Federal Court Cour fédérale

Date: 20180529

Dockets: T-735-17
T-1052-17
T-932-17
T-1330-17

Citation: 2018 FC 556

Ottawa, Ontario, May 29, 2018

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

S. ROBERT CHAD

Respondent

AMENDED JUDGMENT AND REASONS

I. OVERVIEW

[1] Section 37 of the *Canada Evidence Act*, RSC, 1985, c C-5 [CEA] is a statutory mechanism by which the Attorney General may claim public interest immunity, thereby withholding relevant evidence from a proceeding in order to protect a specified public interest.

In the case before the Court, the Minister of National Revenue ("the Minister") is claiming public interest immunity over redacted information found in the Certified Tribunal Record [CTR] filed in the (T-735-17 and T-1052-17) under Rule 318 of the *Federal Courts Rules*, SOR/98-106 [Rules]. To determine whether the redacted information found in the CTR should be disclosed or protected, the Court must balance the public interest in the disclosure of the information against the public interest advanced by the Attorney General.

II. FACTS AND PROCEDURAL HISTORY

A. The Applications for Judicial Review

[2] The Minister is currently auditing the Respondent, Robert S. Chad, in respect of his 2011, 2012 and 2013 personal income tax returns, as well as the income tax and GST/HST returns of certain related entities and entities that are linked through economic relationships with the Respondent under the Related Party Initiative Program [Program]. This Program aims to examine the tax compliance of high net worth taxpayers and their economic relationships.

[3] On May 4, 2017, the Respondent received two Requirement Letters, each dated April 20, 2017, issued by Parmpal Sandhu, Auditor at Canada Revenue Agency [CRA], requiring him to produce documents and information [Requirements] under sections 231.1 and 231.6 of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [ITA].

[4] On May 18, 2017, the Respondent filed two notices of application for judicial review to set aside by *writ of certiorari* the decision of the Minister to issue the Requirements, alleging that

they had been improperly issued, and were *ultra vires*, overly broad or non-compliant with the ITA.

B. The Disclosure Applications

[5] Pursuant to Rules 317 and 318 of the Rules, the Respondent requested all materials relied on in issuing the Requirements. The Minister provided a CTR with certain information redacted [the Redacted Information].

[6] The Attorney General then brought two applications under section 37 of the CEA for orders prohibiting the disclosure of the Redacted Information. The public interest grounds for the objections to disclosure of the Redacted Information were set out in the certificate of Sue Murray, Acting Director General of the International and Large Business Directorate of the International, Large Business and Investigations Branch of CRA [Certificate], pursuant to section 37(1) CEA.

[7] Early in the section 37 proceedings, the Respondent alleged that the Applicant's approach to disclosure had created procedural unfairness. He therefore sought an order directing the Applicant to produce Ms. Murray for cross-examination, which he argued was necessary and productive to test the opinions and conclusions laid out in the Certificate. The Applicant opposed the cross-examination of Ms. Murray.

[8] On September 21, 2017, as case management judge, I ordered that files T-1330-17 and T-932-17 [the Section 37 Applications] be disposed of before any steps were in T-735-17 and T-

1052-17 [the Judicial Review Applications]. I also ordered that the Respondent bring a motion in the Section 37 Applications for leave to cross-examine Ms. Murray on the Certificate.

[9] On December 6, 2017, I ordered that the Crown provide written submissions on the legal basis and proposed process it would rely on in the Section 37 Applications. I also invited counsel for the Respondent to provide submissions on this matter.

[10] On March 20, 2018, I issued reasons in *Canada (Attorney General) v Chad*, 2018 FC 319 [March Reasons], in which I set out, at paragraphs 11 and 12, the appropriate process under section 37 of the CEA for determining the validity of objections to disclosure of information. I will review these steps in the analysis below.

[11] I also concluded in my March Reasons that, in the context of the Section 37 Applications, cross-examination by the Respondent's counsel of Ms. Murray would be a useless and wasteful exercise, and needlessly prolong the proceedings (see paragraphs 23 to 35 of my reasons).

[12] In my March Reasons, I also explained that, in order to adequately assert the scope of the privilege, a Certificate containing only generalized assertions of privilege would not be enough to discharge the Applicant's burden. Thus, I ordered the Applicant to file any documents or affidavits that may be appropriate to adequately support the validity of the alleged privilege.

[13] I also concluded in my March Reasons that the "apparent case for disclosure" test had been met, considering that in an application for judicial review, fairness requires that the parties

have access to a complete CTR containing the "relevant material" to the application (see Rule 317 of the Rules). I thereby requested that the Applicant submit to the Court, on a confidential basis, un-redacted copies of all documents relied on by the Minister in the CTR, so that the Court could determine (i) whether the disclosure of the Redacted Information would encroach upon a specified public interest, and then (ii) determine whether the public interest encroached upon was outweighed by the public interest in disclosure.

[14] On April 5, 2018, the Applicant filed the affidavit of Ms. Sandhu sworn that day, and provided a copy of the unredacted CTR under seal to the Court.

[15] On April 24, 2018, following a Case Management Conference held the previous day, I ordered that an *ex parte* hearing take place to deal with ex parte evidence and submissions as well as to question Ms. Sandhu on her affidavit sworn April 5, 2018.

[16] As I explained in my March Reasons, to ensure fairness and transparency, the Court should be attuned to the worries of the Respondent concerning the validity of the Certificate and the underlying role Ms. Murray played in the audit and redactions:

> [30] (…) The presiding judge must adopt all reasonable measures to permit the Respondent to understand to the fullest extent possible the issues at play in the ex parte – in camera hearing, without going as far as disclosing the redacted information. The Court must be careful, minutious, vigilant and demanding in ex parte proceedings in order to ensure that the Applicant's claim for privilege is fully tested. Considerations of fairness must radiate throughout every step of the section 37 proceedings.

[17] Furthermore, I offered the Respondent the opportunity to submit, confidentially, questions that he wished the Court to ask Ms. Sandhu during the *ex parte* hearing bearing in mind, however, that it is always up to the presiding judge's discretion to determine what type of questions he or she will ask a witness during an *ex parte* hearing.

[18] And finally, to ensure fairness in the *ex parte* hearing, the parties were also given the opportunity to serve and file their respective written submissions on the merits of the Section 37 Applications; namely, whether the disclosure of the Redacted Information would encroach upon the specified public interest, and, if so, to the weighing of competing public interests required to determine whether to order disclosure.

