Federal Court Cour fédérale

Date: 20201117

Docket: T-1244-19

Citation: 2020 FC 1061

[ENGLISH TRANSLATION]

Montréal, Quebec, November 17, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

LUCIEN RÉMILLARD

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

I. Overview

[1] This motion raises the question of whether taxpayers' tax information, which is clearly treated as confidential when in the hands of the respondent, the Minister of National Revenue [Minister], retains this same character once transmitted to the Registry of the Federal Court [Registry] pursuant to section 318 of the *Federal Courts Rules*, SOR/98-106 [FCR]. If such is

not the case, the applicant, Lucien Rémillard, argues that this section is of no force or effect or should be given a reading down, as it would result in an unreasonable seizure within the meaning of section 8 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, 1982, c 11 (UK) [Charter].

II. Facts

[2] Mr. Rémillard is a retired businessman who claims to have established himself in Barbados and thus to have become a non-resident for the purposes of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], effective November 15, 2013.

[3] Since 2015, the Minister has been auditing Mr. Rémillard's residency status but to date has still not reached a conclusion. During this audit, the Canada Revenue Agency [CRA] made requests for administrative assistance from various countries, which were challenged by Mr. Rémillard on July 31, 2019, by an application for judicial review to have said requests for administrative assistance cancelled.

[4] In the underlying application for judicial review, Mr. Rémillard used the procedure provided for in sections 317 and 318 of the FCR to have disclosed to him a certified copy of various documents concerning him obtained or created by the CRA under the powers conferred on it by the ITA. I would like to point out that Mr. Rémillard did not seek disclosure of all the documents in the CRA file, but only the documents and information that were listed in his transmission request under section 317 of the FCR [the Information].

[5] After the transmission request under section 317 of the FCR was served by counsel for Mr. Rémillard, the CRA forwarded to the Registry in two parts, on August 30, 2019, and October 4, 2019, in accordance with section 318 of the FCR, a certified copy of the Information that was treated by the Registry as public documents and placed in the annex to the Court file as provided for in paragraph 23(2)(c) of the FCR. A certified copy of the Information was also sent to Mr. Rémillard's counsel.

[6] On November 1, 2019, Mr. Rémillard served the affidavits [Affidavits] in support of his application for judicial review on the Minister in accordance with section 306 of the FCR.

[7] On January 14 and 15, 2020, a journalist from the Journal de Montréal contacted Mr. Rémillard and one of his sons to ask questions about the application for judicial review. This is how Mr. Rémillard was informed that the journalist was in possession of the Information.

[8] On the night of January 15 to 16, 2020, Mr. Rémillard's counsel filed an *ex parte* motion with this Court for an emergency interim order of confidentiality and a publication ban, for a period of ten days. Such an interim order to ensure that the Information would be treated as confidential under section 151 of the FCR and that its contents would not be published [Interim Order] was made by this Court in the early hours of January 16, 2020.

[9] In accordance the Interim Order, on January 16, 2020, Mr. Rémillard filed the present motion for order of confidentiality. The Interim Order was subsequently extended until the hearing of this motion for order of confidentiality was held before me, on August 31, September 1 and 4, 2020.

[10] On March 12, 2020, Mr. Rémillard served a notice of constitutional question on the Attorney General of Canada and on those of the provinces. The notice of constitutional question was filed on March 18, 2020.

[11] On August 21, 2020, the Minister reproduced the Affidavits, as well as some material in support of them, in his respondent's record filed under section 310 of the FCR in preparation for the hearing on this motion for order of confidentiality.

[12] On August 24, 2020, I extended the Interim Order to the Affidavits and ordered that Volume I of the respondent's record filed with the Registry on August 21, 2020, in paper and electronic formats, be therefore removed from the Court's public record and kept under seal by the Registry.

[13] On September 4, 2020, prior to the conclusion of the hearing on this motion for order of confidentiality, I ordered that the Interim Order be extended so that the Information and Affidavits reproduced in Volume I of the respondent's record filed with the Registry on August 21, 2020, in both paper and electronic format, remain confidential until the judgment to be rendered on this motion for order of confidentiality.

III. Issues

[14] The issues are the following:

A. Does the Information that has been transmitted to the Registry pursuant to section 318 of the FCR become public documents because of its transmission to the Registry?

B. If so, does transmission to the Registry under section 318 of the FCR unjustifiably contravene section 8 of the Charter?

C. To the extent that section 318 of the FCR has force and effect constitutionally, should the Information be subject to an order of confidentiality and publication ban under section 151 of the FCR?

IV. Discussion

A. *Does the Information that has been transmitted to the Registry pursuant to section 318 of the FCR become public documents because of its transmission to the Registry?*

[15] First, Mr. Rémillard submits that the transmission of the Information following the procedure established by sections 317 and 318 of the FCR does not make them public and argues that it is the responsibility of the Minister or the Registry to take measures to preserve the confidentiality of documents **transmitted** under section 318 of the FCR until the documents are **filed** with the Court by one of the parties, for example, by filing the parties' records under sections 309 and 310 of the FCR.

[16] In addition, according to Mr. Rémillard, this Information would be confidential for the following reasons:

a) The procedure provided for in sections 317 and 318 of the FCR, in the context of an application for judicial review, is a method of pre-trial discovery. Thus, all documents transmitted to the Registry under section 318 of the FCR are subject to an implied rule of confidentiality, even in the absence of an explicit rule in the FCR. The open court principle would therefore come into play only once those documents have been introduced into evidence.

b) The Information is be tax information whose confidentiality is intrinsically protected by the ITA.

c) Public disclosure of documents transmitted to the Registry under section 318 of the FCR upon receipt would render section 151 of the FCR superfluous in the context of judicial review proceedings.

[17] I will discuss the three reasons for confidentiality separately. However, I will make a preliminary remark beforehand.

[18] Mr. Rémillard challenges the notion put forward by the Minister that the transmission of the record from an administrative decision-maker to the Registry constitutes a "pressing and substantial" objective at the heart of the Court's constitutional power of review and avoids shielding that administrative decision-maker from review of their decisions, as discussed by Justice Stratas in *Slansky v Canada (Attorney General)*, 2013 FCA 199 [*Slansky*]. He makes several arguments to argue that section 318 of the FCR is simply a procedural rule of an

administrative nature and not a rule intended to facilitate the exercise of the powers of review of administrative decisions by the Court. I must say at the outset that one does not preclude the other. A rule of administrative procedure may be intended to facilitate the exercise of the Court's power to review administrative decisions.

[19] Mr. Rémillard raises the point that if the procedure provided for in sections 317 and 318 of the FCR were so important to the exercise of the Court's powers of review:

i. this procedure would not be optional or, in other words, it would not depend on the willingness of the parties to request a copy of the certified tribunal record;

ii. the Minister should not be able to object to the transmission of documents as allowed by subsection 318(2) of the FCR;

iii. sections 317 and 318 of the FCR would have provided for the "filing" and not the "transmission" of the documents; and

iv. this procedure would have an equivalent in the *Code of Civil Procedure of Québec*, RSQ, c C-25 [Code of Civil Procedure], which provides instead for the need for a court order to forward the documents to the Registry, without this requirement hampering the exercise of the Quebec courts' judicial review power.

[20] I cannot accept these arguments for the following reasons:

i. The optional nature of the procedure does not affect its usefulness. Indeed, it is possible that the parties do not feel the need to resort to this procedure in cases

where, for example, they already have all the evidence in their possession or because the questions submitted to the Court are purely legal in nature. However, it is clear that in the majority of cases the parties and the Court need this procedure, as is the case here, for example, which necessarily demonstrates the usefulness of the procedure.

ii. Mr. Rémillard's second argument is based on the premise that it is the administrative decision-maker who controls the contents of the certified record before the reviewing court. This is incorrect. It is important that the reviewing court be in possession of the administrative decision-maker's record, but this does not mean that the normal rules of evidence, including the rules on the exclusion of evidence, are set aside. As noted by Justice Stratas in *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 at paragraph 12 [*Lukács*]:

> When determining the validity of an objection, the Court is tasked with deciding the content of the evidentiary record in the proceeding—the application for judicial review—before it. The Court must, as in any other proceeding, decide on the admissibility of the evidence presented to it. As the master of its own proceedings, the Court is obliged to follow its own standards and not rely on the opinion of the administrative decision-maker: see *Slansky*, supra, at paragraph 274 (much of the following analysis is based on that judgment).

Section 318 of the FCR should not be considered in isolation. Justice Stratas went on to state the following at paragraph 15:

> These Rules and powers allow the Court determining a Rule 318 objection to do more than just uphold or reject the administrative decision-maker's objection to disclosure of material. The Court may craft a remedy that furthers and reconciles, as much as possible, three objectives: (1) a valid review of administrative decisions in accordance with section 3 of the Rules and section 18.4 of *the Federal Courts Act* and the principles set out in subsections 6 and 7 above; (2) procedural fairness; (3) the protection of any legitimate interest in confidentiality while ensuring the greatest possible publicity in accordance with the principles of the Supreme Court set out in *Sierra Club of Canada*, supra.

It is therefore obvious that the objection to the transmission provided for in subsection 318(2) of the FCR is only a codification of the principles relating to objections to the admissibility of a document. It would be illogical if the tribunal could not oppose the transmission of a document which would in any case be inadmissible in evidence. This codification does not, however, make the procedure established by sections 317 and 318 of the FCR less relevant.

iii. Although I discuss this question in more detail further on, it seems to me that the reason the certified tribunal record is "transmitted" and not "filed" is to allow the parties to file afterwards, in their respective records in accordance with sections 309 and 310 of the FCR, only the documents [TRANSLATION] "to be used by [the parties] at the hearing". Although the transmission under section 318 of the FCR does not in itself immediately make the documents part of the **evidentiary record**, this does not mean that these documents upon receipt by the Registry do

not form part of the **Court file**. Both types of files are subject to the same rules regarding public accessibility, that is, sections 23 and 26 of the FCR.

iv. Article 530 of the Code of Civil Procedure states:

> 530. An application for judicial review is presented before the Superior Court on the date specified in the attached notice of presentation, which cannot be less than 15 days after service of the application. The judicial review is conducted by preference.
>
> Unless the court decides otherwise, the application does not stay proceedings pending before another court or the execution of the judgment or decision under review. <u>If necessary, the court orders that the exhibits it specifies be sent without delay to the court clerk.</u>
>
> A review judgment that rules in favour of the applicant is served on the parties if it orders that something be done or not be done.

[Emphasis added.]

Therefore, in Quebec, the exhibits are not automatically transmitted to the court registry, but can be sent on request. It seems to me that the difference between sections 317 and 318 of the FCR and article 530 of the Code of Civil Procedure is merely procedural in nature. The result, in the end, is the same: There is "transmission" of documents in the possession of the administrative decision-maker to the court registry. This argument, by raising the fact that this procedure exists in other jurisdictions, seems rather to support my view that this procedure is not unnecessary.

