Federal Court of Appeal | Cour d'appel fédérale

Date: 20220408

Docket: A-292-20

Citation: 2022 FCA 63

[ENGLISH TRANSLATION]

CORAM: **DE MONTIGNY J.A.**
GLEASON J.A.
LOCKE J.A.

BETWEEN:

LUCIEN RÉMILLARD

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard by online videoconference hosted by the Registry on December 13, 2021.
Judgment delivered at Ottawa, Ontario, on April 8, 2022.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GLEASON J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This appeal raises the interesting question of what the open court principle entails and how it coexists with the confidentiality of an individual's tax file. More specifically, this Court is called upon to determine whether the documents in the certified record transmitted by the Minister to the Court Registry pursuant to rule 318 of the *Federal Courts Rules*, SOR/98-106 (the Rules) lose their confidentiality and become accessible to the public and, if so, whether rule 318 violates section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter).

[2] At the end of extensive reasons, the Federal Court (per Mr. Justice Pamel) concluded that certified records become accessible to the public upon transmission to the Federal Court Registry and that the transmission of such a record does not constitute a seizure within the meaning of section 8 of the Charter: *Rémillard v. Canada (National Revenue)*, 2020 FC 1061, 2020 CarswellNat 6038. After reviewing the submissions of both parties and the record before us, I am of the view that the appeal should be dismissed.

I. The facts

[3] The facts are not in dispute and are relatively simple. Mr. Rémillard is a retired businessman. He claims to have established himself in Barbados in 2013 and thus to have become a non-resident of Canada for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA). Since 2015, the Minister has been auditing Mr. Rémillard's non-resident status; during an audit, the Canada Revenue Agency (CRA) made requests for administrative assistance from certain countries. Mr. Rémillard challenged these requests on July 31, 2019, by filing an application for judicial review on the grounds that the requests for assistance purportedly misrepresent that he is still a resident of Canada.

[4] As part of his application for judicial review, Mr. Rémillard relied on rule 317 to request the disclosure of the documents and information (the Information) concerning him obtained or

created by the CRA under the powers conferred on it by the ITA. This request is worded as follows:

> [TRANSLATION]
>
> UNDER RULE 317 OF THE *FEDERAL COURTS RULES*, THE APPLICANT REQUESTS THAT THE MINISTER FORWARD HIM AND SEND TO THE REGISTRY A CERTIFIED COPY OF THE FOLLOWING DOCUMENTS, WHICH ARE NOT IN HIS POSSESSION BUT ARE IN THE POSSESSION OF THE TRIBUNAL:
>
> (a) the foreign requests; and
>
> (b) all documents considered, consulted, or generated by the Minister or by any person or entity acting on behalf of the Minister, including work sheets, written communications and handwritten notes taken during oral communications, that relate to or are relevant to the foreign requests.
>
> (Appeal Book, at page 93.)

[5] In response to this request, and under rule 318, the CRA sent the Registry (in two parts) a certified copy of the Information. The Registry treated the Information as public documents and placed it in the annex to the Court file as provided for in paragraph 23(2)(c). The Registry also sent a certified copy of the Information to counsel for Mr. Rémillard.

[6] On January 14 and 15, 2020, a journalist contacted Mr. Rémillard and one of his sons regarding the application for judicial review. This is how Mr. Rémillard apparently learned that the Information was accessible to the public and that a journalist had accessed it. Counsel for Mr. Rémillard then immediately filed an *ex parte* motion for an interim order of confidentiality and a publication ban for a period of 10 days.

[7] The Federal Court issued the interim order within hours of the filing of the motion and ordered that the Information be treated as confidential under rule 151 and that its contents not be published. In accordance with that interim order, Mr. Rémillard filed the motion for order of confidentiality that is the subject of this dispute. Since that time, the interim order was extended until the hearing before Justice Pamel. A notice of constitutional questions was also served on the Attorney General of Canada and the provincial attorneys general.

II. The Federal Court decision that is the subject of this appeal

[8] First, the Federal Court rejected Mr. Rémillard's claim that it is the responsibility of the Minister or the Registry to take the necessary measures to preserve the confidentiality of documents that are transmitted until they are filed with the Court by one of the parties. After recalling that the procedure provided for in rules 317 and 318 ensures the integrity of the record in case of doubt and allows the parties to obtain the record used by the administrative decision-maker, thus meeting a pressing and substantial objective, the Federal Court went on to state that documents submitted under rule 318 are clearly subject to the open court principle and are accessible to the public as soon as they are received at the Registry by virtue of rules 23 and 26.

[9] In that regard, the Federal Court reiterated the fundamental nature of the open court principle and refused to make a distinction between the Court file and its annex, while recognizing that not all documents in the Court file or in the annex will necessarily be made available to the public. Indeed, subrule 152(1) of the Rules allows documents to be marked as confidential where they are required to be treated as such by law or where the Court orders that

they be treated confidentially. Although a document transmitted to the Registry pursuant to rule 318 is not necessarily part of the evidentiary record, it is nonetheless part of the Court file and is therefore in the public domain.

[10] Mr. Rémillard also advanced a number of arguments that justified, in his view, that the Information that was transmitted should be kept confidential even if the Rules made it public. In particular, he relied on the principle of an implied undertaking of confidentiality, which states that information collected during discovery cannot be used for purposes other than for preparing for the trial.

