assess. The applicant may pursue its desired outcomes in the objection and the appeal processes under the *Excise Tax Act*: *Tele-Mobile*, at para 5; *JP Morgan*, at paras 77-78 and 82; *Valero*, at para 17.

[145] In sum, considering the basis pleaded for the judicial review of CRA's decision, the key remedies requested, and the factual and remedial connections between CRA's "ultimate

assessing position", its proposal dated March 16, 2021 and the contents of the Reassessments, I find that the matters pleaded in the first Notice of Application are directly and intimately related to the correctness or validity of CRA's assessment position as now implemented in the Reassessments. The applicant's concern is that CRA's assessment position was not supported by the facts and the applicable law, which is in substance a challenge to the validity of the Reassessments: *JP Morgan*, at para 82. These issues are also all bound up in CRA's underlying consideration of the facts and evidence that led it to its assessment position in its March 16, 2021, letter that the applicant's business was involved in a sham and participated in a carousel scheme. As noted above, the Supreme Court and Federal Court of Appeal have consistently concluded that the correctness or validity of the Reassessments is not a matter for an application for judicial review to this Court. The applicant has thus failed to state a cognizable claim under administrative law that can be brought in this Court.

[146] In reaching these conclusions, I recognize that CRA's position in its proposal letter dated March 16, 2021, is not identical to the position CRA took in the Reassessments. However, while the details of the two documents are not identical (e.g., the quantum of ITCs rejected), the issues at stake between the parties are the same: the facts giving rise to CRA's concerns about Newave's operations and conclusions it has reached based on the evidence gathered, the denial of certain input tax credits, and the consequences of doing so including the assessment of penalties and the deregistration of Newave from CRA's GST/HST program. The fact that the second Notice of Application incorporates so much of the first application by reference is consistent with this observation and indeed, the overall conclusion I have reached about the first application.

[147] Focusing now on the second kind of fatal flaw identified by Justice Stratas in *JP Morgan*, at para 66, in my view, the applicant also has an adequate alternative path to resolve its issues using expert decision-makers and the processes in the *Excise Tax Act*: *British Columbia Investment Management Corp* at para 38; *Addison*, at para 8; *JP Morgan*, at para 81-82; *Strickland* at para 42. The matrix of factual and legal issues related to any challenges to the validity of the Reassessments, including the requests for disclosure of CRA documents to the applicant to enable and facilitate those challenges, can and should be resolved in this case through the objection process and/or an appeal to the Tax Court under the *Excise Tax Act*.

[148] In my view, any allegations about procedural fairness at the audit stage can be remedied at the objection or appeal stage: *JP Morgan*, at para 82 (bullet point with the heading "[i]nadequate procedures followed by the Minister in making the assessment"). Allegations of unfairness arising from non-disclosure can be addressed through a request to CRA (or the Tax Court) for proper and timely disclosure, and can be resolved in the factual context of the Reassessments and in the light of the specific issues raised by this case (e.g. as described in CRA's March 16, 2021 letter). Similarly, the involvement of different CRA personnel in the objection process, and certainly an appeal to a Judge of the Tax Court, would rectify the applicant's concerns about individual CRA auditors' alleged predetermination or "actual bias" in the decision whether to receive submissions from the taxpayer after making a proposal for reassessment.

[149] The first Notice of Application pleads into certain provisions of the Taxpayer Bill of Rights and alleged legitimate expectations arising from that document. In my view, the CRA

auditors' compliance or non-compliance with the terms of the Taxpayer Bill of Rights is properly a matter for the tax appeal process. The Tax Court is much better suited to address the issues in it, given the relative expertise of that Court compared with this Court.

[150] Lastly, the parties referred to the decision of Justice McDonald in *Iris Technologies Inc v Canada (National Revenue),* 2021 FC 597, at paras 10-11 and 27. That decision was an appeal from a decision of Prothonotary Aalto not to strike a notice of application that sought declaratory relief related to allegations including procedural unfairness at the audit stage and an invalid purpose for the assessment. The Court dismissed the appeal and declined to interfere with the Prothonotary's conclusions. Newave contended that Justice McDonald's decision supported its ability to seek judicial review on the basis of procedural unfairness at the audit stage. The Minister submitted that the Court's decision was incorrect and distinguishable, noting that (unlike here) CRA had not followed a proposal process with the taxpayer. In my view, it is sufficient to say that the decisions of Prothonotary Aalto, and Justice McDonald on appeal, turned on the specific pleading at issue (see, e.g., McDonald J.'s reasons, at para 26). The present case also turns on the matters pleaded in the notices of application.