[21] Even if I accept Mr. Rémillard's argument that the procedure provided for in sections 317 and 318 of the FCR merely constitutes an administrative mechanism allowing a party to perfect

their record and that the authenticity of the evidence filed before the Court could be ensured by the adversarial process, as is the case in a civil dispute, for example, the procedure remains a safety net allowing the parties, and the Court, to verify the integrity of the evidence.

[22] Although the transmission of the certified record to the Registry is not a [TRANSLATION] “means of submitting the evidential record to the Court”—which is done by filing the parties’ records in accordance with sections 309 and 310 of the FCR—it is a mechanism by which the parties may obtain the record used by the administrative decision-maker to render their decision. This procedure thus allows parties to “have the reviewing court [that is tasked with ruling on a decision’s reasonableness] consider the evidence presented to the tribunal in question” (*Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 at para 13 [*Canadian Copyright*]; *Hartwig v Saskatchewan (Commission of Inquiry)*, 2007 SKCA 74, 284 DLR (4th) 268 at para 24 [*Hartwig*]).

[23] In this regard, the procedure provided for in sections 317 and 318 of the FCR ensures the integrity of the record in case of doubt, and I am of the opinion that it meets a “pressing and substantial” objective and is an essential element of the process of administering evidence in the proceedings before the Court.

[24] To end on this point, I must point out that it is not up to me to reform the FCR in light of the usefulness of transmitting the certified record to the Registry and the public’s access to that record. If these provisions are really outmoded, it will be up to the Rules Reform Committee of the Federal Court—not me—to update them. In other words, even if these provisions were

unnecessary (and we have just seen that they are not), they still exist and have the force of law, until proven otherwise.

Documents submitted under section 318 of FCR covered by open court principle

[25] Mr. Rémillard’s starting premise is that the documents transmitted to the Registry under section 318 of the FCR are not subject to the open court principle and are not part of the Court’s file which is accessible to the public. I reject this position.

[26] The principle that court proceedings are public “is unquestionably one of the fundamental values of Canadian procedural law” (*Lac d’Amiante du Québec Ltée v 2858-0702 Québec Inc.*, 2001 SCC 51 at para 62 [*Lac d’Amiante*]; see also *AG (Nova Scotia) v MacIntire*, 1982 CanLII 14 (CSC), [1982] 1 SCR 175 [*MacIntire*]; *Edmonton Journal v Alberta (Attorney General)*, 1989 CanLII 20 (CSC), [1989] 2 SCR 1326 [*Edmonton Journal*]).

[27] The public character of justice is one of the fundamental foundations of the Canadian judicial system, and open and accessible court proceedings are a corollary to freedom of expression. In *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 [*Sierra Club*], the Supreme Court of Canada observed at paragraph 36:

> The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:
>
>> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(*b*). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward

> opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place.
>
> Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

[28] More specifically, documents sent to the Court are kept in the Court file and in its annex.

Sections 23 and 26 of the FCR provide as follows:

Court file	**Dossier de la Cour**
23(1) For each proceeding of the Court, the Administrator shall keep a file that is composed of the following documents, each marked with its date and time of filing, and that is organized by order of filing:	23(1) Pour chaque instance devant la Cour, l'administrateur tient un dossier dans lequel sont classés, selon la date et l'heure du dépôt qu'ils portent, les documents suivants:
(a) every document filed under these Rules, an order of the Court or an Act of Parliament, other than affidavits or other material filed in support of a motion or as evidence at trial;	a) tous les documents déposés en application des présentes règles, d'une ordonnance de la Cour ou d'une loi fédérale, à l'exception des affidavits et autres documents et éléments matériels déposés à l'appui d'une requête ou à titre d'éléments de preuve à l'instruction;
(b) all correspondence between a party and the Registry;	b) toute la correspondance échangée entre une partie et le greffe;
(c) all orders;	c) toutes les ordonnances;

(d) copies of all writs issued in the proceeding; and	d) des copies de tous les brefs délivrés dans le cadre de l'instance;
(e) such other documents relating to the proceeding as the Court may direct.	e) tout autre document relatif à l'instance que la Cour ordonne de conserver.
Annexes	**Annexe**
(2) The Administrator shall keep an annex to each Court file that is comprised of	(2) L'administrateur tient une annexe à chaque dossier de la Cour dans laquelle sont versés les éléments suivants:
(a) all affidavits;	a) tous les affidavits;
(b) all exhibits; and	b) toutes les pièces;
(c) <u>all other documents and material in the possession of</u> the Court or <u>the Registry</u> that are not required by these rules to be kept in the Court file.	c) <u>tous les autres documents</u> et éléments matériels <u>en la possession</u> de la Cour ou <u>du greffe</u> dont les présentes règles n'exigent pas la conservation au dossier de la Cour.
. . .	. . .
Inspection of files	**Examen de dossiers**
26(1) If the necessary facilities are available, a person may, with supervision and without interfering with the business of the Court, inspect a Court file or annex that is available to the public.	26(1) Lorsque les installations de la Cour le permettent, toute personne peut, sous surveillance et d'une manière qui ne nuit pas aux travaux de la Cour, examiner les dossiers de la Cour et leurs annexes qui sont disponibles au public.
Removal or deletion of documents	**Retrait ou suppression de documents**
(2) Nothing shall be removed or deleted from a Court file or annex except	(2) Rien ne peut être retiré ou supprimé d'un dossier de la Cour ou de ses annexes sauf:

(a) under an order of the Court;	a) sur ordonnance de la Cour;
(b) by an officer of the Registry acting in the course of his or her duties; or	b) par un fonctionnaire du greffe dans l'exercice de ses fonctions;
(c) in accordance with rule 26.1.	c) en conformité avec la règle 26.1.
. . .	. . .
[Emphasis added.]	[Je souligne.]

[29] Documents filed under the rules and other documents referred to in section 23 of the FCR are kept in the Court file. All other documents and material in the possession of the Registry that are not required by these rules to be kept in the Court file, which include, as Mr. Rémillard conceded, documents transmitted to the Registry under section 318 of the FCR, are kept in the annex to the Court file.

[30] Mr. Rémillard is trying to make a distinction between the Court file and its annex, arguing that only what was in the Court file was subject to the principle of open and accessible court proceedings. I reject this position. Section 26 of the FCR is clear: the open court principle allows any person to consult a Court file or any annex "that is available to the public" (section 26 of the FCR; *Harkat (Re)*, 2009 FC 167 at para 11 [*Harkat*]).

[31] Although the general rule states that documents in a Court file or in its annex are public, not all documents in the Court file or in the annex are necessarily "available to the public". Where the material is required by law to be treated confidentially or where the Court orders that the material be treated confidentially, this material continues to be treated confidentially and is

designated as such at the time of being filed with the Court, by identifying, as needed, the legislative provision or the Court order under which it is required to be treated as confidential (section 152(1) of the FCR). Otherwise, the FCR does not provide for a mechanism for recognizing the confidentiality of documents “in the possession of the Registry”.

[32] In particular with regard to information of a private nature, it is important to clarify that even if information is private, a party who institutes a legal proceeding waives his or her right to privacy, at least in part (*Frenette v Metropolitan Life Insurance Co.,* [1992] 1 SCR 647 [*Frenette*]; *Lac d’Amiante* at para 42). This is true even with regard to tax information when a legal proceeding is introduced. Although taxpayers have a reasonable expectation of privacy when such information is provided to the Minister following a request for information under the ITA, when they are referred to the Court, “by operation of law [they become] available to the public at large” (*Gernhart v Canada*, [2000] 2 FC 292 at paras 2 and 33 (FCA) [*Gernhart*]).

[33] This means that, with the exception of a rule of law, a mechanism provided for by the FCR or, I would add, reasons for judicial policy (as in *Lac d’Amiante)*, documents submitted to the Registry and kept in the Court file or in one of its annexes are subject to the open court principle and are accessible to the public.

[34] Mr. Rémillard submits that what is transmitted under section 318 of the FCR is not intended to become public, whether or not it is private information. It is then up to the party concerned to present in evidence, and therefore to make public, the documents that it wishes to submit to the Court. He submits that the documents exchanged, as long as they are not put into evidence, are not subject to the open court principle.

[35] Mr. Rémillard notes that under section 318 of the FCR, the tribunal must “transmit” rather than “file” the material with the Registry, and therefore “the material is not . . . part of the evidentiary record” (*Canadian Copyright* at para 18; *Canada (Attorney General) v Lacey*, 2008 FCA 2420 [*Lacey*]).

[36] It is clear that section 318 of the FCR refers to the “transmission” of documents to the Registry and not their “filing”. Relying on *Lacey*, Justice Stratas observed in *Canadian Copyright* that this means that “[t]he material is not formally before the reviewing court in the sense of being part of the evidentiary record” (*Canadian Copyright* at para 18).

[37] But it does not follow that these documents have not entered the public domain and are not part of the Court file. In *Kirikos v Fowlie*, 2016 FCA 80 [*Kirikos*], the Federal Court of Appeal observed as follows at paragraph 19:

> What is meant by the “open court principle”? In a nutshell, it signifies that in Canada, unless otherwise stated, all court proceedings, <u>including all material forming part of a court’s records,</u> remain publicly available.
>
> [Emphasis added]

[38] It is not because the documents are not part of the evidentiary record that they are not part of the Court file, and, I remind you, it is the documents in the Court file that are subject to the open court principle.

[39] In addition, as noted by the Federal Court of Appeal in *Gernhart* at paragraph 33 concerning a previous provision of the ITA comparable to subsection 241(3) of the ITA which

provided for the "transmission" of a taxpayer's file to the Tax Court of Canada in the event of a challenge to a Minister's decision:

> Subsection 176(1) of the Act is the pivotal enactment which eventually permits the world at large to obtain copies of a taxpayer's return. All documents transmitted by the Minister to the Tax Court are potentially available to be inspected by the general public, whether or not they have been tendered into evidence by any of the parties to the action.
>
> [Emphasis added]

[40] It should also be borne in mind that the *Lacey* decision was rendered prior to the amendment of sections 309 and 310 of the FCR, which resulted in the adoption of paragraphs 309(2)(e.1) and 310(2)(c.1) of the FCR. Prior to these amendments, certified tribunal records could only be included in the parties' records if they were introduced by affidavit, filed and served in accordance with sections 306 and 307 of the FCR, and if "one of the . . . affidavits will identify the documentary exhibits, which include some or all of the documents comprising the tribunal record" (*Canada (Attorney General) v Canadian North Inc*, 2007 FCA 42 at paras 3 and 5).

[41] However, since the adoption of paragraphs 309(2)(e.1) and 310(2)(c.1) of the FCR, no affidavit is required. The documents contained in the certified record no longer need to be filed in evidence to appear in a party's record; they "can simply be placed in the applicant's record or the respondent's record . . . [w]hen that is done, the material is in the evidentiary record before the reviewing court and may be used by the parties and the court" (*Canadian Copyright* at para 17).

