Federal Court  Cour fédérale

Date: 20210621

Docket: T-1244-19

Citation: 2021 FC 644

[ENGLISH TRANSLATION]

Montréal, Quebec, June 21, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

LUCIEN RÉMILLARD

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

PUBLIC ORDER AND REASONS
(Public version released on June 23, 2021)

I. Overview

[1] The applicant, Mr. Rémillard, is wealthy and attracts more media attention than most people because of his profile. Mr. Rémillard is asking this Court to issue an order of confidentiality and a permanent publication ban on certain information contained in the common evidentiary record [common record] and, as the case may be, referred to in the memoranda and

appendices of the applicant and the respondent. It should be noted that Mr. Rémillard filed his motion under section 151 of the *Federal Courts Rules*, SOR/98-106 [FCR], as there was debate during the hearing as to whether this type of motion was appropriate.

[2] Mr. Rémillard's submissions that the information he seeks to protect is inherently confidential and that the Minister of National Revenue [Minister] improperly exercised her discretion under section 241(3)(b) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], are not persuasive. Moreover, Mr. Rémillard has not satisfied me that the requested order meets the necessity and proportionality criteria set out in the case law relating to section 151 of the FCR, except for the information set out in Practice Note No. 16 (amended) of the Chief Justice of the Tax Court of Canada [TCC] dated September 3, 2020 [Practice Note], which provides for certain information to be redacted from public versions of documents filed with the TCC registry, as well as the name of a certain person that appears in Mr. Rémillard's tax file.

[3] I am therefore granting the motion in part and suspending my decision for 30 days so that Mr. Rémillard may, if he deems it appropriate, apply for a stay of my order so as to appeal it.

II. Facts

[4] 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 ITA, effective November 15, 2013.

[5] 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 Swiss, American and Barbadian authorities [Foreign Requests], which were challenged by Mr. Rémillard on July 31, 2019, by an application for judicial review to have said requests for administrative assistance cancelled.

[6] In a decision dated November 17, 2020 (*Rémillard v Canada (National Revenue)*, 2020 FC 1061 [*Rémillard*]), I dismissed Mr. Rémillard's interlocutory motion for an order of confidentiality with respect to the certified record that was transmitted to the Registry at Mr. Rémillard's own request under the procedure set out in sections 317 and 318 of the FCR [certified record]. The certified record contains a set of documents that includes internal correspondence between CRA employees and agents, as well as several working versions and final versions of the Foreign Requests, with attachments. The documents contain information on Mr. Rémillard and on persons related to him [Third Parties], including a range of personal, commercial, tax and banking information collected by the CRA pursuant to its audit powers under the ITA.

[7] My decision of November 17, 2020, is currently being appealed to the Federal Court of Appeal (File No. A-292-20), but no judgment on the merits has yet been issued. In any event, the outcome of that appeal has no bearing on this motion because that appeal concerns the confidentiality of the certified record, whereas this motion concerns the confidentiality of certain items in the common record.

[8] In addition to the documents in the certified record and since the date of transmission of the certified record to the Registry, the parties have exchanged a number of affidavits and have conducted examinations on affidavits that also contain information Mr. Rémillard would prefer not to have disclosed:

(a) the affidavits of the CRA:

i. Denis Robichaud's affidavit of January 10, 2020, which identifies a number of bank statements, including account numbers and balances, belonging to Mr. Rémillard and to Third Parties;

ii. the attachments to that affidavit, which include banking records and information and tax forms relating to Mr. Rémillard and Third Parties;

iii. Keely Storr's supplemental affidavit of October 13, 2020, which contains working versions of the Foreign Request to Barbados and its attachments, which include banking records and information relating to Mr. Rémillard; and

(b) the affidavits filed in support of Mr. Rémillard's request, which include documents exchanged with the CRA as part of its audit of Mr. Rémillard.

[9] The Court ordered the parties to file a confidential version of the common record, which currently includes five affidavits in support of Mr. Rémillard's request, with supporting exhibits; four affidavits by the two CRA affiants, with supporting exhibits; the transcripts of six days of cross-examination, with the exhibits produced; the undertakings shared by both sides; and excerpts from the certified record.

[10] Mr. Rémillard is seeking an order of confidentiality and a permanent publication ban on the so-called confidential material contained in the common record and, as the case may be,

referred to in the memoranda and appendices of the applicant and the respondent, to be filed with the Court for the hearing on the merits of the underlying application for judicial review. In particular, Mr. Rémillard is seeking orders covering the following information [the Information]:

> (a) social insurance number and employee identification number;
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> (b) business number and GST/HST account number;
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> (c) medical information not relevant to the disposition of the proceeding;
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> (d) date of birth (unless it must be provided, in which case only the year must appear);
>
> (e) names of minor children (unless they need to be identified, in which case only the child's initials must appear);
>
> (f) bank number (unless it needs to be provided, in which case only the last four digits must appear);
>
> (g) Mr. Rémillard's financial information;
>
> (h) information regarding Third Parties that are not involved in the proceedings and that have not consented to the use of their confidential information collected by the CRA.

