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## INCOME TAX

ADMINISTRATION AND ENFORCEMENT

Appeal from Federal Court decision (2021 FC 1438) dismissing second application by appellant for authorization to serve requirement on respondent concerning virtually all of respondent's commercial or business customers, i.e. those whose subscription subject to general rate — *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (Act), s. 231.2(3) providing that Minister shall not require any person to provide information or any document (requirement) relating to one or more unnamed persons, i.e. persons whose identity not known to Minister, without prior authorization of judge — Federal Court may authorize application if (a) ascertainable group existing; (b) provision of information or any documents is required to verify whether persons in group have complied with their tax obligations — Minister's first application for authorization to Federal Court discussed in *Canada (National Revenue) v. Hydro-Québec*, 2018 FC 622, [2018] 4 F.C.R. D-11 (*Hydro-Québec 2018*) — This first application (2017 Application), evidence supporting it contained no explanation of how commercial or business customers constituted ascertainable group within meaning of Act, or why this clientele targeted by Minister — Second application (2019 Application), appealed here, targeting virtually same clientele, information as 2017 Application — In dismissing 2019 Application, Federal Court indicated that, in light of teachings of *Roofmart Ontario Inc. v. Canada (National Revenue)*, 2020 FCA 85 (*Roofmart*), there was reason to believe that its decision on 2019 Application would be different from its decision on 2017 Application — However, having concluded that *Hydro-Québec 2018* decision *res judicata*, Federal Court dismissed Minister's application without ruling on whether 2019 Application satisfied conditions of Act, s. 231.2(3) — *Per* Goyette J.A.: Issue whether *Hydro-Québec 2018* decision *res judicata* with consequence that 2019 Application must be rejected — For principle of *res judicata* to apply, six conditions having to be met, three of which relating to judgment, three to action — Federal Court determined that *Hydro-Québec 2018* decision met three conditions for judgment (i.e. court must have jurisdiction, judgment must be final, judgment must have been rendered in contentious case) — Also determined that 2017, 2019 Applications satisfied three conditions for action, namely identity of parties, object, cause — However, fact that conditions for application of *res judicata* may be met cannot compensate for fact that Act, s. 231.2(3) by its wording, nature not allowing application of principle of *res judicata* — Wording of s. 231.2(3) not in itself determining whether decision authorizing or refusing service of requirement is *res judicata* — Under general audit powers of s. 231.1, Minister may request same type of information from taxpayer more than once if necessary — Judicialized requirement is similar to application to judge for search warrant, such as application under Act, s. 231.3 or *Criminal Code*, R.S.C., 1985, c. C-46, s. 487 — However, well established that judge's decision refusing to issue search warrant not having force of *res judicata* — If principle of *res judicata* not applying to application for search warrant in criminal matters, this should be especially true with regard to application for authorization to serve requirement — Principle of *res judicata* not applying to decisions rendered in respect of applications for judicial authorization made by Minister under Act, s. 231.2(3) — This not meaning, however, that Minister may abuse right seeking judicial authorization more than once for same or similar requirement — If Minister abusing this discretion by submitting same application without satisfactory explanation or supporting evidence, or if Minister making unreasonable application, Minister risking not only refusal of authorization, but also judicial decision that Minister abusing discretion — When Minister resubmitting application for authorization to serve requirement for information concerning

unnamed persons, Federal Court must consider whether requirement for information satisfying two conditions of Act, s. 231.2(3), if so, exercise its discretion and determine whether this application should be authorized — In this case, Federal Court not carrying out this exercise, given finding of *res judicata* — Federal Court's ruling overturned — File returned to Federal Court for analysis of Minister's application — Appeal allowed — *Per* Boivin and LeBlanc JJ.A. (concurring reasons): Some reservations expressed about analysis underlying Goyette J.A.'s conclusions in this case, in particular her parallel between *Criminal Code*, s. 487 and Act, s. 231.2(3) — Sufficient simply to recall existence of residual discretion available to Federal Court under s. 231.2(3), while specifying, as Court did in *Roofmart*, that this residual power "is not a means by which Parliament's policy choices, as expressed [in s. 231.2(3)], are to be revisited."

CANADA (NATIONAL REVENUE) V. HYDRO-QUÉBEC (A-21-22, 2023 FCA 171, Boivin, LeBlanc and Goyette JJ.A., reasons for judgment dated July 27, 2023, 16 pp. + 9 pp.)