[42] Mr. Rémillard cites *Quebec Port Terminals Inc. v Canada (Canada Labour Relations Board)* (FCA), [1993] FCJ No 421, 164 NR 60 [*Quebec Port Terminals*] for the proposition that documents forwarded to the Registry under former section 1613 of the FCR, the predecessor to section 318 of the FCR, were not automatically part of the Court file. However, upon reading paragraph 11 of that decision, it is clear that when Judge Décary referred to the "record of the Court", he meant the evidentiary record, that is, the parties' records that are filed in accordance with sections 309 and 310 of the FCR as they now read. He was not referring to the Court file as provided for in sections 23 and 26 of the FCR. In any event, the documents relevant to the *Quebec Port Terminals* case had been created after the administrative decision in question was rendered.

[43] Furthermore, as with *Lacey*, *Quebec Port Terminals* was rendered before paragraphs 309(2)(e.1) and 310(2)(c.1) of the FCR were adopted.

[44] According to Mr. Rémillard, the argument that the certified record becomes public as soon as it is added to the Court file is absurd for three reasons:

i. Documents that are not before the judge as evidence could, nevertheless, be consulted by the public.

   I see no problem here. Although the Court decides solely on the basis of the record before it (*Gernhart* at para 48; *Quebec Port Terminals* at para 11), the Court file is also, albeit in another way, before the Court. Indeed, the Court might very well consult the Court file for reasons other than to support its decision. This is indeed one of the reasons why the open court principle extends to everything in

the Court file, with the exception, of course, of the confidential elements contained in that file.

ii. In cases where two applicants submit identical applications for review based on similar submissions against decisions rendered by the same administrative decision-maker, and where one of the applicants already has their complete record in hand but the other does not, the person who makes their request under section 317 of the FCR to obtain their record would be placed in an unfair position with respect to the applicant who already has their complete record, in the sense that they would be subject to the obligation to make their complete record public.

For my part, I do not see any injustice in such a case, which, I must emphasize, seems very hypothetical to me.

iii. Two persons affected by the same decision by the same administrative decision-maker could make applications for review based on different submissions, where one person may be required to resort to converting their application into an action under subsection 18.4(2) of the *Federal Courts Act* [Act], while the other may not see the need to do so and may simply file application request under section 317 of the FCR.

For my part, again, I do not see a problem in this hypothetical case. The parties may choose the appropriate remedy in light of the questions they raise in their applications. The result is no injustice or absurdity.

[45] In the end, and as I have already pointed out, subject to a specific rule of law, a mechanism provided for under the FCR or reasons for judicial policy, documents submitted to

the Registry in accordance with the procedure set out in sections 317 and 318 of the FCR and kept in the Court file are subject to the open court principle and remain publicly available (*Kirikos* at para 19).

[46] It is not disputed that there is no mechanism under the FCR that makes the Information confidential. With the exception of the Interim Order, no prior order was made in this case concerning the confidentiality of the Information under section 151 of the FCR.

[47] I now come to the three reasons raised by Mr. Rémillard that would justify keeping the Information confidential even though the FCR themselves make it public.

a) *Implied undertaking of confidentiality*

[48] The principle of an implied undertaking of confidentiality is a case-law concept that arises from judicial policy reasons (*Juman v Doucette*, 2008 SCC 8 at para 23 [*Juman*]; *Lac d'Amiante* at para 73).

[49] Mr. Rémillard submits that the Information and, in substance, all documents transmitted to the Registry by a tribunal under section 318 of the FCR are subject to an implied undertaking of confidentiality, a concept enshrined in *Juman* and *Lac d'Amiante*.

[50] In support of this argument, Mr. Rémillard notes that the judicial review procedure is of a summary nature and that it does not allow examinations for discovery contrary to an action. He submits that the procedure set out in sections 317 and 318 of the FCR compensates for the

absence of such an exploratory examination by enshrining the right of the person seeking judicial review to seek discovery of certain documents.

[51] According to Mr. Rémillard, extending the rule of implied confidentiality to the documents transmitted to the Registry under section 318 of the FCR would not constitute an infringement of the open court principle since the documents (or at least part of them) would become public in any event upon their filing in evidence, i.e., once they are included in a party's record under sections 309 and 310 of the FCR, and the Court is only supposed to consider the evidentiary record to render its decision.

[52] As for the Minister, he submits that, under the terms of the FCR, certified records are public and, as such, part of the judicial proceedings, that the procedure provided for in sections 317 and 318 of the FCR does not provide for a discovery process, and that confidentiality is normally required by the party obliged to transmit documents.

[53] I cannot accept the arguments put forth by Mr. Rémillard

[54] First of all, I would note that the implied undertaking of confidentiality is a rule that aims to prevent the use of information collected during discovery for purposes other than for preparing for the trial, in order to limit invasions of privacy whenever judicial proceedings are initiated. And as stated by the Supreme Court in *Lac d'Amiante* at paragraph 42:

> Even if files or information are confidential or private, a party who institutes a legal proceeding waives his or her right to privacy, at least in part . . . . When legal proceedings are instituted, they necessarily set in motion the process for verifying allegations and information presented unilaterally by one party. The rule of

> confidentiality, however, seeks to limit the invasion of privacy at the examination on discovery stage by restricting the scope of the examination to what is necessary for the conduct of the proceeding. The rule acknowledges that if the information is relevant and is not protected by some other privilege, it must be communicated to the adverse party. However, the rule prohibits that party from using it for purposes other than preparing for the trial and defending his or her interests at trial, or from disclosing it to third parties, without specific leave from the court.

[55] I note from Mr. Rémillard's arguments that certain similarities can be drawn between the procedure under sections 317 and 318 FCR and examinations for discovery. In particular, these two procedures are aimed at the discovery of documents. Indeed, "[t]he root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery" (*Juman* at para 20). Also, the transmission of documents under section 318 of the FCR may be considered as a method of discovery (*Access Information Agency Inc. v Canada (Attorney General)*, 2007 FCA 224 [*Access Information*] at para 21); *Athletes 4 Athletes Foundation v Canada (National Revenue)*, 2020 FCA 41 at para 17).

[56] However, it does not follow that all the logic and the basis of the principle of an implied undertaking of confidentiality in the context of an examination for discovery established by *Lac d'Amiante* and *Juman* are valid with respect to the transmission of documents under section 318 of the FCR. To put it succinctly, I cannot accept the argument that section 318 of the FCR is to judicial review what examination for discovery is to actions. We will now look at the many differences between the two procedures.

(i) Exploratory nature of examinations for discovery

[57] The procedure provided for in sections 317 and 318 of the FCR does not involve any discovery processes equivalent to an examination for discovery, which is **exploratory** in nature. An examination for discovery is a procedure for the verification and examination of allegations and information submitted unilaterally by a party allowing for "freedom to investigate", oriented toward "a far-reaching and liberal exploration that allows the parties to obtain as complete a picture of the case as possible" in exchange for which "an implied obligation of confidentiality has emerged in the case law, even in cases where the communication is not the subject of a specific privilege" (*Lac d'Amiante* at paras 42 and 60). However, there is no exploratory investigation as part of the disclosure process under section 317 of the FCR. For example, this text cannot be usefully invoked to obtain documents not available to the administrative decision-maker at the time of its decision (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 112).

[58] Contrary to examinations for discovery, "[w]hen dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance" (*Access Information*, para 21).

[59] Moreover, for the party conducting the examination for discovery to truly "explore", the other party must necessarily cooperate fully in the investigation. This obligation of cooperation is, moreover, another of the foundations of the implied undertaking of confidentiality which we do not find in the procedure set out in sections 317 and 318 of the FCR. A tribunal to which these sections apply has no interest in hiding the information, as opposed to a party in a civil dispute, for example. And as stated by the Supreme Court in *Lac d'Amiante* at paragraph 26:

> [26] There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude (“litigation by avalanche”) as often to preclude careful pre-screening by the individuals or corporations making production.

[60] Moreover, the Minister has argued—rightly, in my view—that it is generally the party who is obliged to submit information that requires that information to remain confidential in the course of examinations for discovery. The situation is vastly different from the case at hand, where it is rather the party requesting the information (and even requesting it to be transmitted to the Registry) that is also requesting confidentiality.

[61] I am not saying a party can only request that information be treated as confidential when it is that party who is obliged to disclose that information, as it is obvious that the party will always be able to request this confidentiality under section 151 of the FCR (*Bah v Canada (Citizenship and Immigration)*, 2014 FC 693 (CanLII) at para 13 [*Bah*]). I am simply saying that the need for the other party’s cooperation in conducting an examination for discovery is another judicial policy reason justifying the implied undertaking of confidentiality in examinations for discovery that has not been transposed into the procedure prescribed by sections 317 and 318 of the FCR.

[62] Thus, the exploratory nature of examinations for discovery and the objective of promoting free and complete exchanges of information made it necessary to develop the implied undertaking of confidentiality.

[63] The procedure provided for in sections 317 and 318 of the FCR is not exploratory in nature but rather procedural in nature; it is simply a matter of submitting to the reviewing court, and to the requesting party, the documents on which the administrative decision was rendered so that it could examine what the decision-maker has done.

[64] I do not accept Mr. Rémillard's contention that the procedure under sections 317 and 318 of the FCR is exploratory in nature simply because Mr. Rémillard did not know exactly what information was held by the tribunal in his case. His request for information was very precise and detailed. He had to have at least some idea of what information would be disclosed. At the very least, Mr. Rémillard should have suspected that the information disclosed would be tax-related and therefore private. As a result, certain mechanisms provided for by the FCR were available to him to ensure the confidentiality of the Information. Mr. Rémillard was not taken hostage by the FCR. We will deal with these mechanisms in good time, but for now I must mention that the fact that there are already mechanisms in the FCR that achieve the same objective as the implied undertaking of confidentiality also militate in favour of not importing this principle in this case.

(ii) Examinations for discovery take place outside the Court

[65] Contrary to the transmission of documents provided for in section 318 of the FCR, examinations for discovery are private in nature and do not take place at a public hearing. The documents are exchanged and the evidence is generally inspected away from the Court's gaze, unless its intervention is requested by one of the parties (*Juman* at para 21).

[66] Until then, the information exchanged, whether documentary or oral, remains strictly between the parties. The FCR provide similar mechanisms, namely that affidavits of documents are served on the parties, not filed in court (section 223 of the FCR), and that copies of the documents they list are simply provided to the other party (section 228 of the FCR), for example.

[67] These documents, as well as the stenographic notes of examinations for discovery, if any, are generally not included in the Court file, unless they are attached to the affidavits in support of an application. At trial, these documents and excerpts from the stenographic notes may be presented as evidence (sections 226 and 288 of the FCR).

[68] In fact, the Supreme Court found, in *Lac d'Amiante*, that the principle of an implied undertaking of confidentiality is not contrary to the open court principle since the application of this obligation of confidentiality is limited to a phase which is not part of the "hearing" within the meaning of former article 13 of the Code of Civil Procedure. The Court observed that "at the examination on discovery stage, concern for transparency is not an issue because the examination is not a sitting of the courts. It is therefore legitimate in that case to give greater weight to the privacy interest, by imposing the obligation of confidentiality on information that is disclosed" (*Lac d'Amiante* at para 70).