[11] Items (a) to (f) of the Information are essentially the information set out in the Practice Note; Mr. Rémillard is not suggesting that this Court is in any way bound by the Practice Note, but rather that the information, being sensitive and not relevant to the underlying application, should be protected from public scrutiny by an order of confidentiality.

[12] The Minister agrees that items (a) to (f) of the Information and the name of [redacted], which appear in Mr. Rémillard's tax file, should be redacted. The only remaining issues are items (g) and (h), namely Mr. Rémillard's financial information and information regarding Third Parties other than the person already acknowledged by the Minister.

[13] There is a subtle but noticeable shift in focus between Mr. Rémillard's written submissions in support of this motion and the arguments of his counsel before me during the hearing. In particular, regarding the test in *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522 [*Sierra Club*], his counsel emphasized tax secrecy as the important public interest to be protected, rather than privacy. This may be because, four days before the hearing, the Supreme Court issued its decision in *Sherman Estate v Donovan*, 2021 SCC 25 [*Sherman*]; I issued a direction to the parties stating that I expected this matter to be addressed at the hearing.

[14] Mr. Rémillard's written submissions are in two parts. The first part suggests that the Information is inherently confidential and there is no need to consider the *Sierra Club* criteria, since the information is sensitive and not necessary for the discussion. In particular, Mr. Rémillard submits that disclosure under paragraph 241(3)(b) of the ITA of items of the Information that are not necessary to dispose of the underlying application does not alter the fact that the Information is confidential and protected by section 241 of the ITA, and the Court should therefore intervene to ensure that the confidentiality of the Information is protected by means of a confidentiality order.

[15] The second part of Mr. Rémillard's written submissions deals more specifically with the *Sierra Club* criteria. In particular, Mr. Rémillard submits that the [TRANSLATION] "risk of a loss of privacy associated with the public disclosure of the Information is serious, real and substantial".

[16] At the hearing, however, Mr. Rémillard focused instead on what he alleges was a violation of paragraph 241(3)(b) of the ITA by the Minister, in that the information in his tax file that was disclosed went beyond what was relevant and necessary to dispose of the underlying application, and he stated that an order of confidentiality was the required remedy, or the appropriate corrective measure, to mitigate damages for this violation of the law.

[17] As mentioned, Mr. Rémillard's alternative argument based on the *Sierra Club* criteria focused more on the important public interest of protecting tax secrecy, which was at serious risk of being lost because the Minister had disclosed information that was not relevant to the issues, than that of protecting Mr. Rémillard's privacy. However, Mr. Rémillard's evidence still focuses on what is deemed to be a serious risk to his privacy. Mr. Rémillard argues that I did not need any additional evidence of a serious risk to tax secrecy in his case and that I can simply take judicial notice that a violation of paragraph 241(3)(b) of the ITA would cause him harm.

III. Preliminary issues

[18] Regarding whether the Minister went beyond what she should have done in disclosing information under paragraph 241(3)(b) of the ITA, Mr. Rémillard states that the issue should be left to the trial judge, as the [TRANSLATION] "master of relevance", and that his position will depend on what the judge decides (*St-Adolphe-d'Howard (Municipalité de) c Chalets St-Adolphe inc.*, 2007 QCCA 1421 at paras 12, 13, 16; *Timm v Canada*, 2019 FC 36). I disagree. The determination of what the Minister properly disclosed under paragraph 241(3)(b) of the ITA cannot be a moving target. What a judge, on the merits, may ultimately consider relevant for the purposes of their decision is a very different determination from the one the Minister makes

when deciding what tax information can and should be disclosed in a court file under paragraph 241(3)(b) of the ITA and the applicable case law. For example, what is relevant on the merits may well be much narrower in scope than what the arguments may reasonably support; peripheral issues are resolved, and issues are limited to the hearing, such that what may have been considered relevant at the time of disclosure by the Minister under subsection 241(3) of the ITA may not appear in the Court's decision.

[19] At this time, neither party has filed their record, so the possible direction of the attack or defence has not yet been determined. What remains for the Court to review at this stage in assessing the reasonableness of the Minister's disclosure in her affidavits, during cross-examination and in response to the undertakings sought by Mr. Rémillard is the third amended notice of application, dated March 10, 2021 [notice of application], and Mr. Rémillard's request under sections 317 and 318 of the FCR.

[20] As well, it seems to me that, if Mr. Rémillard is alleging that the Minister improperly disclosed information from his tax file that was not relevant or necessary for the issues in the case, the more appropriate remedy would have been a motion to strike the evidence that the Minister sought to introduce under sections 81, 306 and 307 of the FCR rather than including that evidence in the common record and then seeking a confidentiality order under section 151 of the FCR (*Canada (Attorney General) v Quadrini*, 2010 FCA 47; *Pelletier v Canada (Attorney General)*, 2008 FC 803, appeal dismissed in *Canada (Attorney General) v Chrétien*, 2010 FCA 283). There is no question that the Court has the power to control disclosure under paragraph 241(3)(b) of the ITA at this stage. However, the two types of motions have different purposes.