[11] The Federal Court rejected this argument on the grounds that the logic and the basis of this principle cannot be transposed to the transmission of documents under rules 317 and 318. While there are some similarities between examinations for discovery and the procedure provided for under rules 317 and 318, the latter is not exploratory in nature, but rather is intended to provide the reviewing court and the parties with access to all of the documents on which the administrative decision-maker relied in making its decision. Moreover, examinations for discovery take place outside the Court, and documents exchanged between the parties during this process are not in the possession of the Court or the Registry and remain in the hands of the parties until they are placed in the Court file, whereas documents requested by a party under rule 317 are transmitted to the Registry and placed in the Court files and their annexes.

[12] The Federal Court also rejected Mr. Rémillard’s argument that section 241 of the ITA protects the confidentiality of tax information once it is transmitted to the Registry. Unlike other

provisions such as paragraph 83(1)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, or subsections 658(1) and 955(1) of the *Bank Act*, S.C. 1991, c. 46, section 241 does not render taxpayers' tax information inherently confidential because of the nature of the documents themselves. The purpose of that provision is only to impose a positive obligation on the Minister to treat such documents confidentially while in the Minister's possession. Once the information has been transmitted to the Registry under rule 318, it is rule 318 that frames the way in which the information must be handled.

[13] Lastly, the Federal Court rejected Mr. Rémillard's argument that the public disclosure of documents transmitted to the Registry under rule 318 would render rule 151 of the same Rules moot because the documents would be made public before he could even review them and apply to the Court to ensure that they be kept confidential. The Court pointed out that rule 151 could be used to protect confidential information even after it has entered the public domain. Also, the Court has shown flexibility in the past, such as by allowing parties to view documents and decide whether to file a motion under rule 151 before making documents public.

[14] In addition, the Federal Court rejected Mr. Rémillard's argument that was based on section 8 of the Charter. The appellant claimed that rule 318, at least insofar as it is interpreted as allowing public access to the record transmitted by the administrative decision-maker to the Registry, constitutes an unreasonable search. The Court rejected this argument, holding that "the objectives of the procedure established by [rules] 317 and 318 … and the open court principle are not interests of the state that section 8 of the Charter seeks to temper" (para. 141).

[15] The Court recognized that Mr. Rémillard had a reasonable expectation of privacy with respect to his tax information and could therefore expect that the information would be known only to the persons to whom it was disclosed and would be used only for the purposes underlying its disclosure. However, the rules relating to the disclosure of tax information by the Minister have been well established in the event of legal proceedings. Mr. Rémillard could not have been unaware of rule 318 (as well as rules 23 and 26) and could not have maintained a reasonable expectation of privacy from the moment that he filed an application for judicial review of a decision by the Minister and requested the transmission of certain documents under rule 317.

[16] Moreover, the procedure set out in rules 317 and 318 is not a procedure for enforcement or application of a law; far from constituting an unreasonable incursion by the state into an individual's privacy, rule 318 is a procedural mechanism to ensure the efficient conduct of a judicial review procedure.

[17] Lastly, the Court noted that Mr. Rémillard consented to the transmission of his personal information since he himself made a request to that end, as authorized by rule 317. As for the argument that this was not true consent given that he had no choice but to make the request in order to prepare his record, the Court reiterated that Mr. Rémillard controlled the timing of the request, that he had the opportunity to ask the Court to make an order of confidentiality, and that he could also have asked that his application for judicial review be heard as if it were an action.

[18] In light of its decision that the transmission of the Information to the Registry complied with rule 318 and did not constitute a seizure within the meaning of section 8 of the Charter, the

Federal Court concluded that it was not necessary to consider the question of the reasonableness of the seizure, including the conciliation of the interests of the taxpayer and the state. Accordingly, the Court also determined that no analysis was required with regard to section 1 of the Charter.

[19] Lastly, the Court refused to issue an order of confidentiality and a publication ban under rule 151 on the grounds that Mr. Rémillard's request was general in nature and that he had not attempted to demonstrate that all of the documents meet the requirements of such a request. However, the Court added that Mr. Rémillard remained free to file a more focused request at a later date, specifically concerning the documents for which he considers an order of confidentiality and/or a publication ban to be necessary.

III. Issues

[20] This appeal essentially raises two issues, which I would phrase as follows:

(1) Was the Federal Court correct in concluding that certified records become public when they are transmitted to the Court Registry under rule 318?

(2) To the extent that certified records do become public when they are transmitted to the Registry, did the Federal Court err in concluding that there was no resulting violation of section 8 of the Charter?

[21] The appellant also raised, as a preliminary objection, the issue of whether the Federal Court could, on its own initiative, review the confidential Information that was transmitted to the Registry and not submitted as evidence by either party. I will deal with this issue as part of my analysis of the first issue.

IV. Analysis

[22] Even though the parties did not address this issue in their memorandums or oral submissions, it is appropriate to begin by considering the applicable standard of review. Since the Supreme Court's decision in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*], it is well established that correctness applies to questions of law raised in an appeal. Indeed, the issues in this appeal are clearly legal in nature, and one of them is even constitutional. In this context, as the Supreme Court has noted, an appellate court is therefore "free to replace the opinion of the trial judge with its own" (*Housen* at para. 8).