[69] As was observed in *Juman* at paragraph 21:

> . . . oral discovery is not conducted in front of a judge. The only point at which the "open court" principle is engaged is when, if at all, the case goes to trial and the discovered party's documents or answers from the discovery transcripts are introduced as part of the case at trial.

[70] The Supreme Court noted the following at paragraph 72 of *Lac d'Amiante*:

> As we have seen, examinations for discovery is neither part of the judicial record nor part of a trial. Its content is therefore not accessible to the public since it remains in principle in the private realm. At this stage, no transparency requirement in the judicial system would justify having this information leave the realm of privacy, making it accessible to the public or the media. Furthermore, we must remember that once the trial begins, with the exception of the limited cases held in camera or with a non-publication order, the media have extensive access to court records, and to the parties' exhibits and documents, and hearings. This access is firmly guaranteed to them, in order to safeguard the public's right to information on civil or criminal justice and freedom of the press and expression.

[71] Accordingly, I reject Mr. Rémillard's argument that the transmission of documents under section 318 of the FCR is also done out of court. As we have seen, once in the possession of the Registry, all documents placed in the Court files and in the annexes to them, except in the situations described in section 152 of the FCR, are available to the public and to the Court. Contrary to how information obtained during examinations for discovery is treated before being filed as evidence by one of the parties during the trial, section 318 of the FCR itself provides that the documents must be transmitted to the Registry so that the Court can consider the evidence presented to the tribunal in question (*Canadian Copyright* at para 13).

[72] Conversely, before being filed with the Court, documents communicated between the parties during an examination for discovery remain in the hands of the parties and are not "in the possession of the Court or the Registry" (paragraph 23(2)(c) of the FCR).

(iii) Evidentiary record and Court file

[73] Mr. Rémillard argues that *Lac d'Amiante* teaches that documents are subject to the open court principle only when they are "filed" in evidence before the Court. This is an erroneous interpretation of that authoritative judgment. Mr. Rémillard confuses the notion of evidence with the notion of public access to Court files.

[74] The context of *Lac d'Amiante* was an examination for discovery, and the issue was how information exchanged during an examination for discovery should be dealt with. As Justice Lebel stated, the information exchanged "does not become a part of the court record and does not enter into the proceedings between the parties as long as the trial has not commenced and the adverse party has not entered it in evidence" (*Lac d'Amiante* at p 773).

[75] However, we must bear in mind that in the course of the examination for discovery, the courts' rules of procedure generally provide that the only way for the information gathered during this process to enter the public domain is through the evidentiary record or through an affidavit. In other words, the incorporation of information into the Court file takes place simultaneously with its incorporation into the evidentiary record.

[76] This is not the case with the transmission of the certified tribunal record to the Registry under section 318 of the FCR. All documents in the evidentiary record are part of the Court file, but not everything in the Court file is part of the evidentiary record. Once again, with certain exceptions, everything in the Court file and in its annex is subject to the open court principle.

[77] In this context, it was logical that in *Lac d'Amiante*, the Supreme Court referred to the need to file this information as "evidence" before it was made public, because it was previously

kept outside the legal proceedings. This reasoning does not apply to documents transmitted to the Registry under section 318 of the FCR because, once in the possession of the Registry, these documents are in the public domain and form part of the Court's file under sections 23 and 26 of the FCR.

(iv) Free and full exchange of information

[78] As I have already explained, the concept of protecting the free and full exchange of information does not come into play in the transmission of a certified tribunal record.

[79] The certified record represents nothing less than the relevant documentary evidence on which the administrative decision-maker relied in making its decision. The procedure provided for in sections 317 and 318 of the FCR is simply intended to enable the applicant and therefore the Court to understand the elements on which the decision-maker relied in making its decision. In this context, it is not necessary to protect documents transmitted under sections 318 of the FCR from the prying eyes of an open court, as is necessary for documents transmitted in the context of examinations for discovery.

(v) Summary nature of judicial review procedure

[80] Nor am I satisfied that the procedure under sections 317 and 318 of the FCR should compensate for the lack of an exploratory discovery process in applications for judicial review before this Court. They are supposed to be summary in nature (section 18.4 of the Act). With respect to judicial review, other than in exceptional cases, the only evidence to be presented to the Court is specified in sections 309 and 310 of the FCR.

[81] Mr. Rémillard invites me to transpose into this application a principle which normally comes into play in an action. It is important to recall Justice Phelan's observations in *Barreiro v Canada (National Revenue)*, 2008 FC 850 at paragraphs 11 and 12 [*Barreiro*], in the context of an application for judicial review:

> [11] In the course of normal litigation involving an action, the documents in question would be produced at discovery but generally subject to the express (or implied) undertaking of confidentiality. The result is that such information in the litigation would only be publicly available at the trial.
>
> [12] The Federal Court changed its procedures for the relief of declaration (which is the principal relief sought) from the use of an action to the current procedure of a judicial review. As a consequence, affidavit evidence (usually the type of evidence heard in an action at trial) is available when filed with the Registry. <u>To some extent, the pre-trial disclosure protections are lost by the form of the proceeding.</u>
>
> [Emphasis added.]

[82] Mr. Rémillard had several options. For example, if a party wishes to have greater flexibility in matters of inquiry and procedural safeguards, it may still ask the Court to order that the application for judicial review be heard as if it were an action, as provided for in subsection 18.4(2) of the Act (*Association des crabiers acadiens Inc. v Canada (Attorney General)*, 2009 FCA 357 at para 39 [*Association des crabiers acadiens*]). (I will discuss the use of subsection 18.4(2) of the Act below.)

(vi) Alleged prejudicial effect

[83] I accept the argument put forth by Mr. Rémillard concerning the importance of the procedure established by sections 317 and 318 of the FCR; the certified record containing the

evidence presented to the tribunal in question and transmitted to the Registry under this procedure allows litigants to "effectively pursue their rights to challenge administrative decisions from a reasonableness perspective" (*Hartwig* at para 24; *Lukács* at para 6; *Slansky* at para 275). Without this information, litigants cannot effectively exercise their right to judicial review.

[84] However, I reject the idea that the procedure under sections 317 and 318 of the FCR has an unjustified detrimental effect on a litigant's right to challenge a government decision. As we will see, the FCR offer options to applicants wishing to maintain the confidentiality of their information.

(vii) Supposedly anachronistic nature of procedure

[85] Finally, Mr. Rémillard correctly submits that, on the grounds of judicial policy, the **automatic** and **mandatory** transmission to the Court of the **entire** taxpayer's file is archaic, and as observed by Justice Dubé at trial in *Gernhart v Canada*, 132 FTR 2, [1997] 2 CTC 23 at paragraph 12: "it is no longer necessary for the administration of justice that the whole taxpayer's file become the Tax Court's identified file".

[86] However, in this case, the transmission does not cover the entire taxpayer's file and is not mandatory or automatic. Section 317 of the FCR allows the transmission of documents contained in the certified record only at the request of a party and limits the transmission of these documents to what is indicated in the request for transmission and only the "material relevant to

an application" (section 317 of the FCR; see also *Canadian Private Copying Collective v Cano Tech Inc.*, [2006] 3 FCR 581 (affirmed on appeal 2007 FCA 14) [*Cano Tech*]).

[87] Overall, I conclude that the transmission of relevant documents from the certified tribunal record to the Registry under section 318 of the FCR is subject to the open court principle. As observed by the Federal Court of Appeal in *Kirikos* at paragraph 19, this principle "signifies that in Canada, unless otherwise stated, all court proceedings, including all material forming part of a court's records, remain publicly available".

[88] In this case, the same is true of the FCR with respect to documents transmitted to the Registry under section 318 of the FCR, and there is no reason for judicial policy to advocate broadening the application of the implied undertaking of confidentiality to those documents; this would be unjustifiable, because it would be contrary to the fundamental open court principle enshrined in *MacIntire* and *Edmonton Journal*.

b) *Effect of ITA*

[89] Mr. Rémillard submits that section 241 of the ITA is a rule of law that protects the confidentiality of tax information once it is transmitted to the Registry. Section 241 of the ITA reads as follows:

Provision of information	**Communication de renseignements**
241(1) Except as authorized by this section<u>, no official or other representative of a government entity shall</u>	241(1) Sauf autorisation prévue au présent article, <u>il est interdit à un fonctionnaire ou autre représentant d'une entité gouvernementale</u>:

(a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;

a) de fournir sciemment à quiconque un renseignement confidentiel ou d'en permettre sciemment la prestation;

(b) knowingly allow any person to have access to any taxpayer information; or

b) de permettre sciemment à quiconque d'avoir accès à un renseignement confidentiel;

(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or for the purpose for which it was provided under this section.

c) d'utiliser sciemment un renseignement confidentiel en dehors du cadre de l'application ou de l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi*, ou à une autre fin que celle pour laquelle il a été fourni en application du présent article.

Evidence relating to taxpayer information

Communication de renseignements dans le cadre d'une procédure judiciaire

(2) Notwithstanding any other Act of Parliament or other law, no official or other representative of a government entity shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.

(2) Malgré toute autre loi ou règle de droit, nul fonctionnaire ou autre représentant d'une entité gouvernementale ne peut être requis, dans le cadre d'une procédure judiciaire, de témoigner, ou de produire quoi que ce soit, relativement à un renseignement confidentiel.

Communication where proceedings have been commenced

Communication de renseignements en cours de procédures

(3) Subsections 241(1) and 241(2) do not apply in respect of

(3) Les paragraphes (1) et (2) ne s'appliquent:

(a) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or

a) ni aux poursuites criminelles, sur déclaration de culpabilité par procédure sommaire ou sur acte d'accusation, engagées par le dépôt d'une dénonciation ou d'un acte d'accusation, en vertu d'une loi fédérale;

(b) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

b) ni aux procédures judiciaires ayant trait à l'application ou à l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi* ou de toute autre loi fédérale ou provinciale qui prévoit l'imposition ou la perception d'un impôt, d'une taxe ou d'un droit.

. . .

. . .

Information may be communicated

Communication de renseignements

(3.4) The Minister may communicate or otherwise make available to the public, in any manner that the Minister considers appropriate, the following taxpayer information:

(3.4) Le ministre peut communiquer au public, ou autrement mettre à sa disposition, de la façon qu'il estime indiquée, les renseignements confidentiels suivants:

(a) the names of each organization with respect to which an individual can be entitled to a deduction under subsection 118.02(2); and

a) le nom de chacune des organisations pour lesquelles un particulier peut avoir droit à une déduction en vertu du paragraphe 118.02(2);

(b) the start and, if applicable, end of the period in which paragraph (a) applies in respect of any particular organization.

b) la date du début et, le cas échéant, de la fin de la période pendant laquelle l'alinéa a) s'applique relativement à une organisation.