[21] A motion to strike, if granted, would result in the removal of evidence intended to be placed in the Court file. A motion for confidentiality, meanwhile, would allow the evidence to remain in the Court file and to be considered by the judge hearing the case, but away from public scrutiny. Moreover, although the degree of relevance, peripheral or central, of the evidence that the confidentiality order would seek to protect is something that I will have to consider in exercising my discretion to make such an order (*Sherman* at para 106), an application under section 151 of the FCR is not the way to determine whether the Minister has in fact breached her obligations under paragraph 241(3)(b) of the ITA by disclosing a taxpayer's tax information. In short, the open court principle cannot be sacrificed to remedy an error by the Minister when other procedures provide a similar remedy without undermining this basic principle.

[22] In any event, I believe there is no need to decide whether the application is appropriate because, ultimately, Mr. Rémillard has not persuaded me that the Minister's disclosure of items (g) and (h) of the Information, namely Mr. Rémillard's financial information and information regarding Third Parties other than the person already acknowledged by the Minister, is not necessary in order to decide the issues and that a significant public interest, namely privacy and the confidentiality of tax information, according to Mr. Rémillard, will be seriously jeopardized unless a confidentiality order is issued.

IV. Analysis

A. *Whether nature of Information in itself warrants order of confidentiality*

[23] Mr. Rémillard claims that most of the Information in the common record is included to inform the Court about the context of the Foreign Requests and to provide a complete

chronology. He states, however, that it is [TRANSLATION] “not central to the discussion and will not be the subject of a determination by the Court”. This statement is disputed by the Minister.

[24] Mr. Rémillard argues that the courts readily acknowledge that sensitive information not necessary for the discussion must be redacted from their public records, despite the test in *Sierra Club*. In support of this argument, Mr. Rémillard cites *Singer v Canada (Attorney General)*, [2011] FCJ No 13 (FCA) [*Singer*] at paras 9 and 11, where the Federal Court of Appeal found that the social insurance number had to be redacted from the documents available to the public because it was information that was not necessary to dispose of the motions raised in the appeal.

[25] Mr. Rémillard also cites *Pakzad v Canada*, [2017] TCJ No 59 (TCC) at para 18 [*Pakzad*], where the TCC recognized that certain personal information that is not necessary to decide an appeal, such as the mother’s passport number, driver’s licence number and maiden name, should not appear in Court files.

[26] Mr. Rémillard sees two criteria in these two decisions that would make it possible to obtain the requested order without having to meet the *Sierra Club* test, namely where the information (1) is sensitive and (2) is not necessary to dispose of the matter.

[27] Mr. Rémillard makes two additional arguments before discussing the *Sierra Club* test. First, the Court should be guided by the Practice Note and redact all the Information covered by it, which is all the Information that is the subject of this motion except for items (g) (Mr. Rémillard’s financial information) and (h) (information regarding Third Parties). Second,

the Information is protected by section 241 of the ITA, and the Minister's disclosure of it is contrary to privacy and tax secrecy laws and case law.

(1) *Sierra Club* test required

[28] I must state at the outset that I disagree with Mr. Rémillard's submission that the *Sierra Club* test need not be met for information to be treated as confidential if the information is deemed to be sensitive and not necessary to decide the issues. Moreover, the decisions he cites do not support his submission. The *Sierra Club* test was applied in *Singer*, *Pakzad* and *Barreiro v Canada (National Revenue)*, 2008 FC 850 [*Barreiro*], on which Mr. Rémillard relies.

[29] In *Pakzad*, the TCC even refused to declare certain private information confidential, since a real risk to an important interest (the *Sierra Club* test) was not well grounded in the evidence. In *Singer*, this Court simply confirmed the parties' agreement that social insurance information should be protected from public access and that the information was not ultimately necessary to address the issues raised—in short, that redacting the information was consistent with the requirements of the *Sierra Club* test.

[30] I can certainly see a judge exercising discretion to ban the publication of such clearly non-relevant personal information in the public domain. However, this is a far cry from the creation, as Mr. Rémillard suggests, of a rule of confidentiality independent from the one set out in *Sierra Club*.

[31] Moreover, in the recent decision in *Sherman*, the Supreme Court clearly reaffirmed the *Sierra Club* test as a guide to judicial discretion in circumstances such as this.

(2) Practice Note

[32] I agree that the *Sierra Club* test is met with respect to the information identified in the Practice Note (items (a) through (f) of the Information), and I agree to order that it be redacted from the common record, except for the last four digits of the bank accounts that are essential to an understanding of the dispute, appearing in the public version of the record. The evidence establishes a serious risk of identity theft with respect to Mr. Rémillard if a confidentiality order is not issued for this Information.

(3) Protection under section 241 of ITA

[33] Having resolved the issue of items (a) through (f) of the motion, I must now consider items (g) and (h), namely Mr. Rémillard's financial information and the information regarding the Third Parties.