[151] To commence a judicial review application in this Court, the applicant's pleading must disclose a proper application under the *Federal Courts Act* – one that raises true issues for judicial review in this Court and one that is not properly the subject of the dispute resolution processes in the *Excise Tax Act*. In my view, the first Notice of Application does not do so. It is the kind of "incidental litigation" designed to circumvent the system of tax appeals established

by Parliament and the jurisdiction of the Tax Court, as contemplated by the Supreme Court in *Addison*, at para 11. It must therefore be struck out.

(iii) Analysis of the Second Notice of Application

[152] Newave filed the second Notice of Application on June 11, 2021. It seeks judicial review of the decision to issue Notices of Reassessment on June 10, 2021, for the periods from January 1, 2017 to December 31, 2019. Newave requested that the second application be heard concurrently with the first application.

[153] The facts pleaded in support of the application are those in the first Notice of Application, with references to the content of the pleadings and CRA's steps to issue the Reassessments.

[154] The grounds for the application are the grounds outlined in the first Notice of Application, plus allegations that CRA disregarded this Court's oversight role and the first Notice of Application, and that CRA exercised its discretion for an improper purpose, abused its power and abused its process. Newave also reiterated its position that CRA failed to provide it any disclosure with respect to its audit position and did not allow it to make any substantive submissions.

[155] The relief requested in the second Notice of Application was for the orders requested in the first application; an order declaring the invalidity of the Reassessments; an order declaring CRA's decision to issue the Reassessments to be an abuse of power and an abuse of process; interim orders to stay collection action against Newave and preventing CRA from deregistering

Newave from GST/HST, or staying the deregistration, pending the determination of the application; punitive damages in the amount of $5 million; and costs.

[156] The Minister submitted that the essential character of the second Notice of Application is a challenge to the validity or correctness of the Reassessments, which is not permitted by appellate cases interpreting section 18.5 of the *Federal Courts Act* and the objection and appeal provisions of the *Excise Tax Act*.

[157] I agree. In my view, the second Notice of Application is an improper challenge to the Reassessments in the guise of a judicial review application. Any such attack on the merits of the Reassessments, or the facts and law on which they are based, must be done under the processes in the *Excise Tax Act*: *Johnson*, at para 23; *JP Morgan*, at para 82.

[158] Newave contended that the decision to reassess (as opposed to the reassessment itself) could be the subject of an application for judicial review, citing *Chrysler*, at paras 24-25 and *JP Morgan*, at paras 69 and 96. I do not agree. As Justice Mactavish held in *General Motors*, trying to separate the decision to reassess from the reassessment itself is a meaningless exercise: *General Motors*, at para 104, citing *Canada v. Roitman*, 2006 FCA 266, at para 25. Unlike *Chrysler*, where the matter at issue was the discretionary decision and conduct of the Minister, the true matters at issue in the second Notice of Application are subject to objection and appeal under the *Excise Tax Act*. Issuing the Reassessments was not a discretionary decision: *JP Morgan*, at paras 77-78.

[159] It is clear that the second Notice of Application must be struck out.

IV. **Conclusion**

[160] The applicant's motion for interlocutory relief is dismissed.

[161] The Minister's motion to strike is allowed and both Notices of Application are struck out, without leave to amend. The applicant did not make submissions on how it could amend its Notices of Application to plead a proper judicial review, and I see none in the circumstances.

[162] The Minister is entitled to costs of both motions. If the parties cannot reach an agreement on quantum, they may make submissions to this Court within 15 days of this decision, by letter not exceeding 5 pages. The Court will then fix the quantum of costs payable.

ORDER in T-904-21 and T-945-21

THIS COURT ORDERS that:

1. The applicant's motion for interim relief under subsection 18.1(2) of the *Federal Courts Act* is dismissed.
2. The respondent's motions to strike are allowed. The Notices of Application in Court Files T-904-21 and T-945-21 are struck out, without leave to amend.
3. The applicant shall pay costs of both motions to the respondent. If the parties cannot reach an agreement on quantum, they may make written submissions to this Court within 15 days of this Order, by letter not exceeding 5 pages. The Court will then fix the quantum payable.