A. *Was the Federal Court correct in concluding that certified records become public when they are transmitted to the Court Registry under rule 318?*

[23] The appellant argues that the transmission of relevant material to the Registry by the tribunal that is in possession of it cannot be likened to the filing of evidence and that therefore, the material is not before the Court. In an adversarial system of justice, it is the parties who are in control of the course of their case, including the documents that they wish to introduce into evidence. It would follow, therefore, that the open court principle would not be engaged until the parties have introduced into evidence the documents on which they intend to rely in support of their proceedings. It would also be absurd to conclude that documents transmitted to the Registry must be accessible to the public on the basis of the open court principle, insofar as the procedure set out in rules 317 and 318 is not mandatory and is used only at the discretion of the parties.

[24] The appellant also argues that the primary purpose of the procedure set out in rules 317 and 318 is to allow litigants to challenge an administrative decision that affects them by having access to all the relevant material and that this procedure is intended to be equivalent, in a way, to the examination for discovery procedure that is available to parties in an action. The appellant considers the secondary purpose—the authentication of documents by the Registry—to be an outdated formality and a relic of the past that must instead be left to the parties. He argues that it would be inconceivable for litigants who wish to have access to their records to be forced to share them with the whole world.

[25] Lastly, the appellant claims that the Federal Court erred in invoking the other means and procedures (such as the motion for order of confidentiality provided for in rule 151) that the appellant could have used to keep his information confidential. Not only would these remedies be inapplicable in this case, but they would also only seek to create exceptions to a principle (the open court principle) before the conditions are even met for it to apply.

[26] These arguments, which were made with confidence and skill by counsel for Mr. Rémillard, are far from being irrelevant. Nevertheless, I have come to the conclusion, after careful consideration and for the following reasons, that they must be rejected.

[27] In order to fully understand the details of the debate before us, it is appropriate to begin by examining rules 317 and 318, which govern the transmission to the Court Registry of the record compiled by the administrative decision-maker, as well as these rules' interaction with rules 2, 23 and 26, which specify certain procedures for compiling and consulting the Court's

files. I will then discuss the impact of the open court principle on these rules. Lastly, I will conclude this part of my analysis by examining the role of the judge called upon to decide an application for judicial review and the restrictions imposed on the judge by our adversarial justice system.

[28] Rule 317 allows a party that does not have in its possession (or is not certain that it has in its possession) all of the documents on which the administrative decision-maker relied in making its decision, to request that those documents be transmitted to that party. This mechanism allows the party challenging an administrative decision to ensure that it does indeed have all of the documents relevant to its application, and thus to effectively assert its rights. Rule 317 also ensures that the administrative decision will not be immune from informed judicial review insofar as the reviewing court will have access to the same record and information as the original decision-maker. This dual purpose was well summarized by the Court of Appeal for Saskatchewan in *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268. Speaking in the context of a provision similar to rule 317, the Court wrote (at para. 24):

> In my opinion, therefore, it is necessary to recognize and give effect to the reality that, in order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question. No other result is fully consistent with the present substance of administrative law.
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> (See also: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, [2007] F.C.J. No. 814 (QL) at para. 7; *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, [2015] F.C.J. No. 1397 (QL) at para. 13 [*CCLA*]; *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at para. 6 [*Lukács*]; *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at paras. 275–278, 314–315 [*Slansky*]; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, [2012] F.C.J. No. 93 (QL) at paras. 18–20.)

[29] Rule 318 further provides that the tribunal must send to the Registry and to the requesting party a certified copy of the material relevant to the request, subject to any objections that the party may raise and that the Court will decide.

[30] As noted above, the appellant places great emphasis on the fact that the documents are transmitted to the Registry, and not to the Court, and are therefore not before the Court until they are entered into evidence by either party. This statement is strictly accurate, as confirmed by several decisions of this Court: see, in particular, *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)*, [1995] 1 FC 459, [1994] F.C.J. 1608 (QL); *Cold Lake First Nations v. Noel*, 2018 FCA 72, [2018] CarswellNat 1425 at para. 30. The applicant (or the respondent) may choose to file in his or her record all the documents transmitted by the tribunal or only those that he or she intends to use in support of his or her application, without the need to introduce them by way of an affidavit: see paras. 309(2)(e.1) and 310(2)(c.1) of the Rules. See also: *CCLA* at para. 17; *Canada (Attorney General) v. Lacey*, 2008 FCA 242, [2008] F.C.J. No. 1221 (QL) at paras. 6–7.

[31] In addition to this objective of providing the applicant and the Court with all the documents on which the administrative decision-maker based its decision, there is another objective, maybe secondary but still important, that consists in allowing the authenticity of the transmitted documents to be verified. The appellant argued before us that this objective is a relic of the past that is no longer justified in light of technological advancements, that the onus is on the parties to ensure that the documents are authentic, and that it would be absurd to consider that

the transmission to the Registry of the documents provided for under rule 317 can meet a pressing and substantial objective if this mechanism is optional.

[32] With respect, I cannot accept this argument.