[34] Mr. Rémillard's argument regarding section 241 of the ITA has two parts. First, Mr. Rémillard challenges the Minister's right to disclose items of the Information relating to his financial situation under paragraph 241(3)(b) of the ITA (and paragraph 241(5)(a)). Second, Mr. Rémillard submits that this same information, once disclosed in the context of a legal proceeding, must be treated as inherently confidential. In *Rémillard*, I rejected the second submission, concluding that the mere fact that information is taken from a taxpayer's tax file does not make it confidential (*Rémillard* at para 91); I see no reason to conclude otherwise now.

[35] Indeed, without going into the details of what I have already explained in *Rémillard*, there is no support for the argument that all financial and tax information must be kept confidential in a proceeding in order to preserve the right to privacy. If that were the case, most, if not all, cases brought before the TCC would automatically be subject to a confidentiality requirement. Mr. Rémillard has accepted this position and has stated that he waives the confidentiality of the relevant information but maintains his right to the confidentiality of other information that he considers irrelevant and sensitive. This approach is flawed and "[f]or all intents and purposes . . . amounts to reversing the requirement of the burden of proof that will fall, *de facto*, on the party requesting the dismissal of the motion for a confidentiality order and rendering the making of confidentiality orders practically systematic" (*Desjardins v Canada (Attorney General)*, 2020 FCA 123 at para 88).

[36] Regarding the argument that the exception to confidentiality with respect to proceedings provided for in subsection 241(3) of the ITA is not absolute, in that it permits disclosure of confidential information only to the extent necessary (*Barreiro* at para 8; *Scott Slipp Nissan Ltd v Canada (Attorney General)*, 2005 FC 1479 at paras 16–17), I accept the submission that the Minister's interest in disclosing taxpayer information under this subsection is only "to the extent necessary for the administration and enforcement" of the ITA, and that "[l]itigation, particularly at this stage, does not justify the Minister in disclosing taxpayer information simply because there is litigation" (*Barreiro* at paras 8, 17; *Rémillard* at para 115; *Slattery (Trustee of) v Slattery*, [1993] 3 SCR 430 [*Slattery*]).

[37] However, in this case, I am not satisfied that items (g) and (h) of the Information in the common record, which the Minister disclosed under paragraph 241(3)(b) of the ITA, include

information beyond that which is necessary for the administration and enforcement of the ITA. It should be noted that, since disclosure under these provisions is a discretionary, the standard of review would be reasonableness (*Bradwick Property Management Services Inc v Canada (National Revenue)*, 2019 FC 289 at para 51 [*Bradwick*]).

[38] In support of his arguments in this regard, Mr. Rémillard relies on jurisprudential principles to the effect that the privacy interests of taxpayers, particularly in relation to their financial or related information, is to be taken seriously (*Slattery* at 444). Mr. Rémillard believes that a similar principle applies, *a fortiori*, when it comes to information (financial or other) regarding the Third Parties.

[39] Mr. Rémillard states that both financial information and information regarding the Third Parties should be kept confidential:

> (a) this information does not affect the decision that this Court will make;
>
> (b) in particular, no financial information will have to be the subject of a determination, since the underlying application does not seek to establish Mr. Rémillard's income, the quantum of one or more transactions he made, the value of the transactions in his bank accounts, or the balance of these accounts; and
>
> (c) in particular, no information regarding the Third Parties will have to be the subject of a determination, since the Third Parties are not parties to the proceedings and the Review is not intended to establish the identity of the Third Parties, their relationship with Mr. Rémillard, or their involvement in the facts relevant to the Review.

[40] I cannot agree with Mr. Rémillard's submissions. According to the Minister, and I accept this proposition, the relevance of the information disclosed is assessed not only on the basis of the notice of application, but also on the basis of the request made under section 317 of the FCR (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 108). The notice of application alleges that the CRA made [TRANSLATION] "misrepresentations" to foreign authorities and that the Foreign Requests were [TRANSLATION] "fishing expeditions". As for the request under section 317 of the FCR, Mr. Rémillard opted for a broad formulation of the documents relevant to the request, namely:

> i. the Foreign Requests themselves; and
>
> ii. all records considered, accessed or generated by the Minister, or by any person or entity acting on behalf of the Minister, including worksheets, written communications or notes taken during oral communications, that relate to or are relevant to the Foreign Requests.

It was in this context that affidavits were exchanged between the parties and examinations on affidavits took place.

[41] I accept Mr. Rémillard's assertion that not all of the information in the record is necessarily relevant to the issues to be determined in the final decision. However, that is not the issue. Relevance will be decided by the judge hearing the underlying application for judicial review on the merits.