[19] A three-hour *ex parte in camera* hearing was held on May 15, 2018, during which Ms. Sandhu answered questions regarding her April 5, 2018 affidavit. Of note, I asked most of the questions that were provided by the Respondent. As a result of the hearing, some Redacted Information in the CTR was made public. Moreover, also as a result of the hearing some un-redacted information was provided to the Respondent on a confidential basis due to privacy concerns, but will remain redacted in the public record.

[20] On May 23, 2018, a case management conference was held, where I explained to the Respondent in great detail, without divulging any potential privileged information, how the *ex parte in camera* hearing unfolded. I also reassured the Respondent that, considering this exceptional procedure, I took particular care to address his concerns when questioning Ms. Sandhu on every proposed redaction to the CTR in a frank and direct manner.

III. PUBLIC EVIDENCE PRESENTED TO THE COURT TO GROUND THE PRIVILEGE CLAIMED

A. The Certificate of Ms. Murray pursuant to section 37(1) of the Canada Evidence Act

[21] During this case management conference on May 23, 2018, Ms. Margaret McCabe, counsel for the Applicant, confirmed for the Court that she acted as a conduit between Ms. Murray, the author of the Certificate, and Ms. Sandhu. Ms. McCabe also explained that Ms. Murray had read all relevant documents and information before certifying, in her delegated authority, the objection to disclosure.

[22] Ms. Murray, Acting Director General of the International and Large Business Directorate of the International, Large Business and Investigations Branch of CRA in Ottawa, certified that the production of the Redacted Information, which included discussions and analyses between auditors and CRA specialists in the course of an ongoing audit, would be injurious to the public interest. Furthermore, she certified that the public interest in preventing disclosure at this stage outweighed any interest the Applicant might have in having access to the Redacted Information at this stage, given the purpose of the Requirements in the course of the audit.

[23] The public interest being claimed by the Minister is the proper administration and enforcement of the ITA, which includes:

- ensuring the timely and proper processing and completion of audits;
- seeking that the provision of assistance from specialists is carried out in a candid and open manner with freedom of discussion and analyses;

- ensuring that auditors can make strategic decisions and objectively consider whether taxpayers have been forthright or whether to seek further information;
- protecting internal tools and approaches as well as the technical advice of specialists during the development of the audit plan, assessment of risk, and identification of potential non-compliance by taxpayers;
- protecting the disclosure of technical advice and analysis that could prejudice ongoing audit operations and inhibit internal discussions having as their purpose the thorough examination and verification of the taxpayer's compliance; and
- avoiding giving the opportunity to taxpayers to structure responses or provide documents to audit queries that could hide information or be misleading.

[24] Ms. Murray also explained that:

- taxpayers can obtain information with respect to the audit of returns upon the issuance of a reassessment; and
- some audit methods and techniques appearing in the CTR have no connection to the issue raised in the application.

B. The Accompanying public affidavit of Ms. Sandhu

[25] On May 15, 2018, Ms. Sandhu, case manager for the Related Party Initiative, International, Large Business and Investigations Branch of CRA in the Fraser Valley and Northern Tax Services Offices, attended the *ex parte* hearing for the purpose of questioning by the Court on her affidavit of April 5, 2018. The affidavit, the unredacted CTR and the subsequent *ex parte in camera* interrogation of Ms. Sandhu were able to fill in several evidentiary blanks left by Ms. Murray's Certificate.

[26] Ms. Sandhu's public affidavit outlines the following objections to disclosing the portions of the consultations and technical advice between technical specialists and auditors:

- the advice provided to auditors by technical specialists assists the auditors in focusing their requests for relevant information, in analyzing information provided by the taxpayer, and in determining the next steps in the audit;

- the ITA is complex, such that understanding and applying many of its provisions requires different levels of knowledge and specialization;

- disclosing internal technical consultations while the audit is ongoing will impact negatively on audits because CRA auditors will be reluctant to openly discuss issues in their files with technical advisors, which will result in auditors not having the requisite tools to correctly assess tax implications of certain tax structures;

- providing specific internal CRA discussions during the audit will ultimately remove control over the conduct of the audit from CRA and give it to the taxpayer;

- disclosing audit fact-specific information, such as the strengths and weaknesses of potential assessing positions, could cause taxpayers with off-shore entities or non-resident trusts to tailor or modify information provided to CRA in the event of an audit;

- disclosure would reveal internal discussions, thought processes, strengths and weaknesses about potential assessing positions in respect of the Respondent and selected entities, which could in turn provide them with a roadmap to structure their responses to CRA; and

- disclosing discussions concerning non-resident trusts and off-shore entities could impact CRA's ability to obtain information known to the Respondent that is located outside of Canada.

IV. POINTS IN ISSUE

(1) Whether the disclosure of the Redacted Information would encroach upon a specified public interest;

(2) If so, whether the public interest encroached upon is outweighed by the public interest in disclosure; and

(3) If disclosure of the Redacted Information is ordered, what conditions if any should be imposed upon that disclosure.

V. SUBMISSIONS OF THE PARTIES

[27] As a preliminary note, the submissions of both the Applicant and the Respondent were filed at the Court at the same time. Therefore, the Court has taken into consideration the fact that the parties did not have the opportunity to respond to one another's arguments on all points.

[28] The Applicant argues that the public interest in disclosing the Redacted Information is outweighed by the immediate and unnecessary harm to Canada's ability to administer and enforce the ITA, and specifically to conduct functional audits of taxpayers.

[29] On the other hand, the Respondent argues that the public interest being advanced by the Applicant relates to the carrying out of routine government responsibilities, some of which are publicly disclosed. Furthermore, he argues that the Applicant has not submitted sufficient evidence to the Court to establish the encroachment upon the privilege, and thus that the Court need not proceed to the balancing exercise.

A. Is the Applicant asserting a class privilege?

[30] According to the Respondent, the Applicant is claiming that communications between CRA auditors and technical specialists are immune from disclosure. The Respondent highlights that Ms. Sandhu asserts that, notwithstanding differences "from audit to audit", the disclosure of communications between CRA auditors and specialists "will cause taxpayers" to structure the information they provide to CRA when audited. The crux of the Respondent's argument is that the Applicant, in relying on these statements, is asking this Court to find that a privilege exists to

protect communications that occur within that relationship, regardless of the nature of the specific communications. In her submissions, the Applicant does not explicitly try to establish a class privilege.

B. Does the disclosure of the Redacted Information encroach upon a specified public interest?

[31] The Applicant chose to concentrate her submissions on the weighing of competing interests by starting her analysis at the last stage of the section 37 exercise (i.e., determining whether the public interest claimed is outweighed by the public interest in disclosure). By diving directly into the balancing exercise, the Applicant implicitly submits that there is an encroachment on the public interest if the redacted information is disclosed to the public. This was confirmed during the *ex parte in camera* hearing.