[33] The appellant relied primarily on a paragraph from this Court's decision in *Gernhart v. Canada*, [2000] 2 FC 292, 1999 CarswellNat 2136 [*Gernhart*] to support his argument. That case dealt solely with the compatibility of subsection 176(1) of the ITA, as it read at the time, with section 8 of the Charter. This tax provision required the Minister of National Revenue to send the Tax Court of Canada (TCC) copies of returns, notices of assessment, notices of objection and other relevant documents upon an appeal of an assessment by a taxpayer. Through the application of rule 16 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, all of these documents became accessible to the public. I will discuss this decision in greater detail in the second part of my analysis, which concerns unreasonable search and seizure.

[34] In his written submissions, the appellant relies on paragraph 36 of that decision to argue that this Court recognized in that case that subsection 176(1) of the ITA "has by reason of developments in the social, technological and legal field become a historical aberration" (at paras. 34 and 54 of the appellant's memorandum). I would make the following comments with respect to this statement.

[35] Firstly, it is important to specify that the excerpt quoted by the appellant does not express the Court's position, but rather repeats the comments of counsel for the Minister in his

memorandum. Secondly, the Court's conclusion that subsection 176(1) of the ITA no longer serves any valid purpose is part of an analysis of the unreasonable nature of the seizure authorized by that provision. On the basis that one of the purposes of the Charter is to ensure that legislation keeps pace with the times, the Court could only reject the Minister's claims and conclude that the mere historical presence of this provision was not sufficient to establish that it was not unreasonable. However, that is not the issue that I must resolve at this stage of the analysis, which is concerned only with the meaning and scope of rules 317 and 318.

[36] I also note that subsection 176(1) of the ITA, as it read at the time, had no authentication purpose, as counsel for the respondent pointed out. Care must therefore be taken not to speculate as to what the Minister's position and the Court's decision would have been otherwise. Lastly, it is also relevant to note that the appellant has not cited any other decision of this Court or even of the Federal Court to support his argument that rules 317 and 318 no longer serve any purpose. On the contrary, this Court has reiterated, subsequent to *Gernhart*, that the authentication purpose is still relevant: *CCLA* at para. 18; *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 42 at para. 11 [*Canadian North*].

[37] It would certainly be possible to consider other ways of ensuring the authenticity of the documents filed by the parties in their respective records and to rely upon the rules governing adversarial proceedings, as the appellant suggests, to achieve the same objective. I can even conceive that technological advancements may make it less necessary than it was at other points in time to send the decision-maker's record to the Registry in order to ensure that the documents that will potentially become part of the applicant's or the respondent's record are indeed

documents that were before the administrative decision-maker. However, this is not sufficient to conclude that a rule is inapplicable as long as that rule has not been amended or repealed.

[38] In any event, it seems more important to me to situate rules 317 and 318 within the broader architecture of the Rules governing the Federal Courts to have a good understanding of their meaning and scope. The definitions found in rule 2 include that of "Court file", which is described as "the file maintained pursuant to rule 23 or 24." Rule 23 further provides, in its first subrule, that the Administrator shall keep a file that is composed of documents such as "document[s] filed under these Rules," "correspondence between a party and the Registry" and "all orders". The second subrule also provides that the Administrator shall keep an annex to each Court file that is comprised of affidavits, exhibits, and "all other documents and material in the possession of the Court or the Registry that are not required by these Rules to be kept in the Court file" (para. 23(2)(c)). The certified record from the tribunal that is transmitted to the Registry under rule 318 clearly falls into this subcategory.

[39] While it may be tempting to rely on this rule to conclude, as the appellant invites us to do, that the annexes (and thus the certified record) are not formally part of the Court file, such an approach seems to me to be erroneous. The definition of "Court file" in rule 2 makes no such distinction; therefore, the annex must be considered part of the Court file. If it were to be determined that the "Court file" includes only the Court file referred to in the first subrule of rule 23, the definition in rule 2 would be unnecessary and redundant since the Court file would be defined as the Court file. Moreover, the interpretation suggested by the appellant would mean

that affidavits and exhibits placed in the annex would not be part of the Court file, and this is clearly an untenable position.

[40] Subrule 26(1) further provides that files and annexes "that [are] available to the public" may be inspected by a person if the necessary facilities are available. The appellant would like to take advantage of what he considers to be a condition ("if they are available to the public," as he reads it) to conclude that subrule 26(1) does not resolve the issue of public accessibility of Court files and their annexes, but merely provides for the ways and means of accessing documents that are also public. To the extent that a document has not been filed with the Court by either party in one of their respective records, that document would not be part of the Court file and would therefore not be accessible to the public. This interpretation appears to me to be unfounded.

[41] Rules 23 and 26 are in Part 2 of the Rules, which deals with the administration of the Court. In addition to the provisions relating to Court files (rules 21–26.1), this part of the Rules contains rules relating to officers of the Court (rule 12), the seals of the two courts (rule 13), the Registry (rules 14–18), fees (rules 19–20), unclaimed exhibits (rule 27), hearings (rules 28–40), and the summoning of witnesses (rules 41–46). It is clear that these rules have nothing to do with substantive law and are intended only to facilitate the proper functioning of the Court. The rules governing procedure and evidence, and in particular those governing the confidentiality of documents, must therefore be sought elsewhere.

