Federal Court of Appeal | Cour d'appel fédérale

Date: 20220617

Docket: A-142-21

Citation: 2022 FCA 117

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

CRAIG LEVETT and NATHALIE BENSMIHAN
OFER BAAZOV and CATHY BENSMIHAN
9179-3786 QUÉBEC INC.

Appellants

and

THE ATTORNEY GENERAL OF CANADA
and THE CANADA REVENUE AGENCY

Respondents

Heard at Montréal, Quebec, on May 3, 2022.

Judgment delivered at Ottawa, Ontario, on June 17, 2022.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] This is an appeal from a judgment of the Federal Court (*per* St-Louis J.) dated April 12, 2021. The Federal Court dismissed the appellants' consolidated amended applications for judicial review relating to the validity of three requests for information (the RFIs) addressed by

the Canada Revenue Agency (the CRA or respondent) to the Swiss Federal Tax Administration (the Swiss Authorities).

[2] The appellants are all Canadian taxpayers. Craig Levett and Nathalie Bensmihan are husband and wife and so are Offer Baazov and Cathy Bensmihan. The appellant 9179-3786 Québec Inc. (9179 Inc.) is a corporation owned by Mr. Levett. The RFIs at issue were sent to the Swiss Authorities in the context of audits conducted by the CRA under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the Act) in relation to foreign investments and foreign income that the appellants may not have properly reported in Canada.

[3] The first two RFIs, both dated October 30, 2017, concerned Mr. Levett and Ms. Nathalie Bensmihan, on the one hand, and Mr. Baazov and Ms. Cathy Bensmihan, on the other. Both requested from the Swiss Authorities the exact same banking information related to accounts presumably held with the Hyposwiss Private Bank by the appellants and/or two corporations, Zhapa Holdings and Kilworthy Limited, and to accounts presumably held with the Banque Union Bancaire Privée (Banque UBP) by the appellants and/or a corporation by the name of Optivilla Holding. The third RFI, dated April 19, 2018, concerned the audit of 9179 Inc. and sought corporate and financial information about a Swiss entity by the name of Socimbal AG (Socimbal), in relation to an unrepaid loan of USD $1,300,000 made by that corporation to 9179 Inc. in March of 2007.

[4] The RFIs were made pursuant to a tax treaty between Canada and Switzerland, *i.e.* the *Canada-Switzerland Income Tax Convention*, signed at Berne in 1976, as amended by the

Convention between the Government of Canada and the Swiss Federal Council for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed at Berne in 1997, and further amended by the *Protocol Amending the Convention between Canada and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital*, signed at Berne in 2010, which, at Article XII, sets out an "Interpretative Protocol" (the *Tax Convention*). The *Tax Convention* has force of law in Canada pursuant to section 19 of the *Act to Implement Conventions Between Canada and Morocco, Canada and Pakistan, Canada and Singapore, Canada and the Philippines, Canada and the Dominican Republic and Canada and Switzerland for the Avoidance of Double taxation with respect to Income Tax*, S.C. 1977, c. 29 and section 12 of the *Tax Conventions Implementation Act, 2013*, S.C. 2013, c. 27.

[5] The appellants judicially challenged the legality of the RFIs on a number of grounds. In a 59-page decision reported at 2021 FC 295, the Federal Court dismissed them all.

[6] Before us, the appellants contend that the RFIs ought to have been quashed on the basis that the CRA (i) did not exhaust all domestic avenues to obtain the information sought; (ii) based the RFIs on allegations that were false and that it knew were false; (iii) did not provide full and frank disclosure to the Swiss Authorities; (iv) illegally sought and obtained solicitor-client privileged information; and (v) illegally disclosed confidential taxpayer information. They claim that by concluding otherwise, the Federal Court's decision ought to be overturned. The appellants also submit that the Federal Court erred by permitting the filing of only portions of a supplementary affidavit sworn by Mtre Charles Leibovich, on August 19, 2019 (the

Supplementary Affidavit). Mtre Leibovich was Nathalie Bensmihan's legal representative at the time this appellant was being audited by the CRA.