Information may be communicated

(3.5) The Minister may communicate or otherwise make available to the public, in any manner that the Minister considers appropriate, the name of any person or partnership that makes an application under section 125.7.

Communication de renseignements

(3.5) Le ministre peut communiquer au public, ou autrement mettre à sa disposition, de la façon qu'il estime indiquée, le nom de toute personne ou société de personnes qui a fait une demande en application de l'article 125.7.

. . .

Disclosure to taxpayer or on consent

(5) An official or other representative of a government entity may provide taxpayer information relating to a taxpayer

(a) to the taxpayer; and

(b) with the consent of the taxpayer, to any other person.

Divulgation d'un renseignement confidentiel

(5) Un fonctionnaire ou autre représentant d'une entité gouvernementale peut fournir un renseignement confidentiel:

a) au contribuable en cause;

b) à toute autre personne, avec le consentement du contribuable en cause.

. . .

Definitions

(10) In this section

taxpayer information

means information of any kind and in any form relating to one or more taxpayers that is

Définitions

(10) Les définitions qui suivent s'appliquent au présent article.

renseignement confidentiel

Renseignement de toute nature et sous toute forme concernant un ou plusieurs contribuables et qui, selon le cas:

(a) obtained by or on behalf of the Minister for the purposes of this Act, or	a) est obtenu par le ministre ou en son nom pour l'application de la présente loi;
(b) prepared from information referred to in paragraph (a),	b) est tiré d'un renseignement visé à l'alinéa a).
but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates and, for the purposes of applying subsections (2), (5) and (6) to a representative of a government entity that is not an official, taxpayer information includes only the information referred to in paragraph (4)(l). (renseignement confidentiel) [Emphasis added.]	N'est pas un renseignement confidentiel le renseignement qui ne révèle pas, même indirectement, l'identité du contribuable en cause. Par ailleurs, pour l'application des paragraphes (2), (5) et (6) au représentant d'une entité gouvernementale qui n'est pas un fonctionnaire, le terme ne vise que les renseignements mentionnés à l'alinéa (4)l). (taxpayer information) [Je souligne.]

[90] There is no doubt that, in the hands of the Minister, taxpayer tax information must be treated confidentially. The importance of this confidentiality was emphasized by the Supreme Court in *Slattery (Trustee of) v Slattery*, [1993] 3 SCR 430 [*Slattery*], where Justice Iacobucci observed at page 444:

> Section 241 reflects the importance of ensuring respect for a taxpayer's privacy interests, particularly as that interest relates to a taxpayer's finances. Therefore, access to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in those exceptional situations does the privacy interest give way to the interest of the state.
>
> As alluded to already, Parliament recognized that to maintain the confidentiality of income tax returns and other obtained information is to encourage the voluntary tax reporting upon which our tax system is based. Taxpayers are responsible for reporting their incomes and expenses and for calculating the tax owed to

> Revenue Canada. By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. The opposite is also true: if taxpayers lack this confidence, they may be reluctant to disclose voluntarily all of the required information (Edwin C. Harris, *Canadian Income Taxation* (4th ed. 1986), pp. 26-27).
>
> [Emphasis added.]

[91] But I cannot support the argument that the Information, indeed all taxpayer tax information, becomes inherently confidential under section 241 of the ITA, thereby maintaining confidentiality in the hands of the third parties to which the documents were transmitted (as allowed by section 241 of the ITA), thus requiring the Minister to ensure that they are clearly designated as confidential at the time of their transmission to the Registry (subsection 152(1) of the FCR) and treated as such by these third parties in accordance with the Minister's fiduciary obligations to taxpayers.

[92] Section 241 of the ITA does not render taxpayer tax information inherently confidential because of the nature of the documents themselves. This provision does not have the same effect as, for example, paragraph 83(1)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], or even subsections 658(1) and 955(1) of the *Bank Act*, SC 1991, c 46, which provide as follows:

Confidential information	**Caractère confidentiel des renseignements**
658(1) Subject to subsection (2), information regarding the business or affairs of a bank, authorized foreign bank or external complaints body or regarding persons dealing	658(1) Sous réserve du paragraphe (2), <u>sont confidentiels et doivent être traités comme tels les</u> renseignements concernant l'activité commerciale et les

with any of them that is obtained by the Commissioner or by any person acting under the Commissioner's direction, in the course of the exercise or performance of powers, duties and functions referred to in subsection 5(1) of the *Financial Consumer Agency of Canada Act*, and any information prepared from that information, is confidential and shall be treated accordingly.

affaires internes de la banque, de la banque étrangère autorisée ou de l'organisme externe de traitement des plaintes ou concernant toute personne faisant affaire avec eux — ainsi que les renseignements qui sont tirés de ceux-ci —, obtenus par le commissaire ou par toute autre personne exécutant ses directives, dans le cadre de l'exercice des attributions visées au paragraphe 5(1) de la *Loi sur l'Agence de la consommation en matière financière du Canada*.

Disclosure permitted

(2) If the Commissioner is satisfied that the information will be treated as confidential by the agency, body or person to whom it is disclosed, subsection (1) does not prevent the Commissioner from disclosing it

. . .

Communication autorisée

(2) S'il est convaincu que les renseignements seront traités comme confidentiels par leur destinataire, le commissaire peut les communiquer:

. . .

Confidential information

955(1) All information regarding the business or affairs of a bank holding company, or regarding a person dealing with a bank holding company, that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of

Caractère confidentiel des renseignements

955(1) Sont confidentiels et doivent être traités comme tels les renseignements concernant l'activité commerciale et les affaires internes de la société de portefeuille bancaire ou concernant une personne faisant affaire avec elle et obtenus par le surintendant ou par toute autre personne agissant sous ses ordres, dans le cadre de l'application d'une loi fédérale, de même que

Parliament, and all information prepared from that information, is confidential and shall be treated accordingly.	ceux qui sont tirés de tels renseignements.
Disclosure permitted	**Communication autorisée**
(2) Nothing in subsection (1) prevents the Superintendent from disclosing any information	(2) S'il est convaincu que les renseignements seront considérés comme confidentiels par leur destinataire, le surintendant peut toutefois les communiquer:
. . .	. . .
[Emphasis added.]	[Je souligne.]

[93] There is no such provision in the ITA. Section 241 of the ITA simply prohibits the disclosure of taxpayer tax information and imposes a positive obligation on the Minister to treat such documents confidentially while in his possession, subject, in this case, to subsections 241(3) and 241(5) of the ITA.

[94] Citing *Slattery*, Mr. Rémillard argues that the Minister is subject to a fiduciary duty of confidentiality, such that the Minister must not only treat the Information as confidential, but also take the necessary measures to preserve that confidentiality if the information inadvertently falls into the hands of a third party, and he must even ensure that this information remains confidential once it is disclosed to third parties as permitted by the ITA.

[95] When I asked Mr. Rémillard's counsel to explain this position, however, they conceded that neither subsection 241(3) of the ITA nor section 318 of the FCR provides a mechanism for

the Minister to lay down conditions for the use of the information that has been disclosed in accordance with the ITA. In addition, there is no specific rule of law under the ITA allowing documents to be marked as confidential for the purposes of subsection 152(1) of the FCR.

[96] Furthermore, I do not think that the *Slattery* decision is useful to Mr. Rémillard. The issue raised in that judgment was to know to what extent the Minister was authorized to disclose information under section 241 of the ITA. The scope of this authorization is not at issue in this case.

[97] Moreover, nowhere in *Slattery* is it mentioned that taxpayers' tax information is intrinsically confidential and remains so when it is in the hands of a third party, let alone when that third party is a public institution subject to an obligation of open court proceedings.

[98] I acknowledge that as long as the Information remains in the hands of the Minister, the Minister is subject to the legal obligation not to provide it "knowingly" to "any person". However, no provision of the ITA or case law has been quoted to me that supports the proposition that section 241 of the ITA extends the confidential treatment of documents once they are legitimately in the hands of the Registry.

[99] I accept the idea that information collected by the Minister within the scope of his administrative jurisdiction cannot be disclosed to anyone, except within the very limited scope of the relevant exceptions provided for in subsections 241(3) and 241(5) of the ITA. Mr. Rémillard did not challenge the Minister's transmission of the Information to the Registry under

section 318 of the FCR. In fact, subsection 241(3) of the ITA permits this to the extent that it is provided for, in respect of legal proceedings.

[100] However, Mr. Rémillard argues, subsection 241(3) of the ITA is limited to disclosure, and this does not mean that, as soon as there is litigation, all information becomes public. I accept the substance of the principle argued by Mr. Rémillard, but not its formulation.

[101] It is not the application of subsection 241(3) of the ITA that dictates how documents so transmitted to third parties are to be treated and, more specifically, whether third parties are to treat those documents confidentially. Rather, it is the legislative provisions and the principles of law that specifically apply to these third parties that frame the way in which they must process the information. In the present case, the provisions of section 241 of the ITA apply only to the Minister.

[102] I asked Mr. Rémillard's counsel if he could cite a rule of law that would punish anyone who uploaded onto the Internet taxpayer information inadvertently left by a minister's agent, for example, on a table in a restaurant or coffee shop. With the exception of the Charter and the *Privacy Act*, RSC 1985, c P-21—which are not applicable in this context—no rule of law that would render the information in question confidential has been cited to me.

[103] Mr. Rémillard argues that subsection 241(3) of the ITA calls for caution: it cannot be validly argued that this text makes all the Information public following its disclosure. Indeed, once the Information is transmitted, the loss of confidentiality does not result from the Minister's power to disclose the Information under subsection 241(3) of the ITA. Rather, it results from the

effect of this disclosure to the Registry—“by operation of law, [they become] available to the public at large” (*Gernhart*); with respect to the Information transmitted under section 318 of the FCR, as I pointed out earlier, except for reasons of judicial policy, a specific rule of law, or a mechanism provided for by the FCR, documents in the Registry’s possession and kept in the Court file or in one of its annexes are subject to the open court principle and are available to the public.

[104] Mr. Rémillard submits that the ITA defines confidential information, and he draws our attention to subsection 241(10) of the ITA. However, this text does not say that the information listed in it is confidential because of the intrinsic nature of tax information. If such were the case, the English version of the text would be the phrase “confidential information” rather than “taxpayer information”. The term “*renseignement confidentiel*” in the French version of this text serves a purely descriptive purpose intended to identify the types of information listed therein, or at most to clarify that the information is confidential as long as it is in the hands of the Minister.

[105] Mr. Rémillard contends that tax documents transmitted to the Registry should be treated as confidential at all times because of the need to protect the integrity of the tax system.

[106] I agree that the idea that section 241 of the ITA “involves a balancing of . . . the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information” in the cases provided for in this section (*Slattery* at p 443); however, Mr. Rémillard did not persuade me that protecting the integrity of the tax system requires that I extend the confidential treatment of taxpayer tax information beyond what is provided for in the ITA.

