Federal Court  Cour fédérale

Date: 20250529

Docket: T-777-23

Citation: 2025 FC 968

Ottawa, Ontario, May 29, 2025

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

SHOPIFY INC.

Respondent

ORDER AND REASONS

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I. Overview

[1] Subsection 231.2(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA or the Act] and subsection 289(1) of the *Excise Tax Act*, RSC 1985, c E-15 [ETA] allow the Minister of National Revenue [the Minister or the CRA (Canada Revenue Agency)] to obtain any information or document from any person for any purposes related to the administration or enforcement of the ITA and Part IX ("Goods and Services Tax") of the ETA, or for the enforcement of a "listed international agreement." Requests for information under those provisions are colloquially known as "named persons requirements," because the Minister knows and names the persons they target.

[2] Under subsection 231.2(3) of the ITA and its equivalent subsection 289(3) of the ETA, the Minister may request disclosure of information and documents from other persons, but instead of relating to persons known to the Minister under subsections 231.2(1) of the ITA or 289(1) of the ETA, this type of request relates to an "ascertainable" group of "unnamed persons." This is what

is colloquially known as an “unnamed persons requirement” [UPR], because the Minister targets persons that are not yet known to them. Unlike a “named persons requirement” under subsections 231.2(1) of the ITA and 289(1) of the ETA, the Minister does not have the unilateral power to obtain information through a UPR. Instead, the Minister must first obtain the Court’s authorization of the Court, pursuant to subsections 231.2(3) of the ITA or 289(3) of the ETA.

[3] The Court will only authorize a UPR when the preconditions set forth in subsections 231.2(3) of the ITA or 289(3) of the ETA are met, namely when (a) there is an “ascertainable” group of persons whose information is requested and (b) the request “is made to verify compliance by the person or persons in the group with any duty or obligation under [the ITA or Part IX of the ETA].” However, meeting these preconditions does not preclude the Court from exercising its residual discretion to deny authorization or impose “any conditions that the [Court] considers appropriate” in the circumstances (*Canada (National Revenue) v Derakhshani*, 2009 FCA 190 at para 19 [*Derakhshani*]; *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50 at paras 23, 30 [*RBCLIC*]; *Rona Inc v Canada (National Revenue)*, 2017 FCA 118 at para 7 [*Rona FCA*], leave to appeal to the Supreme Court of Canada dismissed, see *Rona Inc v Minister of National Revenue*, 2018 CanLII 3412 (SCC); *Roofmart Ontario Inc v Canada (National Revenue)*, 2020 FCA 85 at para 56 [*Roofmart*]).

[4] This particular Application requires the Court to examine whether a UPR may be authorized when the Minister’s objective is not to verify the persons’ compliance with any duty or obligation under the ITA or Part IX of the ETA, but rather to transfer information to a foreign country under an international treaty. Answering this question requires the Court to analyze how

binding international treaties become enforceable in domestic Canadian law, and thus allows this Court to reiterate the doctrinal core of Canada's dualist approach to international law.

[5] On request from the Australian Taxation Office [ATO], the Minister seeks the authorization to issue Shopify Inc. [Shopify or the Respondent] a UPR. The ATO makes this request pursuant to the *Convention on Mutual Administrative Assistance in Tax Matters*, 25 January 1988 (as amended on 27 May 2010), ETS 1988 No 127 (entered into force 1 June 2011, accession by Canada 21 November 2013) [Convention], a multilateral tax treaty to which both Canada and Australia are parties.

[6] The Convention is among the "listed international agreements" incorporated within subsection 231.2(1) of the ITA and its equivalent subsection 289(1) of the ETA. These are the provisions governing "named persons requirements"—a process not involving judicial authorization. At issue here is whether subsections 231.2(3) of the ITA and 289(3) of the ETA, which govern judicial authorization of UPRs, have also incorporated the Convention as a "listed international agreement," despite these provisions not specifically including "listed international agreements" in their text. While the reasons below will mostly refer to the ITA, they also apply to the equivalent ETA provisions at issue (*Roofmart* at paras 1–2).

[7] The Minister submits that the UPR request meets the statutory preconditions under subsection 231.2(3). On the first precondition, the Minister claims to have identified a group of Shopify "Merchants" that are "ascertainable" by their country of residence and use of Shopify's platform. On the second precondition, the Minister submits that a proper interpretation of

paragraph 231.2(3)(b) of the ITA includes “listed international agreements” (similarly to “named persons requirements”). The fact that the Minister has no domestic interest in the information is not a ground of refusal under the Convention, which can be interpreted harmoniously with the general request for information regime existing under the ITA.

[8] Shopify contests these claims, insisting that the target group is both overly broad and inconsistently defined, and that the Convention is without domestic force when relating to UPR requests. It therefore asks to dismiss the Minister’s application.

[9] For the reasons below, the Court cannot authorize the UPR proposed by the Minister. Although the Convention is binding upon Canada as an instrument of international law, and applies in relation to “named persons requirements” under subsection 231.2(1) because of its incorporation in the term “listed international agreement,” the Convention is of no domestic force in relation to UPR requests under paragraph 231.2(3)(b) of the ITA. This is a threshold issue. It is therefore unnecessary to determine whether the target group meets the statutory precondition set out in paragraph 231.2(3)(a) of the ITA, and how this Court should exercise its discretion in the circumstances.

[10] However, for the sake of comprehensiveness and because the Minister has indicated that their Application would serve as a test case for future applications on behalf of foreign tax authorities, I will conduct an analysis on those two further issues.

[11] In this vein, I am satisfied by the information available to me on oath that the Minister has identified an "ascertainable" group in this Application. Further, had the precondition in paragraph 231.2(3)(b) been met in the circumstances, it would have been in the interests of justice to allow the Minister's Application. This is what the evidence demonstrates in this case.

[12] This Application arises in the context of a related but separate UPR application [File No. T-778-23], involving the same parties and a similar request. Although both applications were heard together, with some measure of overlap in the issues and arguments presented, they are meaningfully distinct. File No. T-778-23 concerns a different target group and does not involve the ATO. The application in File No. T-778-23 is purely domestic in nature, similar to other UPR applications that have previously come before this Court (see e.g. *Canada (National Revenue) v Hydro-Québec*, 2018 FC 622 [*Hydro-Québec #1*]; *Canada (National Revenue) v Royal Bank of Canada*, 2021 FC 830 [*RBC*]; *Canada (National Revenue) v Bambora Inc*, 2023 FC 980 [*Bambora*]). What distinguishes this Application from the Court's prior UPR jurisprudence is its international dimension.

II. Context

[13] Shopify is a Canadian corporation offering a subscription-based software platform to build and run independent stores across multiple digital and physical sales venues, including online businesses. Through the popularity of its various services, it has become a leading provider of online e-commerce infrastructure.

[14] The software that Shopify offers its users is said to be content-neutral. It is not a marketplace for e-commerce in itself, but an integrated back-office system that enables its users to sell products and services online, or otherwise keep records and books. For Shopify users that do make sales, products and services may be sold over more than a dozen channels, including brick-and-mortar stores, e-commerce marketplaces such as eBay and Amazon, social media such as Instagram and Tik Tok, or through a public-facing website hosted by Shopify.

[15] Not all Shopify users sell products and services through an "online store" hosted by Shopify. However, users that do make sales through Shopify's platform may rely on Shopify's "Checkout" software ["Shopify Checkout"]. Shopify Checkout integrates several "payment gateways," "payment processors," and "payment aggregators," which are required to complete online payments.

[16] A payment processor is an intermediary between a business selling a product or service and a customer (e.g., banks, credit card institutions, or other financial institutions involved in a transaction), meant to facilitate the transaction and transfer of funds. Many payment processors exist, such as PayPal and Authorize.net. Shopify has its own payment processor ["Shopify Payments"], which "white-labels" the services of Stripe Inc. [Stripe], meaning that Shopify offers Stripe services under its own brand "Shopify Payments" (Fazeli Affidavit at paras 22(e), 24–26, Respondent's Record at 35–36 [RR]).

[17] Where an account uses Shopify's financial services (Shopify Checkout or Shopify Payments), Shopify requires additional information to be disclosed such as date of birth, business

number, business name and/or operating name, email and mailing address, telephone number, domain name and IP address, “payment gateways,” “payment processors,” banking information, total number and total value of transactions for each year, the date that the account was activated and/or closed, and in some cases the Know-Your-Customer [KYC] documentation (Fazeli Affidavit at paras 13, 18(b), 22(e), 23–26, 45, 47, 53–58, 60, 65, 70, 74, 78–80, 86–87, RR at 32, 33, 35–36, 39, 40, 41, 43, 45, 46, 47; Fazeli Cross-Examination at 31–34, 40–44, 98, 101–109, 113–126, Applicant’s Record at 65–68, 74–78, 132, 135–143, 147–160 [AR]; Lee Affidavit, RR at 85–86, Tab 4, Exhibit “B” – “Shopify Terms of Service”).

[18] Canada is a founding member of the Organisation for Economic Co-operation and Development [OECD], a multilateral forum enabling its member states to promote and coordinate best practices in public policy and the regulation of the market economy. Most of the tax treaties ratified by Canada have been negotiated under the *aegis* of the OECD and its Global Forum on Transparency and Exchange of Information for Tax Purposes, including the *Convention on Mutual Administrative Assistance in Tax Matters* (Tremblay Affidavit at para 3, AR at 13). Australia, a fellow member state of the OECD, has also ratified the Convention (Tremblay Affidavit at para 8, AR at 14).

[19] Canada’s tax conventions define the Minister and their authorized representatives as the competent authority in dealing with information requests from Canada’s tax treaty partners. The exchange of information under multilateral tax treaties is accordingly a specialized function within the CRA and its relevant internal directorates (Tremblay Affidavit at paras 4–5, AR at 13).

[20] In April 2022, the Minister received an exchange of information request from Australia pursuant to the Convention (Tremblay Affidavit, AR at 20, Tab 3.(a), Exhibit "A" – "Exchange of Information Request from Australia"). The ATO's request concerns Shopify.

[21] The Australian request explains that vendors established outside of Australia must register for Australian Goods and Services Tax [GST] if their sales to Australian consumers total AUD $75,000 or more in any 12-month period. Shopify provides web services to "merchant stores" and the ATO believes that a proportion of these stores fall within the scope of Australia's GST laws. This belief is informed by the data available to the ATO through the Australian Transaction Reports and Analysis Centre (Australia's financial intelligence agency), and information obtained from other tax authorities. However, due to limitations in the data held by the ATO, Australia has not been able to determine which exact stores meet the relevant GST threshold, and the total amount of GST owing for online sales made to Australian customers. Australia is therefore requesting information from Canada in order to assist the ATO in calculating, communicating, and engaging with the relevant taxpayers with respect to their Australian GST obligations (Tremblay Affidavit, AR at 22, Tab 3.(a), Exhibit "A" – "Exchange of Information Request from Australia").

[22] In the request communicated to Canada in April 2022, Australia asks Canada to provide information pertaining to all "merchants using Shopify Inc." who had customers with Australian billing addresses. The information would cover the period of April 1, 2021, to March 31, 2022, and would consist of the following:

1. Merchant store trading name;
2. Store legal name;
3. Contact name(s);

> 4. Contact number;
>
> 5. Email address(es);
>
> 6. Postal address(es);
>
> 7. '.myshopify.com' URL; and
>
> 8. Total revenue for sales to customers located in Australia by Shopify stores, including all relevant currency information.
>
> (Tremblay Affidavit, AR at 24, Tab 3.(a), Exhibit "A" – "Exchange of Information Request from Australia").

[23] Following through on this request, the CRA's Director of International Collaboration, Ms. Nancy Tremblay, communicated with Shopify's Tax Operations, advising them that Australian authorities had made "foreign exchange of information requests" to the CRA with respect to Shopify (Lee Affidavit at para 54, RR at 67).

[24] In a letter dated January 12, 2023, Ms. Tremblay then wrote to the Tax Operations team with several inquiries about the information collected and retained by Shopify, including the corporation's ability to satisfy certain requests for information (Lee Affidavit, RR at 205–206, Tab 4, Exhibit "K" – "Letter from N. Tremblay to D. Newman and J. Given dated January 12, 2023"). A meeting was later held between the representatives of several teams of the CRA and Shopify on February 14, 2023, with Shopify's legal counsel also attending (Lee Affidavit at para 67, RR at 69).

[25] Further to this February 14 meeting, the CRA emailed the Shopify team and requested links to the information published by Shopify about the information that its affiliated legal entities

possess and control. Shopify responded the same day with these links (Lee Affidavit, RR at 221, Tab 4, Exhibit "O" – "Email from R. Bastarache to A. Beaudoin dated February 17, 2023").

[26] Without further discussion with Shopify, the Minister issued the subject UPR on April 14, 2023, in respect of the ATO foreign exchange of information request (Tremblay Affidavit, AR at 28–29, Tab 3.(b), Exhibit "B" – "Draft Requirement"). The relevant portions of the draft UPR read as follows:

> Pursuant to subsections 231.2(1), (2), and (3) of the *Income Tax Act* (the "ITA") and subsections 289(1), (2), and (3) of the *Excise Tax Act* (the "ETA"), and for purposes related to the administration of Article 5 of the Multilateral *Convention on Mutual Assistance in Tax Matters*, Shopify Inc., is required to provide within forty-five (45) days from the date of this notice of requirement, the following information, regarding merchants using Shopify Inc. who have customers with Australian billing addresses for the period from April 1, 2021, to March 31, 2022:
>
> 1. Merchant store trading name;
>
> 2. Store legal name;
>
> 3. Contact name(s);
>
> 4. Contact number;
>
> 5. Email address(es);
>
> 6. Postal address(es);
>
> 7. '.myshopify.com' URL; and
>
> 8. Total revenue for sales to customers located in Australia by Shopify stores, including all relevant currency information.
>
> [Proposed UPR]

[27] The Minister now applies for judicial authorization of this Proposed UPR under subsection 231.2(3) of the ITA.

III. Issues

[28] The sole question is whether this Court should authorize the Proposed UPR pursuant to subsection 231.2(3) of the ITA. The Application raises three issues in this respect: (a) whether the Minister has identified an "ascertainable" group of persons; (b) whether the Proposed UPR is made to "verify compliance by the person or persons in the group with any duty or obligation [under the ITA]"; and (c) whether the Court should exercise its residual discretion to deny the authorization, or provide any conditions in relation to the Proposed UPR.

[29] The particularity of this Application arises with respect to the second element. The Minister submits that the Convention has force of law in Canada and can therefore form the basis upon which to authorize a UPR, and meet the second precondition under paragraph 231.2(3)(b) of the ITA. Shopify submits that the Convention does not have force of law because it was never the subject of domestic incorporation, and the Minister cannot meet the second precondition because Australia's request has nothing to do with verifying compliance with the ITA, as required under paragraph 231.2(3)(b).

[30] This is a threshold issue. Further analysis of the statutory preconditions becomes necessary only upon finding the Convention to have been incorporated into paragraph 231.2(3)(b) of the ITA.

IV. Analysis

A. Judicial Authorization of an Unnamed Persons Requirement: General Principles

[31] Subsection 231.2(1) of the ITA enables the Minister to serve on any person a notice requiring them to provide any information or document for any purpose related to the administration or enforcement of the ITA, or of a listed international agreement or tax treaty with another country. This entitlement is subject to subsection 231.2(2), which provides that requirements relating to one or more "unnamed persons" must first be authorized by a judge of the Federal Court. To authorize the requirement, the Court must be satisfied that the Minister's application meets the preconditions set out in subsection 231.2(3). Section 231.2 of the ITA provides as follows:

Requirement to provide documents or information	**Production de documents ou fourniture de renseignements**
(1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice sent or served in accordance with subsection (1.1), require that any person provide, within such reasonable time as is stipulated in the notice,	**(1)** Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord international désigné ou d'un traité fiscal conclu avec un autre pays, par avis signifié ou envoyé conformément au paragraphe (1.1), exiger d'une personne, dans le délai raisonnable que précise l'avis :
(a) any information or additional information, including a return of income or a supplementary return; or	**a)** qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;
(b) any document.	**b)** qu'elle produise des documents.
	[…]

[…]

Unnamed persons

(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

Judicial authorization

(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this subsection referred to as the "group") if the judge is satisfied by information on oath that

(a) the person or group is ascertainable; and

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

(c) and (d) [Repealed, 1996, c. 21, s. 58(1)]

(4) to (6) [Repealed, 2013, c. 33, s. 21]

Personnes non désignées nommément

(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

Autorisation judiciaire

(3) Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou la production de documents prévues au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément — appelée « groupe » au présent paragraphe —, s'il est convaincu, sur dénonciation sous serment, de ce qui suit :

a) cette personne ou ce groupe est identifiable;

b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;

c) et d) [Abrogés, 1996, ch. 21, art. 58(1)]

(4) à (6) [Abrogés, 2013, ch. 33, art. 21]

[32] Subsection 231.2(3) of the ITA thus prescribes the test under which the Court must consider the Minister's application.

[33] The Court must carry out this test in three steps. The first two correspond to the statutory preconditions set out in subsection 231.2(3), and must be undertaken on a balance of probabilities: on the first step, the Court must be satisfied that the group or person identified in the Minister's application is "ascertainable" (see paragraph 231.2(3)(a) of the ITA); on the second, the Court must be satisfied that the Minister's requirement is being made to verify the targeted persons' compliance with any duty or obligation under the ITA (see paragraph 231.2(3)(b) of the ITA). The third step engages this Court's residual discretion, granting it the authority to deny authorization even when the Minister meets the statutory preconditions, or to impose any conditions that the Court considers appropriate (*Rona FCA* at para 7). This is a deeply fact-specific exercise, one in which the Court may review all of the circumstances relevant to the application in deciding whether to grant the authorization or impose specific conditions (*RBCLIC* at paras 23, 30).

[34] There is no need for the Court to balance a person's privacy rights with the Minister's ability to administer and enforce the ITA: "Parliament has already done that balancing and made its decision" (*Roofmart* at para 21). The Court's role rather lies in ensuring that the two factual preconditions set out in subsection 231.2(3) have been established. The fear of abuse, or the taxpayer's right to privacy, cannot be "used to create an unexpressed exception to clear language," or displace the principles governing the interpretation of taxation legislation (*Roofmart* at para 20, citing *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 23 [*Placer Dome*]).

[35] The unnamed persons provisions of the ITA are a limitation of the Minister's otherwise extensive powers, guarding against undue encroachment into the lives of taxpayers. Yet the fear

of undue encroachment is no license to read in additional conditions into the legislation (*Roofmart* at paras 20–21). The words of subsection 231.2(3) leave little ambiguity, specifying the exact conditions that must be satisfied for the Minister to obtain judicial authorization for a UPR request. They are precise and unequivocal (see *Bonnybrook Park Industrial Development Co Ltd v Canada (National Revenue)*, 2018 FCA 136 at para 34 [*Bonnybrook*], citing *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10 [*Canada Trustco*]).

[36] In this vein, courts operate on the presumption of Parliament's knowledge and competence. The legislature is presumed to know all that is necessary to produce rational and effective law (*Willick v Willick*, 1994 CanLII 28 (SCC), [1994] 3 SCR 670 at 699; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 45; see also *65302 British Columbia Ltd v Canada*, 1999 CanLII 639 (SCC), [1999] 3 SCR 804 at para 7, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 288), and is indeed presumed to be a skillful crafter of legislative schemes and provisions (*Canada 3000 Inc, Re; Inter-Canadian (1991) Inc (Trustee of)*, 2006 SCC 24 at paras 36–37). Closely related is the presumption of perfection: Parliament says what it means and means what it says (*Re Dillon and Catelli Food Products Ltd (and twenty-two other appeals)*, 1937 CanLII 107 (ON CA), [1937] OR 114 at 176 (Ont CA)).

[37] The history of the provision shows how Parliament balanced the rights and interests at issue.

[38] When Parliament first enacted section 231.2 in 1986, it required the Minister to meet two further statutory preconditions for the authorization of a UPR request. Beyond the group's "ascertainable" nature and the purpose of the requirement being to "verify" compliance, the Minister was required to prove that it was reasonable to suspect that the unnamed persons may not comply with the ITA and that the information sought was not otherwise more readily available (Canada, Department of Finance, *Technical Notes to a Bill Amending the Income Tax Act and Related Statutes*, issued by the Honourable Michael Wilson (Ottawa: Department of Finance, November 1985) at 134–135).

[39] Parliament repealed these preconditions in 1996, intent on easing the Minister's burden of proof to obtain authorization for the issuance of a UPR (*Roofmart* at para 26, citing *Canada (National Revenue) v Greater Montréal Real Estate Board*, 2007 FCA 346 at paras 36–38 [*GMREB*], leave to appeal to the Supreme Court of Canada dismissed, see *Chambre immobilière du grand Montréal c Ministre du Revenu national*, 2008 CanLII 18937 (SCC)).

[40] However, in 2013, the ITA was again amended to remove the *ex parte* stage of the authorization process, now requiring an application to the Court with the possible participation—and objection—of a third party (*Economic Action Plan 2013 Act*, No 1, SC 2013, c 33, s 21(1); see also *Roofmart* at para 51).

[41] The relative alleviation of the Minister's justificatory burden speaks to the importance and breadth of their investigatory power. No proof of a "genuine and serious inquiry" is required on behalf of the Minister (*Roofmart* at para 26, citing *eBay Canada Ltd v MNR*, 2008 FCA 348 at

paras 62, 68 [*eBay*, 2008 FCA 348]). Nor is there need for a "good faith" audit purpose, beyond what the words of the ITA already require (*Roofmart* at para 52). Parliament has granted the Minister broad powers to verify and test taxpayer compliance, and these powers are central to their ability to enforce the ITA (*Roofmart* at para 55; see also *eBay Canada Limited v Canada (National Revenue)*, 2008 FCA 141 at para 39 [*eBay*, 2008 FCA 141]; *RBC* at paras 13–15).

[42] At this juncture, it is useful to note that under paragraph 231.1(1)(d) of the ITA (and paragraph 288(1)(c) of the ETA), a person authorized by the Minister may require a taxpayer or any other person to answer questions related to the administration or enforcement of the ITA. The Minister has no obligation to consult a person on whom a requirement to provide information would then be imposed, but inadequate consultation may lead to circumstances where the UPR request is not sufficiently clear or tailored to the procedures of the third party to allow it to properly respond. In such situations, the Court may have to reject the Minister's application because the UPR request is unclear for the third party, in circumstances where adequate consultation under paragraph 231.1(1)(d) could have enabled the Minister and the third party to properly construe the wording of the proposed UPR for the Court's approval. In other words, collaboration may be key in UPR requests (see e.g. *Ministre du Revenu national c Rona Inc*, 2016 CarswellNat 5372 [*Rona FC*]).

1) The Requirement of an "Ascertainable" Group

[43] Identifying an "ascertainable" group of persons is the first statutory precondition for the judicial authorization of a UPR request, pursuant to paragraph 231.2(3)(a).

[44] There are no fixed criteria in the ITA or case law to determine whether a group is "ascertainable" under paragraph 231.2(3)(a). At the very least, the jurisprudence suggests that it is not purely a question of size and precision: "[the] fact that the UPR may target an unspecified or large number of accounts or that a significant amount of financial information may be captured does not affect its validity" (*Roofmart* at para 39). It is open to the Minister to conduct "horizontal or sector wide assessments of tax compliance," and permissible for a UPR to "inadvertently sweep" within its ambit some persons "who may be of no interest for the Minister for the purposes of verifying compliance" (*Roofmart* at para 40).

[45] A UPR request need not be perfectly tailored to the target group; "unnamed" means "not known to the Minister," rather than "not named in the Requirement" (*Ghermezian v Canada (Attorney General)*, 2020 FC 1137 at paras 67–74 [*Ghermezian*]). It is thus expected that in casting their net, the Minister will undoubtedly catch some information that they did not intend to see and for which they have no use: in amending subsection 231.2(3), "Parliament permitted a type of fishing expedition, with the authorization of the Court and on conditions prescribed by the Act, all for the purpose of facilitating the MNR's access to information" (*Roofmart* at para 45, citing *GMREB* at para 45). The threshold of precision designated by the term "ascertainable" is accordingly low.

[46] A review of the relevant case law confirms the relative ease with which the Minister can identify an "ascertainable" group before the Court. In *Roofmart* (at paras 38–41) the Federal Court of Appeal upheld a UPR request targeting residential and commercial construction contractors who had accounts with the company and an annual total purchase and/or billed amount of $10,000

or $20,000 or greater, for two distinct periods respectively (see *Roofmart* at para 4; *Canada (National Revenue) v Roofmart Ontario Inc*, 2019 FC 506 at para 11), deeming a "total annual purchase requirement" to be a sufficient means of establishing a target group.

[47] Prior to *Roofmart*, the Federal Court of Appeal similarly upheld a request authorizing the Minister to issue a UPR targeting the commercial customers of fifty-seven large retail stores, allowing them to seek the name, address, and the total amount of annual transactions on each commercial account for a period of three years (*Rona FCA* at para 6).

[48] The Federal Court of Appeal likewise upheld a UPR authorization that would identify "PowerSellers" in Canada, meaning those who had sold more than a certain volume of items on eBay, the world's then-largest global online marketplace (*eBay*, 2008 FCA 348 at para 11). The company would be required to release Canadian-address customer information to which it had access, though it did not own the data, which was available on servers outside Canada (*eBay*, 2008 FCA 348 at paras 47–51). To this effect, the Federal Court has since ruled on numerous occasions that if foreign-based information is also located in Canada, it can be compelled to disclose information under section 231.2, by virtue of its Canadian location (*Ghermezian* at para 99; *Shokouhi v Canada (Attorney General)*, 2021 FC 1340 at paras 21–26 [*Shokouhi*]).

[49] In *Canada (National Revenue) v PayPal Canada Co*, 2017 CarswellNat 6671 [*PayPal*], Justice Gascon of the Federal Court found that four years' worth of aggregated transaction information of corporations and individuals holding a PayPal Canada Co. Business Account was an "ascertainable" group and not overbroad (*PayPal* at paras 5–6). Of particular significance in

that case was how PayPal itself indicated to the Minister that the information sought was available in its computer systems, and did not submit any evidence showing that it was not feasible for it to provide the information or that it was unable to comply with the proposed UPR (*PayPal* at paras 11, 14, 18).

[50] Since then, the Federal Court has authorized UPR requests of varying breadth and precision. In *RBC*, Justice Little authorized a UPR seeking the names and addresses of account holders, signing officers, and powers of attorney associated with a specified bank account at an RBC branch in Calgary. Referring to the guidance in *Roofmart*, the Court notably held that the group was "ascertainable" in light of RBC maintaining books and records with the information sought, thus giving the targeted entity the power to identify and list the unnamed persons associated to each account (*RBC* at para 16).

[51] Justice Little authorized a different UPR in *Bambora*, this time seeking the contact information, banking information, and total monthly aggregate of transactions information of all Canadian "merchants" (the same term used in the Proposed UPR) registered with and using Bambora Inc.'s mobile payment and processing products and services over a four-year period. The group was again deemed "ascertainable," the merchants being customers of and registered with the company.

[52] Most recently, in *Canada (National Revenue) v Helcim Inc*, 2023 FC 1202 [*Helcim*], Justice McDonald authorized a UPR targeting the registered account holders of a mobile payment device company, citing the electronic records maintained by the company, which included the

names, banking information, and sales history of the "merchants" (again, the same term used in the Proposed UPR) (*Helcim* at paras 16–22).

[53] To date, the sole occasion on which the Federal Court has deemed a group to be unascertainable was the UPR request denied by Justice Roy in *Hydro-Québec #1*. The group in question consisted of "legal or natural persons not subject to [Hydro-Québec's] large-power or domestic rate," which represented some 4.3 million customers (*Hydro-Québec #1* at para 19). Finding the UPR overly broad, Justice Roy held that "[when] the group is generic and has no connection to the ITA, and information can be requested outside of the scope of the ITA (such as identifying the business clients of a public utility) there is no longer any limit on the fishing expedition" (*Hydro-Québec #1* at para 78). This test for determining whether a group is "ascertainable" was relied upon by the appellants in *Roofmart*, and rejected by the Federal Court of Appeal in that same decision (*Roofmart* at paras 36–42). A "generic" group may nevertheless be considered "ascertainable," and the availability of the information through other means is irrelevant to the analysis (*Roofmart* at para 37).