[32] The Respondent argues that the Applicant has not provided any evidence of a specific deleterious effect or that the Redacted Information would somehow compromise or risk the "integrity" or "proper process" of audits, affect the general administration or enforcement of the ITA, or lead to significant changes in CRA's broader organizational context. The Respondent also submits that the specific concerns of the Applicant are premised on outlandish assumptions that he would use the Redacted Information to commit an offence under the ITA. Thus, he argues that the Applicant is relying on overly-general assertions of privilege, which are considered to be insufficient to ground a proper privilege.

C. Is the public interest encroached upon outweighed by the public interest in disclosure?

[33] It is the Respondent's position that there is insufficient evidence before the Court to proceed to the second step of the analysis. Thus, he spent a considerable amount of his pleadings on the encroachment analysis rather than arguing on the proper weighing of conflicting interests.

[34] According to the Applicant, the following factors should be considered in the balancing exercise:

1. the subject-matter of the litigation;
2. the probative value of the evidence in the particular case and how necessary it will be for a proper determination of the issues;
3. the effect of non-disclosure on the public perception of the administration of justice;
4. whether the claim or defence involves an allegation of government wrongdoing;
5. the level of government from which the information emanated; and/or
6. the sensitivity of the contents of the information (including the extent to which there has been prior publication of the information).

(Bryant, Evidence in Canada at para 15.44)

[35] According to the Respondent, the proper approach is to follow *Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 493 [*Wang*], in which Justice Mactavish listed the following factors to be considered in the balancing exercise:

1. the nature of the public interest sought to be protected by confidentiality;

2. whether the evidence in question will probably establish a fact crucial to the defence;

3. the seriousness of the charge or issues involved;

4. the admissibility of the documentation and the usefulness of it;

5. whether the applicants have established that there are no other reasonable ways of obtaining the information; and

6. whether the disclosures sought amount to general discovery or a fishing expedition.

(*Wang* at para 37 citing *Khan v Canada (Minister of Citizenship and Immigration)*, [1996] 2 FC 316 at para 25)

[36] The Applicant argues that the following points weigh in favour of upholding the objection to disclosure:

- the subject matter of the litigation concerns administrative law principles requiring deference to the decision of the Minister;

- the Redacted Information is not necessary for the determination of the Minister's compliance with the ITA, and relevancy of the redacted consultations between CRA experts and auditors is marginal at best, and is only peripheral to the issue of the reasonableness of the Requirements;

- the effect of non-disclosure does not undermine the public perception of the administration of justice, since taxpayers will be able to feel confident that all taxpayers share equally in the obligations imposed by the ITA;

- the effect of non-disclosure does not undermine the public perception of the administration of justice because the Respondent is not facing criminal charges, nor is he

involved in an immigration proceeding in which liberty and security interests are engaged;

- there are no allegations that there was any intentional conduct by the auditor to cause harm to the Respondent, nor is there any evidence to support allegations of wrongdoing by CRA in the course of the audit;

- the fact that the Requirements are part of an ongoing, not final audit process weighs in favour of upholding the objection to disclosure; and

- disclosing the Redacted Information while the audit is ongoing would permit the Respondent and other taxpayers in similar circumstances to effectively control the course of an audit by structuring their answers, thereby negatively impacting on the administration and enforcement of the ITA.

[37] The Respondent argues that the following application of the above-cited *Wang* factors to the within case strongly favours disclosure:

- section 37 of the CEA offers less public interest protection than sections 38 and 39 of the CEA. The specified public interest does not engage issues of national policy, or involve a risk of harm to the public. Thus, the timely and proper completion of taxpayer audits would fall at the lowest end of the spectrum of activities demanding secrecy;

- the protection of the proper functioning of government is an inadequate justification for government secrecy;

- the underlying Judicial Review Applications engage serious issues from the Respondent's perspective, such as criminal sanctions including imprisonment;

- the Redacted Information appears to arise from internal discussions regarding how the auditors were approaching the Respondent's audit, and could be highly relevant to the core issues in the Judicial Review Applications, such as the procedural and substantive issues that led to the issuance of the Requirements, and whether their issuance were reasonable;

- given the improper assumptions of potential impropriety found in Ms. Sandhu's affidavit, the Respondent has a reasonable basis on which to inquire whether the issuance of the Requirements was even-handed; and

- the documents that the Respondent wishes to be disclosed are a defined set and are few in number, thus there can be no suggestion of a fishing expedition.

VI. Analysis

[38] Public interest immunity or privilege is a duty that is held by the Crown in order to protect information in the public interest (Bryant, Lederman and Fuerst, *The Law of Evidence in Canada*, 3rd Ed (LexisNexis Canada Inc, 2009) at paras 15.2 and 15.3). Section 37 of the CEA provides a statutory mechanism by which the Attorney General may claim public interest immunity to withhold relevant evidence from a proceeding in order to protect a specified public interest.

[39] In my March Reasons, I determined the appropriate process under section 37 of the CEA for determining the validity of objections to disclosure of information:

> [11] The section 37 objection at issue arises in the factual and statutory context of a judicial review application challenging a request for information issued by the Minister to the Respondent, in the course of an ongoing audit of the Respondent under the ITA, for the purposes of that audit. Furthermore, the Court must be cognizant of the statutory context related to the ITA. The Canadian tax system is based on self-reporting, thus in order to perform her statutory duty, the Minister has been given broad powers to inspect and audit information and documents of taxpayers under audit, and to examine any matter relating to the taxpayer to ensure taxpayers pay the correct amount of tax; this is in the public interest (see *eBay Canada Ltd v MNR*, 2008 FCA 141 at para 39; *AGT Ltd v Canada (AG)*, [1996] 3 PC 505 (TD) at para 54). That said, the Court must be alert to fairness considerations in judicial review applications, to ensure that the tribunal record contains all possible elements not covered by the privilege that were in front of the decision-maker when the decision under review was taken.
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> [12] The Court has determined that, in the present proceedings, the following procedure should be followed:
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> 1. The Court must determine whether the Crown has established the specified public interest as claimed;
>
> 2. If that determination cannot be made based on the certificate alone, further submissions, such as a secret affidavit and un-redacted documents, must be filed in support of the privilege claimed, which will be dealt with in an *ex parte* manner;
>
> 3. The Court must determine whether the Respondent has established an "apparent case" for disclosure of the redacted information (*Khan v R*, [1996] 2 FC 316 at paras 24-25);
>
> 4. Once an apparent case for disclosure has been established, the Court must consider reviewing the redacted information (*Khan v R*, [1996] 2 FC 316 at para 25);
>
> 5. If the Court finds that the disclosure of the redacted information would encroach on the specified public

> interest, it must conduct a balancing of interests. The interests to be balanced are the public interest in disclosure and the specified public interest advanced by the Applicant. The Court may review the original form of the redacted information at this stage (*Wang v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 493 at paras 36- 37); and
>
> 6. Determine whether the redacted information should be disclosed.