[107] In addition to the fact that it is confidential, Mr. Rémillard submits that his tax information must be protected because a large part of it reveals, even indirectly, his identity and therefore is considered private information. As I have already pointed out, a party who institutes a legal proceeding waives his or her right to privacy, at least in part, even when the information is personal and private, such as tax information, and I see no reason for restricting the open court principle in this case.

[108] Mr. Rémillard cites subsections 241(3.4) and 241(3.5) of the ITA as examples of how that statute allows taxpayer information to be disclosed to the public and argues that no specific possibility of disclosure to the public is contained in paragraph 241(3)(b), and that, therefore, any information disclosed under the text in paragraph 241(3)(b) does not have the effect of making this information legitimately public.

[109] I cannot accept Mr. Rémillard's reasoning on this point. He has already conceded that subsection 241(3) of the ITA deals only with the disclosure of information, not with the issue of confidentiality. In any event, the objects of these provisions are different. Subsection 241(3) of the ITA provides an exception to the prohibition of disclosure of information under subsections 241(1) and (2) of the ITA when a judicial proceeding is in progress. Subsections 241(3.4) and (3.5) of the ITA simply provide for the extension of this exception, in all cases, limited to the information listed therein.

[110] Mr. Rémillard cites *Scott Slipp Nissan Ltd. v Canada (Attorney General)*, 2005 FC 1479 [*Scott Slipp*], which teaches that the confidentiality of the information that the Minister intends to disclose under subsection 241(3) of the ITA "is based upon the method of its obtaining, not on

some intrinsic value or nature”. Therefore, he argues that although the information may already be in the public domain, the Minister is nevertheless obliged to treat it as confidential and not disclose it to third parties.

[111] Once again, I do not see how this decision reinforces Mr. Rémillard’s position. I acknowledge that although confidential information under subsection 241(10) of the ITA has been made public, the prohibition of disclosure of such information in the hands of the Minister, as set out in section 241 of the ITA, is nevertheless still in play and limits any disclosure of this information by the Minister under the mechanisms provided for in that section.

[112] But it does not necessarily follow that this information acquires an aura of confidentiality that transcends the application of the ITA, requiring that it be treated as intrinsically confidential once disclosed to the Registry of the Court as permitted by section 241 of the ITA (see *Cinar Corporation c Weinberg*, 2005 CanLII 37468 (QC CS) at para 29; *Diversified Holdings Ltd. v Canada* (CA), [1991] 1 FC 595; 34 CPR (3rd) 187 at p 190).

[113] *Scott Slipp* simply teaches that the fact that the type of information referred to in subsection 241(10) of the ITA is made public by a taxpayer does not give the Minister free rein to disclose tax information; this decision does not mean that the restrictions set out in section 241 of the ITA on how the Minister must treat this information end. The *Scott Slipp* decision does not teach, as Mr. Rémillard argues, that the confidentiality of documents transmitted to the Registry under the procedure established by sections 317 and 318 of the FCR is maintained in perpetuity to the extent that the information contained in those documents is covered by subsection 241(10) of the ITA.

[114] I note, by the way, that the English version of the section of the *Excise Tax Act* at issue in *Scott Slipp* (comparable to subsection 241(10) of the ITA) defined the information as "confidential information" instead of "taxpayer information".

[115] Mr. Rémillard cites the *Barreiro* decision, which states that "[l]itigation, particularly at this stage, does not justify the Minister in disclosing taxpayer information simply because there is litigation". Again, I do not see how this decision reinforces Mr. Rémillard's position.

[116] In *Barreiro*, Justice Phelan was asked to determine whether a confidentiality order under section 151 of the FCR should be made with respect to taxpayer tax information that the Minister wished to attach to his affidavit as a respondent under section 307 of the FCR. There is no indication that an application under section 317 of the FCR was made by either party.

[117] The parties do not dispute that subsection 241(3) of the ITA permitted disclosure of taxpayer information in this context. Rather, the issue was whether a confidentiality order protecting taxpayer information should be issued.

[118] It was in this context that Justice Phelan made the comment cited by Mr. Rémillard, and then he spoke on the question of the confidentiality order in accordance with a Supreme Court judgment, *Sierra Club*. Justice Phelan did not discuss whether taxpayer tax information disclosed by the Minister under subsection 241(3) of the ITA and transmitted by the Minister to the Registry under section 318 of the FCR remained confidential once in the possession of the Registry.

[119] Moreover, in *Barreiro*, taxpayer information had not yet been disclosed by the Minister, and I agree that in those circumstances, it must be treated by the Minister as confidential until it is disclosed. The Court simply recognized that in order to prevent taxpayer tax information from being available to the public once the Minister filed his affidavit, a confidentiality order was justified. In fact, this decision simply confirms that taxpayer tax information may, in appropriate circumstances, be protected by a confidentiality order to prevent it from being subject to the open court principle.

[120] Finally, there remains the question of the application of subsection 241(5) of the ITA, namely whether Mr. Rémillard expressly authorized the disclosure of his tax information to the Registry by his request under section 317 of the FCR. Mr. Rémillard argues that his consent was not freely given and that he therefore did not truly consent, because recourse to section 317 of the FCR was necessary for him to pursue his judicial review proceedings. It is not necessary to discuss this issue, as the parties agree that the Minister could disclose the information to the Registry pursuant to subsection 241(3) of the ITA. In the event that I am wrong about subsection 241(3), I have nevertheless addressed the issue of Mr. Rémillard's consent to the disclosure of information to the Registry in the section regarding the constitutionality of section 318 of the FCR.

[121] Accordingly, I find that section 241 of the ITA is not a rule of law under which tax information is to be treated as confidential and therefore does not in any way protect the confidentiality of tax information once it is transmitted to the Registry of the Court. After its transmission under section 318 of the FCR, tax information from taxpayers does not remain confidential in the Registry, contrary to what Mr. Rémillard claims.

c) *Public disclosure of documents sent to Registry will not render section 151 of FCR moot*

[122] Mr. Rémillard argues that finding that documents sent to the Registry under section 318 of the FCR are subject to the open court principle would render any recourse under section 151 of the FCR completely illusory, as the documents would be made public before the applicant could even become aware of them and before he or she could apply to the Court to request that they be treated confidentially. Thus, his right to request that the Information be kept confidential would then be moot, since by the time he is able to make such a request under section 151 of the FCR, his right will already have been infringed.

[123] In addition, Mr. Rémillard argues that section 151 of the FCR applies only to documents or material that will be filed as evidence, and that section 151 of the FCR cannot be used to protect confidential information at the stage where it is simply transmitted to the Registry under section 318 of the FCR.

[124] I reject this analysis. First, the fact that the documents have entered the public domain does not rule out recourse to section 151 of the FCR. In *Bah*, Justice Bédard observed as follows at paragraph 13:

> I find that section 44 of the *Federal Courts Act*, RSC 1985, c F-7 as well as rules 4 and 26(2) of the Rules give the Court the power to deal with a motion for a confidentiality order even where the documents in question have already been placed in the Court file and to apply, by analogy, the principles set out in rules 151 and 152 (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness*), 2011 FCA 223 at para 20, 30, 32-38, 42-46; *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness*), 2012 FCA 299 at para 16).

[Emphasis added.]

[125] In addition, this Court has in the past found ways to accommodate parties when faced with the risk of their private documents being exposed in accordance with the open court principle. In *Harkat*, Mr. Harkat asked the Court to treat as confidential summaries of conversations in which he had participated, in a security intelligence report concerning him. These summaries were not yet part of the Court file, having been neither transmitted to nor filed with the Court and, therefore, would have been part of the public file only if Mr. Harkat had decided to file them with the Court.

[126] Justice Noël followed section 151 of the FCR to mitigate the risks of violating Mr. Harkat's privacy, and the harm he might have suffered had certain summaries been placed in the Court's public file. Justice Noël gave Mr. Harkat the opportunity to review the summaries before placing them in the Court file, so that Mr. Harkat could decide whether he would file a motion for an order of confidentiality under section 151 of the FCR.

[127] The situation faced by Mr. Rémillard in these proceedings is similar to that which troubled Mr. Harkat. Indeed, Mr. Rémillard asserts in this case that, without the systematic recognition of the confidentiality of documents transmitted to the Registry under section 318 of the FCR, he would be faced with the chicken-or-the-egg dilemma of being unaware of the very documents for which he wishes to obtain a confidentiality order and would therefore not be able to file a motion under section 151 of the FCR. However, the Court, in *Harkat*, recognized at paragraph 14 that "the possibility that the matters referred to in these documents may give rise to privacy concerns" and that "[g]iven Mr. Harkat's current lack of knowledge about the contents

of the conversations, it is reasonable to give him an opportunity to review them before he decides whether a confidentiality order should be sought. To do otherwise would remove that recourse from him".

[128] Accordingly, Justice Noël decided "to delay placing the three summaries on the public file until Mr. Harkat has had an opportunity to review them and make a decision as to how he wishes to proceed" (*Harkat* para 15), in the same way as when the Interim Order was issued at the request of Mr. Rémillard.

[129] In our case, the applicant obtained an interim confidentiality order covering all of the information transmitted. He had ample time to identify documents that meet the case-law criteria for issuing a valid order until the end of the trial.

[130] In *Charkaoui, Re*, 2009 FC 342 (CanLII), [2010] 3 FCR 67 [*Charkaoui*], Justice Tremblay-Lamer adopted the principle enshrined by the Court in *Harkat* and, despite the fact that section 151 of the FCR refers to the documents "to be filed", she extended the application of this rule, in conjunction with section 4 of the FCR, to allow a motion for a confidentiality order concerning documents already filed under a security certificate procedure under the IRPA. For the purpose of determining the confidentiality issue, the documents in question were received by the Court but were not placed in the Court's public file until the Court had ruled.

[131] Finally, in *Lukács*, the Federal Court of Appeal clarified that section 318 of the FCR should not be considered in isolation and that, in addition to sections 151 and 152 of the FCR, the Court had other powers, including "its plenary powers in the area of supervision of tribunals

to craft procedures to achieve certain legitimate objectives in specific cases" (*Lukács* at para 14 citing *Canada (Human Rights Commission) v Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 SCR 626 at paras 35 to 38; *Teale v Canada (Attorney General)*, 1999 CanLII 9234 (FC); *Canada (National Revenue) v Derakhshani*, 2009 FCA 190 at paras 10 and 11; *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50 at paras 35 and 36).

[132] While it is true that the Court in *Lukács* was discussing an objection to disclosure under subsection 318(2) of the FCR, I see no reason why the principles enshrined in that decision cannot apply in this case. In the end, the Federal Court of Appeal instructed the parties as to how they should proceed to resolve the issue of disclosure of documents, and I see no reason why this Court could not have done likewise had Mr. Rémillard made the appropriate application **before** commencing proceedings under sections 317 and 318 of the FCR.

[133] Accordingly, I cannot conclude that the public disclosure of documents transmitted to the Registry under section 318 of the FCR renders section 151 of the FCR moot.