[7] Our role in this appeal is to determine whether the Federal Court chose the appropriate standard of review and, if it did, whether it properly applied that standard in reviewing the RFIs. When determining whether that standard was applied properly, the Court must "step into the shoes" of the Federal Court and effectively focus on the administrative decision under review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 12 W.W.R. 1 at para. 10).

[8] It is not disputed that the Federal Court appropriately chose the presumptive standard of reasonableness in considering the first three issues enumerated above. This is entirely consistent with the teachings of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 25 (*Vavilov*). As stated by the Supreme Court of Canada in *Vavilov*, a reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker". That standard requires a reviewing court to "defer to such a decision" (*Vavilov* at para. 85).

[9] The parties, however, differ as to the standard of review applicable to the remaining two issues. The appellants claim that the correctness standard applies to solicitor-client privilege violation issue. As for the taxpayer information disclosure issue, they contend that although the reasonableness standard is the appropriate one, that standard must be applied using the approach

set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 (*Doré*), because, they say, this particular issue engages their rights under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the *Charter*).

[10] The Federal Court determined that neither of the *Charter* rights invoked by the appellants were engaged in this case, with the result that there was no need to resort to *Doré* in reviewing the reasonableness of the RFIs. As for the issue relating to solicitor-client privilege, the Federal Court held that the information allegedly obtained in violation of that privilege was irrelevant, as it had played no role in the issuance of the RFIs. Consequently, the Federal Court chose to review the legality of the RFIs using the standard of reasonableness.

[11] The respondent submits that the Federal Court's choice was the appropriate one and stresses that the issuance of a RFI is a discretionary decision calling, on judicial review, for considerable deference.

[12] As I will further discuss below, I find that the Federal Court chose the appropriate standard of review and applied it properly. Therefore, I see no reason to interfere with its decision.

I. The Domestic Avenues Exhaustion Issue

[13] The appellants submit that both the RFIs issued on October 30, 2017 (the Levett-Baazov RFIs) and the one issued on April 19, 2018 (the 9179 Inc. RFI) are unreasonable because the CRA failed to exhaust all reasonable domestic means of obtaining the information sought in the RFIs before resorting to them. In particular, they claim that the CRA, prior to issuing the RFIs, never used its powers under sections 231.1, 231.2 or 231.7 of the Act and therefore failed to (i) inspect, audit or examine their books and records in an attempt to locate the information, (ii) formally require the production of the information, or (iii) seek a Court order to compel the production of same.

[14] The appellants correctly point out that paragraph 2(*b*) of the *Tax Convention*'s Interpretative Protocol (the Interpretative Protocol) required the CRA to resort to a RFI only "once [it] has pursued all reasonable means available under its internal taxation procedure to obtain the information". However, as the Federal Court quite rightly noted, the CRA is under no obligation to pursue all available domestic means to obtain the information, only all reasonable ones.

[15] Key to this obligation is the word "reasonable". This language strongly suggests some measure of discretion in determining, in any given case, that all reasonable means available under the Act to obtain the information sought have been pursued before sending a RFI to the Swiss Authorities. It also strongly suggests that this determination will be made taking into account the particular circumstances of each case.

a. The Levett-Baazov RFIs

[16] With respect to the Levett-Baazov RFIs, the record shows that the CRA received information from a partner country—and gathered information on online discussion forums—that led it to believe that Messrs. Levett and Baazov might have failed to report foreign investments and foreign income in the taxation years being audited, that is the 2011 to 2013 taxation years in the case of Mr. Levett and the 2010 to 2013 taxation years in the case of Mr. Baazov.

[17] On June 30, 2015, as part of the audit undertaken by the CRA, questionnaires were sent to Messrs. Levett and Baazov pursuant to section 231.1 of the Act. These questionnaires contained a number of questions regarding whether they—or family members—owned residences, property, bank accounts or investments outside Canada or were involved with companies, trusts or other entities abroad.

[18] In response to these questionnaires, both Messrs. Levett and Baazov denied having any foreign interests or any links with foreign companies or entities. In March 2016, the CRA auditor in charge of their audit (the Auditor) proceeded to interview Messrs. Levett and Baazov. Again, both denied having any such interests or links. According to the record, neither of the appellants had filed T1134 nor T1135 forms for the taxation years at issue. These forms are mandatory annual filings for Canadians who, respectively, own a minimum amount of shares of a foreign corporation, and/or have foreign assets or income valued at more than CAD $100,000.