[40] These reasons will address steps five and six of the above-mentioned steps, in order to (i) determine whether the disclosure of the Redacted Information would encroach upon a specified public interest, and, if so, (ii) determine whether the public interest encroached upon is outweighed by the public interest in disclosure, and, if the disclosure of the Redacted Information is ordered, (iii) determine what conditions should be imposed upon the disclosure, if any.

[41] First, I shall quickly address the question of class privilege, which was brought forward by the Respondent but not argued by the Applicant. Two principal categories of privileges have developed in the common law. First, there are case-by-case content-based privileges, which require for policy reasons the exclusion of otherwise relevant evidence after a contextual weighing exercise. Second, there are class privileges that are absolute, in the sense that the information they protect is *prima facie* inadmissible. Such privileges cover types of communications or relationships, such as solicitor-client privilege or informer privilege (*R v Basi*, 2009 SCC 52 at paras 22 - 37; *R v McClure*, 2001 SCC 14 at paras 26-30; *R v Gruenke*, [1991] 3 SCR 263 at 289-291).

[42] The Respondent argues the Applicant is essentially claiming a class over communications that occur between CRA auditors and technical specialists, regardless of the nature of the specific communications. I do not think that the Applicant is trying to establish such a class privilege.

[43] Ms. Sandhu in her affidavit is not claiming that every conversation between CRA auditors and specialist is to be automatically protected based solely on the relationship between auditors and specialists. Rather, she is claiming that the specific content of the Redacted Information in this case could lead to the Respondent and similar taxpayers to advantageously structure their responses. Thus, as Ms. Sandhu is not claiming that every single conversation is privileged based on a certain class, the content of the specific conversations are to be assessed on a case-by-case basis based on their injury to public interest.

[44] Even if the Applicant was claiming such a privilege, I do not think, subject to a more fulsome record, that there is a basis to find that all communications between CRA auditors and specialists must be treated as an absolute or class privilege. A clear line of jurisprudence has demonstrated that it is “practically impossible” to recognize a new class privilege in situations much more perilous to the public interest than the one before us (*Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 87; *R v National Post*, 2010 SCC 16 at para 42). Furthermore, the procedure to follow to establish section 37 public interest immunity requires the weighing of competing interests in a case-by-case contextual manner. The procedure and outcome of such an exercise must always be considered in the context of the litigation at hand.

[45] Thus, having dealt with the question of class privilege, let us now address the essential components of a section 37 application so that the Judicial Review Applications can eventually come to fruition.

A. Would the disclosure of the Redacted Information encroach upon a specified public interest?

[46] In assessing whether the Redacted Information encroaches on a public interest, the Court may not rely upon "generalized assertions of possible disadvantage"; instead, the onus is on the Applicant to demonstrate that the disclosure of the documents at issue "would have a concrete deleterious effect" on the public interest (*Wang* at para 35).

[47] The Respondent argues that the Court can end its analysis at this stage and order disclosure since the Applicant has, by not demonstrating the specific deleterious effect the disclosure would have on the "integrity" of audits and on the general administration of the ITA, not demonstrated how the public interest is being encroached upon. Moreover, the Respondent argues that the Applicant has not shown how the disclosure would lead to any significant changes in CRA's broader organizational context.

[48] I cannot agree with the Respondent that the Applicant has not met her burden. The Applicant has sufficiently demonstrated that the disclosure of the information would have a "concrete deleterious effect" on the public interest. The record before the Court demonstrates that there is a public interest in the proper administration and enforcement of the ITA, which includes ensuring the timely and proper processing and completion of audits of taxpayers. Audits require ensuring that the seeking and provision of guidance from specialists is carried out in a

candid and open manner with freedom of discussion and analyses between CRA specialists and auditors. In an ongoing audit, disclosing consultations with internal technical specialists, where, among other things, the strengths and weaknesses of possible assessing positions are analyzed, could cause the Respondent or similar taxpayers to tailor or modify information provided to CRA. In my opinion, this would be injurious to the proper administration of the ITA and the proper processing and completion of audits of taxpayers.

[49] The Respondent also submits that the specific concerns of the Applicant are premised on overly-general and outlandish assumptions that he would use the Redacted Information to commit an offence under the ITA. I agree with the Applicant that it is well recognized that, while taxpayers can arrange their affairs to minimize their tax burden, some taxpayers use elaborate plans and complex transactions to minimize or avoid tax liability (*Shell Canada Ltd v Canada*, [1999] 3 SCR 622 at paras 44 and 48; *Faraggi v R*, 2008 FCA 398 at paras 56 and 57, leave to appeal to SCC refused).

[50] Moreover, Parliament clearly provided the Minister with the authority to request information from a taxpayer for the purposes of an ongoing audit, thereby recognizing the reality that:

> Nonetheless, it would be naive to think that no one attempts to take advantage of the self-reporting system in order to avoid paying his or her full share of the tax burden by violating the rules set forth in the Act. Because of this reality Parliament enacted several provisions, among them s. 231(3), giving the Minister of National Revenue power to investigate and audit taxpayers.
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> (*R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at para 18)

[51] Moreover, the fact that these claims would lead to significant changes in a broader organizational context of the CRA is irrelevant to whether or not there is encroachment on the public interest in the present audit. The administration of the ITA is based on good faith between the taxpayer and CRA. The record in this case demonstrates that, among other things, revealing CRA's internal technical discussions, as well as strategic discussion on the strengths and weaknesses of possible assessing positions, could possibly endanger the successful and timely audit of the Respondent's file. The fact that the Respondent's audit alone could be affected, without considering the potential effect to the broader organizational structure of CRA, does not render the assertion of privilege overly generalized or non-deleterious. It is my opinion that the enforcement of the ITA in the Respondent's case alone is enough to satisfy the Court of an encroachment on the public interest claimed without even considering its broader impact on CRA.

B. Is the public interest encroached upon outweighed by the public interest in disclosure?

[52] I thought it relevant to start with the Supreme Court of Canada's comments in *Carey v Ontario*, [1986] 2 SCR 637 [*Carey*]:

> It is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation. It is equally clear, however, that certain information regarding governmental activities should not be disclosed in the public interest.
>
> (at para 38)

[53] Although related to common law cabinet privilege, these comments are also pertinent to understanding the competing public interests to be weighed in this case: the public interest in disclosure with the public interest encroached upon by the potential disclosure.

[54] As mentioned above, the parties have presented two different lists of factors, which I do not think are mutually exclusive or irreconcilable. I have therefore combined the factors into the following list of considerations to assist in the Court's balancing exercise:

1. the subject-matter of the litigation / the seriousness of the charge or issues involved;
2. the probative value of the evidence in the particular case and how necessary it will be for a proper determination of the issues / whether the evidence in question will probably establish a fact crucial to the defence;
3. the nature of the public interest sought to be protected by confidentiality;
4. the effect of non-disclosure on the public perception of the administration of justice;
5. whether the claim or defence involves an allegation of government wrongdoing;
6. the level of government from which the information emanated;
7. the sensitivity of the contents of the information (including whether the extent to which there has been prior publication of the information);
8. whether there are no other reasonable ways of obtaining the information; and/or
9. whether the disclosures sought amount to general discovery or a fishing expedition.

(1) What is the subject-matter of the litigation / the seriousness of the charge or issues involved?

[55] Firstly, it is important to mention that audits and criminal investigations are two completely different legal mechanisms. The success of the self-reporting tax system depends on the honesty and integrity of taxpayers, and their collaboration with CRA. Audit powers granted to CRA by the ITA provide for penalties where tax returns are inaccurate. If a taxpayer wishes to

challenge an audit request, it can be done by judicial review to the Federal Court, as in the case at bar. An audit is not a criminal process but an administrative one. On the other hand, CRA has at its disposal investigative functions, which are completely distinct from its audit functions. The purpose of these investigative functions is to investigate cases of importance to CRA, which might divulge schemes of suspected tax evasion of a criminal nature, which are criminal offences. When exercising its investigative functions, CRA and the taxpayer are in an "adversarial relationship", bringing into play constitutional protections (*Stanfield v Minister of National Revenue*, 2005 FC 1010 at paras 35 and 36).

[56] The case at bar is one of administrative, not criminal, law. Although the Respondent asserts rightly that there is a potential for incarceration should he choose not to provide the information sought in the Requirements, I agree with the Applicant that any such penalty could only be imposed by this Court after a successful compliance order application brought by the Minister under the ITA.

[57] As the Applicant has helpfully indicated, decision-makers exercise powers given to them by laws; the Minister is required to assess taxpayers' income tax returns and determine whether taxpayers' self-assessments are accurate (ITA at sections 220(1), 220(2) and 220(2.01); *Canada Revenue Agency Act*, SC 1999, c 17 at sections 5 and 6). In order to properly administer and enforce the ITA, the Minister may request selected documents or information from taxpayers in the course of an ongoing audit (ITA at section 231.1). Thus, the exercise of broad discretionary statutory powers, such as the power to inspect, audit, and examine the information and documents of taxpayers, is in the public interest because it safeguards the integrity of the tax

system by ensuring that taxpayers pay the correct amount of tax (*eBay Canada Ltd et al v the Minister of National Revenue*, 2008 FCA 141 at para 39; *AGT Ltd v Canada (Attorney General)*, [1996] 3 FC 505 at para 54, aff'd [1997] 2 FC 878 (CA), leave to appeal to SCC ref'd [1997] 3 SCCA No 314).

[58] The Applicant submits that the subject matter of the litigation weighs in favour of upholding the objection to disclosure because the litigation concerns administrative law principles requiring the Court to respect the discretion of the Minister to issue requirement letters.

[59] Therefore, whichever way we may envisage this factor, the audit under the ITA is an administrative procedure. The issues at play in the litigation, although of importance to the Respondent, are not such that they would balance in favour of the disclosure of the confidential information.

> (2) What is the probative value of the evidence in the particular case and how necessary would it be for a proper determination of the issues?

[60] As mentioned in my March Reasons, Rules 317 and 318 of the *Rules* demonstrate that an applicant in a judicial review application can request that an administrative decision-maker certify that all relevant material relating to the administrative decision be disclosed. In the specific context of judicial review applications, it is vital and necessary for an applicant to receive the full disclosure of the certified tribunal record to prepare his or her application.

Federal Courts Rules, SOR/98-106	*Règles des Cours fédérales*, DORS/98-106
Material in the Possession of a Tribunal	**Obtention de documents en la possession d'un office fédéral**
Material from tribunal	**Matériel en la possession de l'office fédéral**
317(1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	317(1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.
(…)	(…)
Material to be transmitted	**Documents à transmettre**
318(1) Within 20 days after service of a request under rule 317, the tribunal shall transmit	318(1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet:
(a) a certified copy of the requested material to the Registry and to the party making the request; or	a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause
(…)	(…)

[61] The Federal Court of Appeal set out the role of the Federal Court when reviewing requirement letters issued pursuant to section 231.6 of the ITA in the following way:

> [34] The issue before the reviewing Court is not the reasonableness of the Agency's intention to conduct an audit, but the reasonableness of the notice of requirement in light of the Agency's determination that an audit is required. (…) In the absence of some evidence of bad faith or other improper motive, the appropriateness of an audit is outside the mandate of the Court under subsection 231.6(5).
>
> (*Saipem Luxembourg SA v Canada (Customs & Revenue Agency)*, 2005 FCA 218 at para 34)

[62] My colleague Justice Russell canvassed the question of the standard of review related to the issuance of requirement letters post-*Dunsmuir* in *Soft-Moc Inc v Minister of National Revenue*, 2013 FC 291, aff'd 2014 FCA 10, and concluded that the reasonableness standard was well-settled by past jurisprudence on this question (*Saipem Luxembourg S.A. v Canada (Customs & Revenue Agency)*, 2005 FCA 218 [*Saipem Luxembourg*]; in *Fidelity Investments Canada Ltd. v Canada (Revenue Agency)* at para 27). Citing *Saipem Luxembourg*, Justice Russell highlighted:

> 17 The Applicant points out that in the context of subsection 231.6, the Requirement may be found to be unreasonable even if all the requested information is relevant to the administration of the ITA. The Federal Court of Appeal said at paragraph 27 of:
>
> > The element which is present in section 231.6, and which is lacking in section 231.2, is the availability of judicial review of the notice of requirement on the ground of unreasonableness. Such a review lacks any substance if a notice of requirement is reasonable simply because the information requested is, or may be, relevant to the administration and enforcement of the Act. Given that Parliament took the trouble to provide for a review on the basis of reasonableness, I conclude that Parliament intended that a notice of requirement in respect of a foreign-based document must not only relate to a document which is relevant to the administration and enforcement of the Act but that it must also not be unreasonable.