[54] A review of the relevant case law shows "ascertainable" to be a low threshold. In theory and in practice, the requirement of an "ascertainable" group is easily met by the Minister. However, in light of the arguments presented in this Application and its companion File No. T-778-23, it is worth expounding the conceptual contours of the "ascertainable" group requirement in more detail. The type of analysis required of the authorizing court involves a highly context-specific determination, but there is no doubt a set of minimal conditions that "ascertainable" groups will

meet in the usual course of events—conditions that are self-evident within or inherent to the process itself, rather than additional criteria to be met by the Minister.

[55] In elaborating these minimal conditions, I am mindful that this Court's approach remains grounded in the modern principle, according to which the words of the ITA are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act (*Stubart Investments Ltd v The Queen*, 1984 CanLII 20 (SCC), [1984] 1 SCR 536, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87); *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at paras 21–22 [*Rizzo*]; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26; *Piekut v Canada (National Revenue)*, 2025 SCC 13 at paras 42–49 [*Piekut*]; *Telus Communications Inc v Federation of Canadian Municipalities*, 2025 SCC 15 at paras 30, 43, 53, 104 [*Telus*]). This remains the case even if "the particular nature of tax statutes and the peculiarities of their often complex structures" impose a heightened emphasis on the actual words of the ITA, such that "[broad] considerations of statutory purpose should not be allowed to displace the specific language used by Parliament" (*Imperial Oil Ltd v Canada*, 2006 SCC 46 at paras 24–29 [*Imperial Oil*], citing *Ludco Enterprises Ltd v Canada*, 2001 SCC 62 at para 36).

[56] The Supreme Court of Canada has recently underscored the centrality of legislative text to the exercise of statutory interpretation, referring to text as the "anchor of the interpretive exercise" and "the focus of interpretation" that reveals "the means chosen by the legislature to achieve its purposes" (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para 24 [*CISSS*], citing Mark Mancini,

"The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59 Alta L Rev 919 at 927, 930–931). The Court's interpretative task resides in ensuring a construction of the text that most faithfully ensures the "attainment of its object and carrying out of its provisions according to their true intent, meaning and spirit" (*CISSS* at para 24; see also *Rizzo* at paras 21–22).

[57] Just as with any other federal statute, the ITA must also be read in view of section 12 of the *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act*], such that paragraph 231.2(3)(a) must be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" (see *Piekut* at para 46; *Onex Corporation v Canada (Attorney General)*, 2024 FC 1247 at para 50 [*Onex*], citing *Canada (National Revenue) v ConocoPhillips Canada Resources Corp*, 2017 FCA 243 at para 36).

[58] When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. Of course, the apparent clarity of words taken separately does not suffice, because they "may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation" (*La Presse inc v Quebec*, 2023 SCC 22 at para 23 [*La Presse*], citing *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 10 [*2952-1366 Québec Inc*]). On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role (*Bonnybrook* at para 34, citing *Canada Trustco* at para 10).

[59] In this vein, it is further presumed that the legislature avoids superfluous words and that it does not pointlessly repeat itself or speak in vain (*McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58 at para 36). Every word in a statute is presumed to have meaning and courts must construe statutes in a manner to ascribe some meaning to each and every word used by the legislature (*Tower v MNR (FCA)*, 2003 FCA 307 at para 15, citing *Economic Development Fund v Canadian Pickles Corp*, 1991 CanLII 48 (SCC), [1991] 3 SCR 388 at 408).

[60] Accordingly, this Court should also be mindful of the presumption of consistent expression, by which the meaning of the words used in statutes remains consistent, because "the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 44, citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 217; see also *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 81; *Telus* at para 55; *Rio Tinto Iron and Titanium Inc v Canada (Attorney General)*, 2025 FC 311 at para 124 [*Rio Tinto*], citing *R v Basque*, 2023 SCC 18 at para 59; Pierre-André Côté and Mathieu Devinat, *Interprétation des lois*, 5th ed (Montréal: Éditions Thémis, 2021) at Nos 1142–1143).

[61] Finally, a proper exercise of statutory interpretation requires due consideration of both the French and English versions of the provision. As recently explained by the Supreme Court of Canada in *Piekut*:

> [53] [t]he interpretation of a bilingual enactment must begin with a search for the shared meaning between the two official language versions (*R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, at para. 26, citing *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856, at para.

> 5). The shared meaning is generally preferred unless other indicators of legislative intent suggest that the shared meaning is inappropriate (*Doré v. Verdun (City)*, 1997 CanLII 315 (SCC), [1997] 2 S.C.R. 862, at para. 25; *Khosa*, at paras. 38-40).
>
> […]
>
> [59] Where one version of bilingual legislation is broader than the other version, the narrower version reflects the shared meaning (*Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, at para. 72, citing *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at para. 25, and Côté and Devinat, at para. 1131; see also *Daoust*, at para. 29; Sullivan, at § 5.03[6]). Here, the French text of s. 178(1)(g) is narrower than the English text. The entire French text is qualified by the words "au regard de la loi applicable", while in the English text only s. 178(1)(g)(i) is qualified by the words "under the applicable Act or enactment", leaving the possibility that the date in s. 178(1)(g)(ii) is determined on another basis. The narrower French text eliminates this possibility and hence reflects the shared meaning.
>
> (*Piekut* at paras 53, 59).

[62] Applying these principles in the context of this Application, I note first that the term "ascertainable" appears twice in the ITA, outside of paragraph 231.2(3)(a). Its first appearance is in subparagraph 10.1(5)(b)(ii), which defines the term "eligible derivative" as a "swap agreement, a forward purchase or sale agreement, a forward rate agreement, a futures agreement, an option agreement or a similar agreement, held at any time in the taxation year by the taxpayer [if, among other conditions] the taxpayer has not produced audited financial statements described in subparagraph (i), [and] the agreement has a readily ascertainable fair market value" (emphasis added). The second appearance of the term is in subsection 248(1) of Part XVII of the ITA, which defines the term "office" as "the position of an individual entitling the individual to a fixed or ascertainable stipend or remuneration…" (emphasis added). The French versions of both these

provisions translate “ascertainable” into “*vérifiable*,” whereas paragraph 231.2(3)(a) uses the word “*identifiable*.”

[63] The case law interpreting subparagraph 10.1(5)(b)(ii) sheds little light on the meaning of the term “ascertainable,” but the matters dealing with the term “office” under subsection 248(1) are more useful. As will be expounded below, there is some disagreement as to the degree of prior knowledge implied by the term “ascertainable,” i.e., what must be known *a priori* about the thing that must be ascertained.

[64] Of interest is the analysis undertaken by Justice Reed in *Merchant v The Queen*, 1984 CanLII 5359 (FC), [1984] 2 FC 197 [*Merchant*], a decision of the Federal Court on appeal from the former Tax Review Board. The core issue in that appeal was whether or not monies expended by the plaintiff taxpayer, for the purpose of seeking the leadership of the Saskatchewan Liberal Party, should be treated as a deduction for income tax purposes. The plaintiff argued that the income he received from the party was taxable, but that the start-up costs were validly deductible as a business expense—since he was attempting to get into the business of being a party leader, and not holding “office” as understood under subsection 248(1). In turn, he argued that the income he was receiving was not from an office because the remuneration was not of a “fixed or ascertainable nature” (*Merchant* at 199–200).

[65] Justice Reed rejected this argument and dismissed the appeal, finding the term “ascertainable [to] mean that the amount to be paid is capable of being made certain, or capable of being determined but not that a definite sum be known by the office-holder at the commencement

of holding office" (emphasis added) (*Merchant* at 202). In other words, that which is "ascertainable" may not be exactly known or determined at the outset of the process, but it can be made certain through the process.

[66] A contrasting and narrower meaning of the term "ascertainable" was later advanced by Justice Dussault of the Tax Court of Canada [TCC] in *Payette v MNR*, 2002 CanLII 1202 (TCC) [*Payette*]. Assessing the term "office" as set forth in subsection 248(1), Justice Dussault discussed *Merchant* before ultimately rejecting its broader interpretive guidance: "the Court considers that the descriptor 'ascertainable' must refer to something that can be ascertained *a priori*; otherwise it would have no meaning since everything can be ascertained a posteriori. Thus if the 'stipend' or 'remuneration' is not fixed, it must still be ascertainable in advance with at least some degree of accuracy by using some formula or by referring to certain set factors" (emphasis added) (*Payette* at para 24).

[67] What *Payette* appears to emphasize is a sense of prior knowledge or understanding about the thing that can be ascertained through a given process. For instance, a corporation director with performance incentives built into their position might not know their exact gross income for the upcoming year, but they can ascertain it via a certain formula or set of factors known to them in advance. Similarly, a legal entitlement to a *per diem* rate of remuneration established in advance is sufficiently "fixed or ascertainable" to meet the statutory test, even if it is not possible to determine, at the beginning of a particular year, how many days of service will be required (*Canada (National Revenue) v Ontario*, 2011 FCA 314 at para 9 [*Ontario*]).

[68] The narrower interpretation of the term “ascertainable” advanced in *Payette* has since been followed in a set of cases from the TCC, all of which reject *Merchant* and its characterization of the word (see *Guyard v MNR*, 2007 TCC 231 at paras 24–30; *Real Estate Council of Alberta v MNR*, 2011 TCC 5 at paras 25–41 [*RECA*]; *Her Majesty the Queen in Right of Ontario v MNR*, 2011 TCC 23 at para 24; *9098-9005 Québec Inc v The Queen*, 2012 TCC 324 at paras 10–15). The prevailing interpretation holds that “the ascertainable aspect must be *a priori*, meaning formed or conceived beforehand, relating to or derived by reasoning from a self-evident proposition, and not a posteriori, meaning relating to or derived by reasoning from observed facts” (*RECA* at para 41). An advance determination of the total remuneration for a particular year is not necessary, but there must be some knowable mechanism or set of factors whereby remuneration can be ascertained (*Ontario* at para 10).

[69] There are important contextual and purposive differences between paragraph 231.2(3)(a) and subsection 248(1). Within the former, the term “ascertainable” characterizes a person or group not yet known to the Minister, but whose relevant information will be disclosed to them via “a type of fishing expedition” (*Roofmart* at para 45, citing *GMREB* at para 45). In theory, the precise identities of the persons contained within the “ascertainable” group can be determined through the process of disclosure, even if some of these persons “may be of no interest for the Minister for the purposes of verifying compliance” (*Roofmart* at para 40). The term “ascertainable” serves the purpose of ensuring that the proposed requirement concerns real, identifiable persons whose information may be disclosed to the Minister for the purposes of compliance verification. It is therefore unsurprising that the term “ascertainable” in the French version of the provision should translate into “*identifiable*.”

[70] By contrast, the term “ascertainable” as employed in subsection 248(1) refers to a sum of money, more specifically gross income (see also subsection 5(1) of the ITA). For the purposes of calculating income from an office or employment, an exact number for that sum will necessarily exist, and that number must be known to the CRA at the end of the year. That number may not be known to the taxpayer at the outset of the year, but it can be known to them in the end. In the *interim*, should that taxpayer be holding an “office” in the sense of subsection 248(1), there must be a formula or set of factors enabling them to have some idea of what that number might be as a function of other variables. The term “ascertainable” serves the purpose of characterizing the remuneration or stipend received by a specific kind of subject of the ITA—it describes a number that can be verified by the CRA. It is thus expected that the term “ascertainable” in the French version of subsection 248(1) should translate into “*vérifiable*.”

[71] Although the contextual and purposive differences between the two provisions call for some measure of interpretive divergence, the presumption of consistent expression nevertheless favours a consistent interpretation of “ascertainable” between paragraph 231.2(3)(a) and subsection 248(1). The core reason why such an interpretation should be favoured is because of the similar conceptual role the term “ascertainable” fulfils in each provision.

[72] Within each provision, the term “ascertainable” ultimately fulfils a similar function: it serves to characterize a data point that is not yet exactly known by the Minister, but can be determined with certainty through a coherent set of factors or propositions. An advance determination of the exact data is not necessary; what matters is that the data *can* be made certain. The gross income of a given officer may be uncertain at the outset of a taxation year; but there

must be some understanding of how that income will be made and evaluated, the factors or propositions according to which that specific income will be accrued (*Ontario* at paras 9–10). Likewise, an advance determination of the exact identities of those falling within the target group is not necessary; by definition, the persons targeted under paragraph 231.2(3)(a) are not known to the Minister (*Ghermezian* at paras 62–74). Who exactly will be swept up in the Minister's investigation may be uncertain at the authorization stage; but there must be some understanding of how those identities will be determined, i.e., the factors tracing the exact contours of the target group.

[73] Concretely speaking, this understanding should matter to all involved in the proceedings. If ordered to comply, the third party must be able to understand who exactly is targeted by the UPR request and what information they must provide to the government; the Court will not authorize a UPR that is unintelligible, incoherent, or otherwise beyond its understanding. More fundamentally, the Court will not authorize a UPR request when it knows in advance that the third party cannot comply or understand what information is sought, and from whom. The importance of clarity for a third party to be able to respond to a request for information is all the more important given the potential issuance of a compliance order or even contempt of court if a third party fails to comply, under subsection 231.7(4).

[74] The function I have described here also works in a more text-focused frame of analysis. One legal dictionary entry for the verb "ascertain" defines it as "to identify," or "to determine or make sure" (Nancy McCormack, ed, *The Dictionary of Canadian Law*, 5th ed (Toronto: Thomson Reuters, 2019) *sub verbo* "ascertain"), another defines "ascertainability" as "the susceptibility of

something to a definite and assured determination" (Bryan A Garner, ed, *Black's Law Dictionary*, 12th ed (St-Paul: Thomson Reuters, 2024) *sub verbo* "ascertainability"). Likewise, the *Canadian Oxford Dictionary* defines "ascertain" as "find out as a definite fact" (*Canadian Oxford Dictionary*, 2nd ed (Toronto: Oxford University Press, 2024)). The conceptual core of these definitions essentially matches the interpretation set forth in *Payette*: "ascertainable" is the quality of something that can be made definite or determined.

[75] I do not find this core to be altered by the French version of paragraph 231.2(3)(a), which uses the term "*identifiable*," (a term that also appears in subsection 264(2) in the context of U.S. reportable accounts, and which is directly translated to "identifiable" in English) nor subsections 5(1) and 248(1), which use "*vérifiable*." One legal dictionary defines "identification" as the "*action de reconnaître quelqu'un ou quelque chose*," and "*vérification*" as the *"opération par laquelle une personne examine une chose en vue d'en contrôler l'exactitude ou la véracité"* (Hubert Reid & Simon Reid, eds, *Dictionnaire de droit québécois et canadien*, 6th ed (Chambly: Wilson & Lafleur, 2023) *sub verbo "identification," "vérification"*). In turn, *Le Petit Robert* defines both *"identifier"* and *"vérifier"* as direct synonyms of *"reconnaître"* (*Le Petit Robert* (Paris: Dictionnaires Le Robert, 2021) *sub verbo* "*identifier," "vérifier"*). These terms are reconcilable with both their English versions and each other, all of which connote the quality of something that can be intelligibly determined or made exact.

[76] What emerges from this analysis can be summarized as follows: a group will be "ascertainable," for the purposes of paragraph 231.2(3)(a), upon the understanding that the identities of those within the target group can be readily made exact or determined with sufficient

precision. This is a low threshold that does not *necessarily* become harder to meet as a function of the group's size; it does not insist on any criteria beyond "ascertainability" itself. The Court and the third party should be able to understand who might be a part of the target group, even if their exact identities remain unknown to the parties at the outset of the process.

[77] The cases discussed above all complied with this principle. In some cases, prior collaboration between the Minister and the third party enabled the Court to authorize a UPR that a third party acknowledged was "ascertainable" or identifiable to them (see e.g. *Rona FCA* at para 6; *Rona FC; RBC*). In others, a dollar amount of sales or categories of rates allowed the third party to clearly focus its compliance efforts and respond (see e.g. *Roofmart*; *La Ministre Du Revenu National et Hydro-Québec*, T-1329-19, Order of Justice St-Louis (as she then was) dated June 10, 2024 [*Hydro-Québec #2*]). Following an unsuccessful UPR request in *Hydro-Québec #1*, the Minister refined its "ascertainable" group and eventually obtained authorization from this Court in *Hydro-Québec #2*, with Hydro-Québec electing to leave the issue of the "ascertainable" group to the discretion of the Court. There seem to be several paths to a successful UPR request, but they all involve clarity at the level of paragraph 231.2(3)(a).

2) The Verification of Compliance with the ITA

[78] The second statutory precondition for the judicial authorization of a UPR requires the Minister to demonstrate that the UPR's purpose is to verify the target group's compliance with any duty or obligation under the ITA (see paragraph 231.2(3)(b)). This is the main issue in this Application. Should this Court interpret compliance verification with the ITA to include exchanges of information under the Convention?

[79] There are no fixed criteria to demonstrate if a UPR request is being made to "verify compliance" in the sense meant by paragraph 231.2(3)(b) (*Roofmart* at paras 43–45). Indeed, the Minister is not required "to demonstrate that a tax audit is underway and is conducted in good faith" (*Roofmart* at paras 43–45). As established in *GMREB*, the existence of a pending audit is not a precondition to the exercise of the Minister's UPR powers (*GMREB* at paras 19, 42–43). The sole preconditions to judicial authorization are contained in the words of the ITA itself.

[80] In *Roofmart* at paragraph 48, the Federal Court of Appeal accordingly cautioned parties against "[reinserting] criteria into the legal test that are no longer in the legislation," and this Court against "[converting] the application for an order into a judicial review of the reasonableness of the Minister's decision to seek the information, which it clearly is not." Parliament intended to permit a broad inquiry, subject to the Minister meeting the statutory preconditions (*GMREB* at paras 21, 45).

[81] A survey of the relevant case law illustrates how requirements can be tethered to the purposes of compliance verification without meeting a strict test.

[82] On the facts in *GMREB*, the Minister applied for a UPR to determine whether agents and brokers living in a specific area of Québec had properly completed their income tax returns and reported their commission-based earnings (*GMREB* at para 3). The CRA had received documents from the Real Estate Board while auditing one agent, and applied some months later for a requirement that the Board disclose more information (*GMREB* at para 50). That information included a list of the Board members, identification information about each member, and a list of

properties sold by each individual over a period of three calendar years (see *Canada (National Revenue) v The Greater Montréal Real Estate Board*, 2006 FC 1069 at paras 6, 9–10). The affidavit supporting the application expressly stated that the objective was to determine whether the agents and brokers who earned commissions following the sale of immovable property had complied with all the duties and obligations of the ITA. The Federal Court of Appeal concluded that this evidence satisfied the requirements of paragraph 231.2(3)(b) (*GMREB* at para 50).

[83] *Roofmart* upheld a similar finding on paragraph 231.2(3)(b). Referring to the cross-examination of a witness supporting the application, Justice Rennie of the Federal Court of Appeal noted that it was sufficient for the witness to give a general sense of the purpose for which the information would be used by the CRA. The witness's failure to explain precisely how the information would be used for verification purposes was not fatal to the application. Their testimony was sufficient to establish that the information sought would assist in determining whether the unnamed persons had filed their returns as required, made payroll, GST and HST remittances, reported all of the income earned on the sale or supply of roofing materials, or claimed the purchases as business expenses (*Roofmart* at para 46).

[84] The analysis carried out by Justice Little of the Federal Court in *RBC* is a further example of how to make determinations on paragraph 231.2(3)(b). The supporting affidavit in that case stated, under the heading "Purpose of Application," that the Minister was seeking authorization for "purposes related to the administration and enforcement" of the ITA to determine, among other things, whether a particular account holder was associated with the taxpayer. The affidavit, as such, tracked statutory language contained in subsection 231.2(1) and paragraph 231.2(3)(b), but

did not connect the dots between any of the facts set out in the affidavit and the compliance purpose required to meet the precondition of paragraph 231.2(3)(b) (*RBC* at para 21). The Minister's written submissions similarly tracked language in the statute, not citing any provision in the ITA under which the account holder(s) would have owed duties or obligations that were the subject of compliance verification (*RBC* at paras 22–23).

[85] On the facts presented before the Court, Justice Little found that the evidence addressed and met the requirements of paragraph 231.2(3)(b) of the ITA, because some of the evidence suggested the CRA having a purpose of verifying compliance by the unknown account holder(s) relating to the proper preparation of tax returns in accordance with their duties and obligations in the ITA. Considering the evidence and submissions on the application, as well as the broad information gathering purpose of section 231.2 of the ITA reaffirmed in *Roofmart*, Justice Little exercised the Court's discretion in favour of the Minister. In doing so, he noted that "while the affidavit evidence in this case [did] not explain the purposes of the information requirement in the same manner or in the same detail as the evidence in *Roofmart* and *Greater Montréal Real Estate Board,* the Minister in this application also [did] not seek the same kind or scope of information, i.e., transaction information over several years, or copies of the unnamed persons' personal or business documents" (*RBC* at para 29). Having established that distinction, the Court authorized the UPR.

[86] The most recent UPR analysis undertaken by this Court was in *Helcim*. In that case, the Minister sought to verify if the merchants had properly "(i) filed returns as and when required under the ITA and ETA; (ii) reported all or any of the income earned from sales or services as

required under the ITA; (iii) claimed amounts as business expenses under the ITA; (iv) collected and remitted payroll tax under the ITA; (v) remitted net tax under the ETA i.e., whether they have collected, reported, and remitted all of the GST and/or HST imposed on the sale or supply of their goods and/or services; and (vi) claimed input tax credits" (*Helcim* at para 25). They submitted that upon receiving this information, the CRA would review the data provided to verify the merchants' compliance. On this evidence, Justice McDonald found that the Minister had demonstrated a sufficient connection between the content of the requirement and its stated purpose (*Helcim* at para 27). The Court accordingly granted the application.

[87] Again, the lone occasion on which an applicant failed to meet this second statutory precondition was the UPR request denied by Justice Roy in *Hydro-Québec #1*. In that case, the Court notably concluded that the "information sought by the Minister, that is, the corporations or individuals subject to the business rate, [did] not correspond, in itself and according to a *strict* interpretation, with the production of information or documents [for the purposes of compliance verification]" (emphasis added) (*Hydro-Québec #1* at para 79). Justice Roy noted further that "[the] contact information of Hydro-Québec's business clients [was], at best, outside the scope of the information needed to verify compliance with the ITA" (*Hydro-Québec #1* at para 79).

[88] However, *Roofmart*'s interpretive guidance is now clear on this point: the words of the statute do not set forth a strict test to be met by the Minister (*Roofmart* at paras 43–45).

[89] A review of the relevant case law thus shows the relative ease with which the Minister can demonstrate a compliance verification purpose under paragraph 231.2(3)(b) of the ITA: a strict test need not be met, and the Minister is entitled to track statutory language in their affidavit.

[90] Nevertheless, turning to *RBC* is particularly instructive. While there is no need to elaborate at length as to why the Minister is seeking the authorization to issue a UPR, it would be preferable for their affidavit to "connect the dots" between the facts they set out and the alleged compliance purpose (*RBC* at 21). For example, the Minister may do so by citing the provisions under which the target group "may owe duties or obligations that are the subject of verification for compliance, [and then by relating] those provisions to [evidence] in [their] affidavit" (*RBC* at para 23). Should the Minister put in this effort, it will support the evidence that the second precondition under subsection 231.2(3) of the ITA has been met.

3) The Exercise of Residual Discretion

[91] Even when the Minister meets the statutory preconditions on a balance of probabilities, judicial discretion remains a component of subsection 231.2(3) (*RBCLIC* at paras 23, 30; *Rona FCA* at para 7; *Roofmart* at para 56). This element of discretion is essential to the authorization process (*Derakhshani* at para 19).

[92] The precise confines of the Court's discretionary authority are somewhat ill-defined. This is likely due to the relative scarcity of case law in the area, but also to the rarity with which the Court has been called upon to exercise its discretion under subsection 231.2(3) of the ITA, especially in cases where the third-party recipient of the UPR request has mounted a strong

defence. It is thus unsurprising that a neat set of criteria does not emerge from an examination of the relevant jurisprudence.

[93] The Court's discretionary authority is primarily remedial in nature, enabling it to remedy abuse (*Derakhshani* at para 19; *RBCLIC* at para 23; *Rona FCA* at para 7; *Roofmart* at para 56). It stems first from the permissive wording of the ITA which, importantly, uses "may" rather than "shall" in setting forth the Court's power in the context of judicial authorization (see section 11 of the *Interpretation Act*). Discretion is further baked into the notion of granting authorization "subject to *any* conditions that the judge considers appropriate," (emphasis added) a choice of words granting the Court considerable latitude in crafting its order.

[94] Yet this discretion is also rooted in the power of the Federal Court, independent of statute, to redress abuses of process (*RBCLIC* at paras 33–36). As noted by Justice Stratas of the Federal Court of Appeal in *RBCLIC*, "the Federal Courts' power to investigate, detect and, if necessary, redress abuses of its own processes is a plenary power that exists outside of any statutory grant, an 'immanent attribute' part of its 'essential character' as a court, just like the provincial superior courts with inherent jurisdiction" (*RBCLIC* at para 36). These plenary powers are especially relevant in situations where the Court is exercising its "superintending power over the Minister's actions in administering and enforcing the [ITA]" (*Derakhshani* at paras 10–11).

[95] However, this discretion is not without limits. Once the statutory preconditions have been met, the Court's discretion "is not a means by which Parliament's policy choices, as expressed in the subsection, are to be revisited" (*Roofmart* at para 56). Moreover, the Court cannot allow "[the]

provisions Parliament deleted [to] be resuscitated or brought in through the back door in the guise of policy arguments pertinent to the exercise of the judge's discretion whether to grant the order" (*Roofmart* at para 27). Those provisions historically required the Minister to demonstrate that (i) there be reasonable grounds to believe the subject of a UPR had not complied with the Act; and that (ii) the information or documents requested were not otherwise more readily available (*Roofmart* at para 23). The exercise of judicial discretion is limited by the objective of the statute, the nature of the order sought, and the circumstances in which that order would be made (see e.g. *R v Lavigne*, 2006 SCC 10 at para 27).

[96] A live issue in these proceedings has been whether this Court should consider taxpayer privacy interests in its discretion. This is conceptual terrain on which this Court must tread lightly.

[97] Case law suggests that there is a very low expectation of privacy for business records relevant to determining tax liability, because Canada has a self-assessment and self-reporting system that relies on integrity and honesty (*Redeemer Foundation v Canada (National Revenue)*, 2008 SCC 46 at para 25 [*Redeemer Foundation*]; *Roofmart* at para 55). In the context of a UPR, Parliament has already done the balancing exercise between privacy rights and the need for the Minister to have the requisite tools to administer the ITA (*Roofmart* at para 21). Parliamentary intent favours "[the] broader public interest in the enforcement of our system of taxation [over the company's] private and commercial interests in not disclosing its clients' personal information" (*Roofmart* at para 55; see also *Redeemer Foundation* at para 25; *eBay*, 2008 FCA 141 at para 39). The concurring justices of the Federal Court of Appeal panel in *Canada (Revenu national) v Hydro-Québec*, 2023 CAF 171 [*Hydro-Québec FCA*] even distanced themselves from

commenting on the scope of the Court's residual discretion when Justice Goyette, in dissent on this point, noted the increased concern to be given for taxpayer privacy interests as expressed in *R v McKinlay Transport Ltd*, 1990 CanLII 137 (SCC), [1990] 1 SCR 627 at page 649 in a world where information is abundant, easy to transmit, and where no institution—not even the CRA—is immune from hacking (*Hydro-Québec FCA* at para 25).

[98] On the other hand, the guidance in *Roofmart* does not completely forswear the discretionary consideration of privacy concerns. In fact, such a reading would arguably sterilize the core purpose of this Court's discretionary authority: remedying abuses of ministerial power (*Roofmart* at para 56). The Court rather understands *Roofmart* as warning judges against exercising their judicial discretion to impose conditions and hurdles on the authorization process beyond what is already set forth in statute—thus offsetting the balancing act already undertaken by Parliament (*Roofmart* at para 56). An authorizing Court cannot, on the basis of privacy concerns, demand a higher standard of disclosure or proof than what is already required on behalf of the Minister (*Roofmart* at paras 49–55). It cannot use taxpayer privacy as a ground upon which to demand a "good faith audit purpose" from the Minister (*Roofmart* at paras 43–45). However, it can impose "any conditions that the judge considers appropriate" to remedy abuses in crafting its order (see subsection 231.2(3) of the ITA).

[99] Another live issue in the present case is whether this Court should consider the "feasibility" of the proposed requirement in its residual discretion. This is conceptual terrain on which the Court has trod before, but it also presents its share of difficulties.

[100] To date, the issue of feasibility has been a consideration in two UPR applications before this Court. The first was *Rona FC*, in which Justice Martineau authorized a requirement targeting the commercial customers of fifty-seven large retail stores, allowing them to seek the name, address, and the total amount of annual transactions on each commercial account for a period of three years. The company in question conceded the existence of an "ascertainable" group but argued that the information requested by the Minister was not wholly pertinent to verify compliance with the ITA (*Rona FC* at paras 8–9). Justice Martineau found that Rona was not required to provide the total amount of transactions charged to each commercial client during the relevant period if it provided the Minister with statements of transaction for each commercial client instead, something which the company had already done following a prior *ex parte* motion granted by the Court (*Rona FC* at paras 20–21). This prior motion had authorized the Minister to issue UPRs to twenty hardware stores, six of which belonged to the company. These six stores complied within forty-five days of the Minister's request (*Rona FC* at para 21).

[101] Justice Martineau relied on these latter findings, and others, when exercising the Court's discretion in favour of the Minister's application. In doing so, the Court noted first that the Minister had greatly reduced the scope of the proposed requirement over the course of the proceedings, going from nineteen to just three requirement items, and from eighty-five to fifty-seven targeted stores (*Rona FCA* at para 6; *Rona FC* at para 26). The Court then balanced this consideration against the fact that, even if this narrowed requirement would reduce the time needed to prepare and communicate the required information, it would nevertheless impose a considerable amount of work on the third party subject to the UPR request—notably due to it having no system for

nationwide data storage, and the possibility of commercial clients using several of the company's stores at a time (*Rona FC* at para 27).

[102] What ultimately tipped the balance in the Minister's favour was Rona's evidence showing that each store covered by the request possessed their own systems of information in place, each listing the relevant transaction statements for commercial clients (*Rona FC* at para 28). In other words, there was concrete evidence that Rona could provide the Minister with the requested information (*Rona FC* at para 29).

[103] As for the potential hardship faced by Rona, the Court found that it was unclear how much time and effort would actually be required on Rona's behalf to fully comply with the proposed UPR (*Rona FC* at para 30). To this effect, the Court reiterated its authority to retain jurisdiction and extend the compliance deadline if it proved impossible for Rona to fully comply with its obligations in time, despite all reasonable efforts deployed (*Rona FC* at para 32).

[104] Justice Martineau's analysis was affirmed on appeal, with the Federal Court of Appeal emphasizing the judge's discretionary authority in the circumstances (*Rona FCA* at para 7).

[105] The second case discussing the issue of feasibility issues was *PayPal*, in which Justice Gascon authorized a UPR targeting four years' worth of aggregated transaction information of corporations and individuals holding a PayPal Canada Co. Business Account (*PayPal* at para 20). After finding that the target group was "ascertainable" and that the UPR had been made to verify compliance with the ITA, the Court considered the feasibility of the proposed requirement within

its residual discretion. In doing so, it noted "that PayPal [had] not filed any evidence to support a claim that the Unnamed Persons Requirement [was] overbroad or [reached] a disproportionate number of persons or transactions" (*PayPal* at para 17); "that PayPal [had] indicated to the Minister that the information sought in the Unnamed Persons Requirement [was] available in PayPal's computer systems, and that PayPal [had] not submitted any evidence showing that it [was] not feasible to provide the information or that it [was] unable to comply with the proposed Unnamed Persons Requirement" (*PayPal* at para 18). Justice Gascon accordingly authorized the proposed requirement, satisfied that it was in the interests of justice for the Court to do so (*PayPal* at para 19).

[106] These two cases should inform the Court's exercise of its discretion, and help establish what should be a basic principle at this stage of the analysis: the Court may consider the feasibility of the proposed requirement when presented with evidence that it would be impossible or unduly strenuous for the third party to comply with the UPR. The Court's discretion enables it to remedy abuses of ministerial power, and it would be abusive on the Minister's part to order a person to comply with an impossible or unfeasible UPR request.

[107] However, this discretion should be exercised with caution. Two considerations are worth bearing in mind.

[108] First, the exercise of discretion remains grounded in the evidence before the Court. Residual discretion under subsection 231.2(3) of the ITA is no license to subject *every* proposed UPR to an "undue hardship" analysis or "feasibility" inquiry. Parliament has not mandated such

an exercise. There are no preconditions for the authorization of a UPR beyond those established in the ITA. The relevant question is whether the third party receiving the UPR request has presented evidence that compliance is impossible or unduly strenuous. In the absence of such evidence, there is no need for any kind of feasibility analysis from the Court.

[109] Second, the costs associated with tax compliance are part of a person's basic public duties (*Morguard Properties Ltd v City of Winnipeg*, 1983 CanLII 33 (SCC), [1983] 2 SCR 493 at 507). Giant corporations will tend to have complex internal structures, large customer bases, and various arrangements according to which they collect and store the data most relevant to their compliance with the ITA (see e.g. *eBay*, 2008 FCA 348; *PayPal*; *Hydro-Québec #1*). Smaller corporations can be simpler in structure, deal with a more limited set of customers, and maintain their books and records in a relatively straightforward fashion (see e.g. *Rona FC*). Each will face different challenges when it comes to complying with a UPR request under the ITA. But these differences are not—in and of themselves—bases upon which this Court should circumscribe the Minister's power to ensure compliance with the ITA. The UPR provisions of the ITA do not vary according to the size or sophistication of the parties involved. All must comply with the law of the land. Feasibility should not be a trump card for giant corporations who seek to evade the Minister's investigatory powers.

[110] However, case law has also noted that disproportionate costs may be taken into account in the exercise of the Court's discretion (*RBCLIC* at para 30; *Hydro-Québec #1* at paras 93, 104). In that sense, a UPR that would require massive investments in order to respond may be abusive, and

demand the Court's intervention to narrow it and impose stricter conditions, in appropriate circumstances.

[111] Discretionary intervention can also facilitate the non-abusive exercise of ministerial power. Consider a fictional UPR request consisting of nineteen items, that the Court finds unfeasible and abusive due to its breadth. In such a case, the Court could still make a finding that a UPR tailored to the three most essential items would not be unfeasible or abusive, and authorize a more tailored request. The Minister may find that upon receiving these three items, further information gathering is not necessary. *A contrario*, they might also find that these three items are not enough, and the Minister might seek the Court's authorization to issue a second UPR concerning some of the other items left off the initial UPR. In other words, the Court's discretion under subsection 231.2(3) enables the Minister to proceed in stages. This allows the Minister to obtain the information they require, but also allows the Court to mitigate the hardship that may be caused to the third party. *Rona FC* is a good example of this, for it shows that proceeding in stages may be appropriate, and that the Minister might not need all the items they initially required. In that case, as discussed above, the scope of the UPR request was reduced by the Minister from nineteen items to three.

[112] Overall, the Court's residual discretion is guided by a broad sense of proportionality (see e.g. *Apotex Inc v Janseen Inc*, 2022 FC 1476 at paras 19–20; see also *Canada v Lehigh Cement Limited*, 2011 FCA 120 at paras 34–35; *Hospira Healthcare Corporation v Kennedy Trust for Rheumatology Research*, 2020 FCA 177 at paras 8–9). Judges retain discretion not to compel disclosure of information if the Minister is abusing the process, where disclosure would be impossible or unduly strenuous on the third party receiving the UPR request, or where the proposed

UPR represents a full-fledged fishing expedition. Considerations such as the availability of the information sought and the burden required to obtain it can all be relevant in the Court's exercise of discretion. However, these considerations cannot be taken as mandatory steps of the UPR analysis. They are not additional preconditions for the Minister to meet under subsection 231.2(3) of the ITA. The exercise of residual discretion remains a fact-driven, evidence-based process. When presented with relevant evidence on these fronts, the Court is entitled to consider it.

[113] Having discussed the criteria applicable to the Court's authorization of a UPR under subsection 231.2(3) of the ITA, the threshold issue in this case is whether the Minister can first demonstrate that the Convention has been implemented into Canadian law for the purposes of paragraph 231.2(3)(b). If that is not the case, the Minister's application for a UPR fails on the second element under paragraph 231.2(3)(b) because the Proposed UPR is not required to verify compliance with the ITA.

B. The Status of the Convention in Domestic Law

1) The Status of International Treaties in Domestic Law: General Principles

[114] Domestic law operates on a certain hierarchy of sources (*Canada (Attorney General) v Utah*, 2020 FCA 224 at para 28). The structure of this hierarchy reflects Canada's status as a constitutional democracy endowed with a federal Parliament (*Lake Cree National v Hamelin*, 2018 FCA 131 at para 54), but also as a "dualist system in respect of treaty and conventional law" (*Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 149 [*Kazemi*]). Delineating the place of treaty law within this hierarchy is essential to understanding the status of the Convention in subsection 231.2(3) of the ITA.

[115] At the outset, it is worth noting that international law operates on its own hierarchy of sources (*Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 76 [*Nevsun*]). These sources can be found in Article 38(1) of the *Statute of the International Court of Justice*, Can TS 1945 No 7, which came into force October 24, 1945:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[116] The Supreme Court of Canada refers to these sources as "[the] four authoritative sources of modern international law" (*Nevsun* at para 76), but they do not each stand on equal footing. The text of Article 38(1) of the *Statute of the International Court of Justice* explicitly lists the fourth source of international law (judicial decisions and teachings) as a "subsidiary means for the determination of rules of law" (emphasis added). Treaties, custom, and general principles of law "are all of equal authority" as binding sources of international law, but decisions from the International Court of Justice and the like are merely "evidence by reference to which the existence and contents of the rules of positive international law are determined" (Phillip M Saunders & Robert J Currie, eds, *Kindred's International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Emond Publishing, 2018) at 4).

[117] This hierarchical distinction matters for treaty interpretation. As shall be detailed below, the interpretive methodologies employed by international courts in relation to a treaty do not bind

the parties to that treaty. Parties have competence to interpret the treaties to which they are bound, subject to certain legal rules to which they have consented to be bound (James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 364–365).

[118] For the purposes of this Application, it is not necessary to address the role of custom or general principles of law in domestic Canadian law. The issue in this case concerns a specific Convention that Canada has ratified, and the extent to which that treaty has been incorporated into subsection 231.2(3) of the ITA. Neither party has argued that custom should bind this Court to any particular interpretation of the Convention, or that general principles of law have any impact in this Application. Insofar as this Court is required to address any question of substantive international law, these questions are confined to the law of treaties as understood in Canada.

[119] The primary source of the law of treaties is the *Vienna Convention on the Law of Treaties*, 23 May 1969, Can TS 1980 No 37 (entered into force 27 January 1980, accession by Canada 14 October 1970) [*Vienna Convention*]. The *Vienna Convention* was understood upon Canadian ratification as "laying down the fundamental principles of contemporary treaty law," (Saunders and Currie at 7, citing "Canadian Practice in International Law During 1971 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs" (1971) 9 Can YB Intl L 276 at 300) and has since been understood to govern the process by which Canadian courts determine the scope and content of the treaties binding the state (see e.g. *Thomson v Thomson*, 1994 CanLII 26 (SCC), [1994] 3 SCR 551 at 577–78 [*Thomson*]; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 SCR 982 at

paras 51–52 [*Pushpanathan*]; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 11 [*Febles*]; *International Air Transport Association v Canada (Transportation Agency)*, 2024 SCC 30 at para 39 [*IATA*]).

[120] States become parties to a treaty upon ratification, which is defined by Article 2(1) of the *Vienna Convention* as "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty." There is no dispute as to whether Canada ratified the Convention, but some dispute as to what that ratification entails. Part of this dispute stems from the distinction between "ratification" and "incorporation into Canadian law" and their respective implications for enforceable obligations in domestic courts. Tracing the precise contours of this distinction will serve this Court's analysis.

[121] In Canada, the power to ratify an international treaty forms part of the Crown prerogative over foreign affairs, which is duly exercised by the Executive (*Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 35; see also *Turp v Canada (Justice)*, 2012 FC 893 at para 18 [*Turp*], citing AE Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968) at 4, 14; John H Currie, Craig Forcese and Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory*, 2nd ed (Toronto: Irwin Law, 2007) at 54–56).

[122] Neither Parliament nor the provincial legislatures need to be consulted before the Crown binds Canada to a treaty (*Turp* at para 31; see also Gib van Ert, *Using International Law in Canadian Courts*, 3rd ed (Toronto: University of Toronto Press, 2024) at 114 [van Ert, *Using International Law in Canadian Courts*, 3rd ed]). Federal treaty-making power is, nonetheless,

limited by the constitutional division of powers and, therefore, is sometimes subject to reservations on that basis (see *Attorney-General for Canada v Attorney-General for Ontario*, 1937 CanLII 362 (UK JCPC), [1937] 1 DLR 673 at 679). In any event, the federal government has since 2008 adopted a Policy on Tabling Treaties in Parliament, which allows for debate on treaties prior to ratification (Saunders and Currie at 155). The Convention is an example of a treaty that was tabled in Parliament prior to ratification (see Bill C-48, "An Act to amend the Income Tax Act, the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the First Nations Goods and Services Tax Act and related legislation," 2nd reading, *House of Commons Debates*, 41-1, No 222 (8 March 2013) [*Hansard*, 8 March 2013]).

[123] However, the power to ratify an international treaty is quite distinct from the power to give it domestic legal effect. The Crown's prerogative consists of an "authority to enter into obligations toward foreign states diplomatically binding" (emphasis added) (*In Re Employment of Aliens*, 1922 CanLII 58 (SCC), 63 SCR 293 at 329 [*Re Employment*]). These are obligations to be performed in good faith, the one-time observance of which does not discharge the obligations (see Articles 26 and 27 of the *Vienna Convention*; see also Crawford at 29). Such obligations may even affect the rights of individuals (see e.g. *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 106 [*Mason*]).

[124] With that said, supreme legislative authority resides in Parliament (*Canada (House of Commons) v Vaid*, 2005 SCC 30 at paras 44–45). As noted by Chief Justice Sir Lyman Duff, "it is no part of the prerogative of the Crown by treaty […] to effect directly a change in the law governing the rights of private individuals, nor is it any part of the prerogative of the Crown to

grant away, without the consent of Parliament, the public monies or to impose a tax or to alter the laws of trade and navigation […] All these require legislation" (*Re Employment* at 329). The hallmark of any dualist system is to place legislative authority in the hands of elected representatives (*Kazemi* at para 149), whose power cannot be circumvented through Executive power in foreign affairs.

[125] Thus, the distinction between "ratification" and "incorporation into Canadian law" mirrors that between "binding" and "enforceable." Ratification is a Crown prerogative exercised by the Executive, an act that binds the state to uphold its obligations in good faith toward other states; incorporation into Canadian law is a legislative process carried out through Parliament, an act that allows the state's international obligations to be domestically enforced through government institutions.

[126] The domestic incorporation of an international treaty can take many forms, the clearest of which is implementing legislation that expressly reproduces the text of the treaty as an Act of Parliament (see e.g. *Geneva Conventions Act*, RSC 1985, c G-3; *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp); *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIP Act*]). Another path to implementation is "incorporation by reference," whereby an Act of Parliament declares that a treaty, or some part of it, has force of law (see e.g. *Immigration and Refugee Protection Act*, SC 2001, c 27, s 98; *An Act to amend the Carriage by Air Act*, SC 2001, c 31).

[127] Once a treaty has been incorporated into domestic law, it has the same force given to any other valid statute enacted by Parliament (*IATA* at para 93). However, the interpretive methodology to be employed when construing a domestically incorporated international treaty differs slightly from the modern principle of statutory interpretation.

[128] The interpretation of an international treaty that has been directly incorporated into Canadian law is governed by Articles 31 and 32 of the *Vienna Convention* (*Febles* at para 11, citing *Thomson* at 577–78 and *Pushpanathan* at paras 51–52). These two provisions set out the general rule of interpretation in international law and provide guidance on supplementary means of interpretation to be used in certain cases.

Vienna Convention on the Law of Treaties 1969	**Convention de Vienne sur le droit des traités 1969**
Article 31 General rule of interpretation	**Article 31 RÈGLE GÉNÉRALE D'INTERPRÉTATION**
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.	1. Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3.	2. Aux fins de l'interprétation d'un traité, le contexte comprend, outre le texte, préambule et annexes inclus : a) Tout accord ayant rapport au traité et qui est intervenu entre toutes les parties à l'occasion de la conclusion du traité; b) Tout instrument établi par une ou plusieurs parties à l'occasion de la conclusion du traité et accepté par les autres parties en tant qu'instrument ayant rapport au traité. 3. Il sera tenu compte, en même temps que du contexte :

There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended. **Article 32 Supplementary means of interpretation** Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.	a) De tout accord ultérieur intervenu entre les parties au sujet de l'interprétation du traité ou de l'application de ses dispositions; b) De toute pratique ultérieurement suivie dans l'application du traité par laquelle est établi l'accord des parties à l'égard de l'interprétation du traité; c) De toute règle pertinente de droit international applicable dans les relations entre les parties. 4. Un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties. **Article 32 MOYENS COMPLÉMENTAIRES D'INTERPRÉTATION** Il peut être fait appel à des moyens complémentaires d'interprétation, et notamment aux travaux préparatoires et aux circonstances dans lesquelles le traité a été conclu, en vue, soit de confirmer le sens résultant de l'application de l'article 31, soit de déterminer le sens lorsque l'interprétation donnée conformément à l'article 31 : a) Laisse le sens ambigu ou obscur; ou b) Conduit à un résultat qui est manifestement absurde ou déraisonnable.

[129] At first blush, the application of Articles 31 and 32 of the *Vienna Convention* by a domestic Canadian court may seem strange, because the *Vienna Convention* itself has not been directly implemented by domestic legislation. However, it is useful to remember that these provisions are also part of customary international law (see Richard Gardiner, "The Vienna Convention Rules on Treaty Interpretation" in Duncan B Hollis, ed, *The Oxford Guide to Treaties* (Oxford: Oxford

University Press, 2020) 459 at 460; Anthony Aust and Oliver Dörr, "Vienna Convention on the Law of Treaties (1969)" in Anne Peters and Rüdiger Wolfrum, eds, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2023) at para 14), and that custom presumptively forms part of the Canadian common law (John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 253; see also *Nevsun* at paras 90–94).

[130] In any event, as noted by the Supreme Court of Canada in *Febles* (at paras 11, 15), the principles of treaty interpretation under the *Vienna Convention* align quite neatly with the modern principles of statutory interpretation as applied in Canadian courts: considering the "ordinary meaning" of terms, in their "context," and in light of the treaty's "object and purpose," is a process easily likened to considering the "text, context, and purpose" of a given statute (see also *World Bank Group v Wallace*, 2016 SCC 15 at para 47; *IATA* at para 39; van Ert, *Using International Law in Canadian Courts*, 3rd ed at 364–369).

[131] At the "ordinary meaning" stage of the analysis, Article 31 emphasizes that "the intention of the parties as expressed in the text is the best guide to their common intention" (see Crawford at 365; see also *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, [1995] ICJ Rep 53 at 69–70; *Maritime Dispute (Peru v Chile)*, [2014] ICJ Rep 3 at 28). The language of the treaty must also be interpreted in light of the rules of general international law in force at the time of its conclusion, and also in light of the contemporaneous meaning of terms (see *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, [1952] ICJ Rep 176 at 183–84, 197–98; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*), Advisory

Opinion, [1971] ICJ Rep 16 at 31). This emphasis echoes the Supreme Court of Canada's recent insistence on text as the "anchor of the interpretive exercise" and "the focus of interpretation," insofar as it reveals "the means chosen by the legislature to achieve its purposes" (*CISSS* at para 24).

[132] The "context" stage of the analysis gives voice to the principle of "integration" in international law, according to which the meaning emerges in the context of the treaty as a whole (including the text, its preamble, and annexes, and any agreement or instrument related to the treaty and drawn up in connection with its conclusion) (see Crawford at 367). This serves a quasi-identical function to the "context" stage of the modern approach to statutory interpretation (*Rizzo* at paras 21–24; see also *Thomson* at 577–578). However, one specificity of international interpretation is that the *Vienna Convention* explicitly lists the instruments that comprise "context," namely agreements or other instruments made "in connection with the conclusion of the treaty" (see Article 31(2)). No such list exists in the Canadian law of statutory interpretation, thus potentially rendering the contextual analysis in international law a slightly narrower exercise.

[133] The "object and purpose" component of the analysis guards against the risk of the other two stages "[becoming] rigid and unwieldly instruments that might force a preliminary choice of meaning rather than acting as a flexible guide" (Crawford at 366). This does not displace the *Vienna Convention*'s explicitly textual approach, but rather ensures that the meaning gleaned from the text does not stray from the parties' intentions in concluding the agreement (*South West Africa (Liberia v South Africa)*, Preliminary objections, [1962] ICJ Rep 319 at 335; see also *Obligation to Prosecute or Extradite (Belgium v Senegal)*, [2012] ICJ Rep 442 at 449, 454, 460). In this sense,

the “object and purpose” stage of treaty interpretation resembles the Canadian requirement to give statutes “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects” (see section 12 of the *Interpretation Act*).

[134] However, this resemblance should be appreciated with caution. The rules of Canadian statutory interpretation rest on the assumption that Parliament speaks with one voice (Ruth Sullivan, *Statutory Interpretation* (Toronto: Irwin Law, 1997) at 5–7, 35–37, 136–144). No such assumption exists in public international law. Even as they consent to enter into agreements, states can maintain their own partial and equivocal understandings of their obligations, going so far as to even express their own “reservations” about a given treaty (see Articles 19–23 of the *Vienna Convention*). In cases where the meaning of a treaty’s text is unclear, a closer look at these varied understandings may prove necessary (see Article 32 of the *Vienna Convention*). The interpretive exercise necessarily involves reconciling the “national self-interest of each contracting state” (*Canada v Alta Energy Luxembourg SARL*, 2021 SCC 49 at para 37 [*Alta Energy*]) with the ultimate goal being “to [implement] the true intentions of the parties” (*Crown Forest Industries Ltd v Canada*, 1995 CanLII 103 (SCC), [1995] 2 SCR 802 at para 43, citing *JN Gladden Estate v The Queen*, 1985 CanLII 6138 (FC), [1985] 1 CTC 163 (FCTD) at 166).

[135] Moreover, the interpretive methodology set out in the *Vienna Convention* applies when Parliament incorporates a treaty into domestic law, but treaties are rarely incorporated as such (Saunders and Currie at 173). In fact, the most common way that international law comes before Canadian courts is as an interpretive tool (*Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at paras 44–46 [*SOCAN*]).

[136] When Canada ratifies a treaty, the obligations contained therein have some bearing on the exercise of statutory interpretation performed by Canadian courts. This is because legislation is presumed to conform with Canada's obligations under international law (*R v Hape*, 2007 SCC 26 at para 53 [*Hape*]), with treaties being considered relevant to the "context" stage of statutory interpretation (*SOCAN* at para 45).

[137] In practice, the effect of this presumption on the interpretive exercise will vary according to the type of statute engaged. A statute that implements a treaty without qualification must be interpreted in complete consistency with Canada's treaty obligations (see e.g. *Mason* at paras 105–106), but statutes that are less explicit as to their relationship to a given treaty will need to be interpreted with due regard for the case-specific circumstances engaging the treaty (*SOCAN* at para 46, citing *Office of the Children's Lawyer v Balev*, 2018 SCC 16 at para 31; *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at para 36). To this same effect, "[the] contextual significance of international law is all the more clear where the provision to be construed" was enacted with a specific aim toward the implementation of international obligations (*B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 47 [*B010*]). This idea is consistent with the broader notion that "[statutory] interpretation is centred on the intent of the legislature at the time of enactment and courts are bound to give effect to that intent" (see *Telus* at para 32, and the authorities cited therein).

[138] Regardless, where the text permits, legislation should be interpreted in a manner that will allow Canada to comply with its treaty obligations (*Hape* at para 53).

[139] Of course, the presumption of conformity is rebuttable. To interpret Canadian law in a way that conflicts with Canada's international obligations risks unduly encroaching upon the Executive's prerogative over foreign affairs (*B010* at para 47), but Parliament remains a sovereign body (*Canada (Attorney General) v Power*, 2024 SCC 26 at para 48). The constitutional principle of the separation of powers and the sovereignty of Parliament requires that the Executive, on its own, cannot bind Parliament and the courts (*Fraser v Public Service Staff Relations Board*, 1985 CanLII 14 (SCC), [1985] 2 SCR 455 at 469–470; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 SCR 319 at 389; *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at paras 65–66). The rules of public international law, whether derived from treaty or custom, do not constrain Parliament (*Daniels v White*, 1968 CanLII 67 (SCC), [1968] SCR 517 at 538–540; see also *Kazemi* at paras 59–60). Nor are courts expected to defer to the government of the day on international legal questions that may come before them (*Re Chateau-Gai Wines Ltd v Attorney-General of Canada*, 1970 CanLII (Ex Ct), 14 DLR (3d) 411 at 421–423). The interpretation of Canadian law, even in interaction with international treaties, remains an exercise left to the judiciary (Saunders and Currie at 165). Nevertheless, interpreting a Canadian law in a manner incompatible with a treaty compels courts to "[demonstrate] an unequivocal legislative intent to default on an international obligation" (*Hape* at para 53).

[140] With these basic principles established, the issue is whether the Convention has been implemented in Canada, through legislative amendment or through interpretation, in relation to UPR requests.

2) The Minister's Argument: The Convention Has Force of Law in Canada

[141] At the outset of these proceedings, the Minister claimed that the Convention has force of law in Canada by virtue of mere ratification and entry into force (Applicant's Memorandum at paras 27, see note 22). In oral argument and additional written submissions, the Minister modified their position. They now ask this Court interpret subsection 231.2(3) of the ITA harmoniously with the Convention. In their view, an implementing statute is not strictly necessary, insofar as there is no conflict between the Convention and the UPR provision of the ITA. They ground this last claim in an elaborate exercise of statutory interpretation, the core points of which will be expounded below.

a) Text or Ordinary Meaning of Subsection 231.2(3)

[142] The core textual issue is whether the words of subsection 231.2(3) make any reference to the Convention. In their plain meaning, they do not. The relevant precondition for the issuance of a UPR ensures that the Court is satisfied that the request is being "made to verify compliance by the person or persons in the group with any duty or obligation under this Act" (emphasis added) (see paragraph 231.2(3)(b)). There is no mention of any "listed international agreement," and the Minister concedes that the plain meaning of "this Act" is equivalent to "the ITA or Part IX of the ETA" (Applicant's Memorandum at para 43).

[143] However, the Minister submits that a complete analysis of the provision in question cannot rely on the plain meaning of paragraph 231.2(3)(b) alone: "the plain meaning of text is not in itself determinative and must be tested against the other indicators of legislative meaning—context, purpose, and relevant legal norms" (*La Presse* at para 23, citing *R v Alex*, 2017 SCC 37 at para 31

[*Alex*]). The contextual and purposive dimensions of the interpretive exercise can reveal ambiguity where the text seems otherwise clear.

b) Broader Context of Subsection 231.2(3)

[144] The contextual stage of the analysis is of particular importance to the Minister, because it is here that the Court must consider the Convention and its impact on the issue at hand (*SOCAN* at para 45). Accordingly, the Minister argues that the Convention imposes upon them the obligation to issue UPR requests on behalf of Canada's treaty partners.

[145] On the Minister's reading of the Convention, the instrument specifically addresses the need for "cooperation among tax authorities" in a world where the ever-flowing "movement of persons, capital, goods and services" has also "increased the possibilities of tax avoidance" (see Applicant's Memorandum at para 27, citing the Convention's preamble). Indeed, the very object of the Convention under Article 1(1) is to mandate states to "provide administrative assistance to each other in tax matters," a goal that "may involve, where appropriate, measures taken by judicial bodies." Among such measures of assistance are "exchanges of information," with state parties being under the obligation pursuant to Article 4(1) to share "any information [that] is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by [the] Convention." In cases where "the information available in the tax files of the requested State" does not enable the requested state to comply with the exchange of information, the requested state must nevertheless take "all relevant measures" under Article 5(2) of the Convention in order to provide the requesting state with the requested information (Applicant's Memorandum at para 28).

[146] The Minister claims that UPRs are one such "measure" envisaged by the Convention's exchange of information scheme. In support of this claim, they cite the Revised Explanatory Report to the Convention [the "Explanatory Report"], which states that the scope of Article 4(1) is "wide," and that the standard of "foreseeable relevance" is meant to prevent "fishing expeditions," or the request of information "that is unlikely to be relevant to the tax affairs of a given person or ascertainable group or category of persons" (emphasis added) (Explanatory Report at para 50). This point is reiterated later in the Explanatory Report in relation to Article 18, which the Report interprets as "[asking] the applicant State to provide the requested State with all available information which can assist in identifying the person, or an ascertainable group or category of persons, concerned" (emphasis added) (Explanatory Report at para 167). In the Minister's view, the expression "ascertainable group" within the context of the Explanatory Report implies the existence of an obligation to comply with exchange of information requests that demand the use of the UPR scheme domestically.

[147] Importantly, the Minister insists that the Convention requires Canada to provide information even if it has no domestic interest in the information requested (Applicant's Memorandum at para 30). This requirement stems from Article 21(3) of the Convention, which explicitly obliges Canada to "use its information gathering measures to obtain the requested information, even though the requested State may not need such information for its own tax purposes." In particular, this same Article does not permit Canada to "decline to supply information solely because it has no domestic interest in such information" (emphasis added).

[148] The question of "domestic interest" arises in relation to paragraph 231.2(3)(b) of the ITA. Indeed, as a precondition to judicial authorization of a UPR, the paragraph requires that the information be sought to "verify compliance by the unnamed persons with a duty or obligation under [the ITA]." In the Minister's view, this condition is a "domestic interest precondition" that cannot be solely relied upon to decline a request to supply information to another state pursuant to Article 21(3) of the Convention. In other words, Canada cannot refuse a request to exchange information on the sole basis that the information is not being sought to verify compliance with the ITA, because doing so would be in breach of the Convention. The Minister submits that their proposed interpretation conforms with Article 27 of the *Vienna Convention*, which precludes parties to a treaty from "[invoking] the provisions of its internal law as justification for its failure to perform a treaty" (Applicant's Memorandum at paras 29–30).

[149] Moving domestically, the Minister claims that a context-sensitive reading of the legislative scheme, including for UPR requests, shows that it provides "a continuous, ongoing duty by the Minister to gather information for Canada's treaty partners" following the receipt of an exchange of information request (Applicant's Memorandum at para 51).

[150] Parliament granted the Minister a set of information gathering powers enabling them to "administer and enforce" the provisions of the ITA in order to ensure the integrity of Canada's self-assessed tax system (see subsection 220(1) of the ITA; see also *R v Jarvis*, 2002 SCC 73 at para 51). Of significance to the Minister is that subsection 220(1) of the ITA, the initial provision to the Administration and Enforcement section of the ITA, reflects "the ongoing, repetitive nature of administering and enforcing Canada's fiscal legislation" (Applicant's Memorandum at para 47).

In accordance with subsection 31(3) of the *Interpretation Act*, the Minister exercises their powers and performs their duties "from time to time as occasion requires." Complying with Canada's obligation to use its information gathering powers for exchanges of information is one such duty.

[151] The Minister contends that a careful reading of section 231.2 supports their interpretation. Indeed, they claim that the actual power to require any information or any document from any person is contained within subsection 231.2(1) itself, which explicitly allows the Minister to gather information for the administration or enforcement of tax treaties. In other words, while judicial authorization for UPR requests is subject to subsections 231.2(2) and 231.2(3) of the ITA, the UPR request itself remains "a requirement under subsection (1)" (emphasis added). In turn, the words of subsection 231.2(1) enable UPRs to be issued for the administration or enforcement of a listed international agreement. This construction is allegedly supported by the statutory interpretation principle according to which two provisions applicable without conflict to the same facts are presumed to operate fully according to their terms (Ruth Sullivan, *The Construction of Statutes*, 7th ed (Markham: LexisNexis, 2022) at §11.02 [Sullivan, *The Construction of Statutes*]). In the Minister's submission, subsections 231.2(1) and 231.2(3) are overlapping provisions that were meant to apply without conflict to the same set of facts (Applicant's Memorandum at para 49, see note 50).

[152] The Minister notes further that the ITA "provides for specific, ongoing unnamed persons obligations for its treaty partners" (Applicant's Memorandum at para 50). For instance, Part XVIII of the ITA ("Enhanced International Information Reporting") tasks Canadian financial institutions with collecting information on account holders with US Indicia, information which is then

transmitted to the US government through the Minister (see e.g. *Deegan v Canada (Attorney General)*, 2022 FCA 158 at paras 9–16 [*Deegan*]). In turn, Part XIX of the ITA ("Common Reporting Standard") similarly tasks Canadian financial institutions with collecting information on account holders residing in "participating jurisdictions," and then with providing this information to the Minister, who again transmits the information internationally. According to the Minister, these schemes demonstrate Canada's "comfort" with exchanging information about unnamed persons internationally (Applicant's Memorandum at para 51).

[153] Canada's comfort with exchanges of information lies downstream from a broader point, one of central importance to the Minister's application: Canada complies with its treaty obligations.

[154] This compliance bears upon the interpretive exercise with which this Court is tasked. To this effect, the Minister underscores the presumption according to which courts interpret domestic law in conformity with Canada's international obligations (*Hape* at para 53). Clear legislative intent to default on an international obligation rebuts this presumption, but the Minister maintains that the bar for such a rebuttal remains high (see *Oroville Reman & Reload Inc v Canada*, 2016 TCC 75 at paras 31–51). They accordingly ask this Court to avoid subscribing to interpretations of subsection 231.2(3) that would undermine the object and purpose of the Convention and thus breach Canada's obligations pursuant to it, citing the principle of deference to the Executive branch's prerogative over foreign affairs (*B010* at para 47). Indeed, while consistency between Canada's statutes and the Convention is not strictly required, Articles 26 and 27 of the *Vienna* Convention remain clear on the notion that "[every] treaty in force is binding upon the parties to

it and must be performed by them in good faith," and that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Applicant's Memorandum at paras 55–56, see note 64).

[155] In this vein, the Minister submits that Canada has indicated its intention to perform UPRs on behalf of its treaty partners. To support this claim, the Minister notes that Canada has included "unnamed persons requirements" under the heading "Competent Authority's ability to obtain and provide information," when communicating its domestic information gathering powers to its tax treaty partners (Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Review Canada 2011 at paras 125–127 [2011 Peer Review]). Canada similarly stated that "[there] are no laws or regulatory practices in Canada that impose restrictive conditions on exchange of information that would be incompatible with the international standard" (2011 Peer Review at para 207). Later peer reviews contain similar statements as well (Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Canada 2013 at paras 130–132, 143, 184, 212; Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Canada 2017 (Second Round) at paras 230–232 [2017 Peer Review]).

[156] Moreover, the Minister submits that Canada has already issued UPRs at the request of other states in the past (2017 Peer Review at paras 230–232). On the Minister's understanding, the first time was in *Andison (TG) v MNR*, 1995 CanLII 19005 (FC), [1995] 1 CTC 203 [*Andison*], a case in which a requirement for information was issued pursuant to a bilateral tax treaty with the United States [U.S.]. The second time was in 2010, when Justice Boivin (as he was then) issued a UPR under the former *ex parte* regime, concerning a dual-purpose request for information from

Australia (see *Canada (Minister of National Revenue) v Dale St. Jean and Gregory D. Tindall*, T-332-10, Order of Justice Boivin, 16 March 2010 [*St. Jean*]). Although the order in *St. Jean* makes no reference to its international dimension, the application record shows that the information sought was both for the Minister's own compliance verification concerns, and on behalf of Australia for the administration or enforcement of its Income Tax Assessment Act (see T-332-10, Application Record, Affidavit of Cynthia Maier at paras 2–4) (Applicant's Memorandum at para 57).

[157] Overall, the Minister argues that the Convention forms part of the context of subsection 231.2(3) of the ITA, and that the provision should be interpreted in light of Canada's commitment to exchanging information with its tax treaty partners.

c) The Object and Purpose of Subsection 231.2(3)

[158] The Minister understands Parliament to have granted the Minister robust UPR powers for both Canada and its treaty partners.

[159] At the outset, the Minister characterizes the history of UPRs in Canada as an animated conversation between the courts and Parliament. The Supreme Court of Canada in *James Richardson & Sons v MNR*, 1984 CanLII 1 (SCC), [1984] 1 SCR 614 [*Richardson*] held that a general requirement provision was insufficient to permit a requirement imposed on unnamed persons. In subsequent amendments to the ITA, Parliament responded by expressly authorizing UPRs. Over the years, it reduced the preconditions for judicial authorization and removed the prior *ex parte* regime, providing a full opportunity to respond at the time of the Minister's application.

According to the Minister, what these changes demonstrate is Parliament's longstanding commitment to providing them with an extensive power to issue UPRs (Applicant's Memorandum at para 52).

[160] The Minister contends that this extensive power also applies to tax treaties. In support of this claim, they note that the Convention standard for an exchange of information is "[foreseeable relevance] to the administration or enforcement" of the requesting state's domestic tax laws, as set out in Article 4 of the Convention, which is understood as a threshold similar to what is demanded for UPRs under subsection 231.2(3) of the ITA. Indeed, as understood in the OECD commentary, the requesting state must provide background sufficient to understand the request and demonstrate that the requested information is for determining compliance by the unnamed persons, which in turn requires "an explanation of the applicable law and why there is reason to believe that the taxpayers in the group for whom information is requested have been non-compliant with that law" (see OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (Paris: OECD, 2017) at 489–490) (Applicant's Memorandum at para 53).

[161] The foreseeable relevance standard shares a similar purpose to the preconditions in subsection 231.2(3) of the ITA. The purpose of the statutory preconditions in subsection 231.2(3) is to guard against fishing expeditions, i.e., to ensure that the Minister intends to audit the unnamed persons, and not simply gather information to be used at a later date for some other purpose (see *Roofmart* at para 45, citing *GMREB* at para 45). Likewise, the foreseeable relevance standard is meant to prevent "fishing expeditions," or the request of information "that is unlikely to be relevant to the tax affairs of a given person or ascertainable group or category of persons" (Explanatory

Report at para 50). Accordingly, if the Minister is satisfied that the request is foreseeably relevant, then the purpose of paragraph 231.2(3)(b) of the ITA will necessarily be satisfied. This interpretation gives meaning to the Convention's respect for Canada's domestic law safeguards while respecting the limitations the Convention imposes on domestic tax interest preconditions pursuant to Article 21(3) (Applicant's Memorandum at para 54).

d) Additional Considerations

[162] Following Shopify's arguments (in its Memorandum of fact and law and in oral argument) that the Convention had not been implemented into Canadian law, the Minister was allowed to and provided the Court with additional written submissions. The Minister advanced its understanding of how Canadian law implements the Convention and how Parliament (as opposed to the Executive) understood the ambiguity between the domestic need to verify compliance and the international obligation to exchange information. The main thrust of the Minister's argument is that "Canada ratified the Convention on the premise that there was no conflict with domestic law," and that the absence of conflict is equivalent to domestic incorporation (Applicant's Additional Memorandum at para 5). The Minister marshals several arguments to this effect.

[163] At the outset, the Minister claims that Parliament's amendments to the ITA's privacy regime (section 241 of the ITA or the equivalent section 295 of the ETA) are sufficient to permit UPRs under the Convention. This claim rests partially on the notion that Parliament is not bound to observe a particular form of implementation for the Convention to have the force of law. A standalone implementation statute is not necessary. Rather, the sole requirement is that the "legislature must make its intent to implement sufficiently clear so that courts will treat the statute

as implementing legislation, or at least reach the treaty-compliant result the legislature intended" (Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: University of Toronto Press, 2008) at 240 [van Ert, *Using International Law in Canadian Courts*, 2nd ed]). Extensive changes may require standalone implementation legislation, as in *Andison*, where the treaty in question changed withholding rates and ceded primary taxation rights to another jurisdiction. However, the Minister argues that such extensive changes may not be necessary in other cases, such as this one. As it pertains to the multilateral information exchange regime envisaged by the Convention, only minor amendments to the ITA privacy regime were necessary to remove any conflict with domestic law.

[164] The privacy regime in question is contained within subparagraph 241(4)(e)(xii) of the ITA, which applies to information already in the hands of the Minister as well as information that must be gathered following a request for assistance. Parliament grants officials the power to share information by providing or allowing the inspection of or access to taxpayer information under, and solely for the purposes of, a provision contained in a tax treaty with another country or in a listed international agreement. The Convention is one such listed international agreement.

[165] The Minister describes at length the process whereby Canada considered and ratified the Convention, emphasizing that ratification was in fact dependent on making limited amendments to the privacy regime in subparagraph 241(4)(e)(xii) of the ITA (*Hansard*, 8 March 2013 at 14772). This is evidenced in the comments made by the Parliamentary Secretary to the Minister of National Revenue, in the debates preceding the Convention's ratification, when it was tabled in Parliament (*Hansard*, 8 March 2013 at 14772). Those debates were partially informed by an explanatory

memo provided to Parliament, which also explains the Department of Finance's responsibility to amend Canadian tax laws, subject to reservations, "for the full implementation of the Convention" (House of Commons, "Explanatory Memorandum on the *Convention on Mutual Administrative Assistance in Tax Matters and the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters*" Sessional Paper, 41-1, No 8532-411-30 (29 February 2012)).

[166] On the Minister's understanding of this legislative history, Parliament's focus on amending the privacy regime is telling. It reveals that Parliament was satisfied that amending the privacy regime to contemplate the exchange of information under the Convention would unlock the path toward ratification, as opposed to referencing the Convention in section 231.2 of the ITA. In other words, an amendment mentioning the Convention in section 231.2 of the ITA was not strictly necessary. It merely provided greater clarity.

[167] A corollary of this last point is that an amendment to paragraph 231.2(3)(b) is not necessary either. Nevertheless, in Budget 2024, an amendment to paragraph 231.2(3)(b) was proposed, to include the term "listed international agreements" under the second statutory precondition to the authorization of a UPR by the Court. The Minister argues that the proposed amendment was for clarification purposes, but not to alter the ITA. In fact, the explanatory notes to the 2024 proposed amendment say as much, stating that the added term "confirms" that the Federal Court may authorize a UPR under the Convention (*Explanatory Notes to Legislative Proposals Relating to the Income Tax Act and Regulation* (Ottawa: Deputy Prime Minister and Minister of Finance, August 2024) at 67 [*Explanatory Notes*]). Even so, the Minister submits that consideration of this proposed amendment would be premature and of limited relevance to the interpretive exercise (see

subsection 45(2) of the *Interpretation Act*). They repeat that "subsequent amendments cannot be assumed to alter or confirm the prior state of the law," and warn this Court against drawing any conclusions on the sole basis of this proposal (*Canada v Oxford Properties Group Inc*, 2018 FCA 30 at para 46 [*Oxford Properties*]).

[168] Finally, the Minister reiterates that the Convention and its extrinsic material resolve whatever ambiguity is created by the notion of domestic tax compliance in paragraph 231.2(3)(b) of the ITA.

[169] Among the extrinsic components relied upon by the Minister is the fact that Canada made no reservation nor any declaration on the applicability of the Convention with respect to UPRs. This is important because Article 30 of the Convention limits the kind of reservations that can be entered by state parties, thus discouraging states with serious concerns as to the treaty's implications to ratify without the means and motivation to comply. Other treaties, such as the OECD Model Bilateral Tax Treaty, allow member states to make bespoke reservations, endorsing a comparatively flexible or *à la carte* approach to ratification. The Convention does otherwise, and the Minister therefore maintains that Canada could not have ratified the Convention in good faith if it wanted to restrict the performance of its obligations in relation to UPRs.

[170] The purpose of ratification was to expand Canada's ability to benefit from multilateral information sharing, while simultaneously expanding its obligations to do the same. In the Minister's view, nothing suggests that Parliament intended to restrict UPRs for Canada only.

3) Shopify's Argument: The Convention Does Not Have Force of Law in Canada

[171] Shopify warns this Court against rewriting paragraph 231.2(3)(b) of the ITA to sanction UPRs made on behalf of Canada's treaty partners. The required elements of subsection 231.2(3) of the ITA make no reference to tax treaties, and this Court should not circumvent Parliament's express intention at the sole behest of the Executive and its foreign dealings. Simply put, the Minister reads into the provision words that are not there. This is not something a Court should do when confronted with clear and unambiguous text (*R v McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 SCR 686 at 701 [*McIntosh*]; *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para 27).

[172] Accordingly, Shopify contends that the Minister's "strained" exercise in statutory interpretation cannot "save [their] invalid application" (Shopify's Memorandum at para 34).

a) Text or Ordinary Meaning of Subsection 231.2(3)

[173] Shopify relies on the Federal Court of Appeal's conclusion that the words of subsection 231.2(3) of the ITA are "clear and unambiguous," and must therefore "simply be applied" (*Roofmart* at para 20, citing *Shell Canada Ltd v Canada*, 1999 CanLII 647 (SCC), [1999] 3 SCR 622 at para 40). Additional conditions cannot be read into legislation, nor can a supposed purpose "create an unexpressed exception to clear language" (*Placer Dome* at para 23). Accordingly, the Minister's Application, which is made for the alternate purpose of upholding "international obligations and to provide assistance to Canada's treaty partners," (Tremblay Affidavit at para 6, AR at 14) should be rejected (Shopify's Memorandum at para 36).

[174] The Minister acknowledges that the plain meaning of the words in paragraph 231.2(3)(b) does not support their interpretation. For Shopify, this acknowledgement alone could resolve the matter in its favour.

b) Broader Context of Subsection 231.2(3)

[175] The Minister asserts that the context surrounding paragraph 231.2(3)(b) of the ITA reflects a latent ambiguity as to the role of the Convention. Shopify raises four arguments to the contrary.

i. The Convention Does Not Displace the Domestic Tax Interest Precondition Under Paragraph 231.2(3)(b)

[176] Shopify takes the Minister to be suggesting that the Convention authorizes and obliges them to use measures in excess of their legal authority in order to obtain information requested by a treaty partner. That suggestion, however, is directly and repeatedly controverted by the language of the Convention itself, which makes clear that the Convention does not require the Minister to take steps to obtain information that they do not have lawful means of undertaking.

[177] While international agreements can take precedence over domestic laws to the extent of the inconsistency (see e.g. *Pacific Network Services Ltd v Canada (Minister of National Revenue)*, 2002 FCT 1158 at para 12 [*Pacific Network*]), Shopify submits that the Convention resolves for such inconsistencies by expressly deferring to domestic law. Indeed, Article 21(2) of the Convention carves out from the Minister's obligations any request for information that is "not obtainable under [Canadian] laws or administrative practice." For Shopify, there must be an enabling Canadian law and judicial or administrative procedure that can be referred to as giving the Minister the authority to gather the information requested pursuant to Australia's UPR request.

However, the Minister does not have the power to obtain the information sought absent a Court order; and the Court cannot authorize such an order under subsection 231.2(3) because such orders are limited to when, *inter alia*, the Court is satisfied that the UPR request is made "to verify compliance […] with any duty or obligation under [the ITA]." The Convention is absent from subsection 231.2(3). Since the Minister does not have the power to obtain the information, a refusal from Canada to disclose the information would comply with Article 21(2) of the Convention, because the Minister has no obligation to provide information that is "not obtainable under [Canadian] laws or administrative practice" (Shopify's Memorandum at paras 40–42).

ii. The Minister Mischaracterizes Article 21(3) of the Convention

[178] The Minister relies upon Article 21(3) of the Convention to argue that Canada, and this Court, cannot rely on the domestic tax interest precondition in paragraph 231.2(3)(b) to refuse to provide information to a treaty partner. However, for Shopify, such a suggestion would be a mischaracterization of the scope and content of Article 21(3).

[179] For context, Article 21(3) of the Convention provides as follows:

Article 21 – Protection of persons and limits to the obligation to provide assistance	**Article 21 - Protection des personnes et limites de l'obligation d'assistance**
3 If information is requested by the applicant State in accordance with this Convention, the requested State shall use its information gathering measures to obtain the requested information, even though the requested State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations contained in this	**3.** Si des renseignements sont demandés par l'État requérant conformément à la présente Convention, l'État requis utilise les pouvoirs dont il dispose pour obtenir les renseignements demandés, même s'il n'en a pas besoin à ses propres fins fiscales. L'obligation qui figure dans la phrase précédente est soumise aux limitations prévues par la présente Convention, sauf si ces

Convention, but in no case shall such limitations, including in particular those of paragraphs 1 and 2, be construed to permit a requested State to decline to supply information solely because it has no domestic interest in such information.	limitations, et en particulier celles des paragraphes 1 et 2, sont susceptibles d'empêcher l'État requis de communiquer des renseignements uniquement parce que ceux-ci ne présentent pas d'intérêt pour lui dans le cadre national.

[180] As to the requirement that Canada use "its information gathering measures to obtain" the information requested by Australia, the Explanatory Report states that the term "information gathering measures" means "laws and administrative or judicial procedures that enable [Canada] to obtain and provide the requested information" (see Explanatory Report at para 208). Here, the sole "law and administrative or judicial procedure" enabling Canada to obtain information about a group of unnamed persons is subsection 231.2(3) of the ITA, which requires the Minister to provide information on oath that the requirement is being sought to verify compliance under the ITA. A judge of the Federal Court may then authorize that requirement if satisfied by that information on oath.

[181] In other words, should the Court not authorize this proposed requirement, it would not be a situation in which Canada is declining to "use its information gathering measures to obtain the requested information," as prohibited by Article 21(3). Rather, the Minister did in fact "use its information gathering measures," by seeking the Court's authorization. However, by choice of Parliament, the Minister does not have any information gathering measures that may be employed in this particular circumstance because the mandatory precondition in paragraph 231.2(3)(b) requiring a purpose to "verify compliance […] with any duty or obligation under this Act" has not been satisfied. This conclusion is underscored by the Explanatory Report, which confirms that "tax

administrators can only take those measures [that are] consistent with their domestic laws" and that the Convention is not meant "to extend the existing domestic powers of [Parties'] tax administrations" (Explanatory Report at para 24). Simply put, where the Minister does not have the authority to obtain information absent court authorization, the Convention does not provide the Minister with additional measures.

[182] Nor is this a situation where the Minister is declining to provide or supply information solely because they do not have a domestic tax interest in the matter. Rather, it is a situation where the Minister is unable to supply the information because they do not have legal authority to obtain the information in the first place. The CRA may respond to a treaty partner's information request by accessing information that it already holds, that it can obtain through a "named persons requirement," or that is publicly available, but there is a clear distinction between supplying information and undertaking specific actions to gather information (see 2011 Peer Review at para 125). Article 21(3) is not meant to be used as a license to rubber stamp the Minister's application (Shopify's Memorandum at paras 43–49).

iii. The Minister Ignores Article 21(2) of the Convention

[183] Article 21(2) of the Convention limits the obligation to provide assistance and protects the rights and safeguards guaranteed to persons living under the laws of the requested state. In Shopify's view, the Minister has ignored these limits and protections, specifically eschewing any substantive analysis of how Articles 21(2)(a), 21(2)(c) and 21(2)(g) affect the treaty obligations at play.

[184] As the Explanatory Report notes, Article 21(2)(a) indicates that Canada is not obligated to assume authority that they do not already have in order to carry out a request for assistance. Article 21(2)(a) states, "as a general principle, that [Canada] is not obliged to carry out measures at variance with its own laws. Nor, since the obligation to provide assistance is further qualified, is [Canada] obliged to use powers provided for in its domestic laws but which it does not in practice normally use" (Explanatory Report at para 183). In other words, Canada is not required to carry out Australia's request for assistance because doing so would be at variance with the authorizing provisions of the ITA, namely paragraph 231.2(3)(b).

[185] Moreover, as the Explanatory Report also notes, Article 21(2)(a) indicates that Canada is not obligated "to exercise powers" that Australia "does not possess in its own territory," which means that Canada is not expected to take action on behalf of Australia if Australia "has no domestic power to take" that action in the first place (Explanatory Report at para 183). This rule prevents Australia from making use of other states to exercise greater powers than it possesses under its own law.

[186] Similarly, Article 21(2)(c) of the Convention relieves Canada of the obligation to "supply information [that] is not obtainable under its own laws or its administrative practice." Once more, this means that the Minister is not expected to assume authority that they do not already have in order to carry out a request for assistance: "Information is regarded as obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them by following the normal procedure" (Explanatory Report at para 188). As put further by the Explanatory Report (at para 179), the principle elucidated by Article 21(2)(c) "states explicitly

what is implicit throughout the Convention: that the rights and safeguards of persons under [Canadian] laws or administrative practices are not reduced in any way by the Convention."

[187] The Minister also ignores a provision relieving them of their duty to provide assistance under the Convention where the requesting party has failed to exhaust its domestic options to obtain the requested information.

[188] Article 21(2)(g) provides that the Convention does not require Canada to "provide administrative assistance if [Australia] has not pursued all reasonable measures under its laws or administrative practice, except where recourse to such measures would give rise to disproportionate difficulty." The Explanatory Report notes that the requested state (Canada) should generally assume that the applicant state (Australia) has taken these appropriate measures (Explanatory Report at paras 203, 201–205). However, Canada may decline to provide assistance under the Convention "if it has good grounds for assuming that [Australia] still has convenient means of action within its own territory" (Explanatory Report at para 201).

[189] According to Shopify, there is no evidence that the ATO actually exhausted its domestic options before seeking the Minister's assistance under the Convention. What the record confirms instead is that Australia issued a mere "informal information request" to Shopify, and then declined to take any additional steps after receiving Shopify's initial response, in which Shopify explained that the ATO, at the very least, would need to issue a valid subpoena, warrant, or order that compels Shopify to produce the requested information. Moreover, Shopify claims that there is no evidence that the Minister made any inquiries as to whether Australia had in fact pursued "all reasonable

measures available." Accordingly, the Minister is not strictly obliged to provide assistance under the Convention, and would not be in violation of its international obligations if it declined to supply the relevant information to Australia.

[190] Nor is the Minister required to provide assistance in light of the ATO's inconsistent assertion that it has "no other way of obtaining the information requested" (Tremblay Affidavit, AR at 23, Tab 3.(a), Exhibit "A" – "Exchange of Information Request from Australia"). The inconsistency arises in the ATO request itself, where the ATO states both that (1) the "information would be obtainable under [Australia's] laws or in the normal course of administrative practice in similar circumstances," and that (2) the ATO has "pursued all means available to obtain the information requested [and has] no other way of obtaining the information requested" (Tremblay Affidavit, AR at 23, Tab 3.(a), Exhibit "A" – "Exchange of Information Request from Australia"). In any event, if the ATO is indeed asserting that it lacks domestic authority to obtain the information at issue (and therefore has in fact exhausted all reasonable measures available), then the Minister is still not required to provide assistance under the Convention because Article 21(2)(a) provides that the Convention does not require Canada "to carry out measures at variance with […] the laws or administrative practice of the applicant state."

[191] Overall, there is no obligation under the Convention to issue UPRs on behalf of treaty partners when such a measure would be inconsistent with domestic laws. Canadian law protects unnamed persons through the preconditions set out in subsection 231.2(3) of the ITA, and it is contrary to the object and purpose of the Convention to remove or dilute those protections for the sake of international compliance, especially when the applicant state has not pursued all reasonable

measures available to obtain the information under its own laws, and may not have similar powers to obtain UPR information on their own territory (Shopify's Memorandum at paras 50–57).

iv. Other Provisions of the ITA Do Not Expand the Minister's Authority

[192] The Minister suggests that there is contextual support for an expansive reading of the Minister's UPR powers, because the authorizing provisions form part of the "Administration and Enforcement" section of the ITA.

[193] Shopify disagrees with this assertion. It claims that under the ITA, Parliament expressly confers upon the Minister the exact authority that they are entitled to exercise, and no more. The various powers in the Administration and Enforcement sections of the ITA do not reflect an overriding authority to redraft the mandatory preconditions in subsection 231.2(3) of the ITA, so that the Minister may meet them in a broader set of situations. Parliament grants power with care and precision.

[194] The same response applies to the Minister's reference to Parts XVIII and XIX of the ITA. Shopify argues that these parts of the ITA were expressly enacted to facilitate Canada's ability to meet specific FINTRAC and other international financial reporting obligations. These parts do not include UPR powers, much less impose any obligations on companies like Shopify to collect and produce information for the purpose of verifying compliance with the tax obligations of another jurisdiction. The enactment of Parts XVIII and XIX also shows that where Parliament intends to allow the Minister to share information with another jurisdiction, it enacts specific laws to that effect—even where a listed international agreement or tax treaty already applies. Accordingly,

Parts XVIII and XIX do not provide any additional context that is relevant to the statutory interpretation of the authorizing provisions.

[195] On a slightly different note, the Minister asserts that since subsection 231.2(1) contemplates the issuance of a "named persons requirement" to meet treaty obligations, subsection 231.2(3) must also allow this Court to issue a UPR that is foreseeably relevant to treaty obligations. This is because subsection 231.2(3) concerns the power to "impose on a third party a requirement under subsection (1)," a provision that makes explicit mention of "listed international agreements."

[196] Shopify disagrees. It claims that where Parliament intends to permit the disclosure of information for the purpose of administration or enforcement of a treaty obligation, it does so expressly and not by implication, as in subsection 231.2(1) and subparagraph 241(4)(e)(xii) of the ITA (see e.g. *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 at para 25).

[197] For that matter, a cogent reading of section 231.2 does not indicate any relation between UPRs and the Minister's treaty obligations. As a starting point, subsection 231.2(1) provides that the Minister may require a person to produce information related to the "administration or enforcement" of the ITA, a "listed international agreement," or for greater certainty, of a tax treaty with another country. This subsection applies to "named" as well as unnamed requirements. However, subsection 231.2(1) is "subject to subsection (2)," a provision that solely applies to UPRs. The effect of subsection 231.2(2) is to impose the additional requirement that the Minister obtain judicial authorization under subsection 231.2(3) before actually issuing a UPR request. In turn, subsection 231.2(3) contains the clear, mandatory preconditions for the authorization of such

a requirement, including the condition that the requirement be made to verify compliance with a duty or obligation under the ITA.

[198] In Shopify's view, the precision employed by Parliament in defining the Court's jurisdiction in the authorizing provisions is telling. It establishes the choice to permit UPRs in a relatively narrow set of situations, and only for purposes related to the administration or enforcement of the ITA.

[199] To this effect, Shopify raises the existence of the Budget 2024 proposed amendments to paragraph 231.2(3)(b), which are explicitly stated to come into force only on royal assent of the enacting legislation—meaning that they are forward-looking only. Budget documents expressly acknowledge that the current text of the ITA presents "limits to existing information gathering powers" and that the "proposed amendments are intended to enhance" CRA abilities (House of Commons, *Budget 2024 – Tax Measures: Supplementary Information* (2024) (Department of Finance) at 31). These statements reflect Parliament's desire to expand the Minister's existing information gathering powers, not to clarify them. On Shopify's reading of the relevant provisions of the *Interpretation Act*, the proposed amendments demonstrate that the Minister currently lacks authority to submit a UPR based on foreign tax treaties (Shopify's Memorandum at paras 58–67).

c) The Object and Purpose of Subsection 231.2(3)

[200] Shopify claims that the Minister's interpretation is at odds with the purpose of the authorizing provisions.

[201] In *Roofmart*, the Federal Court of Appeal held that the purpose of subsection 231.2(3) is to reflect the balance prescribed by Parliament between privacy rights, on the one hand, and the Minister's need for "tools to administer the Act," on the other (*Roofmart* at paras 20–21). As the Minister acknowledges, the Australian UPR does not advance any such purpose. Rather, it has been requested so that the Minister can comply with "international obligations" and "provide assistance to Canada's treaty partners" (Tremblay Affidavit at para 6, AR at 14).

[202] The Minister suggests that the Convention should benefit from a liberal interpretation and should be applied in a manner that accords with the intentions of the contracting states (see *Alta Energy* at para 37). However, Shopify argues that the Convention does not override the plain language of the mandatory preconditions or extend the Minister's authority, and the express carve-outs at Article 21(2) specifically defer to domestic laws and administrative practices. In other words, harmonious interpretation cuts both ways for the Minister. Convention provisions do indeed apply harmoniously with the ITA, so as to ensure that the Convention does not affect the rights and safeguards secured by persons under Canadian laws or administrative practices (Shopify's Memorandum at paras 68–72).

d) Additional Considerations

[203] In additional written submissions, Shopify responded to several of the Minister's additional arguments and reiterated that the Convention does not have force of law within subsection 231.2(3).

[204] At the outset, Shopify underscores that mere ratification of an international treaty does not give it force of law (*Kazemi* at para 149; *SOCAN* at para 47). Rather, "international treaties and conventions are not part of Canadian law unless they have been implemented by statute" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 69). This is to say that the Convention is not enforceable in itself and cannot amend a statute of Parliament (*Sin v Canada*, 2016 FCA 16 at paras 12–15).

[205] Nevertheless, Shopify submits that international treaties may be incorporated into domestic law via implementing statute or incorporation by reference, where all or some portions of the treaty are incorporated into Canadian law, making the enacted treaty (or the enacted portion) part of domestic law (Sullivan, *The Construction of Statutes* at §18.03(1), (4)).

[206] In this case, Shopify understands the Minister to have accepted that the Convention has not been specifically incorporated into domestic Canadian law, acknowledging that "the Convention has no standalone implementation statute" (Applicant's Additional Memorandum at para 1). As for incorporation by reference, the Minister does not even assert that the domestic tax interest precondition has been amended to any such effect.

[207] For Shopify, the failure to harmonize or implement the Convention into domestic law should end the discussion of whether it has been incorporated. Parliament had the Convention in mind when it revised subsection 231.2(1) and subparagraph 241(4)(e)(xii) of the ITA, yet chose not to amend paragraph 231.2(3)(b) to permit the issuance of UPRs on behalf of other countries. This was a specific choice made by Parliament, and Parliament does not speak in vain (*R v*

Morrison, 2019 SCC 15 at para 89). Where it has carefully chosen the contours and scope of a law's parameters, that choice must be respected. Shopify submits that such a choice has been made here.

[208] In this same vein, Shopify contends that all relevant context supports its interpretation. At the outset, they underscore the notion of "[the] contextual significance of international law [being] all the more clear where the provision to be construed 'has been enacted with a view toward implementing international obligations,'" which is not the case here. Subsection 231.2(3) of the ITA was neither enacted based on the Convention nor with a view toward implementing any Convention obligations, as is sometimes the case in domestic legislation (*B010* at para 47; *Canada (Attorney General) v Heffel Gallery Limited*, 2019 FCA 82 at para 55). Rather, it was enacted in response to the Supreme Court of Canada's guidance in *Richardson*, several decades before the Convention came into force.

[209] Since ratification, the ITA has been amended several times, but in no way that gives the Convention force of law in subsection 231.2(3).

[210] In 2007, the definition of a "listed international agreement" was added to subsection 123(1) of the ETA, and that defined term was then included in subsection 289(1) of the ETA ("named persons requirements"). That same year, the term was added to paragraph 295(5)(n) (ministerial authorization to disclose taxpayer information to a treaty partner without criminal sanction) and 99(1) (non-GST request of any person for books and records for purposes of administration or enforcement of a listed international agreement) (see *An Act to amend the Excise Tax Act, the*

Excise Act, 2001 and the Air Travellers Security Charge Act and to make related amendments to other Acts, SC 2007, c 18, ss 2(6), 47, 48(3), 66)).

[211] In 2013, the definition of a "listed international agreement" was added to subsection 248(1) of the ITA, and that defined term was then included in subsection 231.2(1) ("named persons requirement") and subparagraph 241(4)(e)(xii) of the ITA (*An Act to amend the Income Tax Act, the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the First Nations Goods and Services Tax Act and related legislation*, SC 2013, c 34, ss 353, 357(1), 358(20)). Soon after, Parliament removed the *ex parte* application procedure in the authorizing provisions as well (see *An Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013, and other measures*, SC 2013, c 33, ss 21(1), 46(1)).

[212] Shopify submits that through these amendments, Parliament has clearly and plainly spoken as to the manner in which the Convention is incorporated into domestic law, having been incorporated into these amended provisions only.

[213] To this effect, Shopify contends that the Minister has taken the 2013 amendments to subparagraph 241(4)(e)(xii) of the ITA out of context and exaggerated their significance. Here, Shopify mostly reiterates its prior interpretation of Article 21(3) and its relevance to the case at hand: the Convention does not grant the Minister any more power than they have under domestic law. After ratification of the Convention, section 241 of the ITA required amendment, in parallel with the expansion of subsection 231.2(1), to allow the Minister to use a "named persons requirement"—which does not require court authorization—to assist a treaty partner. Specifically,

it is Shopify's submission that subparagraph 241(4)(e)(xii) was enacted to ensure that any 231.2(1) disclosure of a "named persons requirement" under the Convention would be duly lawful. This is why section 241 needed amending prior to ratification, as reflected in the comments of the Minister's representative, Cathy McLeod, prior to ratification (*Hansard*, 8 March 2013 at 14772).

[214] The Minister interprets the lack of explicit discussion of UPRs in the leadup to ratification as a sign that exchange of information powers were considered "without any limitation on unnamed [persons requirements]" (Applicant's Additional Memorandum at paras 10–11). Shopify understands the lack of government discussion as revealing something more direct: Parliament was not seeking to expand the Minister's UPR powers. The limitation on the Minister's power to issue requirements for information was clearly delineated at the time of these discussions and was ultimately not altered by the 2007 and 2013 amendments. They remain unaltered today.

4) Analysis: The Convention Has Not Been Incorporated into Subsection 231.2(3) of the ITA

[215] Having reviewed the submissions in detail, I find that the Convention has not been incorporated into subsection 231.2(3) of the ITA. The Convention does not impose an obligation to issue a UPR for the purpose of sharing information with Australia in the circumstances of this Application, and subsection 231.2(3) does not grant the Minister the power to issue a UPR under the Convention. For the following reasons, the Application must fail.

a) Text or Ordinary Meaning of Subsection 231.2(3)

[216] Both the Minister and Shopify understand "this Act" in paragraph 231.2(3)(b) to mean "the ITA," but disagree as to whether and to what degree the interpretation of that paragraph should venture beyond this plain meaning.

[217] Following the Federal Court of Appeal's guidance in *Roofmart* at paragraph 20, with respect to subsection 231.2(3), "[where] the words of a provision are clear and unambiguous, as they are here, the words must simply be applied." However, the application of these words must nevertheless be informed by a contextual and purposive reading of the ITA. A rote or mechanical application of subsection 231.2(3) would flatten the important issues raised by the parties and would fail to give voice to the careful design choices made by Parliament in crafting the regime at hand. In other words, the plain meaning of subsection 231.2(3) can be more faithfully applied in light of its context and purpose within the ITA (*Miller v Canada (National Revenue)*, 2022 FCA 183 at para 38; see also *CIBC World Markets Inc v Canada*, 2019 FCA 147 at paras 27–28; *Hillier v Canada (Attorney General)*, 2019 FCA 44 at para 24).

[218] Of course, the text remains the "anchor of the interpretive exercise" and "the focus of interpretation," insofar as it reveals "the means chosen by the legislature to achieve its purposes" (*CISSS* at para 24). The anchor is a fine metaphor for text. A docked ship is not necessarily immobile, but it never drifts too far from where it was meant to be moored.

[219] Pursuant to subsection 231.2(1), Parliament granted the Minister the authority to obtain any information or document, from any person, "for any purpose related to the administration or enforcement of this Act, [or] of a listed international agreement" (emphasis added). The term

"listed international agreement" is defined in subsection 248(1) of the ITA as including the Convention, thus incorporating it into subsection 231.2(1) for the purposes of a "named persons requirement."

[220] In turn, the Minister's ability to "impose on a third party a requirement under subsection (1) relating to an unnamed person" under subsection 231.2(3) is circumscribed through judicial authorization, conditioned on the judge's satisfaction required under paragraph 231.2(3)(b) that the requirement has been "made to verify compliance by the person or persons in the group with any duty or obligation under this Act" (emphasis added). There is no mention of any "listed international agreement," and both the Minister and Shopify understand the plain meaning of "this Act" as equivalent to "the ITA" [or Part IX of the ETA] (Applicant's Memorandum at para 43; Respondent's Memorandum at para 63).

[221] I agree with the parties. The plain meaning of "this Act" in paragraph 231.2(3)(b) of the ITA is the ITA itself [or the ETA for its purposes], to the exclusion of any "listed international agreement" defined in subsection 248(1). There is no reason why "this Act" would suddenly change its plain meaning from subsection 231.2(1) to subsection 231.2(3), the former being explicitly distinct from "listed international agreements."

[222] Basic principles of statutory interpretation support this conclusion (see *Piekut* at para 47).

[223] First, the presumption of consistent expression assumes that the legislature uses language carefully and consistently so that within a statute or other legislative instrument, the same words

have the same meaning and different words have different meanings (*R v Zeolkowski*, 1989 CanLII 72 (SCC), [1989] 1 SCR 137; Sullivan, *The Construction of Statutes* at §8.03; see also *Rio Tinto* at para 124 and the authorities cited therein).

[224] I see no reason to depart from this presumption here. The very first provision of the ITA notes that "[this] Act may be cited as the *Income Tax Act*," and it stands to reason that "this Act" would conserve this meaning throughout the statute. This is not to say that words in a statute cannot have different meanings depending upon the context in which Parliament uses them. However, when different meaning is intended, a legal drafter will provide a specific definition applicable to a specific section or part of a statute. In this case, it seems highly unlikely that Parliament would refer to "this Act" twice within section 231.2 and assign a different meaning to each reference. If anything, the proximity of identical terms to one another in a statute reinforces the likelihood of their consistent meaning (*Barrie Public Utilities v Canadian Cable Television Assn (CA)*, 2001 FCA 236 at para 23).

[225] Second, the presumption against tautology presumes Parliament to avoid superfluous or meaningless words; every word is presumed to have a specific role in advancing legislative purpose (*R v Proulx*, 2000 SCC 5 at para 28; Sullivan, *The Construction of Statutes* at §8.05). For this reason, courts avoid adopting interpretations that would render any portion of a statute redundant or meaningless.

[226] Again, I see no reason to depart from this presumption. Interpreting paragraph 231.2(3)(b)'s reference to "this Act" as encompassing "a listed international agreement" renders

subsection 231.2(1) partially redundant, insofar as it lists "the administration or enforcement of this Act" as a separate purpose from the "[administration or enforcement] of a listed international agreement." In other words, the addition of "listed international agreements" to the list in subsection 231.2(1) is seemingly meaningless and redundant if "this Act" already encompasses the tax treaties set out in subsection 248(1).

[227] It is true that the presumption against tautology can be rebutted where repetition serves an intelligible purpose (Sullivan, *The Construction of Statutes* at §8.03). For instance, tautologous words can be deliberately included in legislation for greater clarity, out of an abundance of caution (*Onex* at para 119). In essence, this is what the Minister argues in their later submissions (see Applicant's Additional Memorandum at para 4).

[228] However, this argument is not persuasive. For one, it is unclear why Parliament would speak out of an abundance of caution in subsection 231.2(1) and not in subsection 231.2(3). The "named persons requirement" regime is rather permissive, enabling the Minister to require "any information" or "any document" from "any person" for "any purpose related to the administration or enforcement of this Act [or] a listed international agreement" (emphasis added). By contrast, the UPR regime is relatively restrictive. It requires that a "judge of the Federal Court [be] satisfied by information on oath" of certain preconditions, including a more limited purpose of compliance verification with "this Act." In other words, it is a place where Parliament has chosen to be slightly more cautious, carving out a specific and circumscribed regime for the sake of judicial supervision (*Roofmart* at paras 22–27). The Minister's argument does not explain why Parliament would opt for an abundance of caution in a permissive context and eschew that same caution in a context that

seems to demand more prudence. In failing to explain this, the Minister's argument fails to rebut the presumption against tautology that would explain why the addition of the term "listed international agreement" was required to provide greater clarify in subsection 231.2(1), but not equally required in subsection 231.2(3).

[229] Moreover, the principle of implied exclusion seems to weigh against the Minister's argument. Without belabouring the point, Parliament's failure to include "listed international agreement" in paragraph 231.2(3)(b) seems deliberate in light of its inclusion in several other provisions of the ITA, including subsection 231.2(1). Indeed, when a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned: "if the legislature had intended to include comparable items, it would have mentioned them expressly or used a general term sufficiently broad to encompass them; it would not have mentioned some while saying nothing of the others" (Sullivan, *The Construction of Statutes* at §8.09; see also *Canadian Private Copying Collective v Canadian Storage Media Alliance*, 2004 FCA 424 at para 96). When Parliament turned its mind to section 231.2 of the ITA, it saw fit to mention "listed international agreements" in one subsection and not the other; it listed "this Act" as a potential purpose for requiring information in both. This fact on its own may not be determinative of the matter, but it certainly militates for the interpretative conclusion at which I have arrived.

[230] In any event, the Supreme Court of Canada has noted that "[an] argument based on implied exclusion is purely textual in nature and cannot be the sole basis for interpreting a statute" (*Green*

v Law Society of Manitoba, 2017 SCC 20 at para 37). A contextual and purposive analysis of the statute is necessary.

b) Broader Context of Subsection 231.2(3)

[231] Treaties are relevant to the context stage of statutory interpretation (*SOCAN* at para 45). Given the centrality of international law to this Application, it is unsurprising that context should be the site of considerable disagreement between the parties.

i. Preliminary Point: Locating the Substance of the Dispute

[232] Accurately characterizing the arguments in this case has been a challenge. This is due in part to the complex nature of the proceedings, but also to the Minister's evolving positions in both oral argument and additional written submissions.

[233] For instance, in their initial submissions before the Court, the Minister argued that "the rule against relying on domestic interest preconditions prevails over the deference to Canada's domestic laws," and then relied upon "[the] judicial history of unnamed persons requirements on behalf of Canada's treaty partners" in submitting that "tax treaties have the force of law in Canada and will prevail over domestic law" (Applicant's Memorandum at paras 30–31). The "judicial history" upon which the Minister initially relied consisted of only *Andison*.

[234] However, the Minister later acknowledged that the comparison with *Andison* was not fully on point (see Applicant's Additional Memorandum at para 3). The treaty at issue in *Andison* was the *Canada-United States Convention with Respect to Taxes on Income and on Capital*, 26

September 1980 (as amended by the Protocols signed on 14 June 1983, 28 March 1984), CTS 1984 No 15) [*Canada-United States Convention*], the domestic application of which was entrenched through the *Canada–United States Tax Convention Act*, 1984, SC 1984, c 20. Unlike the Convention, the *Canada-United States Convention* was thus specifically incorporated into Canadian law through a standalone implementation statute. Moreover, under section 3 of the *Canada-United States Convention*, the provisions of the treaty at issue were to prevail to the extent of any inconsistency between domestic and international law. There is no such provision in the Convention in the case at hand.

[235] As such, rather than argue that "[the] Convention specifically overrides the domestic interest requirement in ITA 231.2(3)(b)" in the exact same way as in *Andison* (Applicant's Memorandum at para 32), the Minister now advances a subtler argument. Namely, that through a contextual and purposive reading of subsection 231.2(3), there is in fact no inconsistency between the Convention and domestic law. That argument will be examined below.

[236] In the same vein, the Minister initially argued that under this Court's decision in *Pacific Network* (at paragraph 53), "the Minister does not need judicial authorization for an unnamed persons requirement on behalf of a treaty partner because the Minister is not seeking the information for its own purposes" (Applicant's Memorandum at para 35, see note 34). The Minister nuanced this claim in later submissions, noting that *Pacific Network* (like *Andison*) concerned a different tax treaty, namely the *Convention Between of the Government of Canada and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 2 May 1975 (as

amended by the protocols signed on 16 January 1987 and 30 November 1995), CTS 1976 No 30 [*Canada-France Income Tax Convention*] (see Applicant's Additional Memorandum at para 3). Unlike the Convention, this treaty and its supplementary protocols were also incorporated into Canadian law through an implementing statute, and came into force by Order in Council PC 1999-138 of February 4, 1999 (SI/99-19, C Gaz 1999 II 712), pursuant to section 10 of *An Act to implement conventions for the avoidance of double taxation with respect to income tax between Canada and France, Canada and Belgium and Canada and Israel*, SC 1974-75-76, c 104.

[237] Similar to *Andison*, the treaty in *Pacific Network* was further subject to "inconsistency" provisions incorporated in Canadian law, namely subsections 2(2) of the *Canada-France Income Tax Convention Act, 1976* and 10(2) of the *Income Tax Conventions Act, 1976*, which provided that the "purposes" mentioned in Article 26(1) of the *Canada-France Income Tax Convention* would "prevail to the extent of the inconsistency" with the limitation in subsection 231.2(1) to "any purpose related to the administration or enforcement of the [Income Tax] Act" (see *Pacific Network* at para 12). Again, no such provision exists with respect to the Convention in this case.

[238] In any event, the Minister seems to no longer be arguing that *Pacific Network* displaces the need for judicial authorization under subsection 231.2(3) (Applicant's Memorandum at para 35, see note 34). They are right to abandon that argumentative path.

[239] At issue in *Pacific Network* was an application to quash and declare unlawful a set of requirements issued under subsection 231.2(1) of the ITA to compel disclosure of information and corporate documents for the purposes of complying with the *Canada-France Income Tax*

Convention's exchange of information scheme (*Pacific Network* at para 1). In support of their application, the companies argued that these requirements should have been subject to the judicial authorization scheme under subsection 231.2(3) of the ITA. The Court rejected this argument, explaining that the requirements issued by the Minister under subsection 231.2(1) did "not relate to unnamed persons," but instead to the applicants themselves (*Pacific Network* at para 52). In other words, *Pacific Network* is a case about a "named persons requirement" for information made pursuant to an international treaty. To the extent that it addresses the use of international agreements in UPRs, it does so by tracing a distinction:

> […] I note that the authorization mentioned in subsection 231.2(3) of the Act applies to a requirement issued for a purpose related to the administration or the enforcement of the Act. This is not the case here. It is apparent that any information relating to unnamed persons cannot and will not be used by the Minister under the Act, but will simply be transmitted to the competent authorities of France pursuant to a request made under Article 26 of the *Canada-France Income Tax Convention* and for the purposes stated at paragraph 1 of said Article 26.
>
> (emphasis added) (*Pacific Network* at para 53)

[240] Simply stated, requirements issued to obtain information that "will simply be transmitted to the competent authorities of [another state]" are not the same as requirements "issued for a purpose related to the administration or the enforcement of the Act" (*Pacific Network* at para 53). Pacific Network stands for the proposition that subsection 231.2(3) applies to the latter, and not the former.

[241] It is important to note, however, that both *Andison* and *Pacific Network* were decided prior to the amendments that included "listed international agreements" in subsection 231.2(1) of the ITA, and thus seemingly expanded the listed purposes in subsection 231.2(1) beyond "the

administration or the enforcement of the Act" (Applicant's Additional Memorandum at paras 17–19). Nevertheless, those cases cannot support an argument suggesting that subsection 231.2(1) applied to international agreements even without an amendment implementing international agreements into Canadian law, as both the *Canada-United States Convention* and the *Canada-France Income Tax Convention* were themselves completely incorporated into Canadian law and included a provision that they prevailed over any inconsistency. Therefore, subsection 231.2(1) could apply, because the exchange of information was specifically provided under the Conventions, under Article 27 of the *Canada-United States Convention* and Article 26(1) of the *Canada-France Income Tax Convention*, "for carrying out the provisions of this Convention" (*Andison* at 205–206; *Pacific Network* at paras 3, 12). Consequently, the requirement under subsection 231.2(1) relating to the "administration or the enforcement of the Act" could not apply in those cases, and was substituted by the requirements "for carrying out the provisions of this Convention," as required by the statute implementing those Conventions into Canadian law.

[242] In essence, *Andison* and *Pacific Network* do not provide a definitive answer to the central issue in this case, namely the question of whether a UPR can be authorized for the sole purpose of complying with the Convention, without an implementing amendment. They merely clarify the (uncontested) notion that compliance with an international tax treaty was reason enough to issue a requirement under subsection 231.2(1), in a case where the purposes of the treaty were intended to prevail over the words of the domestic statute.

[243] This being said, the Minister does not take *Pacific Network* to be completely analogous with the case at hand. This is because no strict conflict exists between the Convention and the ITA,

according to the Minister. Rather, the text of the ITA can be interpreted "harmoniously with Canada's obligations to perform UPRs under the Convention," when read in light of the legislative context (emphasis added) (Applicant's Additional Memorandum at para 2(c)). Again, this will be discussed below.

[244] With this potential misunderstanding addressed, it is possible to address one more. Contrary to the Minister's initial assertion, *Andison* and *St. Jean* are not necessarily instances in which Canada responded to exchange of information requests for the sole purpose of treaty compliance, and without requiring compliance verification with the ITA (see Applicant's Memorandum at para 57).

[245] *Andison* concerned a "named persons requirement," partially quashed because it was seeking information related to unnamed persons, and thus required judicial authorization prior to being issued (see *Andison* at 207–208). Neither party submitted any evidence to the effect of any UPR having been issued following the Court's ruling. Regardless, the precedential value of such a UPR would have been limited in light of the differences between the treaties to which the exchanges of information were subject.

[246] In turn, *St. Jean* concerned a UPR made for reasons beyond mere treaty compliance. As previously mentioned, the application record shows that the information sought was both for the Minister's own compliance verification concerns, and on behalf of Australia for the administration or enforcement of its Income Tax Assessment Act (Affidavit of Cynthia Maier at paras 2–4, Application Record of File T-332-10). In other words, Canada had its own domestic tax interest in

the information it provided Australia. The Minister could therefore satisfy the domestic tax interest precondition under paragraph 231.2(3) without recourse to international law. Once validly in possession of the information, the Minister could then provide the information to Australia in compliance with the Convention. There is no such dual interest in this Application.

[247] The distinctions made between this case, *Andison*, *Pacific Network*, and *St. Jean* all underscore a broader point: the facts of this Application are quite unique, and the jurisprudence in this area of the law is of comparatively little guidance in resolving the matter. There is no established roadmap to follow beyond the laws and the interpretive principles available to decipher them. I will accordingly proceed with those principles in mind, ultimately concluding that the context surrounding subsection 231.2(3) of the ITA does not support the Minister's position.

ii. The Convention Has Not Been Incorporated into Domestic Law

[248] The Convention has not been incorporated into domestic Canadian law by reference or through harmonious interpretation, because the reference to "listed international agreements" in subsection 231.2(1) does not apply in subsection 231.2(3), and because the amendments to the privacy regime are not sufficient to authorize UPRs for treaty compliance purposes.

[249] Although the Minister concedes that there is no "standalone implementation statute" incorporating the Convention into domestic law (see Applicant's Additional Memorandum at para 1), the Minister's core argument is anchored in the notion of harmonious interpretation between the ITA and the Convention, a harmonization enabled by amendments to the former's privacy regime.

[250] However, the Minister also maintains that the Convention has been incorporated by reference into the authorizing provisions through subsection 231.2(1) (Applicant's Memorandum at para 49) (the argument is discussed at paragraph 151 of these reasons). In support of this argument, the Minister submits that a UPR remains "a requirement under subsection (1)" under subsection 231.2(3) itself, and that it can accordingly be issued for the administration or enforcement of a "listed international agreement," as incorporated by reference in subsection 231.2(1).

[251] This argument cannot succeed. The regime set out in subsection 231.2(1) is explicitly "subject to subsection (2)," which prevents the Minister from issuing "a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3)." In turn, judicial authorization explicitly turns upon other preconditions established in paragraphs 231.2(3)(a) and 231.2(3)(b) of the ITA.

[252] Each precondition narrows the type of requirement that can be issued by the Minister, in comparison with subsection 231.2(1). "Named persons requirements" can be issued with respect to "any person" (emphasis added), but UPRs require evidence of an "ascertainable" person or group. Likewise, "named persons requirements" can be issued for "any purpose related to the administration or enforcement of this Act" (emphasis added) or of a "listed international agreement," whereas UPRs must be "made to verify compliance" with the ITA. In the context of subsection 231.2(3), "a requirement under subsection (1)" refers to a UPR to provide "any

information" or "any document." The mention of subsection 231.2(1) in subsection 231.2(3) does not imply a wholesale transfer of the former into the latter.

[253] Accepting the Minister's proposed interpretation would require this Court to displace the mandatory preconditions set out in subsection 231.2(3), thus displacing the clear and unambiguous words established by Parliament (*Roofmart* at para 20). This is something the Court cannot do.

[254] In response, the Minister raises the statutory interpretation principle according to which two provisions applicable without conflict to the same facts are presumed to operate fully according to their terms (Sullivan, *The Construction of Statutes* at §11.02). The Minister submits that subsections 231.2(1) and 231.2(3) are two such provisions.

[255] I disagree. By definition, subsections 231.2(1) and 231.2(3) do not apply without conflict to the same set of facts. The Minister could not have submitted this application under subsection 231.2(1) because it related to one or more unnamed persons and was thus "subject to subsection (2)." In fact, the words of subsection 231.2(2) imperatively state that "[the] Minister shall not impose" (emphasis added) a UPR unless authorized by a Federal Court judge. Arguments about compliance verification and "ascertainable" groups are not necessary for "named persons requirements," and the Minister evidently brought this Application before the Court on the assumption that it could not proceed with its requirement for information under subsection 231.2(1).

[256] In short, the mention of "a requirement under subsection (1)" in subsection 231.2(3) does not displace the need for the Minister to satisfy this Court of the mandatory preconditions established by Parliament. This Court can only authorize a UPR made for compliance verification with the ITA, as set by the clear words of paragraph 231.2(3)(b).

[257] Having established that the Convention has not been incorporated by reference within paragraph 231.2(3)(b), it is now time to address the question of whether it has been incorporated by harmonization.

[258] To begin, I agree with the Minister that the legislature is not bound to observe a particular form of implementation for the Convention to have force of law (Applicant's Additional Memorandum at para 3). As put by Saunders and Currie (at 212), "to identify and categorize the ways in which implementation can occur […] is a bit like cataloguing snowflakes" (see e.g. *Thomson* at 601–602). No particular form of words is required. For obligations that can be honoured through Executive power alone (e.g., an obligation to issue an apology to another state as reparation for an international wrong), legislative incorporation may not even be necessary.

[259] In this case, legislative implementation is necessary because the international obligations created by the Convention are not self-executing. The process whereby the Minister obtains the information sought by another state is provided by the ITA. As such, for the Convention to have force of law in paragraph 231.2(3)(b), the Minister must demonstrate that the legislature constructed the statute so as to reach the intended treaty-compliant result (van Ert, *Using International Law in Canadian Courts*, 2nd ed at 240).

[260] The Minister submits that harmonization is achieved through the absence of conflict between the Convention and the authorizing provisions. Five contextual factors are said to demonstrate this absence: (1) UPRs are an information gathering measure envisaged by the Convention; (2) Article 21(3) of the Convention overrides the domestic tax interest precondition in paragraph 231.2(3)(b); (3) Article 27 of the *Vienna Convention* prevents Canada from relying on its internal law to justify its failure to perform a treaty obligations; (4) subparagraph 241(4)(e)(xii) enables the disclosure of information for the purpose of administration or enforcement of the Convention; (5) Canada did not enter any declarations or reservations pertaining to UPRs upon ratifying the Convention. I will address each factor in turn.

(1) UPRs as an Information Gathering Measure Under the Convention

[261] First, the Minister points to the Convention's Explanatory Report, which notes that the "foreseeable relevance" standard under Article 4(1) is meant to prevent "fishing expeditions," or a request of information "that is unlikely to be relevant to the tax affairs of a given person or ascertainable group or category of persons" (emphasis added) (Explanatory Report at para 50). The Minister relies on the Explanatory Report in support of their argument that UPRs are an information gathering measure envisaged by the Convention and, ultimately, implemented in the ITA.

[262] As a matter of treaty interpretation, the Minister's evidence is rather thin. Explanatory Reports are not taken to be authoritative interpretations of a treaty, even less a binding or enforceable source of international law (Saunders and Currie at 4). They do not and cannot displace the terms of a treaty, the "ordinary meaning" of which remains the grounding interpretive source

pursuant to Article 31 of the *Vienna Convention*. Nor do they constitute "context for the purpose of the interpretation of [the] treaty," insofar as an Explanatory Report is not an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty," nor an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" (see Article 31(2)). Likewise, the Explanatory Report cannot be qualified as a "subsequent agreement between the parties regarding the interpretation of the treaty" or as a form of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (see Article 31(3)). The experts who prepared the Explanatory Report do not say otherwise, explicitly stating that the report "does not constitute an instrument providing an authoritative interpretation of the text of the Convention" (Explanatory Report at 1, AR at 1286). The mere presence of the expression "ascertainable group" in an Explanatory Report is not enough to prove that the Convention envisages UPRs as an information gathering measure under Articles 4(1) and 5(2).

[263] This is not to say that the Explanatory Report is meaningless or that it should not be marshalled as interpretive evidence (see e.g. *Alta Energy* at paras 38–45). Rather, I wish to underscore its proper function: as intended, this Explanatory Report can "facilitate the understanding of the Convention's provisions," without serving on its own as the authority upon which to base a conclusive interpretation of the treaty's provisions in a given case (Explanatory Report at 1, AR at 1286). Other contextual factors, such as those listed in Article 31 of the *Vienna Convention*, are required to support the Minister's conclusion.

[264] With this said, I nonetheless agree with the general proposition that UPRs may be a tool that the parties to the Convention may use to exchange information. The Convention provides for the exchange of information between the parties for the purposes of mutual administrative assistance in tax matters. The Convention does not explicitly *exclude* any measure that the parties may use in doing so. Rather, Article 5(2) of the Convention clearly provides that where "the information available in the tax files of the requested State is not sufficient to enable it to comply with the request for information," the requested state must take "all relevant measures" in order to provide the requesting state with the requested information. In my view, the Convention therefore includes the *potential* for requested states to respond to a request for information through a UPR process.

[265] The issue is therefore not whether the Convention requires the use of UPRs to respond to a request for information. Rather, the issue is rather whether the ITA allows the Minister to impose a UPR in the context of a request under the Convention, and, if not, whether the Minister's lack of power to respond to a UPR request in the circumstances is in breach of the Convention.

[266] On this latter question, and for the reasons detailed below, I find that the ITA does not grant the Minister the power to unilaterally impose a UPR in response to a request under the Convention. The ITA's specific legislative preconditions preclude the Minister from unilaterally responding to the request; they require the Court's authorization. Even so, the Minister's inability to respond does not entail a breach of the Convention.

(2) Article 21(3) and the Domestic Tax Interest Precondition in Paragraph 231.2(3)(b)

[267] Second, the Minister claims that Article 21(3) of the Convention prevents Canada from declining a request to supply information solely on the basis of a domestic tax interest precondition, namely paragraph 231.2(3)(b) of the ITA. For the Minister, this removes any conflict between the ITA and the Convention insofar as the Convention prevails over a domestic tax interest precondition.

[268] I disagree with the Minister's characterization of Article 21(3), essentially for the reasons raised by Shopify.

[269] For one, it is worth clarifying that Article 21(3) is of a relatively narrow scope. It is not an inconsistency or conflict provision providing that the Convention prevails over the ITA, as in *Andison* and *Pacific Network*. In fact, the drafters of the Convention have opted for no such provision at all. Article 21(3) has the simple effect of limiting the range of reasons why a state may decline to supply information to another state, excluding the lack of "domestic interest in such information" from that range (Explanatory Report at para 209). The mere fact that a state "may not need [the requested] information for its own tax purposes" cannot serve as the *sole* justification for a failure to respond to a request under the Convention. Other justifications, such as those listed in Articles 21(1) and 21(2) of the Convention, may relieve the requested state from supplying the information, but even those justifications should not be construed as enabling a state to decline a request because it has no domestic interest in the information. In those cases, pursuant to Article

21(3), "the requested State shall use its information gathering measures to obtain the requested information" (emphasis added).

[270] In this case, the sole law or administrative procedure enabling Canada to obtain information about a group of unnamed persons is subsection 231.2(3) of the ITA—a process that hinges on judicial authorization. In turn, this judicial authorization requires the Minister to satisfy the Court through information on oath that the mandatory preconditions in paragraphs 231.2(3)(a) and 231.2(3)(b) have been met.

[271] The core idea is that the Minister—on their own—does not have the power to issue a UPR without meeting certain conditions. If those conditions have not been met, the Minister cannot impose a requirement on a third party for information related to unnamed persons. The power to issue a UPR is not something Parliament grants with no strings attached.

[272] Put differently, the Minister has no information gathering powers to exercise in this particular situation because they do not have the legal authority to issue a UPR that does not meet paragraph 231.2(3)(b) of the ITA. It is not a matter of "domestic interest" in the information sought by Australia, but a question of what Parliament has enabled the Minister to obtain and how they may obtain it.

[273] A contrast with the "named persons requirement" regime may be enlightening here. Where another state requests information related to a named person, the Minister can use their information gathering powers under subsection 231.2(1) to obtain what is being requested. There is no extra

step or condition to meet—the legal authority to compel and supply the information resides wholly in the Minister, by choice of Parliament. In such a situation, were the Minister to refuse to use their power under subsection 231.2(1) to obtain the information for the *sole* reason that they have no domestic interest, this would be a violation of Article 21(3) and a breach of the Convention.

[274] Likewise, there is plenty of information already held by the Minister or publicly available to them. This is information that should also be provided upon request. If the Minister were to refuse to provide that information due to a lack of domestic interest, that would again violate Article 21(3) and the Convention.

[275] In short, Article 21(3) does not expand a state's information gathering powers; it merely narrows the range of justifications according to which a state can decline to use them. The Convention does not give the Minister any more domestic power than they already have. Indeed, Article 21(2)(a) provides that the requested state does not have "to carry out measures at variance with its own laws or administrative practices." Moreover, Article 21(2)(c) provides that the requested state does not have "to supply information which is not obtainable under its own laws." The Explanatory Report supports this conclusion, stating that "tax administrators can only take those measures [that are] consistent with their domestic laws" and that the Convention is not meant "to extend the existing domestic powers of [Parties'] tax administrations" (Explanatory Report at para 24). Overall, the Convention does not purport to grant to the Minister additional measures or authority to obtain information beyond what exists (including with its limitations) in domestic law.

[276] In this particular case, the Minister complied with the Convention. As required under Article 5(2) of the Convention, the Minister took "all relevant measures to provide the applicant State with the information requested." Those measures were to seek the authorization of the Court. The Court cannot authorize the UPR, as Parliament requires that such UPRs be "made to verify compliance by the person or persons in the group with any duty or obligation under this Act" under paragraph 231.2(b) of the ITA.

(3) Article 27 of the *Vienna Convention* and Reliance on Internal Law

[277] The Minister submits that their proposed interpretation of the Convention's force is supported by Article 27 of the *Vienna Convention*, which precludes parties to a treaty from "[invoking] the provisions of its internal law as justification for its failure to perform a treaty" (Applicant's Memorandum at paras 29–30, 48, 46).

[278] With respect, I disagree. Article 27 is not a blanket measure whereby "the provisions of the treaty prevail" automatically to the extent of "any inconsistency with domestic law" (Applicant's Memorandum at para 46). The plain meaning of the text provides for something narrower, the confines of which are worth explaining here.

[279] Briefly stated, the function of Article 27 can be understood through counterfactual reasoning. Treaties are meant to be a stable and consensual basis upon which states create reliable relationships of mutual obligation between each other; if a state could simply subtract itself from a treaty obligation by invoking the provisions of its domestic law, no state could rely upon any other state's expression of consent to be bound (see Currie at 156). Thus, the law of treaties relies

on a baseline assumption about the relationship between domestic and international law. As the Minister rightly notes, it assumes that domestic law cannot dictate the scope and content of international legal obligations undertaken in good faith by way of treaty (John H Currie, Craig Forcese, Joanna Harrington and Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory*, 3rd ed (Toronto: Irwin Law, 2022) at 14, 48, 84–87). Nothing Parliament says can change the words of the Convention.

[280] However, Article 27 of the *Vienna Convention* is not an invitation for states to disregard or violate their own laws for the sake of treaty performance. In fact, the variable nature of domestic implementation is owed to the fact that "international law rarely dictates how a state must behave within its domestic legal order" (Currie at 157). Similar to Article 21(3) of the Convention, Article 27 of the *Vienna Convention* is best understood as limiting the range of justification that can be offered by a state declining performance of a treaty obligation: it provides that a domestic legal rule does not justify defaulting on a treaty obligation. If a state chooses to breach its treaty obligations out of respect for its domestic law, it will be diplomatically responsible to other state parties to a treaty for the breach. The possibility of a breach is part of what makes collaboration between different branches of government so essential; the Executive is best placed to understand its obligations, but often requires the legislature to give these obligations effect (van Ert, *Using International Law in Canadian Courts*, 3rd ed at 144; see also Peter Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Thomson Carswell, 2007) at §11.3(c)).

[281] A more precise understanding of Article 27 of the *Vienna Convention* is necessary in this case because it should not be confused as a general "inconsistency" provision, as in *Andison* and

Pacific Network. Article 27 does not transform domestic law in order to ensure its compliance with treaty obligations; it merely limits a range of state justification (see generally Annemie Schaus, "1969 Vienna Convention: Article 27 Internal law and observance of treaties" in Olivier Corten and Pierre Klein, eds, *The Vienna Conventions on the Law of Treaties* (Oxford: Oxford University Press, 2011) 688). This should be clear from the plain meaning of the text. Article 27 is written as a prohibition: "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (emphasis added). Nothing in these words implies a positive duty to change one's internal law, or to resolve conflicts between internal and international law in favour of the latter. The duty imposed by Article 27 is restrictive in nature and relates solely to the question of what can justify a failure to perform a treaty obligation.

[282] In short, Article 27 has neither the power nor the vocation of removing conflict between domestic and international law. Rather than impose any sort of "paramountcy over domestic law to the extent of any inconsistency with the ITA" (Applicant's Memorandum at para 56), the plain meaning of Article 27 sets out a much narrower—and essentially communicative—obligation to state parties: to not rely on their own domestic law when justifying a failure to uphold their treaty obligations. The Minister cannot use Article 27 as a trump card for domestic incorporation.

(4) Amendments to the ITA Privacy Regime and Exchanges of Information Under the Convention

[283] The fourth factor on which the Minister relies is subparagraph 241(4)(e)(xii), which enables the disclosure of information for the purpose of administration or enforcement of the Convention. In the Minister's view, this provision is mainly what removed any conflict between the ITA and the Convention.

[284] I disagree with the Minister. In light of the evidence presented before this Court, it seems clear that where Parliament intends to permit the disclosure of information in furtherance of a treaty obligation, it does so expressly.

[285] Certain principles of statutory interpretation are worth recalling at the outset. First, as recently held by the Supreme Court of Canada, "[statutory] interpretation is centred on the intent of the legislature at the time of enactment and courts are bound to give effect to that intent" (*Telus* at para 32). Relatedly, "[the] contextual significance of international law is all the more clear where the provision to be construed" is enacted with a specific aim toward the implementation of international obligations (*B010* at para 47). The statute must therefore be interpreted with due regard for the case-specific circumstances engaging the relevant international obligations (*SOCAN* at para 46).

[286] In this Application, subsection 231.2(3) of the ITA cannot be said to have been enacted with an aim toward the implementation of an international obligation, as the provision existed prior to the ratification of the Convention (*Roofmart* at paras 21, 45). The legislative history identified by both the Minister and Shopify demonstrates this fact (as summarized in paragraphs 208–214 of these reasons).

[287] When the term "listed international agreement" was first defined in the ETA, Parliament saw fit to include it in subsection 289(1) (named persons requirements), paragraph 295(5)(n) (ministerial authorization to disclose taxpayer information to a treaty partner without criminal sanction), and subsection 99(1) (non-GST request of any person for books and records for purposes

of administration or enforcement of a listed international agreement). The subsequent inclusion of "listed international agreements" in the ITA followed the same pattern in 2013, when it was included in subsection 231.2(1) and subparagraph 241(4)(e)(xii). At the very least, Parliament has shown itself willing to amend its disclosure provisions to include international treaties, as a result of the ratification of the Convention. This is not an issue on which Parliament was silent, or reliant on contextual interpretation.

[288] There is no doubt that ratification was dependent on amending the privacy regime in subparagraph 241(4)(e)(xii) of the ITA (*Hansard*, 8 March 2013 at 14772). This provision was thus amended, alongside subsection 231.2(1), to enable the Minister to assist treaty partners through "named persons requirements." While parliamentary debates have limited reliability and carry limited weight (*Piekut* at para 75; see also *R v Moriarity*, 2015 SCC 55 at paras 31–32), the Hansard evidence upon which the parties rely shows the following: the duly lawful exercise of subsection 231.2(1) and its international dimension were ensured by the amendments to the ITA privacy regime in section 241. This is consistent with how Parliament incorporates "listed international agreements" into domestic law. Leaving subsection 231.2(3) without any mention of the Convention would be inconsistent.

[289] To this point, I note that the Minister does not reference any specific mention of UPRs in the government discussions leading to ratification. They merely claim that those discussions considered the exchange of information "without any limitation on unnamed [persons requirements]" (Applicant's Additional Memorandum at paras 10–11). In light of how Parliament has chosen to include treaty obligations into its disclosure schemes, I find the Minister's argument

unpersuasive. As Shopify rightly notes, a simpler explanation seems more likely: the government did not speak about UPRs because it was not seeking to change the Minister's power (or lack thereof) to issue them. Parliament had the opportunity to amend the text of subsection 231.2(3) following ratification; it did not take that opportunity. The Court is bound to respect that choice.

(5) Declarations or Reservations upon Ratifying the Convention

[290] The fifth and final factor upon which the Minister relies to demonstrate harmonization is the fact that Canada made neither reservation nor declaration on the applicability of the Convention with respect to UPRs. This is not a point on which the Minister dwells much, with good reason. A reservation is a derogation or statement of non-application vis-à-vis a legal obligation (see Article 2(1)(d) of the *Vienna Convention*). If there is in fact no treaty obligation to use UPRs as an information gathering measure, then a reservation is inapposite. The converse proposition is also true. States make reservations about obligations to which they would otherwise be bound, so the absence of a reservation can signal either (1) the will to accept the legal effect of a provision or (2) the understanding that no such effect or provision exists in the first place. In sum, the absence of reservations is a neutral factor in the Minister's argument. It does not change the conclusion to which this Court has arrived.

[291] For these reasons, I find that the Convention has not been incorporated into subsection 231.2(3) of the ITA and that Parliament's failure to do so is not in breach of the Convention. For the reasons below, Parliament's failure to incorporate the Convention into Canadian law is also not incompatible with the presumption of conformity of domestic laws with international obligations.

iii. The Presumption of Conformity

[292] Courts avoid interpretations of domestic law that would entail a violation of Canada's international obligations, absent "unequivocal legislative intent" toward that result (*Hape* at para 53).

[293] Shopify does not purport to show Parliament's intent to default on an international obligation, instead arguing that there is in fact no obligation to comply with Australia's request. The key nuance in this argument is this: the presumption of conformity applies to international legal obligations, as opposed to diplomatic commitments writ large. In other words, the mere fact that Canada has accepted to do something for Australia has no bearing on the interpretive exercise. What matters is the treaty that Canada has chosen to ratify, and the obligations contained therein.

[294] I agree with Shopify. Under the words of the Convention itself, Canada is under no obligation to provide the requested information to Australia, because the Minister does not have the unilateral power to obtain the information (as opposed to "named persons requirements" under subsection 231.2(1)).

[295] Thus, even if this Court favours an interpretation that conforms with Canada's treaty obligations, the presumption of conformity does not necessarily favour the Minister's interpretation, because Canada is under no obligation to supply the requested information to Australia under the terms of the Convention, or on the facts of this case.

[296] As explained above, Articles 21(2)(a) and 21(2)(c) (and as supported by the Explanatory Report) provide that Canada is not obliged to carry out measures at variance with its own laws or to supply information that is not obtainable under its own laws or administrative practices. In other words, Canada is not required to carry out Australia's request for assistance because doing so would be at variance with the authorizing provisions of the ITA, namely paragraph 231.2(3)(b).

[297] Properly interpreted, paragraph 231.2(3)(b) requires that the UPR be "made to verify compliance by the person or persons in the group with any duty or obligation under this Act." The impact of Parliament's intent is that the information requested by Australia is "not obtainable" under the ITA, because for UPR purposes, the ITA requires a verification purpose "with any duty or obligation" under the ITA.

[298] That interpretation is consistent with the Convention's recognition that state parties have different domestic laws, that local taxpayers are entitled to benefit from them (Article 21(1)), and that state parties do not have to implement wholesale changes to their domestic tax legislation. To the contrary, the Convention specifically recognizes that some requests for information may be denied because domestic legislation does not allow information to be obtained in the circumstances (such as paragraph 231.2(3)(b)). Recognizing that states should not be obliged "to carry out measures at variance with [their] own laws," the state parties also recognized that not all requests for information would be answered—and that a refusal on the basis of a domestic prohibition to obtain such information would not be in breach.

[299] Consequently, rather than supporting a breach of the Convention, an interpretation affirming the Minister's refusal on the basis of the legal precondition existing under paragraph 231.2(3)(b) of the ITA supports the principle of conformity with international obligations. This interpretation conforms to Canada's obligation provided under Article 21(1), according to which the rights and safeguards secured to Canadian taxpayers by the laws of Canada must be respected. It is also consistent with Articles 21(2)(a), 21(2)(c), and 21(3), according to which Canada can refuse to provide information that is "not obtainable" under the ITA or decline to carry out measures "at variance" with its domestic laws, as long as this refusal is not solely due to its lack of "domestic interest" in the information.

[300] I would also add that in the context of this specific Application, there are other reasons why the Minister may validly refuse to respond to the Australian request, and refusal on those grounds would also not be in breach of the Convention. Namely, under Article 21(2)(g) of the Convention, Canada is not required to "provide administrative assistance if [Australia] has not pursued all reasonable measures under its laws or administrative practice."

[301] Mindful of this condition, the ATO noted in its request that the "information would be obtainable under [its] laws or in the normal course of administrative practice in similar circumstances," and that it had indeed "pursued all means available in Australia to obtain the information requested except where disproportionate difficulties [had] arisen" (Tremblay Affidavit, AR at 23, Tab 3.(a), Exhibit "A" – "Exchange of Information Request from Australia"). However, the "means" referenced by the ATO correspond to the "extensive research" they undertook "on public domain information on the identified businesses as well as any information

received by the ATO" (Tremblay Affidavit, AR at 23, Tab 3.(a), Exhibit "A" – "Exchange of Information Request from Australia"); and the ATO only engaged in brief communications with Shopify in late 2021. When Shopify refused an informal request to provide information, explaining that the ATO would need to issue a valid subpoena, warrant, or order that compels it to produce the requested information, the ATO proceeded with this exchange for information request to Canada under the Convention, maintaining that it had "no other way of obtaining the information requested," instead of proceeding to obtain the necessary warrant or order (if the ATO indeed had that power under its internal domestic tax legislation) (Tremblay Affidavit, AR at 23, Tab 3.(a), Exhibit "A" – "Exchange of Information Request from Australia").

[302] This points to a contradiction in Australia's request. If there is indeed no other way of obtaining the information requested from Shopify, then Australia has no UPR power or a similar process to obtain that kind of information. In that case, the information is not obtainable under Australia's own laws or administrative practice, and Canada is not under an obligation to respond under Article 21(2)(c) of the Convention. Conversely, if the information is indeed obtainable under Australia's own laws or administrative practice, then Canada is under no obligation to provide that information to Australia until it pursues that information under those same laws and administrative practices, under Article 21(2)(g).

[303] In this case, there is no evidence showing that Australia did anything beyond sending Shopify an informal request for information. The laws and practices which might enable Australia to obtain this information were not demonstrated and, if existing, there is no evidence that they were employed.

[304] This being said, Article 21(2)(g) should not be interpreted as imposing upon the Minister an "extra step" in its exchanges of information with other states. Nothing in the Convention imposes upon Canada the obligation to make other states prove that they have "pursued all reasonable measures available under its laws or administrative practice" (see Explanatory Report at paras 201–205). Requiring proof from the applicant state would be to misinterpret the scope and valence of Article 21(2). The question is not whether Canada must impose certain conditions on its treaty partners, but whether Canada is under the obligation to supply information when these conditions are not met. In this case, Articles 21(2)(c) and 21(2)(g) may each relieve the Minister of that obligation, such that Canada does not breach the Convention if it refuses to respond to Australia's UPR request.

iv. Other Provisions of the ITA and the Proposed Amendment

[305] The Minister references Parts XVIII ("Enhanced International Information Reporting") and XIX ("Common Reporting Standard") of the ITA, suggesting that they demonstrate Canada's broad comfort with gathering information and disclosing it to treaty partners. Similarly, the Minister suggests that there is contextual support for an expansive reading of the Minister's UPR powers, because the authorizing provisions form part of the ITA's Administration and Enforcement scheme.

[306] I disagree with the Minister's reading of the ITA. As discussed above, where Parliament intends to permit the disclosure of information in furtherance of a treaty obligation, it does so expressly. These parts of the ITA are a good example of this general pattern: where Parliament

intends to allow the Minister to share information with another jurisdiction, it adopts specific laws to that effect.

[307] The final element of context disputed between the parties is the 2024 proposed amendment to paragraph 231.2(3)(b). Shopify claims that the proposed amendment demonstrates that the Minister currently lacks authority to submit a UPR based on foreign tax treaties. The Minister maintains that consideration of this proposed amendment would be premature and of limited relevance to the interpretive exercise, citing Chief Justice Noël's guidance to this effect in *Oxford Properties*.

[308] I agree with the Minister. Amendments does not imply change in law, and it would not be appropriate for this Court to ground its conclusions on the proposed 2024 amendment to paragraph 231.2(3)(b) (see subsection 45(2) of the *Interpretation Act*). The following passage from *Oxford Properties* is on point:

> [86] Whether an amendment clarifies the prior law or alters it turns on the construction of the prior law and the amendment itself. As explained, the *Interpretation Act* prevents any conclusion from being drawn as to the legal effect of a new enactment on the prior law on the sole basis that Parliament adopted it. Keeping this limitation in mind, the only way to assess the impact of a subsequent amendment on the prior law is to first determine the legal effect of the law as it stood beforehand and then determine whether the subsequent amendment alters it or clarifies it.

[309] The "prior law" in this case is paragraph 231.2(3)(b) as it currently stands; these reasons construe it and determine its legal effect. As for the proposed 2024 amendment, there is no legal effect of the new enactment to be determined because Parliament has not yet adopted it, and it has never been applied. Drawing conclusions as to whether the 2024 proposed amendment alters or

clarifies the present law—on the sole basis of an amendment having been proposed—is accordingly premature.

[310] However, all relevant textual, contextual, and purposive analysis of paragraph 231.2(3)(b) point in a direction suggesting that indeed, the proposed amendment would permit a UPR not only when the Court is satisfied that the requirement is made to verify compliance with any duty or obligation "under this Act," but also under a "listed international agreement" (*Explanatory Notes* at para 67). Should this amended provision come into force upon royal assent, it would incorporate the Convention into subsection 231.2(3) of the ITA. Until then, as discussed above, the Convention's force within section 231.2 is limited to subsection 231.2(1).

[311] With the contextual stage of analysis now settled, the Court must look to the purpose of the subsection 231.2(3) of the ITA.

c) The Object and Purpose of Subsection 231.2(3)

[312] A statute must "be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" (see section 12 of the *Interpretation* Act; *Piekut* at para 46). Tax provisions are no exception to this rule (*Imperial Oil* at para 26).

[313] As held by the Supreme Court of Canada in *CISSS* at paragraph 24, the text is the "anchor of the interpretive exercise," "the focus of interpretation," and is the starting point that reveals "the means chosen by the legislature to achieve its purposes." The Court's interpretative task resides in

ensuring a construction of the text that most faithfully ensures the "attainment of its object and carrying out of its provisions according to their true intent, meaning and spirit" (*CISSS* at para 24).

[314] Moreover, in *Telus*, the Supreme Court of Canada explained that in the interpretative exercise, the intent of the enacting legislature is key but that statutes can be applied to circumstances that were not originally contemplated at the time of enactment (at para 35). Indeed, an enactment drafted in broad or open-textured language may cover new circumstances not originally contemplated, given the evolving context of society (*Telus* at paras 33–34).

[315] In this Application, the issue arises as to whether paragraph 231.2(3)(b) can be interpreted as including the Convention, in light of their compatible purposive content, even if paragraph 231.2(3)(b) was enacted prior to ratification.

[316] While not specifically arguing that their proposed interpretation of paragraph 231.2(3)(b) rested on a "dynamic" interpretation of the provision, the Minister argued that the purpose of the provision favoured an interpretation that was consistent with the Convention's broad object and purpose. Namely, enabling the exchange of information between state parties, for mutual administrative assistance in matters of taxation.

[317] For the Minister, the legislative history of subsection 231.2(3) demonstrates Parliament's intent to grant the Minister extensive information gathering powers while limiting fishing expeditions. This is a purpose shared with Article 4 of the Convention, whose "foreseeable relevance" standard is meant to prevent "fishing expeditions," or the request of information "that

is unlikely to be relevant to the tax affairs of a given person or ascertainable group or category of persons" (Explanatory Report at para 50).

[318] In turn, Shopify maintains that the purpose of subsection 231.2(3) is to reflect the balance prescribed by Parliament between privacy rights, on the one hand, and the Minister's need for "tools to administer the Act," on the other (*Roofmart* at para 20). It accordingly warns this Court against diverging from the Federal Court of Appeal's purposive guidance.

[319] While I broadly agree with Shopify's position, I do not think it accurately characterizes *Roofmart*'s guidance. Similarly, while I do not subscribe to the Minister's analysis, I nevertheless recognize some shared traits between Article 4 of the Convention and subsection 231.2(3) of the ITA.

[320] Shopify's reading of *Roofmart* is not completely accurate. When Justice Rennie writes of Parliament "balancing privacy rights against the requirement that the Minister have the requisite tools to administer the Act" (*Roofmart* at para 21), it is not to define parliamentary purpose. Rather, it is to rebut a specific claim raised by the appellants in that case, who asked "that the clear words of section 231.2 be qualified by reading in broader concepts such as the requirement of balancing privacy rights against the requirement that the Minister have the requisite tools to administer the Act" (*Roofmart* at para 21). Justice Rennie is describing a set of principles considered by Parliament in the elaboration of subsection 231.2(3). The mere fact that these principles were considered does not make them the purpose of the provision. Balancing enforcement and privacy

is part of what Parliament did in crafting subsection 231.2(3), but the provision should not necessarily be reduced to that balancing act, and *Roofmart* purports to do no such thing.

[321] However, subsection 231.2(3) does represent a sort of balancing exercise: "Parliament intended to permit a broad inquiry, subject to the conditions being met" (emphasis added) (*Roofmart* at para 45). The Federal Court of Appeal in *Roofmart* likewise understood that "Parliament permitted a type of fishing expedition, with the authorization of the Court and on conditions prescribed by the Act, all for the purpose of facilitating the MNR's access to information" (emphasis added) (*Roofmart* at para 45, citing *GMREB* at para 45). Each passage connotes a balance between the Minister's investigatory powers and the need to protect taxpayers from undue government encroachment. This balance is reflected in the mandatory preconditions. The first precondition enables the Minister to investigate a large group of persons, provided it is "ascertainable"; the second enables them to do the same, provided it be done with the purpose of verifying compliance with the ITA. Parliament leaves this Court "the obligation of ensuring that two factual prerequisites are established in the evidence on a balance of probabilities" (*Roofmart* at para 21).

[322] The purpose of subsection 231.2(3) is to permit a broad inquiry, subject to certain specific conditions. These conditions reflect the need to circumscribe government power in light of taxpayer rights and protections. Moreover, they reflect a set of expectations: "[where] Parliament has specified precisely which conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers and the Minister would rely on those conditions" (*Roofmart* at para 20, citing *Canada Trustco* at para 11). This sense of reliance is in

part why "[additional] conditions cannot be read into the legislation" (*Roofmart* at para 20). Third parties should have a sense of who is being targeted and why, and the statutory preconditions disclose "the means chosen by the legislature to achieve its purposes" (*CISSS* at para 24). To read words into subsection 231.2(3) "which are simply not there" would be to risk stepping beyond the objectives intended by Parliament, and ultimately beyond the functions of the judicial role (*McIntosh* at 701). A supposed purpose does not supplant clear language (*Placer Dome* at para 23).

[323] Parliament has already considered the implementation of the Convention and enacted specific amendments to the ITA to that effect. However, it has not implemented the Convention within paragraph 231.2(3)(b). The Minister's proposed interpretation, dynamic, harmonized, or otherwise, cannot cure that defect.

[324] The parties agree that the original meaning of the term "this Act" refers to the ITA. All relevant context demonstrates that Parliament did not grant additional powers to the Minister, and did not enable the Minister to exchange information obtained through a UPR to a state party to the Convention. Though I am mindful of the limited reliability and weight of Hansard evidence (*Piekut* at para 75), the absence of persuasive evidence disclosing Parliamentary intent to expand the terms of paragraph 231.2(3)(b) cuts against the Minister's position (*Telus* at para 62).

[325] The implementation of the Convention into Canadian law has important consequences for Canadian taxpayers. Parliament was clearly informed of the ratification of the Convention, and of the specific amendments that were proposed to implement it. Parliament specifically amended the

privacy regime under section 241, as well as the Minister's power to transfer information obtained through the "named persons requirement" regime. However, UPRs are different in nature, and require the authorization of the Court following specific preconditions. Parliament appears to have never been asked, and there was never any debate, to amend the legislative preconditions under which the Court could authorize the Minister to issue a UPR, or allow the Minister to then transfer the information obtained to state parties. The object and purpose of paragraph 231.2(3)(b) remain intact from its original enactment, and the Convention cannot, without more, expand its meaning.

[326] In the end, as held by the Supreme Court of Canada in *Telus*: "[in] interpreting Parliament's intent and applying it to developing circumstances, courts must be careful not to engage in policy choices best left to legislatures. 'It is not for the Court to do by « interpretation » what Parliament chose not to do by enactment'" (at para 80, citing *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57 at para 53).

d) Conclusion

[327] The Federal Court of Appeal describes the words of subsection 231.2(3) of the ITA as "clear and unambiguous," and asks courts to simply apply them to the facts of the case (*Roofmart* at para 20). Yet statutory interpretation "cannot be founded on the wording of the legislation alone" (*Rizzo* at para 21). As the Supreme Court of Canada has noted, the modern approach to statutory interpretation comes laden with "[the] possibility of the context revealing a latent ambiguity" in text that otherwise "[appears] clear and unambiguous" (*Piekut* at para 44, citing *2952-1366 Québec Inc* at para 10; see also *La Presse* at para 23; *Alex* at para 31).

[328] Upon a careful analysis of the statutory scheme, I find that the Convention has not been implemented into subsection 231.2(3) of the ITA. The wording chosen by Parliament is indeed unambiguous and makes no mention of the Convention. Other parts of the ITA only reinforce the notion that where Parliament intends to incorporate a treaty obligation, it does so expressly. The presumption of conformity is real, but it does not grant the Minister any more power than what Parliament has chosen to grant them through subsection 231.2(3) of the ITA.

[329] While the mandatory preconditions in subsection 231.2(3) share something in common with the Convention's "foreseeable relevance" standard, insofar as both purport to permit broad information gathering measures (subject to certain specific conditions), these similarities do not broaden the Minister's power in any way.

[330] As discussed above, a refusal to exchange information on the basis of paragraph 231.2(3)(b) is consistent with Articles 21(1) and 21(2) of the Convention, because the treaty does not affect the rights and safeguards secured to taxpayers under the ITA, nor impose on the Minister an obligation to carry out measures at variance with Canadian law. Rather, the Convention should be understood as enabling states to offer mutual administrative assistance in tax matters—while nonetheless maintaining the rights and protections each state provides to its taxpayers.

[331] In this Application, the Minister did what the ITA allowed them to do, which is to seek the Court's authorization to issue a UPR. The ultimate result is that the Court cannot authorize the UPR, leaving the Minister in a position where they cannot respond positively to the ATO request. However, this is an adequate response to the ATO, because the Convention does not require the

Minister to take any other measure, including measures that would be at variance with the ITA. Transferring information in the current context would be at variance with the ITA's requirement of judicial authorization, a safeguard under Article 21(1) of the Convention.

[332] The ruling in this case therefore aligns with the text, context, and purpose of both paragraph 231.2(3)(b) of the ITA and the Convention.

C. The Requirement of an "Ascertainable" Group

[333] The Minister failed to meet the second precondition because the Convention is not implemented within paragraph 231.2(3)(b) of the ITA. The Application is dismissed for that reason alone.

[334] However, should I be wrong in relation to the application of the Convention, it is worth examining whether this Application meets the first precondition, that of whether the Minister has identified an "ascertainable" group.

1) The Minister's Argument: The Target Group Is "Ascertainable"

[335] Australia seeks information on all Shopify merchant stores that have customers with Australian billing addresses for the period from April 1, 2021, to March 31, 2022. Canada understands the merchant stores referenced in the Australian request to mean "the business entities and individuals that hold a Shopify account and use Shopify's platform to operate their online stores" (Tremblay Affidavit at para 9, AR at 14). For ease of reference, these entities and individuals are what the Minister calls "Merchants."

[336] The Minister maintains that "Merchants" are an "ascertainable" group because they share three identifiable characteristics: they "a. hold a Shopify account; b. use Shopify's platform to operate their online stores; and c. have customers with Australian billing addresses" (Applicant's Memorandum at para 39).

[337] More importantly, the Minister claims that Shopify knows the number of Merchants and can provide the requested information.

[338] With respect to the number of Merchants, the Minister relies on the affidavit provided by Ms. Anna Lee, a Shopify Regulatory Analyst who confirmed that "[she had been] informed by Mr. McCambridge [a data scientist at Shopify], and [believed] that, of the Canadian Shopify accounts that have made sales to customers with Australian billing addresses, approximately one percent of these accounts are likely to have total revenues of AUD $75,000 or more for sales to customers with Australian billing addresses" (Lee Affidavit at para 48, RR at 66). On cross-examination, Ms. Lee specified that she "[did not] remember the [exact number of Canadian Shopify accounts that made sales to customers with an Australian billing address] and [did not] remember if it was provided to [her]" (Lee Cross-Examination at 34, AR at 704), and also "did not see the actual report or whatever [the data scientist] researched" (Lee Cross-Examination at 34, AR at 704). Rather, "[she] was just informed of this information through [her] legal counsel" (Lee Cross-Examination at 34, AR at 704).

[339] As to Shopify's ability to provide the requested information, there are contrasting accounts. Shopify has declined to provide information about non-Canadian accounts that have made sales to

Australia, taking the position that two Shopify subsidiaries—Shopify International Ltd. ("Shopify Ireland") and Shopify Commerce Singapore Pte. Ltd. ("Shopify Singapore")—possess and control that information (Lee Affidavit at paras 26–28, RR at 62). However, the Minister maintains that Shopify routinely accesses Shopify Ireland and Shopify Singapore information from Canada through a centralized portal. To this effect, Ms. Lee answered on cross-examination that "there is one form" for the submission of legal requests for information across "all jurisdictions," and that these requests are reviewed by a team of analysts at Shopify (Lee Cross-Examination at 12, AR at 682).

[340] In any event, what lies at the core of the Minister's argument is the notion that the "size" of the group, in and of itself, does not matter. On this point, they cite *Roofmart*'s guidance in advancing that the large or unspecified nature of a group does not necessarily affect the validity of their proposed requirement (*Roofmart* at paras 39–41). The statutory criterion set out in paragraph 231.2(3)(a) is not size-dependent; it does not necessarily become harder to meet as a function of the numerical size of the target group. Nor is the fact that the group may include persons who may be of no interest for the Minister for the purposes of verifying compliance determinative. Parliament has granted the Minister the tools to conduct horizontal assessments of tax compliance, and such assessments will inevitably sweep up unwanted information. The target group is ascertainable despite its breadth.

2) Shopify's Argument: The Target Group Is Not "Ascertainable"

[341] Shopify contends that the Minister has failed to identify an "ascertainable" group, thus failing to fulfil the statutory precondition in paragraph 231.2(3)(a). It supports this contention on three grounds: (1) the Minister provided no evidence that an "ascertainable" group exists; (2) the

Minister's definitions of "Merchants" is unworkable; and (3) the target group is large and overbroad.

a) The Minister Provided No Evidence That an "Ascertainable" Group Exists

[342] Even if the Minister succeeds in clearly defining an "ascertainable" group, Shopify maintains that the Minister has nonetheless failed to provide information on oath to establish its existence in fact. The Minister's evidence is sparse, unsupportive of critical points, and fundamentally ignorant of how Shopify operates and collects information.

[343] For one, according to Shopify, the Court cannot accept much of the Minister's evidence. Contrary to subsection 81(1) of the *Federal Court Rules*, SOR/98-106, Ms. Tremblay's affidavit is not confined to the facts within the affiant's personal knowledge. Rather, it contains inadmissible hearsay evidence that fails to state the source of information and belief. This evidence should be struck.

[344] In support of this claim, Shopify cites specific passages that it finds problematic. Among them is Ms. Tremblay's assertion that "Shopify is a cloud-based, all-in-one e-commerce platform that offers a subscription-based software sales platform to businesses, which provides those businesses with the ability to build and run an online store," and that "Shopify is a Canadian company incorporated under the laws of Canada on September 28, 2004, with a registered address located in Ottawa, Ontario" (Tremblay Affidavit at paras 14–15, AR at 15). Failing to specify how exactly she would know the stated information is a fundamental error that prevents the Court to

assess the evidence for reliability. This error, according to the Shopify, makes the offending passages worthless to the Minister's application.

[345] Moreover, the evidence that Shopify can identify the individuals in the target group is thin: in her affidavit, Ms. Tremblay merely "assumes that Merchants' identities are known to Shopify" (Tremblay Affidavit at para 17, AR at 16). An assumption does not make for an "ascertainable" group, especially when that assumption is refuted by evidence on oath. On this point, Shopify cites the affidavit of Mr. Mani Fazeli, Vice President of Product at Shopify, who claims that the "Canadian corporation Shopify does not possess or control all of the information that the CRA has requested in the Australian UPR," because a portion "of the information is or may be in the possession and control of affiliated corporate entities, depending upon the location of Store Owners that have Australian customers" (Fazeli Affidavit at para 32, RR at 37). He also claims that "[some] of the information requested in the Australian UPR is not available to any corporate entity of Shopify, because Shopify is not required to, and does not, collect or maintain complete information about Store Owners' customers" (Fazeli Affidavit at para 33, RR at 37). The absence of evidence on oath proving that an ascertainable group exists should hinder the Minister's application.

b) The Minister's Definition of "Merchants" Is Unworkable

[346] The Minister's definition is problematic for Shopify insofar as it does not correspond to any known category of Shopify user or business within its data universe. Unless a financial services offering like "Shopify Payments" or "Shopify Checkout" is activated, Shopify does not require its "Store Owners" to provide information about their relationship to the business, meaning that

Shopify has no way of identifying whether the "Store Owner" is "[using] Shopify's platform to operate their online store" (Respondent's Memorandum at para 79). For instance, some account users may be employees or contractors of the business, who cannot refer to the stores as "theirs" because they are not the owner of the business for which the account is held. Other accounts use Shopify's software for purposes other than operating "online stores," and would thus similarly not be captured by the term "Merchants." The Minister's definition is accordingly unworkable.

c) The Target Group Is Large and Overbroad

[347] The Minister's memorandum of argument states that Shopify should be required to disclose "information about business entities and individuals worldwide" (Applicant's Memorandum at para 17). For Shopify, any such requirement would expand the scope of the request beyond that actually requested by the ATO. Indeed, by arguing that the group includes users with a billing address in any country, the Minister expands the scope of the Australian UPR beyond the group for which the Minister asserts that there is a valid purpose, thus creating a broad, heterogeneous group. The Minister has failed to show how information related to the larger generic group is connected to any good faith audit purpose under the ITA (or even under Australian tax legislation if that were permitted).

[348] Further, as indicated by the ATO itself, vendors outside of Australia are only required to register for GST in Australia if their sales to Australian customers total AUD $75,000 or more in any 12-month period (see Tremblay Affidavit at 17, AR at 16). Despite the ATO only requesting information relating to accounts whose sales to Australian customers total more than AUD $75,000, the Australian UPR makes no effort to refine and restrict its request to only seek out that

information. This is different from *Roofmart*, where the Federal Court of Appeal upheld the lower Court's decision that the group was "ascertainable" based on a "total annual purchase requirement" (*Roofmart* at para 38). The group here is not circumscribed in any such fashion and should therefore not be targeted by a UPR.

3) Analysis: The Target Group Is "Ascertainable"

[349] I find that the Minister's target group qualifies as "ascertainable" under paragraph 231.2(3)(a) of the ITA. As discussed above, the target group must be sufficiently clear to allow a third party to respond, because of the risk of contempt under subsection 231.7(4) of the ITA that might result from a failure to comply.

[350] The Minister requests information relating to "Merchants," who are defined in Ms. Tremblay's affidavit as "the business entities and individuals that hold a Shopify account and use Shopify's platform to operate their online stores" (Tremblay Affidavit at para 9, AR at 14). In my view, the term "Merchant" as defined by the Minister is both specific and known to Shopify, such that it allows it to properly identify the scope of the group within which the Minister is seeking information. In that sense, I reject the arguments and evidence of Shopify alleging the contrary.

[351] At paragraph 13 of Ms. Lee and Mr. Fazeli's respective affidavits (RR at 32, 57), Shopify indicates that it uses the terms "Merchant" and "Account Owner" interchangeably to refer to the "Store Owner." The "Store Owner" means "the designated representative of the account that contracts with Shopify under the Subscription Agreement" (Lee Affidavit at para 13, RR at 57). The "Store Owner" also refers to the "Owner of a Shopify account" (Fazeli Affidavit at para 13, RR at 32). Therefore, Shopify itself defines the term "Merchant" as including any "Store Owner"

or "Account Owner" even if, as their own evidence demonstrates, the "designated representative of the account that contracts with Shopify" may not be the actual "owner" of the business, but may be an employee or a third party (Fazeli Affidavit at paras 18(c), 44, 76, RR at 33, 39, 45; Lee Affidavit at para 38, RR at 64).

[352] The Shopify Terms of Service support this finding. At the outset, they indicate that the account holder must "confirm that [they] are receiving any Services provided by Shopify for the purposes of carrying on a business activity and not for any personal, household or family purpose" (Lee Affidavit, RR at 85, Tab 4, Exhibit "B" – "Shopify Terms of Service"). The Terms of Service then indicate that while the "Store Owner" is usually the person signing up for the Shopify Service, "[if] you sign up on behalf of your employer, your employer is the Store Owner responsible for your account" (Lee Affidavit, RR at 87, Tab 4, Exhibit "B" – "Shopify Terms of Service"). In this same vein, "[if] you are signing up for the Services on behalf of your employer, then you must use your employer-issued email address and you represent and warrant that you have the authority to bind your employer to our Terms of Service" (Lee Affidavit, RR at 87, Tab 4, Exhibit "B" – "Shopify Terms of Service"). Lastly, the Shopify Terms of Service also indicate that one or more staff accounts may be created and that the Store Owner may determine the level of access associated to each account—meaning that these accounts remain linked to the Store Owner (Lee Affidavit, RR at 87–88, Tab 4, Exhibit "B" – "Shopify Terms of Service").

[353] In addition, the term "Merchant" is used by Shopify in its own "Guidelines for Legal Requests for information" and is defined as including "businesses who use Shopify's platform or services to power their stores in any capacity" (Lee Affidavit, RR at 170, Tab 4, Exhibit "E" –

"Shopify Guidelines"). I find that Shopify's definition of the term "Merchant" is sufficiently close to the Minister's definition, which is "the business entities and individuals that hold a Shopify account and use Shopify's platform to operate their online stores" (Tremblay Affidavit at para 9, AR at 14), such that Shopify should be able to properly determine the group about whom the Minister is seeking information.

[354] To be clear, the Minister is under no obligation to define the "ascertainable" group according to Shopify's preferred internal nomenclature, nor are they expected to track their vocabulary onto Shopify's terms of service. As long as the identities of those within the target group can be readily made exact or determined with sufficient precision by the Court and the third party, the Minister will have met the legislative precondition in paragraph 231.2(3)(a) and identified a sufficiently clear "ascertainable" group. On the evidence adduced, that is the case here.

[355] Consequently, I find that that the term "Merchant" as defined by the Minister is equivalent to the terms "Merchant," "Store Owner," and "Account Owner," as defined by Shopify, and is sufficiently precise to constitute an "ascertainable" group. The terms "Merchant," "Store Owner," and "Account Owner" relate to and identify the actual "individuals or business entities" that used Shopify's platform to make leases or sales of products or services for their own benefit, and these "Merchants" are known to Shopify. The fact that staff and third parties may also have accounts linked to the "Merchant" or "Store Owner" does not affect this finding, because Shopify is always able to link accounts with the ultimate "Store Owner" or "Merchant," regardless of the fact that it may have actually been opened by an employee. Indeed, the information on the Shopify Account,

as indicated in the Terms of Service, always includes the information that will ultimately identify the "Merchant" as defined by both the Minister and Shopify.

[356] I reject Shopify's contention that the Minister has not provided evidence that an "ascertainable" group exists, and that the definition of "Merchants" is unworkable. First, there is no shortage of evidence in this case, coming both from Ms. Tremblay's affidavit, but also the cross-examination of Mr. Fazeli and Ms. Lee. The evidence clearly demonstrates that Shopify can identify their clients and "Merchants," including specifically those that made sales in Australia, through the activation of Shopify's financial services like "Shopify Payments" or "Shopify Checkout." Therefore, the definition of the term "Merchant" is workable and there is evidence that the group exists.

[357] As a result, I find that the term "Merchant" as defined by the Minister is sufficiently precise to constitute an "ascertainable" group. The group is defined solely as those "Merchants" who are business entities and individuals that hold a Shopify account and use Shopify's platform to operate their online stores for their own benefit and who have made sales to customers with Australian addresses. I also find that the information requested in the Proposed UPR relates only to "Merchants" and not other persons.

[358] Shopify's main contention is that it only has some portion of the information requested, and that the only information that could allow it to properly identify those "Merchants" requires the activation of a financial service such as "Shopify Checkout" or "Shopify Payments" (Fazeli Affidavit at paras 13, 18(b), 22(e), 23–26, 45, 47, 53–58, 60, 65, 70, 74, 78–80, 86–87, RR at 32,

33, 35–36, 39, 40, 41, 43, 45, 46, 47; Fazeli Cross-Examination at 31–34, 40–44, 98, 101–109, 113–126, AR at 65–68, 74–78, 132, 135–143, 147–160).

[359] If that is the case, then Shopify is able to respond to the Minister's Proposed UPR. The ITA only requires a third party to provide information that it possesses. If the information sought by the Minister's Proposed UPR is solely contained in "Shopify Checkout" or "Shopify Payments," then the provision of that information only is acceptable to comply with the Proposed UPR. Shopify is not expected to give what it does not have.

[360] In responding to the UPR, Shopify is also entitled to rely on this Court's past jurisprudence in relation to the term "merchant," and can be satisfied that if it responds with information that is consistent with past UPRs authorized by this Court, its response cannot result in future contempt proceedings.

[361] In this regard, I pause to observe that the term "merchant" was used by the Minister and approved by the Court in both *Helcim* and *Bambora,* though the latter also used the term "vendors." In any event, the use of the term "Merchant," as defined by the Minister (Tremblay Affidavit at para 9, AR at 14), is consistent with the CRA seeking to obtain information on individuals and business entities that actually made revenues and/or profit for their own benefit. This interpretation is further consistent with how the word "merchant" is commonly understood and defined: *Black's Law Dictionary* defines the term as "one whose business is buying and selling goods for profit," and the *Canadian Oxford Dictionary* defines it as "[a] person whose occupation is the purchase

and sale of goods or commodities for profit." There is nothing unseemly in the Minister's use or understanding of the word in this context.

[362] In light of my conclusion in this file, it is worth addressing my finding that the Minister did not establish an "ascertainable" group in File No. T-778-23. Briefly stated, I rejected the target group in File No. T-778-23 because the Minister's inconsistent terminology introduced confusion between various understandings of the word "Merchant," and rendered the definition of the "ascertainable" group diffuse and contradictory. This left Shopify in a conundrum as to what to provide to the Minister in response: a) information on "Merchants"; or b) any individual or business entity "associated with" an account. Providing information on a more restricted category of "Merchants" carried the danger of contempt proceedings; but providing information on any individual or business entity "associated with" an account meant risking a breach of its contractual obligations. There was a second confusion as to whether the UPR only targeted accounts having a Canadian address upon registration, or included all accounts with a Canadian address at any time. The Proposed UPR in this Application does not suffer from any such confusion.

[363] Finally, Shopify argues that the Proposed UPR requests information about business entities and individuals worldwide, and not only those that made sales to Australian customers for a total of AUS $75,000 or more. It thus argues that the Proposed UPR expands the scope of the ATO request beyond what it actually requested.

[364] I disagree. While the ATO request is indeed justified by Australia's GST requirements, the actual wording of the request is not so limited (Tremblay Affidavit, AR at 22, 24, Tab 3.(a), Exhibit

"A" – "Exchange of Information Request from Australia"). Indeed, the ATO wants the information relating to Merchants that have made sales in an amount less than AUD $75,000, perhaps to add the amount of those sales with additional sales made with a different payment system such as PayPal.

[365] As for Shopify's allegation that the Proposed UPR expands the request to Merchants worldwide, when the ATO request is specific to only Shopify Inc. (and therefore presumably only those accounts with addresses in Canada, the USA, or Puerto Rico), the ATO request is unclear in that regard. As suggested, the ATO request could be interpreted as being limited to Shopify Inc. (and the addresses associated with it accordingly). However, interpreting the ATO request as including all Shopify entities worldwide is likewise reasonable on the basis of Australia's justification for requesting the information.

[366] While the ATO request identifies Shopify as "Shopify Inc." and includes an Ottawa address, the evidence provided by Ms. Lee demonstrates that Shopify Inc. controls Shopify Singapore and Shopify Ireland and that those three entities contract together with merchants worldwide (Lee Affidavit at paras 25–28, RR at 61–62). Shopify Inc.'s 2022 Annual Information Form also states that the term "Shopify" "[refers] to Shopify Inc., and its consolidated subsidiaries" (Fazeli Affidavit, RR at 52, Tab 3.(a), Exhibit "A" – "Shopify Inc. 2022 Annual Information Form"). By identifying "Shopify Inc." in its information request, the ATO could therefore include all Shopify entities under Shopify Inc.'s primary corporate structure.

[367] The evidence further demonstrates that Shopify itself has interpreted the ATO request consistently with the Minister's interpretation. In his affidavit, Mr. Fazeli indeed notes that "the [Australian UPR] request is not limited by the location of the 'Shopify stores', such that these may be in any jurisdiction in which Shopify operates" (at para 31, RR at 37; see also para 88, RR at 47). That interpretation is also consistent with Shopify's "Guidelines for Legal Requests for Information," which indicate that all requests for all jurisdictions are made through a centralized "Legal Access Request Portal" and dealt with by the same three Regulatory Analysts (Lee Affidavit, RR at 170, Tab 4, Exhibit "E" – "Shopify Guidelines"; Lee Cross-Examination at 9–13, 26–29, AR at 679–683, 696–699; see also Lee Affidavit at paras 6, 29–33, RR at 55, 62–63).

[368] Clearly, upon receiving the ATO request, both the Minister and Shopify interpreted the request as applying to all Shopify entities. Consequently, Shopify's claim that the Proposed UPR *expands* the scope of the ATO request to worldwide Shopify Merchants is not supported by the evidence and must be dismissed.