[19] The Auditor's interview notes show that Mr. Baazov was confronted with information linking him to Zhapa Holdings. However, he denied having ever been involved in the activities of this corporation, specifying that he had even never heard of it. With respect to Mr. Levett, he was asked about possible links with Zhapa Holdings and Kilworthy Limited. He responded not knowing anything about Kilworthy Limited and not being involved in Zhapa Holdings, although he had heard of it.

[20] The Auditor explained that she was not in a position to seek a Court order under section 231.7 of the Act compelling the production of information concerning these foreign entities because Messrs. Levett and Baazov had responded to her request for information under section 231.1 of the Act and because she did not have sufficient information that could contradict their responses. She also explained that proceeding under section 231.2 of the Act was not an option either because the information she was looking for—and had been unable to obtain from these appellants—concerned foreign entities.

[21] The Auditor decided to proceed with the Levett-Baazov RFIs after she became aware of a publicly available decision of Quebec's *Tribunal administratif des marchés financiers*, dated April 6, 2017 (the TMF Decision), which nourished her belief that Messrs. Levett and Baazov might have foreign interests or be involved with foreign entities. In particular, that decision spoke of possible links to Kilworthy Limited as well as to Optivilla Holding. The Auditor did not see the need to confront Messrs. Levett and Baazov with this information, as they had always denied having any assets, revenues or activities abroad, except for a total foreign income of $3,467 declared by Mr. Levett in 2015. She further explained that the RFIs were unconnected to

the audits performed on the Messrs. Levett and Baazov's spouses, which were related to the sale of shares to a foreign corporation, adding that Nathalie and Cathy Bensmihan's names appeared on the Levett-Baazov RFIs only in case Messrs. Levett and Baazov had used them as nominees for their offshore assets.

[22] The appellants claim that the CRA did not do enough in pursuing domestic means of obtaining the information sought in these RFIs. I disagree, as I am satisfied that it was reasonably open to the CRA, in the circumstances of this case, to proceed with the Levett-Baazov RFIs at the time it did in view of the fact that Messrs. Levett and Baazov had, to that point, denied, on more than one occasion, having any such assets, revenues or activities in the taxation years at issue. One wonders how many times the CRA needed to be told by Messrs. Levett and Baazov, or their representatives, despite indicia to the contrary, that they had no such assets or activities during those years before considering sending a RFI to the Swiss Authorities.

[23] As the respondent points out, Canada's tax system relies on self-reporting and self-assessment by taxpayers (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568 at 636-37 (*McKinlay*); *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 at para. 54; *Orly Automobiles Inc. v. Canada*, 2005 FCA 425, 345 N.R. 284 at para. 20). This is why, when it comes to federal taxes, the CRA is empowered with extended means of verifying the information reported by taxpayers in their tax returns (*McKinlay* at 648; *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381 at paras. 1, 6, 31; *Canada (National Revenue) v. Greater Montréal Real Estate Board*, 2007 FCA 346, [2008] 3 F.C.R. 366 at paras. 34, 47, leave to appeal to the SCC ref'd, 386 N.R. 397 (note)). One such means is the exchange of information

with foreign countries through international tax agreements. The *Tax Convention* is one such agreement as it provides, through Article 25, for a tax information exchange mechanism with a foreign country, Switzerland.

[24] It is trite that "[c]ontrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties", meaning that a "literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated in so far as the particular item under consideration is concerned" (*Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802, 125 D.L.R. (4th) 485 at para. 43 (*Crown Forest*), quoting *Gladden Estate v. Canada*, [1985] 1 C.T.C. 163 (F.C.T.D.), [1985] F.C.J. No. 31 (QL/Lexis) at 166-67 (emphasis in original); see also *Blue Bridge Trust Company Inc. v. Canada (National Revenue)*, 2020 FC 893, 2020 CarswellNat 3732 (WL Can) at para. 18, aff'd 2021 FCA 62, 2021 CarswellNat 4972 (WL Can), leave to appeal to SCC refused, 39682 (16 December 2021) (*Blue Bridge*)).