[134] In conclusion, the FCR are clear and unequivocal: the documents transmitted by the tribunal in accordance with the procedure laid down in sections 317 and 318 of the FCR are accessible to the public as soon as they are received at the Registry by virtue of sections 23 and 26 of the FCR. Moreover, the principles underlying the implicit undertaking of confidentiality are not transposable to this case, especially considering that several options are available to applicants wishing to keep the transmitted information confidential. Furthermore, the ITA, unlike other rules of law, does not assign an inherently confidential character to the information. Finally, these findings do not affect the usefulness and relevance of section 151 of the FCR.

B. *If so, does transmission to the Registry under section 318 of the FCR unjustifiably contravene section 8 of the Charter?*

[135] Mr. Rémillard maintains that the obligation to transmit the Information to the Registry constitutes a seizure. Relying on *Gernhart*, he forcefully argues that the [TRANSLATION] “indiscriminate broadcasting of tax information to a court constitutes a seizure”, and that this seizure is unreasonable because the interest of the litigant in the confidentiality of his or her tax information outweighs the interests of the state in the authentication of certified records by the Registry.

[136] While the facts in *Gernhart* bear some analogy to the present case, and while some of the principles enunciated by the Federal Court of Appeal may apply to Mr. Rémillard’s situation, the legal mechanisms at issue in *Gernhart* are different from those in the present case.

[137] It should be noted that Mr. Rémillard is not arguing that section 318 of the FCR itself is contrary to the Charter. Rather, he is attacking the interpretation, in his view unreasonable, of the effect of transmitting the Information to the Registry under this section.

[138] He argues that the purpose of transmission to the Registry has the same anachronistic purpose that was considered unnecessary by the Court—and admitted by the Minister—in *Gernhart*. Not only would the objective of validating the certified record be pointless, but, according to him, even if one accepts the idea that it is a very important government objective, Mr. Rémillard maintains that the Court must still mitigate the impact of section 318 of the FCR and thus preserve everyone’s rights.

[139] In fact, Mr. Rémillard argues that section 318 of the FCR should be given a reading down such that the word “transmission” should only be used to give assurance of authenticity to the Information transmitted to the Registry, when necessary, without it becoming publicly available.

[140] In the alternative, Mr. Rémillard submits that section 318 of the FCR must be declared of no force or effect in whole or, alternatively, in part as follows:

(a) The phrase “to the Registry” in paragraph 318(1)(a) of the FCR must be declared contrary to the Charter and therefore of no force or effect.

(b) Paragraph 318(1)(b) of the FCR must be declared contrary to the Charter and therefore of no force or effect in its entirety.

(c) Subsection 318(4) of the FCR must be declared contrary to the Charter and therefore of no force or effect in its entirety.

[141] Having heard Mr. Rémillard’s arguments, it seems to me that the protection afforded by section 8 of the Charter is not helpful to him in the context of section 318 of the FCR; the objectives of the procedure established by sections 317 and 318 of the FCR and the open court principle are not interests of the state that section 8 of the Charter seeks to temper.

[142] Section 8 of the Charter provides as follows:

Search or seizure	**Fouilles, perquisitions ou saisies**
8. Everyone has the right to be secure against unreasonable search or seizure .	8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

[143] In outlining the philosophy of the Charter, and in particular section 8, Justice Dickson in *Hunter et al v Southam Inc*, [1984] 2 SCR 145 [*Hunter*], observed at p 156:

> The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means . . . that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess.

[144] Section 8 of the Charter is not intended solely to protect property from unreasonable searches and seizures; it goes beyond the protection of property and includes the protection of a reasonable expectation of privacy (*Hunter* at p 159; *R v Dyment*, [1988] 2 SCR 417 at p 429 [*Dyment*]).

[145] Not all seizures violate section 8 of the Charter, only those that are unreasonable (*McKinlay Transport Ltd.*, [1990]1 SCR 627 at pp 642 and 643[*McKinlay*]). The preliminary question in this case is therefore whether section 318 of the FCR effects a "seizure" (*R v Jarvis*, [2002] 3 SCR 757 at p 796 [*Jarvis*]).

[146] In order for the government's action to be considered a seizure in respect of privacy, first, the expectation itself of the person concerned with respect to his or her privacy must be reasonable. As Justice Dickson stated, in *Hunter* at pages 159 and 160:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by section 8,

> whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

[147] If this expectation is not reasonable in the context in which the person concerned is present, "[u]nder such circumstances, the state authorized inspection or the state demand for production of documents will not amount to a search or seizure within s. 8" (*McKinlay*; see also *Dyment* at p 426; *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at p 590 [*Thomson Newspapers*]).

[148] Second, the seizure must include an enforcement component. As *Hunter* teaches, for a seizure to be considered reasonable, an individual's reasonable expectation of privacy must be balanced against the competing law enforcement interest of the state (the government). As Justice LaForest observed in *Dyment* at page 428:

> Claims to privacy must, of course, be balanced against other societal needs, and in particular law enforcement, and that is what s. 8 is intended to achieve.

[149] Therefore, for a seizure to take place, its ultimate purpose must relate to the application of a particular law in respect of that person (see *Hunter*; *R v Collins*, [1987] 1 SCR 265 [*Collins*]; *Dyment*; *McKinlay*; *Thomson Newspapers*; *R v Edwards*, [1996] 1 SCR 128 [*Edwards*]; *R v Mills*, [1999] 3 SCR 668 [*Mills*]; *Gernhart*).

[150] Moreover, the protection provided by section 8 of the Charter not only comes into play in criminal matters, but also extends to the application of a specific law in regulatory matters, where the provisions of a law relating to its application and to investigations are not so much intended to penalize criminal conduct as to ensure compliance with the law itself (*McKinlay* at pp 641 and 642; *Thomson Newspapers* at p 506).

[151] In *McKinlay*, rendered at the same time as *Thomson Newspapers*, the Supreme Court found that Revenue Canada's request for tax information from taxpayers under subsection 231(3) of the ITA in a tax audit constituted a "seizure" because there was a breach of the taxpayers' privacy expectations, even though it was not unreasonable within the meaning of section 8 of the Charter.

[152] This text recognizes the right to protection not only against searches but also against seizures, and, as observed by Justice LaForest in *Thomson Newspapers*, there is "little difference between taking a thing and forcing a person to give it up" (p 505).

[153] Third, there must be a lack of consent from the person whose information is being seized. Indeed, "the essence of a seizure under s. 8 is the taking of a thing from a person by a public authority without that person's consent" (*Dyment* at p 431; *Thomson Newspapers* at p 516).

a) Mr. Rémillard's expectation of privacy not reasonable in this case

[154] Mr. Rémillard bases his argument on section 241 of the ITA. In his view, he has a reasonable expectation of privacy with respect to the Information. He adds that its disclosure

would impede access to justice, especially since the litigant is not in control of the information that would be disclosed.

[155] In response, the Minister argues that Mr. Rémillard does not have a reasonable expectation of privacy because he waived his right to privacy when he consented to the transmission of the documents and because their transmission allowed the Minister to assert his rights in a contentious proceeding.

[156] A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances (*Edwards* at 145).

[157] I acknowledge that with respect to his tax information, Mr. Rémillard's expectation of privacy "*vis-à-vis* the Minister is relatively low" (*McKinlay* at pp 646 and 650). Mr. Rémillard's right to privacy is protected by the restrictions on the dissemination of his tax information provided for in section 241 of the ITA, however limited those restrictions might be.

[158] I am also prepared to accept the idea that such a reasonable expectation of privacy persists when the scope of the transmission of tax information goes beyond what was necessary to achieve the goals of the transmission (*Gernhart*), when the transmission itself has breached the expectation that tax information will not be transmitted in this manner (*Dyment*), or when private information is disclosed without authority to persons other than those to whom it was originally disclosed (*R v Boudreau*, [1998] OJ No. 3526 (QL) (Gen Div) at para 18).

[159] In short, the right to privacy carries with it a reasonable expectation that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged (*Dyment* at paras 429–30; *Mills*).

[160] However, and contrary to the facts of *Gernhart*, Mr. Rémillard is not in a situation where the Minister is obliged to transmit to the Court all his tax information, whether or not it is used for any purpose whatsoever. In this case, the information was not "indiscriminately broadcast" within the meaning of the words of Justice Sexton in *Gernhart* at paragraph 24 of his decision.

[161] Section 317 of the FCR is specific: a party may only request material relevant to an application. Moreover, section 318 of the FCR provides only for the transmission of the requested material to the Registry (see also *McKinlay* at p 642).

[162] In addition, and contrary to the facts of *Dyment*, the rules relating to the disclosure of tax information by the Minister were not only understood, but expected in the event of legal proceedings. This is not a situation in which the Minister has failed in his obligation to treat the information as confidential. Unlike Mr. Dyment, Mr. Rémillard does not argue that the Minister breached his duty of confidentiality and should not have provided the Information (the blood sample in the *Dyment* case) to the Court (the police in the *Dyment* case) after receiving a request to do so under section 317 of the FCR.

[163] Once an application for judicial review has been filed and a request under section 317 of the FCR has been made, Mr. Rémillard is no longer simply "*vis-à-vis* the Minister", and the protection afforded of to the taxpayer's private information by section 241 of the ITA cannot

restrict the manner in which that information is disseminated by the Court. In this context, I fail to see how there can be a reasonable expectation of privacy on the part of Mr. Rémillard (*SPE Valeur Assurable Inc. c La Reine*, 2019 CCI 174 at paras 63 and 64).

[164] Section 318 of the FCR is clear in that the documents in question are transmitted to the Registry. Sections 23 and 26 of the FCR specify that all documents and material in the possession of the Registry must be kept in the Court file or in the annex to the Court file and that the documents contained therein, subject to exceptions, are accessible to the public.

[165] I do not see how Mr. Rémillard could maintain a reasonable expectation of privacy once he made his targeted request under section 317 of the FCR. Even with respect to tax information, the party that institutes legal proceedings waives, at least in part, the protection of their privacy, even when the information is of a personal and private nature (*Frenette*; *Gernhart*).

b) Law enforcement element

[166] In principle, section 8 of the Charter is normally cited in cases where the state (the government) seeks to compel persons to disclose information in the legitimate interest of the state, whether it is to apply legal provisions of a criminal nature or to ensure compliance with the law itself. In short, there must be a proceeding to enforce or apply the law (see *Hunter*; *Collins*; *Dyment*; *McKinlay*; *Thomson Newspapers*; *Edwards*; *Mills*; *Gernhart*).

[167] However, this is not the case with Mr. Rémillard.

[168] With respect to *Jarvis*, Mr. Jarvis did not challenge the constitutionality of the ITA's provisions, which authorized the audit, but rather the admission into evidence before the Court of statements and documents that were compelled by Revenue Canada officials under these sections (in audit mode), on the grounds that there had been a violation of his rights under sections 7 and 8 of the Charter in the context of a prosecution for tax evasion.

[169] However, the Supreme Court's findings focused on the manner and context in which the information was collected by the Revenue Canada official under the ITA, not on the judicial process to make the evidence public.