[63] As indicated to us by the Supreme Court of Canada, when reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process" and also with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[64] Basic considerations of fairness militate in favour of the most fulsome record possible, so that an Applicant may understand the reasons for which an administrative decision was taken and prepare the substance of their judicial review application. As Justice Stratas explained in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh Nation*], having access to an adequate record that was before the decision-maker is indispensable to a reviewing court in the fulfillment of its responsibility to meaningfully review a decision. While his comments relate to situations where a reviewing court does not have access to the full record, and not to the present situation, where only one party cannot access the full record, I still find his comments on this issue relevant and I reproduce them here:

> [71] [T]he evidentiary record before the administrative decision-maker is indispensable to the reviewing court's fulfilment of its responsibility to engage in meaningful review. In most judicial reviews, the reviewing court must evaluate the substantive correctness or acceptability and defensibility of the administrative decision. It is alert to errors or defects that might render the decision unreasonable. Often error or unacceptability and indefensibility is found by comparing the reasons with the result reached in light of the legislative scheme and—most importantly for present purposes—the evidentiary record before the administrative decision-maker.
>
> [72] For example, a key evidentiary finding made without anything in the evidentiary record in circumstances where evidence was necessary can render an administrative decision unreasonable: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 (CanLII), 455 N.R. 157 at para. 100; *Delios*, above at para. 27. So can a finding that is completely at odds with the evidentiary record. In the case of reasonableness review, where a key part of the record—for example, any evidence on an essential element—is missing and, as a result, the reviewing court cannot assess whether the decision is within the range of acceptability and defensibility and, thus, reasonable, sometimes the reviewing court has no choice but to quash the administrative decision: see, e.g., *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227 (CanLII), [2014] 1 F.C.R. 766 at para. 137; *Canada v. Kabul Farms Inc.*, 2016 FCA 143 (CanLII) at paras. 31-39.

[65] Justice Stratas further explains that if the record before the reviewing court lacks an essential element upon which an administrative decision-maker based its decision, the decision should be quashed:

> [79] (…) The test would seem to be that if a particular evidentiary record—even if bolstered by permissible inferences and any evidentiary presumptions—disables the reviewing court from assessing reasonableness under an acceptable methodology (such as that contemplated in cases like *Delios*, above and *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 (CanLII)), the decision must be quashed.

[66] Lastly, Justice Stratas highlights that ideally, reviewing courts would not go ahead with a judicial review without the most complete record possible, but acknowledges that this cannot always be achieved due to the exigency of ensuring expeditious and prompt proceedings (see paras 81-84). Justice Stratas emphasizes that the reviewing court is not the finder of fact and must only be satisfied that the decision is reasonable:

> [85] (…) Trial courts build the evidentiary record for the first time, making findings of fact. They decide the merits. But reviewing courts are different. Reviewing courts review the decisions of administrative decision-makers. Those administrative decision-makers—not the reviewing courts—have been empowered by Parliament to determine the merits of matters. The administrative decision-makers are the merits-deciders and the reviewing courts are restricted to reviewing those merits-based decisions. See generally, *e.g.*, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, at paras. 14-19; *Bernard (2015)*, above at paras. 22-28.

[67] If the redacted record has enough information for a reviewing court to be able to assess, per *Dunsmuir*, "the existence of justification, transparency and intelligibility within the decision-

making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", then the Court should proceed to the judicial review on the record before it. Having looked at the CTR in great detail, I conclude that the Respondent is capable of fairly arguing whether or not the decision to issue the Requirements is reasonable based on the information disclosed to him in the redacted CTR.

[68] Furthermore, as argued by the Applicant, when weighing competing public interests, it is not enough for the Respondent to assert that the Redacted Information may be relevant to an issue or fact in the matter, such as it was at the "apparent case for disclosure" stage. At the weighing stage, the test for relevancy is whether the information sought is "of critical importance" to establish a fact (*Goguen v Gibson*, [1983] 1 FC 872 at para 77, aff'd [1983] 2 FC 463 (FCAD)).

[69] In the Respondent's Judicial Review Applications, he alleges that CRA issued the Requirements improperly or in a manner that failed to comply with the ITA. It is argued that the Redacted Information could be highly relevant to core issues in the Judicial Review Applications, such as the procedural and substantive issues that led to the issuance of the Requirements, and whether their issuance was reasonable. The Applicant argues that although the Respondent may think the Redacted Information is relevant to know whether the Requirements were made for the proper purpose of administering and enforcing the ITA, a judge who reviews the Redacted Information will easily see that it would not assist the Respondent in making his arguments.

[70] I agree with the Applicant that the Respondent's challenge to the reasonableness of the decision to issue the Requirements will not be enhanced by access to the Redacted Information. I am confident that the Respondent has, in the redacted CTR, all pertinent and relevant information needed to fairly argue his case. I am also confident that none of the Redacted Information is of such "critical importance" that it could assist the Respondent in making his case — namely, proving that the Minister's decision was unreasonable. As determined above, the Redacted Information is not directly relevant to the issue of reasonableness and, in my opinion, could not affect the outcome of the Judicial Review Applications. Thus, this factor does not militate in favour of the disclosure of the Redacted Information.

[71] However, it is to be noted that, in order to ensure fairness, transparency, and a proper judicial determination, it is in the interests of the parties and in the interests of justice that the judge assigned to the Judicial Review Applications be given access to the un-redacted CTR. To assume properly his or her judicial responsibilities the reviewing judge will be given the same CTR as the one that was before the decision maker.

(3) What is the nature of the public interest sought to be protected by confidentiality?

[72] The Respondent argues that section 37 grants a lesser amount of public interest protection than sections 38 and 39 of the CEA. He argues that the proper administration of the ITA does not engage issues of broad national policy, or involve risk of direct harm to members of the public.

[73] I disagree with the Respondent's statement that the enforcement of the ITA does not engage issues of broad national policy. In a democratic society such as Canada, where the

protection and promotion of the social and economic well-being of Canadians is a fundamental national value, there is public interest in a robust system of tax collection and wealth redistribution. Legal measures taken to enforce the ITA must be efficient but reasonable in order to facilitate the collection of taxes, the resolution of allegations of taxpayer non-compliance, the facilitation of audits, and the collection of taxpayer information.