[42] It is rules 151 and 152 that set out the procedure for the filing of confidential documents. Rule 151 provides that a party may submit a motion to the Court for an order "that material to be

filed shall be treated as confidential." Where such an order is made by the Court, only solicitors of record will have access to the documents marked as confidential, and these solicitors must give a written undertaking to the Court that they will not disclose their contents.

[43] The appellant argued, both before the Federal Court and before us, that these rules are illusory in a situation such as his since the documents would be made public before the applicant could even see them and before a motion could even be made to keep them confidential. He also argued that reliance on these rules was unnecessary and ill-founded because they are intended only to protect the confidentiality of information or documents that are in the record filed with the Court by the parties and that would otherwise be accessible to the public. The appellant argued that because the certified record transmitted to the Registry is not part of the Court file and is not public, there is no need to rely on rules 151 and 152 to preserve its confidentiality.

[44] The trial judge acted correctly in rejecting these arguments. I will not return to the second of these arguments, which seems to me to be circular insofar as it is based on the premise that documents transmitted to the Registry become public only once they become part of the record submitted by the parties to the Court. As a matter of fact, this is precisely the question that must be decided and that is answered on its face by rule 26. However, what about the practical impossibility encountered by the appellant with respect to filing a motion to preserve the confidentiality of information that he considers private and that was in the certified record transmitted to the Registry?

[45] It is true that rule 151, as it is worded, appears to be prospective in nature. It indeed allows a party to file a motion for an order that documents "to be filed" be treated as confidential. However, the Federal Court and this Court have shown flexibility in applying this rule. For example, in *Bah v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 693, [2014] F.C.J. No. 1068 (QL), the Federal Court considered that it had the power to impose an order of confidentiality concerning documents that had already been placed in the Court file.

[46] The Court went even further in *Harkat (Re)*, 2009 FC 167, [2009] F.C.J. No. 228 (QL) [*Harkat*] by allowing Mr. Harkat, who was the subject of a security certificate, to view summaries of conversations prepared by counsel for the ministers involved and provided to the Court and the special advocates. Counsel for the ministers argued that these documents could not be kept confidential and should become part of the public file of the Court unless their disclosure would be injurious to national security. The special advocates argued that the documents could contain personal information and wanted Mr. Harkat to be able to see them before they became accessible to the public so that he could decide for himself what to do next.

[47] Recognizing that Mr. Harkat still had the option of seeking a confidentiality order pursuant to rule 151 to block the disclosure of documents that were not otherwise likely to be injurious to national security, the Court granted the special advocates' request. In doing so, it allowed Mr. Harkat to review the conversation summaries that were not yet part of the Court file so that he could make an informed decision about whether to bring a motion for order of confidentiality. I fully endorse the connection made by the Federal Court between that case and Mr. Rémillard's situation in the following paragraph of its reasons:

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

[48] The reasoning of the Federal Court in *Harkat* was adopted in *Charkaoui, Re*, 2009 FC 342, [2010] 3 F.C.R. 67. This case law appears to me to be entirely consistent with rule 55, which allows the Court to vary a rule or dispense with compliance with a rule; rule 3, which sets out the general principle that the Rules shall be interpreted and applied so as to secure a just outcome for every proceeding; and rule 4, which allows the Court to provide for any procedural matter not provided for in the Rules. Furthermore, Mr. Justice Stratas (speaking as a single judge on a motion) recognized, albeit in the somewhat different context of an objection by a tribunal to a request for transmission under subrule 318(2), that this Court can draw upon "its plenary powers in the area of supervision … to craft procedures to achieve certain legitimate objectives in specific cases" (*Lukács* at para. 14).

[49] It therefore seems to me that it is rule 151 that governs public access to documents filed with the Court. In accordance with the Supreme Court case law regarding open and accessible proceedings, it will be up to the judge hearing a motion for order of confidentiality to determine whether it is necessary to withhold certain documents from the public in light of the arguments raised by the applicant, "notwithstanding the public interest in open and accessible court

proceedings.” The highest court has repeatedly stated that the power to impose limits on the openness and accessibility of court proceedings and on the freedom of the press to report on them must be exercised with care and restraint given the crucial importance of respect for both values to the proper functioning of our democracy: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 at paragraphs 1, 36; *A.G. (Nova Scotia) v. MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175 at 183, 185–186; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, 1996 CarswellNB 462 at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332 at paras. 23–26; *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326 at 1326–1339; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835 at 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 at paras. 32–39; *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] S.C.J. No. 25 at paras. 30, 39 [*Sherman*].

[50] This Court has had the opportunity to apply these principles on several occasions, including in *Kirikos v. Fowlie*, 2016 FCA 80, [2016] F.C.J. No. 278, where it stated the following:

> [19] What is meant by the “open court principle”? In a nutshell, it signifies that in Canada, unless otherwise stated, all court proceedings, <u>including all material forming part of a court’s records</u>, remain publicly available. As such, confidentiality orders are the exception. Orders such as the one requested in this case are granted only in exceptional circumstances to avoid deleterious effects on the principle of open courts and freedom of expression … .
>
> [Emphasis added.]

[51] It is therefore under the authority of rule 151 that the appellant could have requested an order of confidentiality to withhold from the public and the press certain documents or

information that he considered confidential. The party seeking such an order will have a heavy burden, as the Supreme Court recently recalled in *Sherman*. Speaking for a unanimous Court, Mr. Justice Kasirer wrote the following in that case (at para. 35):

> For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[52] This is precisely what counsel for Mr. Rémillard did from the moment that he was contacted by a journalist. An interim order was immediately made by the Federal Court, and that order is still in effect following this Court's order of January 26, 2021, granting the motion to stay the order issued by the Federal Court on November 17, 2020.

[53] As noted above, the Rules are flexible enough to ensure that confidentiality is maintained when the circumstances require it. The appellant could therefore have requested to see the documents transmitted to the Court Registry before they were placed in the annex of the Court file, which would have made it possible to bring a motion for order of confidentiality before the documents became accessible to the public. Given the large number of documents sought by the appellant in his request for transmission under rule 317, it was foreseeable that some of those documents might contain information that he considered confidential. In any event, Mr. Rémillard obtained the requested documents from the CRA at the same time as the Court Registry, namely, on August 30 and October 4, 2019, and thus could have brought his motion for order of confidentiality well before January 15, 2020. In these circumstances, I find it difficult to see how Mr. Rémillard can claim that he was surprised that a journalist had had access to the file.

[54] To this, the appellant counters, as noted above, that the open court principle applies only to the record as constituted by the parties and that is before the Court and that he could not therefore expect the public and the media to have access to the record sent by the CRA to the Court Registry under rule 317. I have already explained, in the preceding paragraphs, why this distinction between the Court file and the record of the Registry cannot hold water under the Rules of the Court. Does this mean that the Court can rely on the entire record of the Registry to make its decision, and not only on the evidentiary record constituted by the parties? Would this not go against the very foundations of our adversarial system of justice, where the presentation of the facts is the responsibility of the parties and their counsel?

[55] In general, it is undeniable that a judge is not at liberty to examine documents that are not in the evidentiary record submitted by the parties. The decision of the Ontario Court of Appeal in *Phillips et al. v. Ford Motor Co. of Canada Ltd. et al.*, [1971] 2 O.R. 637, 18 D.L.R. (3d) 641 (at 657), cited by this Court in *Gernhart*, illustrates this principle well:

> Our mode of trial procedure is based upon the adversary system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of facts, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in controversy. A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice for the litigants. Undoubtedly a Court must be concerned with truth, in the sense that it accepts as true certain sworn evidence and rejects other testimony as unworthy of belief, but it cannot embark upon a quest for the "scientific" or "technological" truth when such an adventure does violence to the primary function of the Court, which has always been to do justice, according to law. …

[56] The same is true when the Court is exercising its supervisory power. There can be no doubt that the Court, when presented with an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act), can rely only on the documents in the parties' records. It is the responsibility of the applicant to reproduce in his or her record, in whole or in part, the record transmitted by the administrative decision-maker; if the respondent believes that one or more documents in the certified record that were not filed by the applicant are relevant, the respondent will add them to his or her own record. Only those documents will form part of the evidentiary record and may be considered by the Court: see, in particular, *Canadian North* at paras. 9 and 12; *CCLA* at para. 18.

[57] Of course, this principle creates a certain tension with the very purpose of judicial review. Indeed, reviewing courts are not mandated to make their own findings of fact or to rule on the merits of the submissions made by the parties, but only to rule on the legality or reasonableness of decisions made by administrative decision-makers. In keeping with the principle of the rule of law and the role conferred on the judiciary to ensure that the executive branch is acting within the powers delegated to it by Parliament, it is not the role of the reviewing court to substitute itself for the regulatory or administrative authority and to weigh the evidence itself in order to draw its own conclusions; rather, its role is to ensure that the decision is reasonable or, in some rare cases, correct in light of the applicable law.

[58] However, it goes without saying that, in order to perform this task, the reviewing court must have access to all the evidence that was before the administrative decision-maker. Indeed, how can a court charged with assessing the reasonableness of a decision and the defensibility of

the justification given in light of the evidence do so if it does not have access to the entire record that was before the administrative authority? Is there not a risk, as my colleague Justice Stratas pointed out (dissenting, but not on this point) in *Slansky* at paragraph 276, that an inadequate evidentiary record may in some circumstances immunize the decision made by a decision-maker or an administrative tribunal? For example, how would it be possible to assess whether the evidence in the record supports a conclusion that was reached if all the evidence that was before the administrative body is not on the record of the parties?

[59] In my view, these risks are real, but they nevertheless do not allow the Court to usurp the role of the parties in presenting the evidence and arguments in support of their positions. Even in the context of an application for judicial review, the fundamental principles of our adversarial system of justice continue to apply, and judges must be careful not to act as lawyers and supplement a record that they consider incomplete by consulting, of their own motion, the tribunal record transmitted to the Registry.

[60] In light of the foregoing, I am of the view that the Federal Court erred in consulting of its own motion the certified record transmitted to the Registry by the Minister before the parties had even filed their records. Indeed, it appears, on the basis of paragraph 193 of the Federal Court's reasons, that the judge reviewed the documents before concluding that they did not meet all the requirements for an order of confidentiality. However, I find that this error is of no consequence as it had no impact on the rights of the parties. It must be remembered that the burden is on the party requesting that material be kept confidential to identify it specifically and to state the legal principle under which it must be removed from the record accessible to the public. In this case,

the judge did not definitively dismiss the appellant's motion, but merely indicated that it was too general and therefore did not meet the requirements of rule 151. However, the judge did expressly preserve Mr. Rémillard's right to file a new motion specifically identifying the documents for which he considers confidentiality to be necessary. I therefore see no breach of procedural fairness in this approach.

[61] In summary, I agree with the appellant that judges on judicial review, like judges hearing an action, cannot go beyond what was submitted to them by the parties in the course of their deliberations and must rely on the evidentiary record in reaching their decision in an adversarial system of justice such as ours. The only exception permitted by the Rules is in rule 313, under which the Court may order that other material be filed where it considers that the application records of the parties are incomplete. Indeed, there may be situations where the Court considers that it is not in a position to adequately conduct a judicial review of a decision on the basis of the record submitted by the parties. This is a power that must be exercised with caution as parties should be in control of their own record: *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287 at para. 25. Moreover, this rule does not authorize judges themselves to consult the certified record; at most, a judge may ask the parties themselves to present documents or evidence that the judge deems necessary to carry out the role that has been conferred on him or her.

[62] However, I do not draw the same conclusion from this finding as the appellant. The adversarial nature of our justice system should not be confused with the open court principle (although they are not unrelated). These two major values, which have different origins and rationales, can and must coexist without being equated. As noted above, open and accessible

courts are essential to the transparency of the judicial process and have been enshrined in the Constitution as a matter of freedom of expression. It does not follow that everything that must be made accessible to the public must necessarily end up before the judge. Indeed, there is no reason why the public should not have access to documents and information that judges cannot consider in the exercise of their judicial duties. In fact, this situation occurs regularly, in both civil and criminal matters, without causing any problems whatsoever. In short, there is nothing to prevent the record that was filed with the Court Registry and that is accessible to the public from being different from the record entered into evidence by the parties, which alone can be considered by the judge.

[63] It may well be that the system surrounding public access to a record that has been established by the Rules goes beyond what is required by the open court principle as interpreted by the Supreme Court. This is far from sufficient to render it invalid, especially since rule 151 and the case law relating to it adequately protect the confidentiality of documents and information whose dissemination might violate a legal principle.

[64] I therefore find that the first question raised by this case must be answered in the affirmative. The Federal Court was correct in concluding that the certified record became public upon transmission to the Court Registry pursuant to rule 318.

B. *To the extent that certified records do become public when they are transmitted to the Registry, did the Federal Court err in concluding that there was no resulting violation of section 8 of the Charter?*

[65] The appellant argues that if the Court were to conclude that the certified record transmitted to the Registry under rule 318 must be considered accessible to the public, it must be inferred that it authorizes an unreasonable seizure that is inconsistent with section 8 of the Charter. Should that happen, he asks that the Court of Appeal read down rule 318 so that the transmission of the certified record to the Court Registry does not result in it becoming accessible to the public, or alternatively, that the words "to the Registry" in paragraph 318(1)(a), paragraph 318(1)(b) and subrule 318(4) of rule 318 be declared inoperative.

[66] As he did at trial, Mr. Rémillard relies primarily on the decision of this Court in *Gernhart* to support his argument. In that case, which I have already discussed in paragraph 34 of these reasons, the impugned provision required the Minister to transmit to the TCC all documents in his possession that were relevant to the appeal. Speaking for a unanimous Court, Mr. Justice Sexton relied on *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417 [*Dyment*] to conclude that a seizure can occur even where no investigation is taking place and that the transmission of a taxpayer's tax return to the TCC amounted to a seizure so long as the taxpayer had a reasonable expectation of privacy in filing the return and had not consented to its subsequent transmission to the Court. Justice Sexton stated the following on this issue:

> [24] Indeed, it is natural that most seizures occur during investigations, since investigations permit state actors to narrowly focus the target of a seizure. That salutary idea should not be turned on its ear to then prevent the application of s. 8 of the *Charter* in circumstances where state actors do not engage in investigations. In my view, that conclusion would permit state actors to actively obtain private information for non-investigatory purposes and to indiscriminately

> broadcast that information, despite the fact that people nevertheless have a reasonable expectation of privacy in that information.

[67] Mr. Rémillard argued before us, as he did before the Federal Court, that his situation is no different from that of Ms. Gernhart since rule 317 permits all of a litigant's documents and personal information that are collected by any tribunal to be made public, whether or not they are introduced into evidence. In my view, this argument must be rejected, essentially for the reasons given by the Federal Court. Despite the able argument of counsel for Mr. Rémillard, there is no symmetry between the certified record transmission system established by the Rules and subsection 176(1) of the ITA.