[42] However, the necessity of disclosing information in the proceedings, as assessed by the Minister when preparing the common record, is a very different consideration. In a way, it is this assessment that Mr. Rémillard wishes to have reviewed through this motion. Having reviewed

the material that Mr. Rémillard seeks to make confidential, and in light of the notice of application and the request under sections 317 and 318 of the FCR, I am not satisfied that the Minister has failed to meet her obligation to disclose only the information necessary for the proceedings. Indeed, the Minister correctly pointed out at the hearing that Mr. Rémillard's notice of application, although it addresses only the Foreign Requests, casts doubt on the entire audit process by describing the requests as unauthorized fishing expeditions and by accusing the CRA of having made misrepresentations to the foreign authorities. The request under sections 317 and 318 of the FCR was equally broad in scope.

[43] It is true that some of the allegations in the notice of application are matters of law relating to the process followed by the CRA, such that an in-depth analysis of the common record is not necessary in their regard.

[44] However, with regard to the allegation that the Foreign Requests were an unauthorized fishing expedition, an analysis of the CRA's audit likely will be necessary , to understand what led the CRA to issue the disputed Foreign Requests. For example, the CRA, through its request to the United States, requires information on financial transactions that Mr. Rémillard may have made in the United States. Mr. Rémillard believes that since this information does not link him to Canada, it is not relevant to the determination of the merits of the case. Mr. Rémillard's view on this issue presupposes an overly restrictive interpretation of either the exception to confidentiality in paragraph 241(3)(b) or the scope of this allegation in his notice of application. This allegation may in fact encompass virtually every detail of Mr. Rémillard's tax file that led the CRA to conclude that Mr. Rémillard might still be a Canadian resident, all things considered, and that foreign requests were necessary to conduct this audit. It is therefore difficult to know

where such a broad argument may lead and, more importantly, how the Minister will defend herself against this allegation.

[45] In any event, regarding the financial transactions that Mr. Rémillard allegedly made in the United States and that were provided by the Agency to the American authorities, I cannot say that this evidence is not relevant in establishing a nexus between Mr. Rémillard and Canada, again within the meaning of the disclosure provided for in paragraph 241(3)(b) of the ITA. Contrary to Mr. Rémillard's submission, these transactions do more than simply establish a nexus between him and the United States. Indeed, I can certainly see such evidence providing an explanation or context for other indicia of residence that the Agency may have linking Mr. Rémillard to Canada. It is therefore incorrect to suggest at this point that all evidence of U.S. financial transactions can have no bearing whatsoever on whether the CRA conducted an unauthorized fishing expedition in issuing the Foreign Requests.

[46] Another allegation in the notice of application is that the CRA [TRANSLATION] "failed to follow a thorough and careful process to ensure that the claims it made and the information it provided to foreign governments were true and reliable". Mr. Rémillard claims to be referring to internal communications between the department of the competent authority and the audit department. He states that this information is not redacted. I do not see why it would be.

[47] Mr. Rémillard also alleges that the Agency overstepped its jurisdiction by linking Mr. Rémillard to Canada in the Foreign Requests in an inappropriate manner and by misrepresenting the links through misleading information. This information is at the heart of the dispute, and Mr. Rémillard does not wish to redact it. This position makes sense to me.

Mr. Rémillard submits, however, that there is other information that has been represented to foreign authorities that does not create a nexus between Mr. Rémillard and Canada and that will therefore never enter into the debate as defined by the notice of application.

[48] Ultimately, Mr. Rémillard summarizes as follows the type of information he is now seeking to withhold from public scrutiny, which may be included in items (g) and (h) of the order sought.

[49] On the one hand, he wishes to protect information about his income, his banking transactions and his legal relationships with third parties. I am not satisfied that this information is irrelevant to the proceedings or that it meets the *Sierra Club* test.

[50] On the other hand, Mr. Rémillard wishes to protect historical information that predates the period under audit, such as information relating to third-party entities that have been the subject of an audit by the CRA in the past, for example, one in which [redacted]. Now, the CRA wants to submit [redacted] in evidence because it is information that was given to Barbados in the current foreign request regarding Mr. Rémillard. Mr. Rémillard claims that this information should be redacted from the common record. I disagree. Keeping in mind that the Agency must justify its foreign requests if it is to elicit a response from foreign authorities, I was not persuaded that information about the historical audits [redacted] is not relevant to determining whether it was reasonable for the Agency to issue the Foreign Requests.

[51] In this context, and without knowing the final position of the parties on the issues raised by the underlying application, the Court cannot find fault with the Minister's addition of evidence to the common record that provides context regarding her audit process to demonstrate, for example, that the requests are based on a plethora of information that individually may seem minor but that, taken together, led the Agency to believe that Mr. Rémillard was still a resident of Canada.

[52] In short, the main weakness in Mr. Rémillard's argument in this regard is that he focuses too much on what information will or will not establish his connection to Canada rather than what information will support or address the allegations in his notice of application, that is, information that can shed light on whether the Foreign Requests are reasonable or unreasonable. It is really this latter issue that is the subject of the underlying application for judicial review, and it is this issue that the Minister had in mind when she decided to disclose the information, not whether the information establishes a connection between Mr. Rémillard and Canada.