[74] The Applicant argues that disclosing consultations with internal technical specialists on internal tools and audit methods while audits are ongoing will permit taxpayers with offshore entities or non-resident trusts to tailor or modify to their advantage information they are requested to provide during the course of the audit. The fact that the Respondent's audit is ongoing means that an analogy can be drawn to investigatory privilege, which is claimed to avoid compromising ongoing investigations. Investigation privilege is not an absolute privilege, but, under both the common law and section 37 of the CEA, the Court is required to balance the public interest in protecting effective investigations, as well as those persons who are involved in or assist such investigations, against the public interest of full disclosure (*R v Trang*, 2002 ABQB 19 at para 50; *Toronto Star Newspapers Ltd v Canada*, [2005] OJ No 5533 at paras 14-16; *R v Anderson*, 2011 SKQB 427 at para 33). There are strong similarities between the current section 37 privilege being claimed and investigatory privilege: during the period of an audit or an investigation, sensitive material that could prejudice that particular operation should not be disclosed.

[75] In *Wang*, the Federal Court recently commented on ongoing investigative privilege in the context of a section 37 application. The Minister claimed that the disclosure of the documents

and videos in question would compromise one or more ongoing investigations being carried out by the Canada Border Services Agency. It was argued that the disclosure of the evidence could lead to evidence being destroyed or cause the subject or subjects to flee. As Justice Mactavish explained:

> 35 [T]he Court must guard against reliance on "... generalized assertions of possible disadvantage to an ongoing investigation ...": *Toronto Star Newspapers Ltd. v. Canada* (2005), 204 C.C.C. (3d) 397 (Ont. S.C.J.) at para. 15, [2005] O.J. No. 5533 (Ont. S.C.J.). Rather, the onus is on the Minister to establish that the disclosure of the information in question would have a concrete deleterious effect on the ongoing investigation.
>
> 36 If the Court is satisfied that disclosure of the evidence in question would indeed encroach on a specified public interest, it must then consider whether the public interest in protecting an ongoing investigation is outweighed by the public interest in disclosure: subsection 37(5), *R. v. Richards* (1997), 34 O.R. (3d) 244 (Ont. C.A.) at 248-249, (1997), 100 O.A.C. 215 (Ont. C.A.). If it is determined that the public interest in disclosure outweighs the public interest in protecting an ongoing investigation, then the Court may order the disclosure of all, part, or summaries of the information in question and may impose any conditions on that disclosure that the Court considers appropriate.

[76] The Court in *Wang* concluded that certain documents, if disclosed, would indeed jeopardize ongoing investigations and that the impact on the ongoing investigations could not be mitigated by the production of summaries or redactions. However, for other documents, the Court determined that disclosure would have no negative or detrimental effect on any ongoing investigations.

[77] Turning back to the case at bar, this audit is currently on-going, and the disclosure of audit fact-specific information, such as information related to internal discussions and to the

strengths and weaknesses of the audit and its strategy, could affect the outcome of the audit or otherwise compromise it. Therefore, it is my opinion that this factor weighs heavily in favour of the Applicant's position. With the greatest respect to the moral character of the Respondent, Parliament clearly intended the Minister to have the proper authority to request information from a taxpayer for the purposes of an on-going audit. As mentioned above, it would be naïve to think that no one attempts to take advantage of the self-reporting system. Again, this factor favours the non-disclosure of the information.

(4) What would be the effect of non-disclosure on the public perception of the administration of justice?

[78] Where the Crown is a party to the litigation, its assertion of public interest immunity must be scrutinized carefully; it is not just justice, but also the appearance of justice that is important (*PJ v Canada (Attorney General)*, 2000 BCSC 1780 at para 42). I agree with the Applicant's argument that, having regard to the administrative nature of the proceedings, non-disclosure of the Redacted Information in the course of an ongoing audit will not have a negative effect on the administration of justice. Indeed, I agree that taxpayers will be able to feel confident that all taxpayers share equally in the obligations imposed by the ITA. Furthermore, as mentioned above, tax collection is a laudable objective in a democratic society.

[79] I do not hesitate to state that the public perception of the administration of justice is heightened by the non-disclosure of information in this case. Canadians believe in a system of taxation, where CRA can audit taxpayers fairly and effectively. Canadians would be offended to discover that certain taxpayers, through litigation, have been given access to information on their audit files that could potentially give them an undue advantage or that could harm the CRA's

capacity to properly audit. Thus, it is the disclosure of information in this case, that would in my opinion harm the public's perception in the administration of justice.

[80] Thus, this factor favours non-disclosure at this stage.

(5) Are there allegations of government wrongdoing, that is, that the audit is being conducted for an improper purpose?

[81] The Applicant argues that although the Respondent alleges the Requirements are overbroad, vague, and non-compliant with the law, there is no allegation that there is any intentional conduct by the auditor to cause harm to the Respondent, and neither is there any evidence to support allegations of wrongdoing in the course of the audit.

[82] The Supreme Court of Canada has stated that "it is not for the Court or anyone else to prescribe what the intensity of the examination of a taxpayer's return in any given case should be. That is exclusively a matter for the Minister" (*Western Minerals Ltd v Minister of National Revenue*, [1962] SCR 592 at paras 12 – 13 and14). This case as it is constituted does not in any way indicate directly or indirectly that there is any iota of government wrongdoing. It is one audit among thousands being conducted by the CRA under the ITA.

[83] This factor again favours non-disclosure of the Redacted Information.

(6) What is the level of government from which the information emanated?

[84] The Applicant argues that the fact that the Requirements are part of an ongoing audit process and not final decisions weighs in favour of upholding the objection to disclosure.

[85] The importance of the audit process in the context of the income tax regime of self-assessing and self-reporting income has been well recognized (*R v Jarvis*, 2002 SCC 73 at paras 49-54). However, as argued by the Respondent, the protection of the proper functioning of government has been found by the Supreme Court of Canada to be an inadequate justification for government secrecy (*Carey* at paras 83-84). Requirement letters are essential to facilitating proper auditing, and without such information as provided by the responses to the Requirements, the auditing process is rendered useless. The CRA requests information that is not currently in its possession. The taxpayer, by contrast, has the required knowledge and proof of his or her financial situation. That knowledge can be legitimately sought by an auditor to facilitate his or her work.

[86] I disagree with the Respondent; facilitating tax collection cannot be described as merely "the proper functioning of government." The Minister is not trying to protect internal bureaucratic discussions, but vital information that could prejudice an on-going audit.

[87] Moreover, the fact that the audit is not complete and that there has not been a final determination favours non-disclosure. Internal discussions with auditors and technical experts enable the CRA to efficiently bring its audits to completion.

(7) What is the sensitivity of the contents of the information?

[88] The Applicant argues that disclosing the Redacted Information while the audit is ongoing would be akin to permitting the Respondent, and taxpayers in similar circumstances, to effectively control the course of an audit by advantageously structuring their answers, thereby

negatively impacting on the administration and enforcement of the ITA. On this point, the Respondent argues those allegations are absurd, since CRA will always have control over an audit that it conducts. He also explains that he is not seeking disclosure of the Redacted Information for any purpose other than to protect his personal legal interests. As the Respondent has previously mentioned in past submissions, he is not opposed to any sealing order or undertaking that would prevent publication of the Redacted Information beyond the borders of the Judicial Review Applications.