[68] It is well established that section 8 of the Charter is intended to protect the reasonable expectations of privacy of individuals: *Hunter et al. v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145 at 159; *Dyment* at para. 15. In other words, the person claiming protection under section 8 must be able to show a subjectively held, and objectively reasonable, expectation of privacy: *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320 at para. 12. However, the Supreme Court has repeatedly stated that legitimate expectations of privacy are necessarily diminished where an individual is required to produce documents in the course of a regulated activity (see, for example, *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425 at p.507; *143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General)*, 1994 CanLII 89 (SCC), [1994] 2 S.C.R. 339 at 378; *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, 1994 CanLII 92 (SCC), [1994] 2 S.C.R. 406 at 420–421) or in tax matters (see *R. v. McKinlay Transport Ltd.*,

1990 CanLII 137 (SCC), [1990] 1 S.C.R. 627 at 649–650 [*McKinlay*]; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 at para. 72).

[69] In this case, I find that Mr. Rémillard has not shown that there is a subjective and objectively reasonable expectation of privacy, having regard to all the circumstances. First, he could have limited the number of documents sought in his request for transmission under rule 317. Rather than only including the documents considered by the Minister in making his decision, Mr. Rémillard expanded the scope of his request to include all documents [TRANSLATION] "consulted or generated by the Minister or by any person or entity acting on behalf of the Minister … " and thus proportionally increased the number of documents transmitted and the risk of confidential information being included in those documents. Second, he waited nearly four months before filing a motion for order of confidentiality with the Court and only did so after a journalist had seen the certified record. Given the perfectly clear wording of rule 26, one would have expected him to bring such a motion much earlier, if only as a preventative measure and an additional precaution, if he had any real concerns about his privacy.

[70] Even assuming that Mr. Rémillard may have had a subjective expectation of privacy with respect to some of the information contained in those documents, this expectation does not appear to me to be objectively reasonable in the circumstances. Anyone who brings a case before the courts, whether in family, commercial, administrative, tax or other matters, must expect that large parts of his or her private life will become accessible to the public. This is what is provided for in rule 26, as well as in paragraph 241(3)(b) of the ITA, which states that the confidentiality

of information transmitted to the Minister does not apply in respect of legal proceedings relating to the administration or enforcement of the ITA.

[71] I would add that the concept of seizure involves the taking of a thing from a person by a public authority without that person's consent (*Dyment* at para. 26). In *McKinlay* (at 642), this concept was extended to all situations where a person is required to produce information under compulsion of the state. This is not the situation in which Mr. Rémillard found himself. He asked the Minister of his own initiative to provide him (and the Registry) with the documents that concerned him. He controlled not only the scope of the documents transmitted, but also the timing of his request. He was also informed of the documents that had been provided to the Registry since he also obtained a copy of them.

[72] This situation therefore has nothing to do with the situation in which Ms. Gernhart found herself. The documents were not transmitted by the Minister automatically, but at the request of Mr. Rémillard, and the information was not broadcast "indiscriminately" (the French version of *Gernhart* uses the word "*inconsidérément*"), but only according to the criteria determined by Mr. Rémillard himself. This situation is therefore far from one in which the state is interfering in the private affairs of the appellant, as was the case in *Gernhart* and *Dyment*. Far from transmitting confidential information without his consent and without informing him, it was rather at Mr. Rémillard's own request that the Minister transmitted the relevant documents to the Court Registry.

[73] In his memorandum and at the hearing, Mr. Rémillard argued that he had no real choice in proceeding as he did and that he had to use the procedure set out in rules 317 and 318 in order to make a valid application for judicial review. The Federal Court was correct in rejecting this argument.

[74] As noted above, the procedure set out in rules 317 and 318 is optional and is carried out on the applicant's initiative. It is up to applicants to determine whether they have all the relevant documents to complete their application for judicial review. If there is any doubt, or if applicants wish to supplement their record to ensure that they have exactly the same information as the administrative decision-maker had in making its decision, applicants may avail themselves of this mechanism provided for in the Rules; it is up to applicants to determine the number of documents sought. In this case, it appears that the request for the transmission of documents made by counsel for Mr. Rémillard was written in very general terms, and there is no evidence that all the documents requested were relevant to establish the merits of his application.

[75] Furthermore, Mr. Rémillard could have availed himself of the mechanism provided under rule 151 and asked the Court to make an order to protect the confidentiality of certain information contained in the transmitted documents. The power conferred by this rule has been interpreted in a flexible manner, and counsel for Mr. Rémillard could even have asked to see the transmitted documents before they were made available to the public.

[76] Lastly, Mr. Rémillard could have sought to have his application for judicial review be heard as if it were an action, as authorized by subsection 18.4(2) of the Act. As the Federal Court

noted at paragraph 182, "[t]his provision constitutes Parliament's response to concerns that an application for judicial review would not offer appropriate procedural safeguards when declaratory relief is exercised." If Mr. Rémillard truly believed that the procedural safeguards surrounding an application for judicial review were not sufficient to protect the confidentiality of his personal information, he could have availed himself of this option.

[77] For all of these reasons, therefore, I am of the view that the procedure set out in rules 317 and 318 does not have the effect of a seizure, even when combined with rule 26. It is therefore not necessary for me to consider whether this procedure is unreasonable within the meaning of section 8 of the Charter.

V. Conclusion

[78] I would therefore dismiss the appeal, with costs. The documents that were transmitted to the Federal Court Registry on August 30 and October 4, 2019, and that are currently the subject of an order of confidentiality shall remain confidential and shall not be published for a period of 60 days from the date of this judgment.

"Yves de Montigny"
J.A.

"I agree.
Mary J. L. Gleason J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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