[170] It is true that section 8 of the Charter is intended to protect persons from unreasonable incursions by the state into their privacy, but the procedure established by sections 317 and 318 of the FCR does not effect such an incursion. Section 318 of the FCR does not apply to a government request or order that seeks to intrude "on the individual's privacy in order to advance its goals, notably those of law enforcement" (*Thomson Newspapers* at p 492). The proceeding brought by Mr. Rémillard has no law enforcement component. Rather, the procedure established under sections 317 and 318 of the FCR, as I noted earlier, is a mechanism by which the parties and the Court can obtain the record used by the administrative decision-maker.

[171] This does not mean that there must be an underlying review or investigation in progress for the request or order to constitute a seizure. In *Gernhart*, Judge Sexton stated that a seizure "can occur even where no investigation is taking place" (*Gernhart* at para 22; *Dyment*).

[172] With respect to *Gernhart*, the information was transmitted as part of Ms. Gernhart's appeal to the Tax Court of Canada of the Minister of National Revenue's assessment of her income tax return. That case involved an old provision of the ITA which provided that when a taxpayer appealed an assessment, the Minister of National Revenue had to transfer copies of all the tax documents from the appellant to the Tax Court of Canada.

[173] The Federal Court of Appeal concluded that, in these circumstances, the provision was subject to an unreasonable seizure. However, as in *Dyment*, the purpose of the seizure in *Gernhart* included a law enforcement element.

[174] In addition, the Federal Court of Appeal in *Gernhart* found that the systematic filing of all documents obtained from Ms. Gernhart in the Court, where they became available to the public, did not serve any useful purpose (*Gernhart* at para 36; see also *Cano Tech* at para 113).

[175] In the present case, as I have already noted, the automatic transmission to the Registry of the record requested under sections 317 and 318 of the FCR is rather a useful objective. It is part of a procedure that ensures the integrity of the record in case of doubt. It is part of a procedural mechanism that ensures the effective conduct of a judicial review procedure in accordance with the fundamental open court principle.

c) Mr. Rémillard's consent

[176] In *Dyment*, Justice LaForest confirmed that there is seizure when the authorities take something belonging to a person without his or her consent (*Dyment* at p 421). In fact, it was the

transfer of blood by the doctor to the police officer, contrary to Mr. Dyment's reasonable expectation that his doctor would respect his privacy, which allowed the state to conduct the investigation under the law in force, the Criminal Code.

[177] The Minister submits that Mr. Rémillard cannot argue that there has been a transmission against his will since the request under section 317 of the FCR was filed by him. The Minister is thus drawing a distinction with respect to the facts of the *Gernhart* judgment, in which Ms. Gernhart had not consented to the transmission of her statements to the Registry of the Court.

[178] On the other hand, Mr. Rémillard submits that he never consented to the dissemination of the Information, because in order to pursue his application for judicial review validly, he had no choice but to use the procedure set out in sections 317 and 318 of the FCR to prepare his record. In short, it would not be true consent if it depends on the loss of a remedy.

[179] Mr. Rémillard asserts that there is [TRANSLATION] "indiscriminate broadcasting" because the transmission to the Registry pursuant to section 318 of the FCR constitutes a broadcasting before he can even assert his rights—as soon as he realizes that a right exists, it is immediately lost—and when he is obliged to rely on the procedure in sections 317 and 318 of the FCR, he is thus taken hostage by a procedural rule; he must choose between bringing an appeal or renouncing rights in advance without knowing the contents of the documents thus transmitted to the Registry.

[180] I do not accept Mr. Rémillard's arguments.

[181] It was he who made his requests under section 317 of the FCR. This means that he controlled the timing. As I have already pointed out, he had the opportunity to ask the Court to make an order to protect any information he wished to keep private and confidential. As Justice Stratas observed in *Lukács*, section 318 of the FCR should not be considered in isolation. Faced with a problem such as the one faced by Mr. Rémillard, the Court is able to find a solution that reconciles, to the extent possible, the objectives of a meaningful review of administrative decisions, procedural fairness, and the protection of any legitimate interest in confidentiality while ensuring an open proceeding. (*Sierra Club*; see also *Charkaoui*).

[182] Another possibility was to ask the Court to order that the application for judicial review be heard as if it were an action, as provided for in subsection 18.4(2) of the Act. This provision constitutes Parliament's response to concerns that an application for judicial review would not offer appropriate procedural safeguards when declaratory relief is exercised. Such a conversion is possible, in particular, when an application for judicial review does not provide sufficient procedural safeguards where a declaratory judgment is sought (*Access Information* at para 20; *Haig v Canada*, [1992] 3 FC 611 (FCA) at para 9; *Association des crabiers acadiens* at para 39).

[183] It should be noted that this type of application is discretionary in nature (*Slansky* at para 55), but since Mr. Rémillard has expressed serious concerns about the lack of procedural safeguards concerning the confidentiality of his private information in the context of a section 317 application, I would have thought that he would seek such an order in addition to any other remedy available under the FCR. He merely sought the Interim Order in the evening of January 15, 2020.

[184] In *Gernhart*, Justice Sexton clearly observed that one of the problems posed by former section 176 of the ITA was that it resulted in the transmission of tax information to the Tax Court in the absence of the other party (*Gernhart*, para 36). Although *Gernhart* dealt with information that Ms. Gernhart already knew about, section 318 of the FCR provides that the transmission of documents is not only to the Registry, but also to the party requesting it. It was open to Mr. Rémillard to seek a confidentiality order pending the examination of the Information once it was received, exactly as he had done with the Interim Order.

[185] Finally, Mr. Rémillard argues that his reasonable expectation of privacy is directed at the general public and not the Minister. I do not see how section 8 of the Charter can be useful in this context. It is true that the open court principle and the freedom of expression protected by paragraph 2(b) of the Charter imply that the general public must be able to be aware of the facts relating to a dispute brought before the courts, as in this case. However, this does not mean that section 8 of the Charter allows Mr. Rémillard to claim an expectation of privacy with respect to society in general. It is obvious that the Charter does not apply to relations between individuals.

[186] I conclude that the transmission of the information to the Registry in this case, pursuant to section 318 of the FCR, does not constitute a search or seizure within the meaning of section 8 of the Charter.

[187] In view of my decision, it is not necessary for me to consider the question of the reasonableness of the seizure, including the reconciliation of the interests of the taxpayer and the Crown, or whether the seizure is justified within the meaning of section 1 of the Charter.

[188] Furthermore, since section 318 of the FCR is not contrary to section 8 of the Charter, it is not necessary, as requested by Mr. Rémillard, that I exercise my discretion to decide whether section 318 of the FCR should be given a reading down in order to bring it into conformity with the Charter (*Hunter* at p 168; *Gernhart* at para 47).

[189] Although this is not necessary to dispose of this question considering my conclusion that section 318 of the FCR does not contravene section 8 of the Charter, I must still note that Mr. Rémillard has made no representations as to my power to declare, under section 24(1) of the Charter, that the Information be kept confidential permanently in the event that section 318 of the FCR is contrary to the Charter, as Mr. Rémillard asks me to do so in his conclusions.

C. *To the extent that section 318 of the FCR has force and effect constitutionally, should the Information be subject to an order of confidentiality and publication ban under section 151 of the FCR?*

[190] To demonstrate that the documents must be subject to a confidentiality order, Mr. Rémillard relies on the criteria laid down in the *Sierra Club* judgment, namely necessity and proportionality. Mr. Rémillard's argument on necessity is broken down into three parts: serious, real and substantial risk, the public interest and the absence of reasonable alternative measures.

[191] In response, the Minister submits that Mr. Rémillard does not have an important interest and that he does not claim any serious harm. Furthermore, he submits that the request should only cover information whose confidentiality is strictly necessary.

[192] Neither in his written observations nor during oral arguments has Mr. Rémillard made me aware of the contents of each of the many documents that make up the Information transmitted to the Registry. He simply seeks a general order, arguing that all documents meet the requirements of a confidentiality order as formulated by the Supreme Court in *Sierra Club*.

[193] I am not prepared to make a general order concerning the certified record, without prejudice to Mr. Rémillard's right to request such an order for specific documents at a later date. After reviewing the documents, I am not satisfied that they all meet the requirements for a confidentiality order. That being said, Mr. Rémillard remains free to file a separate motion under section 151 of the FCR, specifically concerning documents for which he considers confidentiality to be necessary.

[194] For the same reasons as those mentioned above, I am not prepared to order a publication ban, especially since the Information, or at least part of it, is already in the hands of a third party, the Journal de Montréal, and since Mr. Rémillard made no specific argument to answer this issue in these proceedings. I am not prepared to accept that issuing a confidentiality order necessarily involves issuing a publication ban, especially when the documents in question are in the hands of a third party. At the very least, I note that Mr. Rémillard has not even explained to me why the same criteria would apply for both types of orders.

V. Conclusion

[195] I must dismiss Mr. Rémillard's motion.

[196] In the event of the dismissal of his motion, Mr. Rémillard asked me to keep the Interim Order in force for the duration of any possible appeal. I think it is preferable to leave it to the Federal Court of Appeal, in the event of an appeal from my judgment, to decide whether it should be stayed, or whether the Interim Order should be extended.

[197] I must point out that the issue of the confidentiality of the Affidavits is separate from that of the confidentiality of the Information, and that the confidentiality of the Affidavits has not been pleaded in this motion.

[198] However, I will stay the coming into force of my decision for a period of 60 days, in addition to the Christmas recess provided for in section 6 of the FCR, in order to give Mr. Rémillard the opportunity to seek any necessary orders. In the meantime, the Interim Order will be maintained.

ORDER in T-1244-19

THIS COURT ORDERS as follows**:**

1. The motion is dismissed.
2. However, this order is stayed for a period of 60 days from the date of this decision, in addition to the Christmas recess.
3. The Interim Order on Confidentiality and Publication Ban dated January 16, 2020, is extended again until the expiry of the stay period for this Order, so that the Certificate and additional documents transmitted to the Registry of the Court on August 30, 2019, and October 4, 2019, as well as the Affidavits reproduced in Volume I of the respondent's record filed with the Registry of the Court on August 21, 2020, in paper and electronic format, remain confidential until the expiry of the stay period for this order.
4. With costs payable by the applicant to the respondent.

"Peter G. Pamel"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1244-19
STYLE OF CAUSE:	LUCIEN RÉMILLARD v MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	CASE HEARD BY VIDEOCONFERENCE IN MONTRÉAL, QUEBEC
DATE OF HEARING:	AUGUST 31, 2020; SEPTEMBER 1, 2020; AND SEPTEMBER 4, 2020
ORDER AND REASONS:	PAMEL J.
DATED:	NOVEMBER 17, 2020

APPEARANCES:

Guy Du Pont Ad.E. Elizabeth Robichaud Léon Moubayed	FOR THE APPLICANT
Jonathan Bachir-Legault Louis Sébastien	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davis Ward Phillips & Vineberg, LLP Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT