Docket: 2021-1171(GST)G

BETWEEN:

FUTURE ELECTRONICS INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 24, 25, 26, 2023, in Montréal, Quebec.
Amended appeal heard on February 15 and 24, 2023, in Ottawa, Ontario.
Amended appeal filed on November 13, 2023, in Montréal, Quebec.
Written submissions filed on September 29 and November 13, 2023.
Submissions heard at the hearing on February 12, 13, and 14, 2024, in Montréal, Quebec.

Before: The Honourable Justice Sylvain Ouimet

Appearances:

Counsel for the Appellant:	Dominic C. Belley Jonathan Lafrance Mareine Gervais-Cloutier Juliana Succès
Counsel for the Respondent:	Huseyin Akyol Vasil Naydenov

ORDER

In accordance with the reasons provided herein, the Court:

1. GRANTS Future Electronics' motion for the issuance of a permanent confidentiality order;

2. ORDERS that the interim confidentiality order be replaced by this permanent confidentiality order;

3. ORDERS that the original transcript of the hearing be retained in the Court record, along with a copy of this order, to be accessible solely to the Court and its personnel, the involved parties and their counsel, and the Agence du revenu du Québec;

4. ORDERS that the copy of the transcript, in which the information described in Annex A has been redacted by the parties, and that was entered in the Court record on November 14, 2023, for the hearings of January 24 and 26, 2023, and on November 27, 2023, for the hearing of January 25, 2023, be accessible to individuals beyond those mentioned earlier;

5. ORDERS that, if a person other than the parties, their counsel, and the Agence du revenu du Québec hire a stenographer to produce the hearing transcript, the confidential information described in Annex A be redacted by the official stenographer designated to produce the transcript;

6. IMPOSES upon the Court clerk and any official stenographer to take all necessary measures to ensure compliance with this order;

7. WITHOUT costs.

Signed at Ottawa, Canada, this 28th day of May 2024.

"Sylvain Ouimet"

Ouimet J.

Translation certified true
on this 17th day of June 2024.

Romy Ghattas

Citation: 2024 TCC 77
Date: 20240528
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REASONS FOR ORDER

Ouimet J.

I. INTRODUCTION

[1] On January 24, 2023, during the trial and pursuant to section 16.1 of the *Tax Court of Canada Rules (General Procedure)*[1] (the "Rules"), Future Electronics Inc. ("Future Electronics") brought a motion for a permanent confidentiality order. The initial motion sought to seal certain documents recorded in the Court record to maintain their confidentiality, as well as redact certain information contained in the testimony of Steven Adams ("Mr. Adams") recorded in the trial transcripts to keep them confidential.

[2] At the opening of the trial, the Court issued an interim confidentiality order orally. Pursuant to this order, the entire contents of the Court record were temporarily sealed, excluding pleadings. The temporary order remained in force until the Court could render a permanent order, a practice typically carried out for practical reasons following the trial's conclusion. That was done in this case.

[3] On February 10, 2023, during a teleconference, Future Electronics amended its motion to narrow its scope. According to the motion, Future Electronics was solely requesting that certain information recorded in the trial transcripts from

[1] SOR/90-688a.

Mr. Adams's testimony be kept confidential. The presentation of the motion continued during a second teleconference held on February 15, 2023.

[4] On February 23, 2023, during a third teleconference, Future Electronics once again amended its motion to further narrow its scope. Future Electronics requested that the Court issue a permanent confidentiality order to maintain the confidentiality of certain information recorded in the trial transcripts. The information in question includes:

1. The name of its suppliers and clients;

2. Information regarding its business model as well as details concerning its commercial partnerships; and

3. The personal addresses of three witnesses who testified during the trial.[2]

To this end, Future Electronics requested that the excerpts from the trial transcripts containing this information be redacted.

[5] On April 21, 2023, at the Court's request, Future Electronics furnished a copy of the excerpts from the trial transcripts wherein the information delineated in paragraph 4 above had been redacted.

[6] On August 31, 2023, the Court requested that the parties submit written submissions regarding the motion. The Court also requested that Future Electronics review the redaction of the transcripts excerpts that were provided on April 21, 2023, as it appeared inadequate in light of the submissions made on February 23, 2023.

[7] On September 29, 2023, Future Electronics sent the Court its written submissions. In these submissions, Future Electronics contends as follows:

- The issue in the appeal is to determine whether the assessment of GST by the Minister of National Revenue in relation to the operation of the cafeteria at the headquarters of Future Electronics was well founded. More specifically, it was to determine whether employees received a taxable benefit when using the cafeteria.

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[2] Transcript of the telephone conference on February 23, 2023.

- According to Future Electronics, no benefit is conferred to its employees regarding their use of the headquarters cafeteria.

- The Minister of National Revenue erroneously assessed GST in relation to what he claims to be a cafeteria benefit for the following reasons:

  1. Lack of a significant price difference between meals provided at the cafeteria and similar meals available elsewhere.

  2. The pivotal role the cafeteria plays in its business model and financial performance. In order to substantiate its theory of causation, Future Electronics must provide evidence of certain core elements of its business model as well as its commercial strategies, including the names of certain suppliers and clients. According to Future Electronics, this information is confidential. Furthermore, in an extremely competitive international market, Future Electronics zealously and legitimately protects this information.

  3. If this information were disclosed to the public (and thus accessible to its competitors) during the trial, Future Electronics would incur significant harm.

[8] On September 29, 2023, Future Electronics submitted to the Court a new copy of the trial transcripts with the proposed redactions.

[9] On October 6, 2023, His Majesty the King ("HMTK") submitted its written submissions to the Court. In these submissions, HMTK contends as follows:

1. In its written submissions, Future Electronics does not mention the reasons why the personal addresses of the witnesses should be kept confidential.

2. Future Electronics redacted the name of the company for which one of the witnesses worked during the years 1986 and 1987. Future Electronics did not request that this information be kept confidential in its motion.

3. Future Electronics did not mention the applicable law regarding the confidentiality order for the names and addresses of the witnesses.

[10] On October 13, 2023, the Court concluded that Future Electronics' submissions made on September 29, 2023, were inadequate. The Court has asked Future Electronics to amend its motion in order to address the following points:

1. The reason(s) for maintaining the confidentiality of the personal addresses of the trial witnesses;

2. The reason(s) for invoking section 16.1 of the Rules to support the motion, particularly as it pertains solely to excerpts from the trial transcripts;

Furthermore, the Court has requested that Future Electronics provide a new copy of the excerpts from the trial transcripts with the proposed redactions in order to comply with the Court's directives.

[11] On November 13, 2023, Future Electronics submitted to the Court an amended motion, new written submissions, and a new copy of the redacted excerpts from the trial transcripts. In its motion, Future Electronics requested that the Court issue a permanent confidentiality in order to keep the following information confidential:

1. The names of its suppliers and clients mentioned during the trial on January 24, 25, and 26, 2023;

2. The information regarding the core elements of its business model and strategic decisions mentioned during the trial on January 24, 25, and 26, 2023.

[12] On November 24, 2023, HMTK submitted new written submissions to the Court. HMTK pointed out that the new copy of the excerpts of the trial transcripts provided by Future Electronics included certain redactions pertaining to the name of the company where one of the witnesses was employed during 1986 and 1987. The name of the same company was also redacted without reason in another place in the transcripts.

[13] On November 27, 2023, following HMTK's submissions, Future Electronics informed the Court that it had made a mistake and that a previous version of the transcripts had been sent to them. Subsequently, the Court received a new version of the redacted transcripts that complied with its directives.

II. ISSUE

[14] The issue is as follows:

- Should the information described below be kept confidential and thus subject to a permanent confidentiality order:

1. The names of the suppliers and clients of Future Electronics mentioned during the trial on January 24, 25, and 26, 2023;
2. The information regarding the core elements of Future Electronics' business model and strategic decisions mentioned during the trial on January 24, 25, and 26, 2023.

[15] To answer this question, the Court will have to answer the following questions:

1. Does the disclosure of this information pose a serious risk to an important public interest?
2. Is the order sought necessary to prevent a serious risk to the interest(s) invoked by Future Electronics, given that alternative reasonable measures will not prevent this risk?
3. As a matter of proportionality, do the benefits of the order outweigh its negative effects?

III. Discussion

A. Which section of the Rules applies when seeking a confidentiality order for information contained in trial transcripts?

[16] According to section 16.1 of the Rules, after a motion is filed, the Court may order that a part of a document be treated as confidential. Section 16.1 of the Rules reads as follows:

> **Confidentiality Order**
>
> **16.1 (1)** On motion, the Court may order that a document or part of a document shall be treated as confidential at the time of filing of the document and determines the conditions in relation to its reproduction, destruction and non-disclosure.
>
> **(2)** Where the Court makes an order, a party or solicitor of record may have access to the confidential document or part of the confidential document only on conditions determined by the Court in relation to its reproduction, destruction and non-disclosure.
>
> **(3)** The order remains in effect until the Court orders otherwise.

[17] In this case, in its motion, Future Electronics requests that the Court issue a permanent confidentiality order to keep certain information recorded in the trial transcripts confidential. Although the transcripts are recorded in writing, the information in question originates from Mr. Adams's testimony.[3] Given this fact, *prima facie*, the Court is of the opinion that section 16.1 does not apply in this case because Mr. Adams' testimony is not a document filed as evidence during the trial and, in the Court's view, section 16.1 pertains to documents submitted as evidence in a trial.

[18] That said, section 4 of the Rules provides that, where matters are not provided for in these rules, judges of this Court shall be granted discretionary power to liberally construe the Rules and determine the practice they deem appropriate. Section 4 of the Rules stipulates the following:

> **Interpretation**
>
> 4 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.
>
> (2) Where matters are not provided for in these rules, the practice shall be determined by the Court, either on a motion for directions or after the event if no such motion has been made.

[19] Given the wording of section 4 of the Rules and considering that section 16.1 of the Rules does not expressly delineate the process for obtaining a confidentiality order pertaining to transcripts, The Court is of the opinion that it must broaden the scope of section 16.1 to make it applicable. The Court deems this approach to be the simplest method to address this procedural gap.

[20] The Court concludes that the scope of section 16.1 of the Rules must be broadened to include transcripts. Therefore, the Court finds that Future Electronics employed the correct procedural recourse since its motion was filed in accordance with section 16.1 of the Rules.

[3] It is important to note that the public cannot obtain a copy of a trial's audio recording from the Court registry or the appointed transcription company without first submitting a request. Consequently, an audio recording of a trial containing a witness's testimony does not require a confidentiality order. If such a request were to be made, the judge who heard the case and issued the confidentiality order must amend the confidentiality order as necessary.

B. Motion for a confidentiality order

(1) Open Court Principle

[21] As a general rule, the public can attend hearings and consult court files and the press is also free to inquire and comment on the workings of the courts.[4] In order to obtain permission to override this principle, a party must meet a compelling burden of proof.[5] Public access will be barred only when the disclosure of evidence would harm important interests or impair the proper administration of justice.[6]

[22] In Canada (Citizenship and Immigration) v. Harkat,[7] the Supreme Court of Canada stated that the open court principle is a "hallmark of a democratic society." Hence, in its view, the applicable test in the case at hand is so strict and demands careful consideration, entailing a delicate exercise of discretionary power.[8] The Supreme Court of Canada has repeatedly recognized that the open court principle is protected by the constitutional guarantee of freedom of expression.[9]

[23] In *Sherman Estate v. Donovan*,[10] the Supreme Court of Canada stated the following on this matter:

> Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General),* [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23–26) Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*., [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339–1340, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view *(Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck,* 2001 SCC 76, at paras. 32–39; *Sierra Club*, at para. 56). The test for discretionary limits on court

[4] *Sherman Estate v. Donovan*, 2021 SCC 25 [*Sherman*], at para. 1.
[5] *Pakzad v. The Queen,* 2017 TCC 83 [*Pakzad*], at para. 7.
[6] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, at para. 4.
[7] *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, at para. 24
[8] *Pakzad*, at para. 7.
[9] *Sherman*, at para. 1.
[10] *Sherman*, *supra* footnote 3.

> openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck,* at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.[11]

[24] Therefore, the courts' discretionary power to restrict the openness of court proceedings through a confidentiality order must be sparingly exercised and always in the interest of preserving a strong presumption that justice should proceed in public view.

(2) Exception to the open court principle – For any type of information to be held confidential, certain conditions must be met.

[25] An individual may request that the Court grant an exception to the open court principle and keep certain information confidential.

[26] In *Sherman*, the Supreme Court of Canada re-examined the criteria it had previously established in *Sierra Club v. Canada (Minister of Finance)*[12] regarding the exercise of a court's discretionary power in relation to court openness.

[27] According to the Supreme Court of Canada, a person asking a court to exercise discretion in a way that limits the open court presumption and issue a confidentiality order must establish that:

1. Court openness poses a serious risk to an important public interest;
2. The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
3. As a matter of proportionality, the benefits of the order outweigh its negative effects.[13]

[28] Only where all three of these prerequisites have been met can a discretionary limit on openness—for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order—properly be ordered.[14]

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[11] *Sherman*, at para. 30.
[12] *Sierra Club of Canada v. Canada (Minister of Finance)*., 2002 SCC 41 [*Sierra Club*]
[13] *Sherman*, at para. 38.
[14] *Sherman*, at para. 38.

[29] Therefore, in order to issue the confidentiality order, the Court must apply a test that asks whether:

1. court openness poses a serious risk to an important public interest.
2. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk.
3. as a matter of proportionality, the benefits of the order outweigh its negative effects.

[30] These three questions must be examined consecutively. Only when the Court answers each of these questions in the affirmative can the requested confidentiality order be granted.

(a) Does court openness pose a serious risk to an important public interest?

[31] In *Sherman*, the Supreme Court of Canada reiterated that there was no exhaustive list of important public interests, and that such public interest may be determined in the abstract at the level of general principles that extend beyond the parties to the particular dispute. The relevant passage reads as follows:

> 42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club* that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55).[15]

[32] In the same decision, the Supreme Court of Canada further clarified that the determination of whether a "serious risk" poses a threat to an important public interest is a factual conclusion that must be drawn considering the context. The judge must first identify an important interest and, second, determine the seriousness of the risk to which this interest is exposed. The relevant passage reads as follows:

> … By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused

[15] *Sherman*, at para. 42.

> simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.[16]

[33] As for the risk in question, it must be real and significant, and the evidence must enable the judge to conclude that it poses a serious threat to the interest.[17] The determination of the significance of harm, or the "serious risk" that poses on the public interest, is a factual one that depends on the facts in context.[18]

[34] Purely personal risks, such as unfavourable media exposure, damage to personal reputation, embarrassment, or potential financial harm, are not adequate grounds to override the open court principle.[19]

(b) <u>Is the order sought necessary to prevent this serious risk to the important public interest because reasonably alternative measures will not prevent this risk?</u>

[35] As established in *Sierra Club* and reiterated in *Sherman*, the condition that the order be necessary requires evaluation to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk, while preserving the important public interest.[20]

[36] The courts have recognized on several occasions that other reasonable measures may include a redaction order, publication ban, sealing orders, and a closed hearing.[21]

(c) <u>As a matter of proportionality, do the benefits of the order outweigh its negative effects?</u>

[37] When courts have to determine the proportionality of the order sought, weighing its benefits against its negative effects, it is also relevant to ask whether

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[16] *Sherman*, at para. 42.
[17] *Sierra Club,* at para. 54.
[18] *Sherman*, at para. 42.
[19] *Pakzad*, at para. 11.
[20] *Sherman*, at para. 105; *Sierra Club*, at para. 57.
[21] *Sherman*, at para. 38; *Shell Canada Limited v. The Queen*, 2022 TCC 39 [*Shell*], at para. 33.

the information sought to be protected by the order is incidental or fundamental to the judicial process.

[38] In *Sierra Club*, the Supreme Court of Canada stated the following regarding the matter of proportionality in this context:

> As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.[22]

[39] As for the deleterious effects, particularly the effects on the right to freedom of expression, in the same decision, the Supreme Court of Canada mentioned the following:

> Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2*(b) Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick*, *supra*, at paras. 22–23. Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have.[23]

[40] To assist the courts in determining the impact of a confidentiality order on the right to freedom of expression, the Supreme Court of Canada enumerated the core values underlying freedom of expression, as follows:

- Seeking the truth and the common good;
- Promoting self-fulfillment of individuals by allowing them to develop thoughts and ideas; and
- Ensuring that participation in the political process is open to all persons.[24]

[22] *Sierra Club*, at para. 69.
[23] *Sierra Club*, at para. 74.
[24] *Sierra Club*, at para. 75.

C. <u>Future Electronics' motion</u>

[41] To obtain the desired order, Future Electronics had to demonstrate that the disclosure of the commercial information it seeks to keep confidential poses a serious risk to an important public interest. Therefore, Future Electronics had to identify the relevant important public interest(s) in this case and demonstrate that there is a serious risk to one or more of them.

[42] A commercial interest can be considered an important public interest, but only under certain circumstances. In *Sierra Club*, the Supreme Court of Canada stated that in order to qualify as an "important commercial interest," an interest cannot merely be specific to the party requesting the confidentiality order; the interest must be one which can be expressed in terms of a public interest in confidentiality. The Supreme Court of Canada provided the example of a private company that could not simply claim that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, disclosure of information would cause a breach of a non-disclosure agreement, then it can be characterized more broadly as the general commercial interest of preserving confidential information. The relevant passage reads as follows:

> 55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the <u>public</u> interest in confidentiality outweighs the public interest in openness" (emphasis added).[25]

[43] In such a case, according to the Supreme Court of Canada, one can then speak of a general commercial interest of preserving confidential information.[26] Therefore, it can be concluded that the disclosure of information protected by a non-disclosure

[25] *Sierra Club*, at para. 55.
[26] *Sierra Club*, at para. 55.

agreement is an "important commercial interest" and therefore an important public interest.[27]

[44] In *Sherman*, the Supreme Court of Canada added that harm to a particular business interest is not sufficient to qualify as an important public interest, but the "general commercial interest of preserving confidential information" was an important interest because of its public character.[28]

[45] In addition, according to the Supreme Court of Canada, courts must be cautious in determining what constitutes an "important commercial interest." A confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule.[29]

[46] In *Shell Canada Limited v. The Queen,*[30] this Court identified five important commercial interests that are important public interests and therefore can be protected.[31] These interests are as follows:

- The general commercial interest of preserving confidential information;[32]

- The general public interest of protecting the right to a fair trial, also described as the public interest of enabling "commercial litigants to vindicate their legal rights without exposing themselves to the real risk of harm";[33]

- The public interest of enabling a litigant, when compelled by the rules of discovery to divulge sensitive and confidential information, to maintain the confidentiality of that information;[34]

- The public interest of promoting commercial certainty and protecting proprietary information;[35] and

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[27] *Shell*, at para. 32a).
[28] *Sherman*, at para. 41.
[29] *Sierra Club*, at para. 56. See generally *Eli Lilly and Co. v. Novopharm Ltd.* [1994], FCJ No. 1141, 56 C.P.R. (3d) 437 (F.C.T.D.), at para. 2, Judge Muldoon.
[30] *Shell*, *supra* footnote 21.
[31] *Shell,* at para. 32.
[32] *Shell,* at para. 32; *Sierra Club,* at para. 55; *Resolve Business Outsourcing Income Fund v. Canadian Financial Wellness Group Inc.*, 2014 NSCA 98, *[Resolve Business]* at para. 36.
[33] *Shell,* at para. 32; *RJG Construction Limited v. Marine Atlantic Inc.,* 2018 NLCA 25, at para. 27.
[34] *Shell,* at para. 32*; Mediatube Corp v. Bell Canada,* 2018 FC 355, at para. 22.
[35] *Shell*, at para. 32; *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, at para. 36.

- The public interest of protecting fair competition.[36]

[47] According to this Court, this is not an exhaustive list. These are important public interests related to commercial or entrepreneurial activities.[37] Furthermore, as mentioned in *Shell*, there is an element of similarity or overlap among some of the important commercial interests listed above.[38] I have nonetheless decided to organize the discussion by addressing them one by one. The important public interests invoked by Future Electronics all figure in this list.

[48] In the case at hand, the Court must first determine whether disclosing the names of Future Electronics' suppliers and clients and/or information pertaining to its business strategies poses a serious risk to any of the important public interests outlined above or to another important public interest (given that the aforementioned list is not exhaustive) that needs to be protected in the context of commercial activities. To this end, the Court will examine the important public interests cited by Future Electronics in its submissions and determine whether the disclosure of information that is to be kept confidential according to Future Electronics poses a serious risk to one or more of these interests.

(1) Does court openness pose a serious risk to an important public interest?

(a) The general commercial interest of preserving confidential information

[49] In *Sierra Club*, the Supreme Court of Canada stated that the preservation of confidential information will be a sufficiently important commercial interest, and therefore an important public interest, in certain circumstances.[39] The conditions set forth by the Supreme Court of Canada were established as follows:

> **60** … Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which

[36] *Shell*, at para. 32; *PearTree Securities Inc. v. NDB Group Syndications Inc.*, 2018 ONSC 7447, 2018 CarswellOnt 23455, at para. 12.
[37] *Shell*, at para. 17.
[38] *Shell*, at para. 17.
[39] *Sierra Club*, at para. 59.

> a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).[40]

[50] Therefore, according to the foregoing, in order to obtain the desired confidentiality order, Future Electronics must demonstrate that:

1- The names of its suppliers and clients, as well as information regarding its business strategies, have always been considered and treated as confidential, and therefore, they are of a confidential nature;

2- On a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information.[41]

[51] According to Mr. Adams' testimony, the names of Future Electronics' suppliers and clients, as well as information regarding its business strategies, have always been considered and treated as confidential by the company and its employees. According to Mr. Adams, these are vital and central information about his business model, and they provide Future Electronics with a competitive advantage. Future Electronics is a private company that is known to be the fourth-largest distributor of electronic components in the world. Its competitors are public companies that question its business model and wonder why it has been so successful. Therefore, Future Electronics, as a private company, pays particular attention to information that could become public. Mr. Adams also stated that it is impossible to ascertain whether certain suppliers and clients agree to have their connections with Future Electronics disclosed to other suppliers and clients.

[52] According to Mr. Adams, if this information were to become public, Future Electronics could lose its franchise rights with its suppliers resulting in revenue loss and damaging its competitiveness, thereby undermining its commercial interests. In such a scenario, when it loses a supplier's franchise, Future Electronics can no longer purchase that supplier's product. Mr. Adams also mentioned that it is likely that some of Future Electronics' suppliers do business with its competitors, to whom it sells their products at different prices. If the names of the suppliers were to be known, this could lead third parties to question their selling prices, potentially negatively impacting its business relationships and the prices they pay for certain goods, consequently affecting its competitiveness and thus conflicting with its business interests.

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[40] *Sierra Club*, at para. 60.
[41] *Sierra Club*, at para. 60.

[53] Considering the explanations Mr. Adams provided during his testimony, the Court is of the opinion that, on the balance of probabilities, the information concerning Future Electronics' business strategies was and has been treated as confidential by the company and its employees. Furthermore, it is reasonable to believe that disclosure of the information would risk compromising its exclusive and commercial rights. Therefore, since the information is treated as confidential and Mr. Adams has satisfactorily explained to the Court that it is of interest to Future Electronics' competitors, the Court concludes that the disclosure of such information poses a serious risk to this important public interest.

(b) The general public interest of protecting the right to a fair trial, also described as the public interest of enabling "commercial litigants" to vindicate their legal rights without exposing themselves to the real risk of harm.

[54] This important commercial interest has been identified by Future Electronics as being at risk. In order to draw a conclusion on this point, the Court must determine whether failure to issue a confidentiality order would put Future Electronics in a situation where it is compelled to choose between its obligations and its right to a full defence.[42] Should Future Electronics be impeded from presenting evidence, perhaps due to a non-disclosure agreement with one of its suppliers or clients, unless a confidentiality order is granted, its right to a full defence, which is of public interest, would inevitably be infringed.

[55] In this case, according to Future Electronics, the sole risk of harm lies in the fact that if the names of its suppliers and clients, as well as the information regarding the core elements of its business model were not kept confidential and were therefore known to its competitors, this would give the latter a competitive advantage. Given this and considering that protecting fair competition is itself an important commercial risk that has been identified by the courts as needing to be protected, the Court will consider Future Electronics' arguments regarding this important commercial interest.

(c) Promoting commercial certainty and protecting proprietary information

[56] To draw a conclusion regarding this important commercial interest, the Court must determine whether publishing the information would expose its owner to

[42] *Shell*, at para. 22.

serious financial harm. In *Sierra Club of Canada v. Canada (Minister of Finance)*,[43] the Federal Court of Appeal stated the following on this matter:

> **12** … Obviously, this overarching consideration has no application to the present case and so it is that the law governing the issuance of confidentiality orders must respond to a plethora of factual patterns. However, the task of isolating an analytical framework is greatly simplified in the present case once it is recognized that the present law already provides an exception for confidential information which qualifies as a "trade secret." According to established principles, a trade secret constitutes a species of property which can be protected by way of injunction. For this reason, the law will not permit disclosure of a trade secret during the course of a trial when to do so would have the effect of destroying the owner's proprietary right and exposing him or her to irreparable harm in the form of a financial loss. This explains why the jurisprudence holds that a confidentiality order must issue where "the subject matter of the action would be destroyed" if the doors of the courtroom were to remain open.
>
> **13** While the present case does not involve a trade secret, I cannot think of any reason why similar treatment cannot be extended to cases involving commercial or scientific information which can be reasonably viewed as having been acquired or accumulated on a confidential basis. More often than not such information is of value to a party's competitors[44]. …

[57] Future Electronics argues that there is an important public commercial interest in ensuring that the identities of third parties, namely its suppliers and clients, are not disclosed, both for its own benefits and theirs.

[58] In this case, according to Mr. Adams' testimony, the names of Future Electronics' suppliers and clients, as well as the information regarding the core elements of its business model and strategic decisions, are considered trade secrets by the company. During his testimony, Mr. Adams demonstrated that it could be advantageous to third parties in the industry, such as former suppliers, for them to obtain access to the list of Future Electronics' current suppliers and clients. Conversely, Future Electronics' current suppliers and clients do not desire their business relationship with the company to be known to all. That is why Future Electronics zealously protects this confidential and proprietary information.

[59] The Court concludes that, based on the explanations provided by Mr. Adams and on the balance of probabilities, considering the market in which Future Electronics operates, the names of its suppliers and clients, as well as its business

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[43] *Sierra Club of Canada v. Canada (Minister of Finance),* [2000] F.C.J No. 732, [2000] 4 FC 426, 187 DLR (4th) 231, 256 NR 1.
[44] *Sierra Club of Canada v. Canada (Minister of Finance)*, at paras 12–13.

strategies, constitute exclusive commercial information, and therefore, it is necessary to keep them confidential.

(d) Protecting fair competition

[60] The general public interest of protecting the right to a fair trial was not directly invoked by Future Electronics as a basis for its motion. That said, given the content of Mr. Adams's testimony, the Court must take it into consideration.

[61] As established in *Resolve Business Outsourcing Income Fund v. Canadian Financial Wellness Group Inc.*[45] and reiterated by this Court in *Shell*, there is a public interest in fair competition.[46]

[62] In *RJG Construction Ltd v. Marine Atlantic Inc.*, the Court of Appeal of Newfoundland and Labrador concluded that failure to grant the confidentiality order would provide commercial advantage to the party's competitors, as they would have access to sensitive commercial and financial information which could be used to their advantage and to the party's disadvantage.[47]

> **27** Failing to grant a confidentiality order in this case would provide an advantage to RJG's competitors by giving them RJG's sensitive commercial and financial information which they could use to their own advantage and to RJG's disadvantage. The open court principle cannot be blind to this reality, and in my view, cannot be permitted to expose a litigant's vulnerability in the absence of good reason. In *Sierra Club*, the Court stipulated that if a court grants a confidentiality order on the basis of an important commercial interest, the commercial interest cannot merely be specific to the party requesting the order, but must be one which can be expressed in terms of a public interest in confidentiality. As I see it, the public interest at stake in cases like this is the ability of commercial litigants to vindicate their legal rights without exposing themselves to the real risk of harm.

[63] Therefore, there may be an important public interest in maintaining and protecting competitiveness within specific industries if it holds significance for the Canadian economy, such as the banking or energy sectors.[48] Given the importance of the electronic parts distribution sector to the Canadian economy and Future Electronics' status as one of the global giants in this industry, the Court is of the opinion that there is a public interest in maintaining competition within this sector.

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[45] *Resolve Business*, *supra*, footnote 32.
[46] *Shell*, at para. 29; see also *Resolve Business*, at para. 31.
[47] *RJG Construction Ltd v. Marine Atlantic Inc.,* 2018 NLCA 25, at para. 27
[48] *Shell*, at para. 31; *Royal Bank of Canada v. Westech Appraisal Services Ltd.,* 2017 BCSC 773, at para. 12.

[64] Based on the information provided to the Court, it is reasonable to conclude that if the names of Future Electronics' suppliers and clients, as well as the information regarding the core elements of its business model and strategic decisions, were not kept confidential, its competitors would gain access to them. This poses a serious risk of granting these competitors a competitive advantage, which is contrary to the important public interest of protecting fair competition. Consequently, there would be a serious risk of fostering unfair competition to Future Electronics' disadvantage if the confidential information in question were to be disclosed during legal proceedings unrelated to the present matter.[49] Thus, the Court concludes that there is a serious risk to the protection of fair competition should the information not be kept confidential.

(e) Conclusion

[65] For the reasons mentioned in paragraphs 49 to 64 above, the Court concludes that if the names of Future Electronics' suppliers and clients, along with the information pertaining to the core elements of its business model and strategic decisions mentioned during the trial on January 24, 25, and 26, 2023, were made public, there would be a serious risk to the following important public interests:

1. The general commercial interest of preserving confidential information;
2. The public interest of promoting commercial certainty and protecting proprietary information; and
3. The public interest of protecting fair competition.

(2) Is the requested order necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk?

[66] To answer this question, the Court must determine whether there are alternative reasonable measures that could be implemented to prevent the serious risk by granting the requested order. If an alternative reasonable measure is possible, the confidentiality order cannot be granted.

[67] Future Electronics did not mention any alternative possible measure. Future Electronics maintains that redacting certain passages of the trial transcripts is necessary and that this measure is the most reasonable under the circumstances.

[49] *Shell,* at para. 30; see *PearTree Securities Inc. v. NDB Group Syndications Inc.*, 2018 ONSC 7447, 2018 CarswellOnt 23455, at para. 12; also see *RJG Construction Ltd v. Marine Atlantic Inc., supra*, footnote 33, at para. 27.

Future Electronics argues that redacting certain passages of the transcripts results in minimal infringement upon the open court principle, since any member of the public will be able to access the redacted transcripts and understand the nature of the issues, the parties' positions, and the concerns that were raised.

[68] Considering the limited amount of information that needs to be redacted, and being unable to identify a less restrictive measure, the Court concludes that redacting the names of Future Electronics' clients and suppliers, as well as the information regarding its business model, is the most appropriate measure under the circumstances. The Court is of the opinion that redacting excerpts from the trial transcripts will not hinder the overall understanding of the dispute between the parties.

(3) As a matter of proportionality, do the benefits of the order sought outweigh its negative effects?

[69] At this stage, the Court must determine whether the benefits of the desired confidentiality order outweigh its negative effects.

[70] Future Electronics argues that the public, its suppliers, and its clients have a real and serious interest in the confidentiality order being granted. According to Future Electronics, it is in the public interest that confidential commercial information be protected. In addition, the proposed redaction allows Future Electronics to fully assert its rights before the Court in exchange for a minimal infringement upon the open court principle. Future Electronics argues that it is in the interest of justice to grant the confidentiality request due to the absence of an alternative reasonable measure, and because, as a matter of proportionality, the benefits of the order sought outweigh its negative effects.

[71] In this case, the information sought to be protected by the order is incidental to the judicial process and maintaining its confidentiality will not prevent the public from understanding the dispute. In fact, according to Mr. Adams' testimony and the Court's opinion, the only people who might have an interest in accessing this information are Future Electronics' competitors for reasons unrelated to the issue in dispute.

[72] Therefore, if this order is not granted, the deleterious effects to Future Electronics outlined in paragraph 71 outweigh by far the potential derogation of the open court principle. Given the limited amount of information to be kept

confidential, their redaction represents a minimal impediment to the open court principle, which, in my opinion, is more than reasonable.

[73] The Court concludes that the criterion of proportionality is satisfied. The information that Future Electronics seeks to protect is ancillary to the dispute and does not compromise the open court principle, as the public would still have access to the court record as well as the redacted trial transcripts and would be able to understand the essence of the dispute despite the redaction. The salutary effects of the order outweigh the deleterious effects. Confidential information is necessary to ensure proper progression of the appeal, and Future Electronics would risk significant harm regarding the preservation of its trade secrets if they were not protected. Therefore, the impact on the public interest of the open court is minimal since the confidential information relates to only a fraction of the total evidence.

IV. Conclusion

[74] In light of the commercial interests raised by Future Electronics in this case, namely the general commercial interest of preserving confidential information, promotion of commercial certainty and protection of proprietary information, as well as the protection of fair competition, the Court considers that Future Electronics has demonstrated a serious risk to several important public interests. The requested order is necessary to prevent a serious risk to each of these interests, as no other reasonable measure would suffice. Therefore, the Court concludes that the order is necessary to protect these interests. Finally, the benefits of such an order outweigh its negative effects.

[75] FOR THESE REASONS, THE COURT:

1. GRANTS Future Electronics' motion for the issuance of a permanent confidentiality order;

2. ORDERS that the interim confidentiality order be replaced by this permanent confidentiality order.

3. ORDERS that the original transcript of the hearing be retained in the Court record, along with a copy of this order, to be accessible solely to the Court and its personnel, the involved parties and their counsels, and the Agence du revenu du Québec;

4. ORDERS that the copy of the transcripts, in which the information described in Annex A has been redacted by the parties, and that was entered in the Court record on November 14, 2023, for the hearings of January 24 and 26, 2023, and on November 27, 2023, for the hearing of January 25, 2023, be accessible to individuals beyond those mentioned earlier.

5. ORDERS that, if a person other than the parties, their counsel, and the Agence du revenu du Québec hire a stenographer to produce the transcript of the hearing, the confidential information described in Annex A be redacted by the official stenographer designated to produce the transcript.

6. IMPOSES upon the Court clerk and any official stenographer to take all necessary measures to ensure compliance with this order;

7. WITHOUT costs.

Signed at Ottawa, Canada, this 28th day of May 2024.

"Sylvain Ouimet"

Ouimet J.

Translation certified true
on this 17th day of June 2024.

Romy Ghattas

ANNEX A

Transcript:

Lines 3–4 and 12–15 on page 86, as well as the reference to the appellant's credit rating found on line 20 of page 102 of the transcript of the hearing on June 3, 2019.

CITATION:	2024 TCC 77
COURT FILE NO.:	2021-1171(GST)G
STYLE OF CAUSE:	FUTURE ELECTRONICS INC. V. HIS MAJESTY THE KING,
PLACE OF HEARING:	Montréal (Quebec) and Ottawa (Ontario)
DATE OF HEARING:	January 24, 25, 26, 2023, February 15 and 24, 2023, November 13, 2023, September 29 and February 12, 13 and 14, 2024.
REASONS FOR JUDGMENT BY:	The Honourable Justice Sylvain Ouimet
DATE OF JUDGMENT:	May 28, 2024

APPEARANCES:

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