[89] Thus, I conclude again that the disclosure of technical advice and analysis between CRA specialists and the audit team would prejudice audit operations which are not complete, and would inhibit internal discussions having as their purpose the thorough examination and verification of a taxpayer's compliance with tax legislation.

[90] I also note in my determination, that the Applicant submits that Parliament can authorize the refusal, through both section 16(1) of the *Access to Information Act*, RSC, 1985, c A-1 and section 22(1) of the *Privacy Act*, RSC, 1985, c P-21 of the disclosure of information where such disclosure could be injurious to the enforcement of any law in Canada. Parliament has also provided authority under section 21(1) of the *Access to Information Act* to government departments to refuse to disclose auditing techniques and operational information containing accounts of government employees' consultations or deliberations.

[91] For all these reasons, this factor when properly assessed does not favour disclosing the Redacted Information.

(8) Has there has been prior publication of the information, and, if so, to what extent?

[92] The Respondent argues that CRA's *Income Tax Audit Manual*, which is publicly available on CRA's website, raises serious doubts about what expectations of confidentiality a CRA auditor can reasonably have. It is argued that disclosing audit methods and techniques militates in favour of disclosure. This issue was specifically brought to the Applicant's attention in October 2017. However, the Applicant has made no effort to address, in any submissions, the publication of the *Income Tax Audit Manual*, its contents, or its significance in this context.

[93] In *Canada (Attorney General) v Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, 2007 FC 766 [*Arar*], in an application under section 38 of the CEA, I prohibited the disclosure of certain redacted portions of the public report issued by the Commission, on the basis that disclosure of this information would be injurious to international relations, national defence, or national security. However, in my reasons I cited *Attorney General v Observer Ltd et al*, [1990] 1 AC 109 (HL):

> The Crown is only entitled to restrain the publication of intelligence information if such publication would be against the public interest, as it normally will be if theretofore undisclosed. But if the matter sought to be published is no longer secret, there is unlikely to be any damage to the public interest by re-printing what all the world has already had the opportunity to read.
>
> (Emphasis added.)

[94] In *Arar* I also noted at paragraph 56 that:

> […] information available in the public domain cannot be protected from disclosure is not an absolute. There are many circumstances which would justify protecting information

> available in the public domain, for instance: where only a limited part of the information was disclosed to the public; the information is not widely known or accessible; the authenticity of the information is neither confirmed nor denied; and where the information was inadvertently disclosed.

[95] In my opinion, there is a difference between describing the various types of audit methods used by CRA and seeing them in application within a specific factual context. I am sympathetic to the Respondent's argument and consider that if a certain audit method or tool without any specific factual reference to the case at hand has been already disclosed by the Applicant in the *Income Tax Audit Manual* or on CRA's website, then it should also be disclosed in the CTR. However, the actualization and application of audit methods and tools to the specific facts of the Respondent's audit cannot be said to be publicly disclosed.

[96] Disclosing the internal information between CRA specialists and auditors is highly sensitive at this stage in the audit. Its disclosure would render the auditing of the Respondent's tax files simply useless. It would give to the Respondent internal auditing knowledge that has the potential to be used solely to advance his interests, which is contrary to the purpose of an audit. Auditors must be empowered to control and lead audits; disclosing the Redacted Information at this stage could give the Respondent an upper hand. This is fundamentally contrary to the policy intentions behind the ITA.

(9) Do the disclosures sought amount to general discovery or a fishing expedition?

[97] I agree with the Respondent that the documents that he wishes to be disclosed are a defined set and are few in number. Thus there can be no suggestion of a fishing expedition.

Only this factor amongst all the ones discussed above favours disclosure of the Redacted Information.

C. Conclusion on the Balancing

[98] For the reasons set out above, in the case before us the factors weigh disproportionally in favour of upholding the public interest in the protection of information related to on-going audits. I therefore order that Redacted Information remain redacted.

[99] I do not need to address the last point in issue, since no disclosure is ordered, thus no conditions should be imposed.

VII. Other Comments

[100] The Judicial Review Applications were delayed for more almost a year by the Section 37 Applications. I note that both parties contributed to these delays. However, I wish to highlight the evidentiary burden that the Attorney General bears in such applications. Considering the non-existence of a class privilege, the Attorney General should facilitate the establishment of public interest claims by promptly providing affidavit evidence and supporting documents, including a non-redacted CTR, to assist the Court in adjudicating these extraordinary procedures, as early as possible, once any section 37 application have been served and filed.

[101] As mentioned above, reviewing courts are not trial courts; they do not build their evidentiary record by making findings of fact. In situations like these, where judicial review applications make it vital for an applicant to receive the most complete record possible to prepare

his or her application, the Attorney General should, in the interest of expeditious proceedings, presume that there is an "apparent case for disclosure", unless there is clear indication of bad faith on the applicant's part. Thus, in these situations, the Attorney General should, after filing and serving the section 37 application, directly submit to the Court, on a confidential basis, all required documents, affidavits and un-redacted CTR to assist the court in establishing the privilege, in conducting the encroachment analysis and finally, in weighing all relevant factors.

[102] Judicial review applications of simple ministerial decisions, such as one to issue a Requirement in an on-going audit, cannot be sidelined by interminable disclosure proceedings.

VIII. COSTS

[103] The Section 37 Applications arise from exceptional circumstances that are not the fault of any of the parties involved. Such applications are required by law and the public interest where, as in this case, the facts justify them.

[104] Therefore, each party will bear his or her own costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Section 37 Applications are granted, the Redacted Information in the CTR must remain confidential and protected;

2. Each party will bear his or her own costs;

3. Since the Section 37 Applications has been determined, T-735-17 and T-1052-17 will be reactivated and to that purpose the parties together shall submit to the Court a timetable that will establish the procedures to be followed in each file within fifteen (15) days of the present judgment. If the parties do not agree, then each one will propose their own timetable. A case management conference will follow in order to finalize the timetable.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-735-17, T-1052-17, T-932-17 AND T-1330-17
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v S. ROBERT CHAD
PLACE OF HEARINGS:	OTTAWA, ONTARIO
DATES OF HEARINGS:	MAY 15, 2018 AND MAY 23, 2018
AMENDED JUDGMENT AND REASONS:	NOËL S. J.
DATED:	May 29, 2018

APPEARANCES:

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Mr. Emmett Scrimshaw	FOR THE RESPONDENT

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