[25] The parties' "true intentions" may be ascertained by resorting to "extrinsic materials which form part of the legal context" (*Crown Forest* at para. 44). This includes "accepted model conventions and official commentaries thereon" (*Crown Forest* at para. 44), such as, as noted by the Federal Court, the *Model Tax Convention on Income and on Capital* emanating from the Organisation for Economic Co-operation and Development (the OECD) and its commentaries (2017) (the Model Convention; the Model Convention's Commentaries), as well as the OECD's *Manual on the Implementation of Exchange of Information Provisions for Tax Purposes*, approved by its Committee on Fiscal Affairs (Paris: 2006) (the Manual).

[26] When the language of Article 25 of the *Tax Convention* is read in light of these "extrinsic materials" (Model Convention's Commentary on Article 26 at para. 6; Manual at para. 23 and at 9, n. 13), it becomes clear that the true intentions of the parties to that agreement was to promote the exchange of information to the maximum extent possible, not to limit it (*Blue Bridge* at para. 20, dealing with a similar provision of the *Convention Between Canada and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, signed at Paris in 1975, as amended by the protocols signed at Ottawa in 1987 and 1995, and at Paris in 2010).

[27] It is also important to underscore at this point that through tax treaties such as the *Tax Convention*, OECD countries have "long recognised the need to improve administrative co-operation in tax matters, notably through exchange of information and assistance in collection of taxes, for the purpose of preventing tax evasion and avoidance" (Model Convention's Introduction at para. 2).

[28] The true intentions of the parties, as they emerge from extrinsic materials when it comes to Article 25 (namely to promote the exchange of information to the maximum extent possible with a view, notably, of preventing tax evasion and avoidance), are reflected, in my view, in the actual language of that provision, coupled with that of the Interpretative Protocol:

a. the information which may be subject to an exchange of information only need to be "foreseeably relevant for carrying out the provisions of this Convention or to

the administration or enforcement of the domestic laws concerning taxes covered by the Convention" (Article 25(1));

b. the notion of "foreseeable relevance" is intended "to provide for exchange of information in tax matters to the widest possible extent", provided the requesting State does not engage in "fishing expeditions" or request information "unlikely to be relevant to the tax affairs of a given taxpayer" (Article 2(*c*) of the *Tax Convention*'s Interpretative Protocol); and

c. the procedural requirements set out in Article 2(*b*) of the Interpretative Protocol, which concern the information that must be provided by the requesting State when making a RFI, are to be interpreted "in order not to frustrate effective exchange of information" (Article 2(*c*) of the *Tax Convention*'s Interpretative Protocol).

(Emphasis added)

[29] Messrs. Levett and Baazov have not convinced me that for the taxation years contemplated by the audits, the issuance of the Levett-Baazov RFIs, when examined in light of the primary objective of Article 25—which is to encourage the exchange of information to the maximum extent possible—and of the particular circumstances of this case, was unreasonable. Like all powers whose exercise involves a measure of judgment or discretion, an abusive exercise of these powers will generally justify the intervention of the reviewing court (*Vavilov* at

para. 108; Guy Régimbald, *Canadian Administrative Law*, 3rd ed. (Toronto: LexisNexis, 2021) at 230-256). However, here, that demonstration was not made.

[30] At the hearing of this appeal, the appellants made much of the fact that the Levett-Baazov RFIs seek information regarding the 2011 to 2015 taxation years while Messrs. Levett and Baazov were audited for the 2010/2011 to 2013 taxation years. They claim that the CRA simply cannot have exhausted all reasonable domestic avenues with respect to the 2014 and 2015 taxation years because neither of them were audited or asked questions by the CRA in respect of those years.

[31] At first glance, the appellants have a point. However, there is more to it in the record. The Auditor explained that she included these two taxation years in the Levett-Baazov RFIs because the TMF Decision made reference to the fact that the account Optivilla Holding held with the Banque UBP had been closed in 2016 and that the account's credit balance had been transferred to another Swiss financial institution in an account whose holder could not be identified. She planned, therefore, to extend Messrs. Levett and Baazov' audits to the 2014-2015 taxation years but in the meantime, she believed that information from both Banque UBP and Hyposwiss Private Bank which would include the years 2014 and 2015 might be relevant to her ongoing audits of Messrs. Levett and Baazov.

[32] The Auditor also explained that she considered seeking that information from Messrs. Levett and Baazov but anticipated that no other results would have been expected than what was obtained from them when they were questioned with respect to the 2010/2011-2013 taxation

years as, with the exception of Mr. Levett who declared a $3,467 foreign income in the 2015 taxation year, none of these appellants declared foreign investments, income or corporate ownership in respect of the 2014 and 2015 taxation years.

[33] I would add that the Swiss Authorities were aware that the actual audits contemplated by the Levett-Baazov RFIs covered only the taxation years of 2010/11 to 2013 and that the CRA intended to extend these audits to the 2014-2015 taxation years. This is what transpires from a decision of the Federal Administrative Court of Switzerland issued in October 2019 (the FAC Decision), dismissing the appellants' challenge of the order of the Swiss Authorities that the information in these RFIs be produced (Tribunal administratif fédéral (Federal Administrative Court), Division I, 29 October 2019, *A. et al. v. Swiss Federal Tax Administration (ESTV)*, A-223/2019 (Switzerland)). In that decision, the FAC was satisfied that the CRA had exhausted all reasonable domestic means available to obtain the information. With respect to the 2014-2015 years in particular, the FAC found that the CRA was entitled to assume that the appellants would provide the same denials regarding any investments or income abroad as they had for the 2010/11-2013 taxation years (FAC Decision at para. 4.1.5).

[34] The FAC Decision is obviously not binding on this Court but I do find, based on the facts of this case, as they appear from the record, that it was reasonably open to the CRA, given, as discussed above, the language and primary objective of Article 25 of the *Tax Convention* and its Interpretative Protocol, to include in the Levett-Baazov RFIs a reference to the years 2014 and 2015, although I agree with the Federal Court that it would have been preferable that the CRA

describe more accurately the status of the years 2014 and 2015 in the context of the actual audits being performed on Messrs. Levett and Baazov.

a. The 9179 Inc. RFI

[35] Regarding the RFI related to 9179 Inc.'s audit, the appellants submit that the CRA never contacted Socimbal's contact person, whose name they had provided to it. They say that it is obvious that the CRA did not exhaust all reasonable domestic means available to obtain the information it wished to obtain on Socimbal and that this failure was known to it. The Auditor explained that she had no legal authority to require information from that contact person as that person was not a Canadian resident nor a person carrying on business in Canada.

[36] As indicated at the outset of these reasons, Socimbal is a Swiss entity. The information sought with respect to that entity in the 9179 Inc. RFI was clearly foreign-based information. The appellants have not explained how the CRA could resort to section 231.1, 231.2 or 231.6 of the Act in order to obtain that information on Socimbal or its representatives in Switzerland. The Auditor admitted to not having contacted Socimbal's contact person in Switzerland, as she was not legally authorized to do so, but claimed that contacting that person would have been of limited value because the CRA did not have the authority to compel the production of documents from a foreign company or entity.

[37] As the Federal Court pointed out, and as the record shows, the only explanation the Auditor was able to get from the appellants or from 9179 Inc.'s representatives here in Canada

regarding the loan at issue was that the lender—Socimbal—was satisfied with it. In other words, it was felt that the appellants had been less than forthcoming in providing information on that transaction, which raised some suspicion. I recall that when the 9179 Inc. RFI was sent to the Swiss Authorities, that loan was more than 10 years old and had not been repaid, in whole or in part, capital or interests, by 9179 Inc.

[38] In light of all these circumstances, the issuance of the 9179 Inc. RFI, which sought from the Swiss Authorities information on Socimbal, a foreign entity, was, in my view, the result of a reasonable exercise of discretion on the part of the CRA, taking into account CRA's obligation to pursue all reasonable means under the Act of obtaining this information.