[53] Mr. Rémillard's incorrect position is best illustrated by his attempt to redact information from the Foreign Requests themselves, since this information allegedly does not connect him to Canada. Cheese with holes in it can be good, but not documents that are the very subject of an application for judicial review.

[54] I also note that Mr. Rémillard is seeking by this motion to preserve the confidentiality of supposedly unnecessary information in documents filed by witnesses for Mr. Rémillard. One might ask why Mr. Rémillard did not simply redact this information before attaching it to his witnesses' affidavits and adding it to the common record.

[55] As for the information regarding the Third Parties, the requests transmitted to the United States, Switzerland and Barbados themselves directly name the Third Parties. The Third Parties are linked to

Mr. Rémillard

[redacted]. They are not third parties completely uninvolved in the proceedings who happen to be mentioned in a matter that does not concern them. Given their involvement in Mr. Rémillard's affairs, and given the very broad purpose of the application for judicial review, I am not satisfied that it was not necessary for the Minister to disclose this information (*Heinig v The Queen*, 2009 TCC 47 [*Heinig*]; *Ludmer c Canada (Attorney General)*, 2014 QCCS 4852 [*Ludmer*]).

[56] It should first be noted that the applicants in *Heinig* and *Ludmer* were seeking the disclosure of third-party information that had been redacted by the Minister. Unlike in this case, the argument was that the exception to confidentiality in paragraph 241(3)(b) of the ITA was applied too lightly.

[57] In *Heinig*, the TCC ordered that a third party's social insurance number be redacted, as it was not relevant to the debate, but held that financial information (business income) of a third party associated with the appellant was relevant to the debate and should not be redacted. I note the principle mentioned by the Court in paragraph 10 of this decision, that certain confidential information about a third party may be severed from a document and redacted without redacting the entire document. However—and the decision is clear on this point—one must always ask whether the information itself should be redacted.

[58] Similarly, in *Ludmer*, the Superior Court of Québec concluded that generally the exemption in paragraph 241(3)(b) applied to third-party information and, therefore, the confidentiality obligation in subsections 241(1) and (2) did not apply. Mr. Rémillard points out that, in that case, in reviewing the legality of the information disclosed by the Minister and in ensuring that the information was relevant and necessary, the Court ordered the removal of information that would have identified the third parties. Contrary to what Mr. Rémillard appears to be suggesting, I do not see how this approach creates an exception to the principle of necessity and relevance provided for in the case law in the context of applying paragraph 241(3)(b) when the information concerned identifies third parties. The identity of third parties may be highly relevant and necessary for determining a dispute and should therefore be disclosed by the Minister.

[59] The question, then, is whether the Information regarding the Third Parties (and not the Third Party itself) is relevant or necessary to the proceedings. In this case, Mr. Rémillard did not identify any information concerning the Third Parties, except for the Third Party acknowledged by the Minister, who is allegedly not involved in the proceedings. On the contrary, their identities and the connections between them and Mr. Rémillard can be used to demonstrate that the Minister had reason to believe that Mr. Rémillard had not relocated to Barbados and therefore that the audit process was not an unauthorized fishing expedition, for example. I am therefore not persuaded that the Minister's disclosure of their information was illegal or unreasonable.

[60] Mr. Rémillard also draws the Court's attention to *Bradwick* at paragraph 54. In that judicial review under section 41 of the *Access to Information Act*, RSC 1985, c A-1,

Justice Locke, having reviewed the redaction, concluded that the information in that case should not be provided under paragraph 241(4)(a) or (b) of the ITA because it was about third parties. Without even discussing the possible distinction between those paragraphs and paragraph 241(3)(b) of the ITA, I do not believe that Justice Locke's conclusion should be read as a determination that third-party information will never be necessary and should therefore never be disclosed. Rather, the decision indicates that determining whether disclosure of confidential information under section 241 of the ITA is necessary depends on the facts of the case. As I have concluded, Mr. Rémillard has not satisfied me that the Information regarding the Third Parties in this case is not necessary or relevant from the perspective of paragraph 241(3)(b).

[61] On the whole, leaving aside the issue of whether the motion is appropriate, I am not persuaded by Mr. Rémillard that the Information is confidential and that it should not be in the common record. The orders sought should therefore not be granted on that basis.

B. *Two-stage Sierra Club test*

[62] The parties generally agree on the applicable legal tests. In *Sierra Club*, the Supreme Court set out the test for orders of confidentiality, including under section 151 of the FCR, in two stages: necessity and proportionality of the proposed order (*Sierra Club* at paras 53–57). The test was recently recast by the Supreme Court in *Sherman* at para 38 around three prerequisites:

> In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> > (1) court openness poses a serious risk to an important public interest;

> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments [citation omitted].

[63] Since the conditions are conjunctive (*Sherman* at para 7), in this case, I need only deal with the first condition, given that I am not satisfied that the interest Mr. Rémillard seeks to protect is an important public interest.