D. The Exercise of Residual Discretion

[369] As stated, even when the Minister meets the statutory preconditions, judicial discretion remains an essential component of the authorization process under subsection 231.2(3) (*Derakhshani* at para 19; *RBCLIC* at paras 23, 30; *Rona FCA* at para 7; *Roofmart* at para 56). Although I do not find the Minister to have met the precondition in paragraph 231.2(3)(b), they have otherwise met the first precondition under paragraph 231.2(3)(a). Should I be wrong about paragraph 231.2(3)(b), it is worthwhile to consider whether the evidence favours the authorization of the Proposed UPR.

1) The Minister's Argument: It Is in the Interests of Justice to Authorize the Proposed UPR

[370] The Minister claims that it is appropriate and in the interests of justice for this Court to exercise its discretion to authorize the Proposed UPR.

[371] At the outset, the Minister cautions this Court against revisiting Parliament's policy choices with respect to privacy. Taxpayer privacy is a delicate matter to which Parliament is sensitive, having notably enacted section 241 of the ITA to prohibit the disclosure of records and information gathered by the Minister to other persons unless it is for the purposes of administrating or enforcing the ITA. While Parliament has put restrictions on the disclosure of taxpayer information, the Minister remains entitled to collect records, including those flowing from an online business. The broader public interest of enforcing the tax system outweighs the taxpayers' private and commercial interests in not disclosing their personal information to the Minister (*eBay*, 2008 FCA 141 at para 39). The Minister submits that they may accordingly require Shopify to produce information, whether in writing or in any other form, including information stored on a server.

[372] While Shopify cites several internal policies and protocols (many of which concern user privacy) to argue that the proposed requirement is too burdensome upon the company (see e.g. Lee Affidavit at paras 40–49, RR at 64–66), the Minister reiterates that Parliament has already considered taxpayer privacy and set out a coherent regime that balances restrictions on disclosure with the Minister's broad information gathering powers. For large corporations like Shopify, the costs associated with the Minister's requirement are part of its basic public duties (*Tele-Mobile Co v Ontario*, 2008 SCC 12 at paras 50, 57 [*Tele-Mobile*]; *Deegan* at paras 60–63). Shopify's internal

processes are not a basis upon which this Court should circumscribe the Minister's information gathering powers.

[373] The Minister is not asking Shopify to provide information that it does not have. They are merely asking for information that Shopify can "access" and that is relevant to the requested items. This notion of "access" is important, because Shopify can access worldwide information from Canada, which indicates that Shopify can access information on all Merchants. To this effect, the Minister maintains that "possession and control" of the information is not the relevant standard in this case. The fact that Shopify Ireland and Shopify Singapore may be in "possession and control" of some of the requested information is not relevant, what is relevant is the fact that it can be accessed in Canada: "it makes no sense [to] insist that information stored on servers outside Canada is as a matter of law located outside Canada [because] it has not been downloaded. Who, after all, goes to the site of servers in order to read the information stored on them?" (*eBay*, 2008 FCA 348 at para 48).

2) Shopify's Argument: The Proposed UPR is Unfeasible and Disproportionate

a) Judicial Discretion Exists to Prevent Fishing Expeditions

[374] Shopify argues that judicial authorization, with its inherent discretion, specifically exists to limit and govern fishing expeditions. Such a scheme would lose its meaning if it did not apply to a requirement like this, which is not tailored to collect information about individuals who the ATO actually intends to target—amounting to nothing more than "a general survey seeking to determine whether these [individuals] are complying with the [relevant law]," which is the very meaning of a fishing expedition (*Hydro-Québec #1* at para 36).

b) Shopify Is Unable to Meet the Minister's Deadline

[375] In *PayPal*, Justice Gascon considered whether it was feasible for the third party subject to a UPR request to provide the requested information (at paras 5–6). Shopify asks this Court to consider "feasibility" as a relevant factor in its discretion, arguing that the proposed requirement will be impossible to satisfy within forty-five days. In short, this Court should not ask Shopify to do the impossible, especially with the spectre of contempt hanging over it pursuant to subsection 231.7(4) of the ITA.

[376] In File No. T-778-23, Shopify provided evidence to the Court purportedly demonstrating that it would take eight full-time working years to comply with the Minister's proposed UPR. It does not provide such specific evidence in this case, instead relying on its submissions in File No. T-778-23 to substantiate its claims. Ms. Lee relies on these same reasons in stating that "[she does] not believe [the manual review of the information to be disclosed to the Minister] would be feasible" (Lee Affidavit at para 48, RR at 66). Shopify maintains that while there are fewer accounts at issue than in the Canadian Application, it would still be impossible to respond to the Proposed UPR within the allotted time.

[377] Shopify's claim with respect to feasibility runs into the objection that, like any large corporation, the costs associated with the Minister's requirement are part of Shopify's basic public duties. In raising this very objection, the Minister partially relies on *Tele-Mobile*, a decision in which the central issue was whether a third party subject to a production order under the *Criminal Code*, RSC 1985, c C-46, could receive financial compensation for production costs. Shopify answers this objection by distinguishing the present case from *Tele-Mobile*, mostly because the

burden of compliance in the latter was considerably lower. The two production orders in *Tele-Mobile* concerned, respectively, call data records of a single individual, and call data records relating to several telephone numbers as part of a drug investigation (*Tele-Mobile* at paras 5–6). The present case concerns sensitive information about hundreds of thousands (if not millions) of online accounts.

[378] Shopify argues that major differences in scale render *Tele-Mobile* somewhat inapposite in this case. Indeed, the Court held in *Tele-Mobile* that even in the criminal context, there can be exemption from production orders that present an "unreasonable burden" (at para 63). In other words, even if compliance with the order is a public duty, a judge may refuse to grant the order because the financial burden associated with compliance is unreasonable.

c) It Is Impossible for Shopify to Comply with the Australian UPR

[379] Shopify submits that it simply cannot comply with the Proposed UPR, for one of two reasons: (1) it does not collect or (2) routinely purges the information sought by the Minister. This argument is related to but distinct from its point on feasibility. The claim here is not that it would be unreasonably burdensome for Shopify to comply with the requirement; it is rather that compliance is impossible, and that this Court should not authorize a UPR request when it knows in advance that Shopify cannot comply. Shopify's claim is that it only has information for Merchants that activated a financial service such as "Shopify Checkout" or "Shopify Payments," but not all the information requested. Moreover, Shopify purges all the information two years after an account becomes inactive. Yet the Minister has not proposed to modify the UPR to allow for such an outcome, and thus reduce the risk of non-compliance for Shopify.

[380] Shopify submits that it is not for this Court to remedy the shortcomings in the Minister's Application. While the Court's residual discretion allows it to authorize a requirement subject to any conditions that it deems appropriate, only the Minister can discharge their evidentiary burden with respect to the statutory preconditions. More should be required from the Minister before Shopify is required to disclose this volume of data.

d) Foreign Laws Apply to Data Held by Shopify's Foreign Entities

[381] Shopify claims that it would need to consider the implications of any foreign data protection laws before disclosing the requested information to the Minister. This is because it does not possess all user data. Rather, Store Owners that have supplied an address of record outside of Canada, Puerto Rico, and the U.S. contract with either Shopify Singapore or Shopify Ireland, and their data is held by those foreign entities. For those users, their data is subject to various foreign laws and regulations related to data protection and privacy—including laws that regulate the collection, use, and disclosure of personal information.

[382] The Minister provided no evidence that they considered the limitations included in the European Union's General Data Protection Regulation, which applies to data held by Shopify Ireland, and Singapore's Personal Data Protection Act, which applies to data held by Shopify Singapore. Both enactments affect Shopify's ability to produce information about users worldwide and would need to be considered in this case.

[383] Moreover, the Minister has not made Shopify Singapore and Shopify Ireland parties to this Application. Instead, the Minister ignores the underlying foreign data protection and privacy laws

that restrict disclosure by these Shopify entities regardless of the Minister having been advised of the same. The Minister should have been more diligent in preparing this application, and the Court should not authorize it.

3) Analysis: The Evidence Favours the Authorization of the Proposed UPR

[384] I am satisfied that it would have been appropriate and in the interests of justice for this Court to exercise its discretion to authorize the Proposed UPR, had the Convention been implemented within paragraph 231.2(3)(b) of the ITA.

a) The Proportionality and Feasibility of the Proposed UPR

[385] In *Rona FC*, *PayPal*, and *Bambora*, this Court considered the feasibility of a UPR request within the exercise of its discretion. I will do the same in this Application, in light of the principles elaborated in paragraphs 91–113 of this decision.

[386] Shopify has not demonstrated that the Proposed UPR is unfeasible. Ms. Lee, after noting that each account requires between five and ten minutes to manually review (Lee Affidavit at para 45, RR at 65), notes that "approximately one percent" of accounts that have made sales to customers with Australian addresses "are likely to have revenues of AUD $75,000 or more" (Lee Affidavit at para 48, RR at 66). However, there is no evidence as to how many accounts need to be manually reviewed. The only evidence adduced by Shopify is that there are hundreds of thousands of active accounts with a Canadian address (Fazeli Affidavit at para 57, RR at 41; Lee Affidavit at paras 20, 40, RR at 60, 64). That evidence related to the Canadian UPR at issue in File No. T-778-23 which, as discussed, was much broader. The evidence relating to the number of Merchants having made sales to customers with an Australian address, and subject to the Proposed

UPR in the File No. T-777-23, is much narrower and does not reveal whether the number of "Canadian Shopify accounts that have made sales to customers with Australian billing addresses" is in the hundreds, thousands, or hundreds of thousands, leaving the Court with no evidence as to whether any response by Shopify is feasible or not, even if five to ten minutes are required for the manual verification of each account.

[387] The only evidence adduced is that Shopify cannot provide a response within forty-five days as required (Lee Affidavit at paras 24, 48–49, RR at 61, 66). Yet the fact that a third party cannot respond within a timeline provided by CRA is not sufficient for the Court to exercise its discretion to refuse to authorize a UPR. Instead, as held in *Rona FC*, the Court should retain jurisdiction to extend the time to respond on motion from the third party, should Shopify be incapable of producing the information in the timeframe initially set.

[388] Consequently, the evidence does not demonstrate that the Proposed UPR is disproportional or unfeasible. To the extent that Shopify cannot respond within the allotted time, Shopify may request an extension by motion, along with evidence as to why it was not able to provide the information on time and how much more time it requires to comply.

[389] Moreover, in direct comparison with the proposed UPR in File No. T-778-23, the Minister has brought something far more limited to the Court, only requesting (i) the "Merchant" store trading name; (ii) store legal name; (iii) contact names; (iv) contact number; (v) email address; (vi) postal code; (vii) '.myshopify.com' URL; and (viii) total revenue for sales. In the absence of more

detailed evidence to the contrary, the Court cannot find that Shopify cannot or should not provide this information to the Minister.

[390] Though not determinative of the exercise of my residual discretion, I note that this Court has authorized UPRs of a similar scope and nature in past cases, notably in *eBay*, 2008 FCA 348, *Roofmart*, *PayPal*, *Bambora*, *Helcim*, and *Hydro-Québec #2* (where the Minister sought the merchants' names, business or operating names and number, contact information, banking information, and monthly transaction amounts).

[391] Most importantly, these other UPRs did not require disclosure of the other items requested in File No. T-778-23, namely: (i) the names of any other individuals or business entities "associated with" the account; (ii) IP addresses; (iii) payment gateways/processors used and/or listed; (iv) KYC documentation; or (v) dates when an account was activated or closed. The Proposed UPR in this Application, contrary to File No. T-778-23, also does not make a distinction as to whether the Canadian address was included on the account "when registering"; and does not request Social Insurance Numbers [SINs], dates of birth, or dates when a Shopify account was activated or closed.

[392] On this last point, two elements of nuance are perhaps warranted, for greater clarity.

[393] First, the distinction I make between these other cases and File No. T-778-23 is not meant to encourage or discourage the Minister from seeking out a particular range of information in its future UPR requests. The Minister is entitled to seek out what they want to seek out, provided they

fulfil the legislated preconditions in subsection 231.2(3) of the ITA. In other words, these other UPRs did not seek out the information sought by the Minister in File No. T-778-23 because they were different files. The Minister can seek out information that it has never sought before, but it must respect the framework established in the ITA.

[394] Second, the notion of "proportionality" should not be understood as an additional requirement to be met by the Minister under subsection 231.2(3) of the ITA. In this case, the evidence before the Court has made it such that the availability of the information sought, and the burden required to obtain it, have become relevant in the Court's exercise of discretion. Yet it might not always be the case. In a fact-driven, evidence-based process, the parties in this case have presented relevant evidence and arguments on the broad proportionality of the Proposed UPR, and the Court has accordingly considered it. However, there is no *a priori* requirement to do any kind of "proportionality analysis" within the UPR framework, or the Court's residual discretion. It is a case-specific determination. I have determined that the issue was relevant in this case, and that the Proposed UPR here is proportional and not abusive.

b) International Privacy Laws

[395] Shopify argues that the Court should reject the Proposed UPR because the Minister failed to consider the implications of foreign data protection laws on Shopify's ability to respond.

[396] I reject that argument.

[397] First, Shopify did not provide any evidence, expert or otherwise, as to what specific foreign provisions it would be breaching (let alone any commentaries or case law interpreting these provisions) if any information were transmitted to the CRA in response to a UPR authorized by the Court. Instead, Shopify merely identified five statutes applying in different jurisdictions, summarily noting that those statutes limit how information may be collected, protected, and disclosed, without any legal argument as to how those statutes would apply to the information relevant to this Application (Fazeli Affidavit at para 98, RR at 49; Lee Affidavit at paras 27–28, RR at 62). The application of foreign law is a question of fact, normally established by expert evidence (*Nevsun* at para 97; *IATA* at para 65).

[398] Second, in her affidavit, Ms. Lee identified herself as one of three Regulatory Analysts at Shopify that have delegated authority to access Shopify data to respond to legal information requests (at paras 5–6; RR at 55), and in her cross-examination, noted that all legal requests for information are made through one single form and centralized portal for all jurisdictions (Lee Cross-Examination at 9–13, 26–29, AR at 679–683, 696–699; see also Lee Affidavit at paras 6, 29–33, RR at 55, 62–63). Ms. Lee also admitted under cross-examination that she has personally responded to legal information requests concerning accounts with addresses in countries serviced by any of the three Shopify entities—Shopify Inc. (Canada) (for addresses located in Canada, the USA or Puerto Rico), Shopify Commerce Singapore Pte. Ltd. (Singapore) (for addresses located in the Asia Pacific region, including Australia, New Zealand, China, Japan, Singapore), and Shopify International Limited (Ireland) (for addresses located in Europe, the Middle East and Africa, South America, the Caribbean, or Mexico) (Lee Affidavit at paras 25–28, RR at 61–62; Lee Cross-Examination at 26–29, AR at 696–699).

[399] Finally, Shopify's own Transparency Report (Lee Affidavit, RR at 74, Tab 4, Exhibit "A" – "2022 Transparency Report") demonstrates that Shopify positively responded and did disclose information in jurisdictions serviced by each of the three Shopify entities and within which the alleged "foreign data protection laws" would presumably apply.

[400] Consequently, I find that Shopify has not demonstrated that foreign data protection laws are an impediment to the disclosure of information to the CRA, under a UPR authorized by this Court. There is no evidence that Shopify would breach any foreign statute should it respond and disclose information following a "valid legal request," as demonstrated by its own positive response to requests for disclosure in its Transparency Report (Lee Affidavit, RR at 74, Tab 4, Exhibit "A" – "2022 Transparency Report"). Indeed, the evidence demonstrates that while disclosure may have to comply with foreign laws, Shopify is able to comply and has disclosed information in the past without breaching the applicable statutes. No evidence or legal arguments have been adduced to demonstrate that a Shopify disclosure to the CRA following the authorization of the Proposed UPR would be in breach of any of those applicable statutes.

[401] Moreover, this Court has already ruled that information located on a foreign-based server may also be "in Canada" if it can be accessed electronically from Canada, and that its disclosure can be compelled under section 231.2 by virtue of its Canadian location (*eBay*, 2008 FCA 348 at paras 38–53; see also *Ghermezian* at para 99; *Shokouhi* at paras 21–26).

[402] In this case, Ms. Lee is located in Canada and has access to legal information requests for disclosure in all jurisdictions. She has even responded to such requests before. For these reasons,

I find that Shopify has access to the information from Canada and can be compelled to disclose it under subsection 231.2(3), should I be wrong in relation to the application of the Convention in paragraph 231.2(3)(b) of the ITA (Lee Affidavit at paras 1, 25–28, RR at 54, 61–62; Lee Cross-Examination at 26–29, AR at 696–699).

c) Unavailable Information

[403] The evidence demonstrates that Shopify does not have some of the information sought by the Minister. Given potential contempt proceedings under subsection 231.7(4) of the ITA, the Court should not authorize UPR requests on items for which the evidence demonstrates that no information exists.

[404] As conceded by the Minister, Shopify is not expected to give what it does not have. For instance, because the evidence demonstrates that Shopify purges information two years after an account has become inactive, Shopify would not be obliged to provide that purged information. In File No. T-778-23, Shopify also adduced evidence that, for example, it does not collect some other information, such as "store type" and SINs (subject to potential contradicting evidence). As such, the Court may in its discretion strike items for which the evidence demonstrates that the third party cannot respond, in order to satisfy the third party that no contempt proceedings may be brought against them on these items.

[405] In this particular Application, subject to the fact that Shopify may have purged some information and only collects certain forms of information on Merchants that have gone through

"Shopify Checkout" or "Shopify Payments" (Fazeli Affidavit at para 61, RR at 42–43), there is no evidence that Shopify is unable to provide any specific item.

[406] Instead of exercising my discretion to strike specific items from the Proposed UPR, as I would have done in File No. T-778-23 had it been authorized, the Court would retain jurisdiction to adjudicate any motion in which, on the basis of the evidence, Shopify can demonstrate that it cannot implement the UPR and respond to the Minister's request on a particular item. As conceded by the Minister, Shopify is only obliged to disclose the information that it has.

[407] Of course, this last point is without practical consequence to the outcome of this decision, as I have found that the Minister's Application has not met paragraph 231.2(3)(b) of the ITA, which precludes me from authorizing the Proposed UPR.

E. The Privacy Commissioner Special Report

[408] Shopify seeks the Court's approval to file the Office of the Privacy Commissioner of Canada's Special Report to Parliament, *Investigation of unauthorized disclosures and modifications of personal information held by Canada Revenue Agency and Employment and Social Development Canada resulting from cyber attacks* (February 15, 2024) [Privacy Commissioner Special Report] in evidence. Shopify argues that the Privacy Commissioner Special Report should be considered by the Court due to the heightened risk to the public interest that arises from disclosure of sensitive information, because the CRA is an attractive target for cyber-attacks.

[409] Shopify attempted to introduce the Privacy Commissioner Special Report through the cross-examination of the Minister's affiants, instead of using one of its own affiants, or introducing it in any other valid way. The Minister objected to questions made to its affiants relating to the Privacy Commissioner Special Report on the basis of relevance. However, answers were permitted under Rule 95(2) of the *Rules*, where the affiants responded that they had not seen the Privacy Commissioner Special Report and had only passing awareness of prior CRA hacking. The Minister therefore argues that since the affiants were not aware of the Privacy Commissioner Special Report, it cannot be introduced into evidence through their cross-examination. Nevertheless, the Minister is of the view that the Privacy Commissioner Special Report is not relevant in this case.

[410] In the circumstances, I do not need to rule on this motion.

[411] Indeed, the Privacy Commissioner Special Report cannot support Shopify's argument that a specific data-breach in 2020 jeopardizes the relevant privacy interests here. The Privacy Commissioner Special Report is not conclusive evidence that the CRA's system is compromised at this time and may affect the data obtained in this case. Moreover, there is no evidence that the CRA system is susceptible to systemic hacking, so as to affect *any* information obtained by the CRA.

[412] While the Privacy Commissioner Special Report could have been relevant if it had been properly introduced into evidence, I agree with the Minister that it would not affect the validity of the Proposed UPR as it does not demonstrate any specific privacy issues related to hacking at this time.

V. Costs

[413] Shopify is presumptively entitled to costs because it was successful in this Application (*Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 30 [*Allergan*]; *Crocs Canada, Inc v Double Diamond Distribution Ltd*, 2023 FC 184 at para 1 [*Crocs Canada*]).

[414] Shopify seeks an order for a lump sum cost award equal to 30% of the solicitor-client costs plus 100% of disbursements. Shopify alleges that the costs incurred exceed $1,000,000 inclusive of both File Nos. T-777-23 and T-778-23, with 58% of the costs allocated to this Application and 36% to the latter, the remaining 6% being for the refusals motion on the issue of the Privacy Commissioner Special Report. Shopify cannot obtain costs for the refusals motion for the reasons described above.

[415] Shopify did not produce any evidence to substantiate their legal costs. A review of the evidence demonstrates that most of the evidentiary record related to File No. T-778-23, and not this Application. There is no explanation as to why this Application would have required such high legal costs as compared to File No. T-778-23, especially considering that Shopify's argument in this Application rested more on arguments of law than discrete factual claims. While I agree that the legal issues were complex, I find that the amount of legal costs invested was disproportional in the circumstances.

[416] Rule 400(1) of the *Rules* provides that the application judge has full discretion when awarding costs, including the decision to award solicitor-client costs or a lump sum amount. As stated by Justice Favel in *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 1492 at

paragraph 23 [*McCarthy*]: "[this] discretion must be exercised judicially. The exercise of awarding costs involves an inescapable risk of arbitrariness and roughness on the part of the Court (*Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842, aff'd 2013 FCA 220 at para 9). This risk is tempered by the applicable legal principles."

[417] Shopify relies on Rule 400(3), which provides:

(3) In exercising its discretion under subsection (1), the Court may consider (a) the result of the proceeding; […] (c) the importance and complexity of the issues; […] (g) the amount of work; (h) whether the public interest in having the proceeding litigated justifies a particular award of costs; […] (o) any other matter that it considers relevant.	(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants : a) le résultat de l'instance; c) l'importance et la complexité des questions en litige; g) la charge de travail; h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens; o) toute autre question qu'elle juge pertinente.

[418] The guiding principles for costs orders were summarized by the Court in *Canadian Pacific Railway Company v R*, 2022 FC 392 at paragraphs 23–26 [*Canadian Pacific*] (see also *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 10 [*Nova*]). Those principles are rooted in "[the Court's] full discretionary power over the amount and allocation of costs," and the notion that "[costs] customarily provide partial compensation […] representing a

compromise between compensating the successful party and burdening the unsuccessful party" (*Canadian Pacific* at para 23).

[419] As noted by Chief Justice Crampton in *Allergan* (at para 19), the Court must also be mindful of the three principal objectives underlying a costs award, namely to (i) provide indemnification for costs associated with successfully pursuing a valid legal right or defending an unfounded claim, (ii) penalize a party who has refused a reasonable settlement offer, and (iii) sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious (see *Canadian Pacific* at para 24).

[420] Broadly speaking, a cost award should "further the objective of securing the 'just, most expeditious and least expensive determination' of proceedings" (see *Nova* at para 11 and *Allergan* at paras 22–23, both citing Rule 3 of the *Rules*; see also *Canadian Pacific* at para 25), and a lump sum should be considered when the *Tariff* rate "bears little relationship to the objective of making a reasonable contribution to the costs of litigation" (*Canadian Pacific* at para 26, citing *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc (CA)*, 2002 FCA 417 at paras 9–10).

[421] As explained in *Crocs Canada* at paragraph 10 (citing *Loblaws Inc v Columbia Insurance Company*, 2019 FC 1434 at para 15), lump sum cost awards usually fall within a range of 25% to 50% of the actual legal costs of the successful party (see also *Nova* at para 17).

[422] In terms of evidence required to award a lump sum in costs, Justice Favel held in *McCarthy* (at para 32) that evidence of the actual legal costs is not necessary. However, to avoid "[plucking

costs] from thin air" (*Shirt v Saddle Lake Cree Nation*, 2022 FC 321 at para 107, citing *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at para 33 and *Nova* at para 15), the Court may rely on Bill of Costs calculations provided by the parties based on elevated costs of Column III and Column V of *Tariff B*, or similar evidence of fees and expenses provided by the parties.

[423] The Minister provided the Court with its *Tariff B* cost outline to support its costs submissions. Shopify did not provide a Bill of Costs outline, nor any other evidence justifying its alleged $1,000,000 amount in legal costs.

[424] Shopify relies mainly on Rules 400(3)(c), 400(3)(g), 400(3)(h), and 400(3)(o) and argues that the lump sum it seeks is justified because the Application was important and complex for the parties. This case involved a considerable amount of work from sophisticated litigants, and by the Minister's own admission, was "important" because it would serve as a test case for further applications under subsection 231.2(3). Further, Shopify argues that it identified the deficiencies in the Minister's Application to them, but that the Minister decided to proceed instead of withdrawing and amending the Proposed UPR, and seeking the authorization of the Court on a new application as was done following *Hydro-Québec #2*.

[425] The Minister responds that Shopify's cost submissions are unreasonable and lack consistency with the Court's prior UPR cost awards, where either no costs or *Tariff B* costs were awarded. The highest amount ever awarded in a UPR is $30,000. The Minister further argues that the Court should avoid the arbitrariness resulting from Shopify's proposed award, which lacks consistency overall (see *Canada v Bowker*, 2023 FCA 133 at paras 26–32).

[426] Taking into account the legal principles set out above, the submissions of the parties, and the discretion afforded to me under Rule 400, I order that the Minister pay lump sum costs to Shopify in the amount of $45,000, all inclusive. This is a reasonable amount, when considering all of the circumstances of this matter as set out above.

[427] First, I agree with Shopify that a *Tariff B* award is insufficient. In this regard, the Minister has filed a draft Bill of Costs proposing a cost award of up to $15,000 for each Application, indicating that this amount would approximate a default *Tariff B* award. I accept the Minister's amount as approximative for a *Tariff B* cost award.

[428] For this particular Application, Shopify indicates that its costs amount to about 58% of its total legal costs, evaluated at about $1,000,000. Its legal costs for this Application are therefore about $580,000. An award of 30% of that amount represents $174,000. Shopify has filed no draft Bill of Cost nor any other evidence to justify its request.

[429] I find Shopify's request unreasonable. While Shopify did demonstrate that the Convention could not ground the Minister's request for a UPR, Shopify's arguments with respect to the "ascertainable" group and the Court's discretion were not substantiated. Also, I find that a good proportion of the costs incurred related to the factual and evidentiary record that Shopify built to defend against the Application in File No. T-778-23, evidence that was partially dismissed in this Application. In an award for increased costs, the Minister should not have to compensate Shopify for a high amount of legal costs when much of those costs were disproportional.

[430] No criticism is advanced toward Shopify's legal strategy; it was entitled to oppose the Minister's UPR request as it did. However, Shopify made the choice of imposing a stringent defence and including a detailed evidentiary record on issues for which it was not successful, and this choice results in both parties having to bear their own costs, to some extent. As held in *Gordon v Altus*, 2015 ONSC 6642 at paras 12, 15, parties that "go to the wall" must expect to have to absorb much of their significant costs, which is the case for Shopify in this Application.

[431] For these reasons, I find that the lump sum requested by Shopify is unreasonable. The legal fees proposed by Shopify are too high in the circumstances and have not been substantiated. Nevertheless, I recognize that *Tariff B* costs of about $15,000 are also disproportional because of the complexity and importance of the legal issues, and sheer scope of the evidence. I therefore rule that a lump sum of an amount of $45,000 all inclusive (which is three times the amount that would have resulted out of a *Tariff B* cost award) is reasonable in the circumstances. An amount of $45,000 all inclusive better represents 30% of a cost award that ought to have been required to defend against this Application and its discrete legal issue relating to the implementation of the Convention into Canadian law.

VI. Conclusion

[432] The Convention has not been incorporated into subsection 231.2(3) of the ITA. The Minister has accordingly failed to demonstrate that the UPR can be authorized by the Court, because it was not "made to verify compliance […] with any duty or obligation under [the ITA]" as required under paragraph 231.2(3)(b).

[433] The Application is dismissed with costs in an amount of $45,000, all inclusive.

ORDER in T-777-23

THIS COURT'S ORDER is that:

1. The Application is dismissed;

2. Costs in an amount of $45,000 are ordered in favour of Shopify.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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