[39] In sum, I am satisfied that the appellants' claim that the CRA did not pursue all reasonable means available under the Act to obtain the information sought through both the Levett-Baazov and 9179 Inc. RFIs must fail and that there is no reason, therefore, to interfere with the Federal Court's conclusion on that issue.

II. The False Allegations and Lack of Full and Frank Disclosure Issues

[40] These two issues are closely interconnected to the one regarding the exhaustion of the domestic means available to the CRA for obtaining the information sought in the RFIs. Indeed, the appellants contend that the RFIs are fatally plagued with two critical false allegations. The first concerns Messrs. Levett and Baazov alleged failure to provide information for the years 2014 and 2015. The second concerns the alleged exhaustion of all domestic avenues by the CRA.

[41] The appellants also claim that by making these false allegations, the CRA failed in its duty to provide full and frank disclosure to the Swiss Authorities. Good faith on the part of the contracting States, they say, is the cornerstone of tax treaties and failure to adhere to that principle is likely to have an adverse impact on the requesting State's reputation. According to the appellants, strict adherence to the duty to provide full and frank disclosure is of utmost importance because RFIs are made *ex parte* while they affect the rights of the taxpayers concerned.

[42] In the same way the issue regarding the exhaustion of the domestic means available to the CRA failed, these arguments must fail as well. I already determined that it was reasonably open for the CRA to send the RFIs at the time it did and that the appellants' claim that the CRA had not at that time pursued all reasonable means available under the Act to obtain the information sought in both the Levett-Baazov and 9179 Inc. RFIs had no merit. Therefore, there was nothing "false" in the CRA's statement in these RFIs that it had pursued all reasonable means available under the Act to obtain that information.

[43] With respect to the 2014-2015 taxation years, the record shows, as I indicated previously, that the Swiss Authorities were aware that the actual audits contemplated by the Levett-Baazov RFIs covered only the taxation years of 2010/11 to 2013 and that the CRA intended to extend these audits to the 2014-2015 taxation years. Again, although the CRA could have used more accurate language when it comes to its interest in the 2014-2015 taxation years, this lack of precision, when the record is considered as a whole, does not amount, in my view, to a "false"

allegation and does not affect, as a result, the reasonableness of the RFIs that concern Messrs. Levett and Baazov and their respective spouse.

III. The Disclosure of Confidential Taxpayer Information Issue

[44] The appellants submit that the CRA exceeded what it was allowed to communicate to the Swiss Authorities. They say that the information the CRA is allowed to communicate in support of an RFI made under the *Tax Convention* can only be that listed at paragraph 2(*b*) of the Interpretative Protocol, namely:

> (i) name and, to the extent known, other information, such as address, account number or date of birth, in order to identify the person(s) under examination or investigation;
>
> (ii) the period of time for which the information is requested;
>
> (iii) a statement of the information sought including its nature and the form in which the requesting State wishes to receive the information from the requested State;
>
> (iv) the tax purpose for which the information is sought;
>
> (v) the name and, to the extent known, the address of any person believed to be in possession of the requested information.

[45] The appellants contend that in so doing, not only did the CRA disregard the requirements of that provision, but it also violated subsection 241(1) of the Act, which protects "taxpayer information"—as defined by subsection 241(10) of the Act—from disclosure.

[46] Although they recognize that subparagraph 241(4)(*e*)(xii) of the Act creates an exception to that prohibition when it comes to providing taxpayer information "under, and solely for the purposes of, a provision contained in a tax treaty with another country or in a listed international agreement" (Appellants' Memorandum of Fact and Law at para. 103), the appellants claim that this exception is curtailed by the terms of paragraph 2(*b*) of the Interpretative Protocol. More particularly, they contend that any communication exceeding the scope of that provision constitutes a violation of subsection 241(1) of the Act as well as a violation of their *Charter* rights to liberty and security of the person and against unreasonable search or seizure.

[47] I see no merit to that argument. I share the respondent's view that paragraph 2(*b*) of the Interpretative Protocol establishes a threshold, not an upper limit. It sets out what the requesting State "shall provide" to the competent authority when making a RFI under Article 25 of the *Tax Convention*. I see nothing in the wording of that provision which would prohibit the CRA from sharing background facts with the Swiss Authorities. Neither do I see anything in the wording of subparagraph 241(4)(*e*)(xii) of the Act that would have the limiting effect the appellants claim it has. In any event, as pointed out by the respondent, according to section 14 of the *Tax Conventions Implementation Act*, the *Tax Convention* supersedes Canadian law "to the extent of the inconsistency".