[64] Mr. Rémillard submits that the media attention surrounding this case and the risk of loss of privacy is in itself a real and significant risk. He relies on the affidavit he has filed in support of this motion to express the risks associated with his loss of privacy. He identifies the following interests that he is seeking to protect:

(a) his preference for discretion when it comes to his business dealings and his desire to stay out of the public spotlight;

(b) the inconvenience caused by the media attention he is receiving;

(c) the risk of identity theft he fears;

(d) the possibility that his business relationships will be jeopardized; and

(e) the unauthorized disclosure of information regarding third parties.

[65] Mr. Rémillard also argues that the disclosure of the Information may impair the proper administration of justice (*S c Lamontagne*, 2020 QCCA 663 at paras 33–35 [*Lamontagne*]; *Toronto Star Newspapers Ltd c Ontario*, 2005 CSC 41 at para 3 [*Toronto Star*]).

[66] Lastly, as mentioned, Mr. Rémillard placed significant emphasis in his oral submissions on the important public interest in protecting tax secrecy.

[67] I cannot agree with Mr. Rémillard's position. His preference for discretion with respect to his affairs and his desire to remain out of the public spotlight are not an important public interests. Indeed, the Supreme Court in *Sherman* was very clear on this:

> the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public. Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Sherman* at para 31 — citations omitted).

[68] I recognize, however, that privacy cannot be treated simply as a personal, non-public concern, and that "[p]ersonal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality". As *Sherman* informs us at paragraph 49:

> The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. <u>However, the key differences in these contexts are such that the public importance of</u>

> privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.
>
> [Emphasis added.]

[69] Therefore, there must be an element of an individual's privacy concerns that elevates them to a public concern, beyond personal concerns and sensibilities (*Sherman* at para 54).

[70] In this case, there is simply no such element; we are not dealing with a risk to Mr. Rémillard's personal safety, an attack on his dignity, a risk of psychological harm or a risk to his professional reputation. *Canadian Broadcasting Corporation v Canada (Border Services Agency)*, 2021 NSPC 15 [*CBC*], which predates *Sherman*, is different from this case. In *CBC*, the Nova Scotia Provincial Court, balancing competing interests in accordance with the *Sierra Club* test, ordered the confidentiality of the names of those who cooperated in the police investigation of a mass killing that attracted widespread media attention. The disclosure of the names in that case was merely a "sliver of information" such that the open court principle did not outweigh the privacy interests of the individuals concerned, who would, as the Court noted, experience anxiety, even trauma and social stigma if their names were revealed. The Court was careful to note that this was not a situation where only sensibilities or embarrassment were involved, as in *AG (Nova Scotia) v MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 SCR 175, but a case "of public outrage of a horrific event that the public wants explained, and anyone connected . . . will undoubtedly be sought out for an explanation" (*CBC* at para 126). The balance of interests in this case is radically different.

[71] The idea that Mr. Rémillard's business relationships will be jeopardized if the Information is made public is mere conjecture, and the unauthorized disclosure of information regarding the Third Parties—persons associated with Mr. Rémillard and even named in the Foreign Requests—cannot be assessed differently from information regarding Mr. Rémillard himself.

[72] Lastly, the risk of identity theft and the disclosure of personal medical information were mitigated (if not eliminated) by redacting items (a) to (f) of the Information.

[73] This leaves Mr. Rémillard's concerns about the disclosure of his personal tax and financial information. In my opinion, whether the important public interest is privacy or tax secrecy, the inconvenience of media attention in this case is at odds with the open court principle and does not in itself warrant the order sought.

[74] There is no doubt that privacy rights "are significant and must be protected" (*BMG Canada Inc v Doe*, 2005 FCA 193 at para 38). I also agree that "maintaining the strict confidentiality of taxpayer information is important" (*Canadian Council of Christian Charities v Canada (Minister of Finance)*, [1999] 4 FC 245 at para 46). However, the circumstances in this case do not warrant granting the requested orders.

[75] As the Supreme Court made clear in *Sherman*, the implementation of the open court principle will necessarily infringe the privacy rights of litigants, so the preservation of that right cannot be a ground in itself for overriding the public nature of court proceedings. There is no

indication that Mr. Rémillard's tax information requires different protection from the usual protection for all other tax records.

[76] If protecting the privacy of a taxpayer's tax information were considered to be an important public interest that justified its confidentiality in a legal proceeding, section 241 of the ITA could expressly provide for this when dealing with the Minister's ability to disclose taxpayer information for the purposes of a legal proceeding (*Cinar Corporation c Weinberg*, 2005 CanLII 37468 (QC CS) at paras 28–32; see, for example, *Youth Criminal Justice Act*, SC 2002, c 1, ss 18 et seq). As I stated in *Rémillard*, section 241 of the ITA does not make taxpayer information inherently confidential; it merely requires the Minister to treat such information as confidential while it is in her hands.