"Andrew D. Little"
Judge

Appendix "A"

Tax Court of Canada Act (R.S.C., 1985, c. T-2)	***Loi sur la Cour canadienne de l'impôt (L.R.C. (1985), ch. T-2)***
Jurisdiction and Powers of the Court	**Compétence et pouvoirs de la cour**
Jurisdiction	**Compétence**
12 (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the Air Travellers Security Charge Act, the Canada Pension Plan, the Cultural Property Export and Import Act, Part V.1 of the Customs Act, the Employment Insurance Act, the Excise Act, 2001, Part IX of the Excise Tax Act, Part 1 of the Greenhouse Gas Pollution Pricing Act, the Income Tax Act, the Old Age Security Act, the Petroleum and Gas Revenue Tax Act and the Softwood Lumber Products Export Charge Act, 2006 when references or appeals to the Court are provided for in those Acts.	**12 (1)** La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application de la Loi sur le droit pour la sécurité des passagers du transport aérien, du Régime de pensions du Canada, de la Loi sur l'exportation et l'importation de biens culturels, de la partie V.1 de la Loi sur les douanes, de la Loi sur l'assurance-emploi, de la Loi de 2001 sur l'accise, de la partie IX de la Loi sur la taxe d'accise, de la partie 1 de la Loi sur la tarification de la pollution causée par les gaz à effet de serre, de la Loi de l'impôt sur le revenu, de la Loi sur la sécurité de la vieillesse, de la Loi de l'impôt sur les revenus pétroliers et de la Loi de 2006 sur les droits d'exportation de produits de bois d'oeuvre, dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

Federal Courts Act (R.S.C., 1985, c. F-7)	**Loi sur les Cours fédérales (L.R.C. (1985), ch. F-7)**
Jurisdiction of Federal Court	**Compétence de la Cour fédérale**
Exception to sections 18 and 18.1	**Dérogation aux art. 18 et 18.1**
18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	**18.5** Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.
Excise Tax Act (R.S.C., 1985, c. E-15)	**Loi sur la taxe d'accise (L.R.C. (1985), ch. E-15)**
Assessments, Objections and Appeals	**Cotisations, oppositions et appels**
Appeals **306** A person who has filed a notice of objection to an	**Appels** **306**La personne qui a produit un avis d'opposition à une

assessment under this Subdivision may appeal to the Tax Court to have the assessment vacated or reassessment made after either

cotisation aux termes de la présente sous-section peut interjeter appel à la Cour canadienne de l'impôt pour faire annuler la cotisation ou en faire établir une nouvelle lorsque, selon le cas :

(a) The Minister has confirmed the assessment or has reassessed, or

a) la cotisation est confirmée par le ministre ou une nouvelle cotisation est établie;

(b) One hundred and eighty days have elapsed after the filing of the notice of objection and the Minister has not notified the person that the Minister has vacated or confirmed the assessment or has reassessed,

b) un délai de 180 jours suivant la production de l'avis est expiré sans que le ministre n'ait notifié la personne du fait qu'il a annulé ou confirmé la cotisation ou procédé à une nouvelle cotisation.

but no appeal under this section may be instituted after the expiration of ninety days after the day notice is sent to the person under section 301 that the Minister has confirmed the assessment or has reassessed.

Toutefois, nul appel ne peut être interjeté après l'expiration d'un délai de 90 jours suivant l'envoi à la personne aux termes de l'article 301, d'un avis portant que le ministre a confirmé la cotisation ou procédé à une nouvelle cotisation.

Disposition of appeal
309 (1) The Tax Court may dispose of an appeal from an assessment by

a) dismissing it; or
b) allowing it and
(i) vacating the assesement or
(ii) referring the assessment back to the Minister for reconsideration and reassessment.

Règlement d'appel
309 (1) La Cour canadienne de l'impôt peut statuer sur un appel concernant une cotisation en le rejetant ou en l'accueillant. Dans le dernier cas, elle peut annuler la cotisation ou la renvoyer au ministre pour nouvel examen et nouvelle cotisation.

(2) [Repealed, 1993, c. 27, s. 132]

(2) [Abrogé, 1993, ch. 27, art. 132]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-904-21 & T-945-21
STYLE OF CAUSE:	NEWAVE CONSULTING INC. V THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 7, 2021
ORDER AND REASONS:	LITTLE J.
DATED:	NOVEMBER 9, 2021

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