[48] As observed by the Federal Court, the information that forms part of an RFI is not left in the open as paragraph 2 of Article 25 of the *Tax Convention* holds the Swiss Authorities to secrecy with respect to that information. Confidentiality is therefore ensured within the contours delineated by section 241 of the Act and Article 25 of the *Tax Convention*.

[49] In sum, keeping in mind that the *Tax Convention* must receive a liberal interpretation that encourages exchange of information to the maximum extent possible, I am satisfied, on a reasonableness analysis, that there is no issue with the fact that the CRA provided the Swiss Authorities with more information—essentially background information—than what was minimally required by paragraph 2(*b*) of the Interpretative Protocol. This, in my view, was permitted by subparagraph 241(4)(*e*)(xii) of the Act, resulting in no breach of the prohibition set out in subsection 241(1) of the Act. I agree as well with the Federal Court that the appellants have failed to establish that their rights under sections 7 and 8 of the *Charter* were engaged by the issuance of the RFIs and that there was therefore a need to embark in the balancing exercise set out in *Doré* in reviewing the RFIs' validity.

IV. The Solicitor-Client Privilege Issue

[50] This issue stems from information collected in the course of the audits of Cathy Bensmihan and Nathalie Bensmihan (the Bensmihans' audits). These audits were conducted for the 2008 to 2013 taxation years in connection, as indicated above, to the sale of shares of a Quebec registered corporation, 9191-1982 Québec Inc. (9191 Inc.) to a Spanish corporation. They were performed by an auditor other than the Auditor up until August 2018—that is, several

months after the RFIs were sent to the Swiss Authorities. It is only at that point that the Auditor took over the Bensmihans' audits.

[51] The information at issue concerns the trust account ledger of the lawyer for 9191 Inc.'s shareholders, Mtre David Assor. That information (the Assor Information) was provided to the CRA in March 2017. It was provided by Mtres Leibovich and Shlomi Steve Levy, who, at the time, were the legal representatives of Nathalie Bensmihan and Cathy Bensmihan, respectively. With that information, the CRA issued a requirement under section 231.2 of the Act to the TD Canada Trust regarding transfers of funds deposited in Mtre Assor's trust account (the TD Information).

[52] The appellants contended before the Federal Court that the Assor Information—and the ensuing TD Information—was obtained in violation of solicitor-client privilege as the CRA never verified, contrary to *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336 (*Chambre des notaires*), whether Nathalie Bensmihan and Cathy Bensmihan had given their consent to the transmission of that information.

[53] The Federal Court denied the appellants' claim. It did so on the grounds (i) that the appellants had not demonstrated that all criteria required to establish solicitor-client privilege were met; (ii) that the transmission of the Assor Information was made in conformity with *Chambre des notaires* as that information was requested directly from Nathalie Bensmihan and Cathy Bensmihan and was provided voluntarily by their lawyers; and (iii) that the requirement

for information subsequently issued to the TD Canada Trust arose from the Assor Information, which had been validly obtained.

[54] The Federal Court further determined that even if the Assor Information and the ensuing TD Information had been obtained in violation of the solicitor-client privilege, this would not assist the appellants, as that information had played no role in the issuance of the RFIs, especially the Levett-Baazov RFIs. As the Federal Court noted, the evidence on record shows that the Auditor was unaware of the Assor Information and TD Information when these RFIs were prepared, which was well before she inherited the conduct of the Bensmihans' audits.

[55] The appellants submit that the Federal Court's findings on that issue are incorrect. They claim that quite apart from the stricken portions of the Supplementary Affidavit, there is ample evidence on record showing that the CRA attempted to obtain the Assor Information other than directly from the taxpayers themselves and that in doing so, sought to circumvent both Cathy and Nathalie Bensmihan's right to professional secrecy.