[77] Since I am not satisfied that the Minister could not disclose the Information under paragraph 241(3)(b), the argument that there is an important public interest in protecting the Information, from the perspective of privacy and tax secrecy, fails. This alleged public interest is offset by the Minister's right to disclose the information in a court proceeding, which, it should be noted, is also an important public interest.

[78] The situation in this case is quite different from that in *Alderville First Nation v Canada*, 2017 FC 631 [*Alderville First Nation*]. Although that decision supports the argument that there is a public interest in protecting information collected by the government, it must be remembered that the decision was made in the context of the fiduciary relationship between Indigenous peoples and the Crown (paras 46, 51, 59, 73) and the objective of reconciliation as reflected in section 35 of the *Constitution Act, 1982* (paras 56, 59, 73). Moreover, this Court noted that "[t]he

interests at stake are more than merely personal privacy interests" (para 58). Lastly, although this Court draws a parallel between the *Privacy Act*, RSC 1985, c P-21, which governs the treatment of information in this case, and section 241 of the ITA (para 47), it should be noted that *Alderville First Nation* did not deal with the protection of tax secrecy.

[79] Finally, Mr. Rémillard submits that disclosing the Information would impair the administration of justice and undermine the confidence of litigants in the justice system (*Toronto Star* and *Lamontagne*). Mr. Rémillard states that disclosing the Information in a context where a litigant wants nothing more than to have an administrative decision reviewed would have a negative impact on access to justice.

[80] I agree with the Minister on this point—there is no evidence to support the assertion that disclosure of tax and financial information would be a barrier to access to justice. For example, Mr. Rémillard does not state in his affidavit that he will have to withdraw his application if this motion is dismissed. Moreover, *Lamontagne* is quite different from this case because, in that case, the protection of the appellant's privacy was the very subject of his appeal.

[81] Since I have concluded that there is no important public interest to protect in this case, and since the requirements of the *Sierra Club* test are conjunctive (*Sherman* at para 7), there is no need to deal with the other requirements of that test in this case.

[82] I am not totally insensitive to the situation faced by Mr. Rémillard. He emphasizes his desire to keep his life out of the public eye but, because of the help and funding he gave his sons

to start their own business by acquiring the general interest television channel TQS, he became a person of interest to the media without even trying to, let alone wanting to.

[83] However, as the Supreme Court noted in *Slattery*, section 241 of the ITA involves a balancing of interests, namely the taxpayer's interest in privacy and the Minister's interest in implementing the law (*Slattery* at 444; *Alderville First Nation* at para 47). Similarly, the Supreme Court very recently reiterated in *Sherman* that the discretion to issue an order of confidentiality and publication ban balances the litigant's privacy interest against the open court principle. Unfortunately for Mr. Rémillard, the scales of justice do not favour him in either case.

[84] In conclusion, a publication ban is granted; however, for the same reasons as mentioned for the order of confidentiality, it can only cover the confidential information covered by that order.

ORDER in T-1244-19

THIS COURT'S ORDER is as follows:

1. The motion is granted in part.

2. The following information in the common evidentiary record is considered confidential on a permanent basis pursuant to section 151 of the FCR:

    a. the name [redacted];

    b. social insurance numbers and employee identification numbers;

    c. business numbers and GST/HST account numbers;

    d. medical information;

    e. dates of birth (unless they are required, in which case only the year must appear);

    f. names of minor children (unless they need to be identified, in which case only the child's initials must appear);

    g. bank number, except for the last four digits, for identification purposes.

3. The parties must file, within 30 days of this order, a public version of the common record in which they have redacted the confidential information.

4. With respect to any other materials that may be filed with the Court in the future regarding the applicant's application for judicial review in this case, the parties and their counsel must file the following:

a. a copy of a public version, redacted to remove any confidential information as set out in paragraph 2 above, any confidential material, and any information that may reveal the information protected pursuant to this order; and

b. three copies of a confidential version for this Court, unredacted, in a sealed envelope labelled with the name of this case. Any text containing confidential information in the confidential version for this Court must be marked with a # symbol immediately before and after the text.

5. If confidential information from material protected pursuant to this order is incorporated into any other document, that portion of the document must be protected and marked as confidential in the same manner as the document from which the confidential information is taken.

6. If the parties disagree on the characterization and treatment of confidential material to be filed in this case, a party may, with prior notice to the other party, seek direction from the Court before filing material containing confidential information.

7. Any person who has access to confidential material must refrain from disclosing it or causing it to be disclosed, directly or indirectly, except as permitted by this or any other order of the Court.

8. After the final conclusion of this application for judicial review, including any appeal, each person to whom confidential material has been disclosed must return such material and all copies thereof or destroy them. Counsel for a party may

retain a copy of such materials for archival purposes. This order will remain in effect until amended or rescinded by the Court.

9. This order is, however, stayed for 30 days from the date of this decision.

10. With costs in the cause.

"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:	MATTER HEARD BY VIDEOCONFERENCE
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APPEARANCES:

Élisabeth Robichaud Léon Moubayed	FOR THE APPLICANT
Louis Sébastien Jonathan Bachir-Legault	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