[56] They contend that the CRA had the obligation under *Chambre des notaires* to verify with Mtres Leibovich and Levy if they had been authorized by their clients to provide the Assor Information. The appellants further assert that the information obtained as a result of these solicitor-client privilege violations formed the basis of a number of statements in the RFIs. Finally, they claim that the Federal Court erred in striking much of the Supplementary Affidavit on procedural grounds, while the stricken portions pertained to the fundamental right to professional secrecy.

[57] I have strong reservations regarding the appellants' claim on that issue. Quite apart from the fact that information found in a lawyer's trust account might not always be covered by the solicitor-client privilege as it may not objectively relate to the relationship of—and communications between—a client and their legal advisor (*Chambre des notaires* at para. 95), there is evidence on record showing that the Assor Information was ultimately obtained as a result of requests made directly to Cathy and Nathalie Bensmihan, which is what *Chambre des notaires* requires, since only the "client" may waive that privilege (*Chambre des notaires* at para. 45). It appears, therefore, that both taxpayers were provided with an opportunity to ensure that their privilege was protected, which, again, is what *Chambre des notaires* requires.

[58] It is true that the Assor Information was provided—voluntarily, according to the record—to the CRA by the taxpayers' legal representatives but requiring the CRA, as do the appellants, to go the extra mile in order to ensure that the client has personally waived privilege is, in my view, a bit of a stretch. This is especially so in light of the fact that, in the case of Nathalie Bensmihan at least, her legal representative, Mtre Leibovich, insisted that he be CRA's interlocutor for any matter regarding CRA's request for the Assor Information.

[59] Be that as it may, I need not decide that particular issue since the appellants face, in my view, an insurmountable obstacle here. Indeed, as found by the Federal Court, the issue of whether or not the Assor Information—and subsequent TD Information—was obtained in violation of the Bensmihans' right to professional secrecy is irrelevant in the circumstances of this case. It is irrelevant because that information, according to the evidence on record, was, in the Federal Court's view, gathered by an auditor other than the Auditor in the context of the

Bensmihans' audits, was not at the Auditor's knowledge when the RFIs were prepared and was therefore not considered for the purposes of these RFIs.

[60] Whether the Assor Information and TD Information, assuming it was obtained in violation of the solicitor-client privilege, was relevant to the determination of the RFIs' validity is a question of mixed fact and law. The Court must therefore defer to such a decision, whether it is reviewed under the reasonableness standard (*Vavilov* at para. 85) or the appellate standard of palpable and overriding error—assuming one considers this relevancy finding to be that of the Federal Court, not the CRA (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada v. South Yukon Forest Corp.*, 2012 FCA 165, 431 N.R. 28 at para. 46).

[61] Here, the Auditor specified that the names of Cathy and Nathalie Bensmihan were mentioned in the Levett-Baazov RFIs because she wanted to make sure they had not acted as nominees for their husbands for the purposes of the information sought in the Levett-Baazov RFIs—not because of information gathered in the Bensmihans' audit. The evidence on record simply does not support the appellants' claim that the Assor Information and TD Information constituted the basis on which the CRA made a number of statements—three in total—in support of the Levett-Baazov RFIs. This argument, drawn from statements that are general in nature, is at best, purely speculative.

[62] Having determined that the solicitor-client privilege argument, even if a violation of that privilege had occurred, cannot succeed because it does not advance the appellants' case, I need not address the claim against the Federal Court's finding relating to the Supplementary Affidavit

as that Affidavit was allegedly meant to bolster that argument. In other words, even if this Affidavit was to be considered in its entirety, it would not change the conclusion I have reached on this issue.

[63] For all these reasons, I find that the Federal Court, in reviewing the RFIs' validity, chose the correct standard of review and applied it properly. I would therefore dismiss the appeal, with costs.

"René LeBlanc"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-142-21
STYLE OF CAUSE:	CRAIG LEVETT and NATHALIE BENSMIHAN, OFER BAAZOV and CATHY BENSMIHAN, 9179-3786 QUÉBEC INC. v. THE ATTORNEY GENERAL OF CANADA and THE CANADA REVENUE AGENCY
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 3, 2022
REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	JUNE 17, 2022

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