Federal Court  Cour fédérale

Date: 20220407

Docket: T-1244-19

Citation: 2022 FC 338

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 7, 2022

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

LUCIEN RÉMILLARD

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

PUBLIC JUDGMENT AND REASONS
(redacted to reflect the orders of the Federal Court of Appeal in dockets A-292-20 and A-186-21)
(Confidential Judgment and Reasons issued March 16, 2022)

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I. Overview

[1] Lucien Rémillard is a businessman who made his fortune in waste management in Quebec. He founded and directed the company RCI Environnement Inc. until he retired in 2013. He then informed the Canadian tax authorities of his intention to emigrate to Barbados in November 2013 and to become a non-resident of Canada for tax purposes.

[2] In November 2015, the Canada Revenue Agency [the **Agency** or the **CRA**] advised him that he had been selected for a tax audit under the Related Party Initiative, the main goal of this audit being to determine his tax residency.

[3] The audit began in April 2016 and continued to the end of 2018. It initially covered the 2013–14 taxation years but was eventually expanded to also include 2015, 2016 and 2017.

[4] The Agency was not satisfied with the information it received from Mr. Rémillard during its internal audit and therefore decided to contact the tax authorities in the US (January 2019), Switzerland (May 2019) and Barbados (June 2019) to obtain the information it was seeking, under the bilateral tax treaties binding Canada and these countries.

[5] Mr. Rémillard is now asking the Court to intervene and to set aside these three information exchange requests [**IERs**], or otherwise order the Agency to withdraw them. He has leveled a number of criticisms against the Agency, including the fact that it did not exhaust its internal resources, provided incorrect or incomplete information to the foreign authorities and essentially went on a "fishing expedition" for the purpose of obtaining information about all of his income instead of his residence; in other words, the applicant is arguing that the requested information was not foreseeably relevant.

II. Background

A. *Confidentiality and in camera session*

[6] The parties filed a common 19-volume, 3,674-page evidentiary record. At filing, the applicant requested a confidentiality order for some of the documents and information in the common evidence. During the hearing of that motion, Justice Peter Pamel, case management judge, confirmed that the Minister had consented to the confidentiality of much of this information (such as the social insurance number, identity of minor children, bank account numbers, and medical information) and that he solely had to rule on the confidentiality of the applicant's financial information and information about third-parties not involved in the dispute.

In an order issued on June 21, 2021 (*Rémillard v Canada (National Revenue)*, 2021 FC 644), Justice Pamel dismissed this motion, suspending the effect of his order for 30 days to allow the applicant to appeal.

[7] It is of note that the applicant had previously sought to obtain the confidentiality of the Agency's certified record, a motion that Justice Pamel also dismissed in an order dated November 17, 2020 (*Rémillard v Canada (National Revenue)*, 2020 FC 1061). That decision was the subject of a first appeal in docket A-292-20. The Federal Court of Appeal heard the appeal on December 13, 2021, and has reserved judgment.

[8] The applicant is also appealing the decision regarding the common evidentiary record in docket A-186-21. On July 14, 2021, Justice Denis Pelletier of the Federal Court of Appeal stayed the execution of Justice Pamel's decision and ordered that the common evidentiary record remain confidential for 30 days following the judgment to be rendered on appeal. The case is still not ready and no hearing date has been scheduled.

[9] The entire evidentiary record is therefore covered by this confidentiality order. Under the circumstances, the Court has no option but to conduct the hearing of the application in camera, in order to avoid radio silence. It also has no choice but to first issue a confidential version of these reasons, to allow the parties to make submissions regarding the excerpts that, in their opinion, should be redacted in a public version.

B. *Impugned tax conventions*

[10] Canada is a member country of the Organisation for Economic Co-operation and Development [OECD] and is a party to several international agreements that allow for the exchange of tax information with several countries including the United States, Switzerland and Barbados. These three bilateral conventions are based on the OECD *Model Tax Convention on Income and on Capital 2017*: OECD Publishing, 2019 [the **Model Convention**], which provides the following at article 26:

> 1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.
>
> 2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons and authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.
>
> 3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, or other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

[11] The conventions in question before me are the *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital*, signed on September 26, 1980, as amended by the Protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, and July 29, 1997 [the **American Convention**], the *Convention between Canada and Switzerland for the Avoidance of Double Taxation with Respect to Taxes on Income*

and Capital, signed on May 5, 1997, and amended by the Protocol signed on October 22, 2010 [the **Swiss Convention**], and the *Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, signed on January 22, 1980, and amended by the Protocol signed on November 8, 2011 [the **Barbadian Convention**] [together, the **Applicable Conventions**]. They all contain clause 26 from the Model Convention.

[12] In Canada, the Minister (or authorized representative) is the designated "competent authority" for the application of these conventions. The various duties of the competent authority are carried out by Agency officials working in information exchange services [**Competent Authority**].

C. *The tax audit*

[13] The tax audit was assigned to a New Brunswick Tax Services Office team led by auditor Denis Robichaud. It began in April 2016, when the initial questionnaire was sent out. There was no response to this questionnaire, and the applicant indicated he did not receive it.

[14] The General Audit Plan completed in June 2016, entitled *Le groupe de Lucien Rémillard* [The Lucien Rémillard Group], 2013–17, began as follows:

> [TRANSLATION]
> ***Scope of the audit***
> The audit shall be done on the entities primarily related to Lucien Rémillard. Lucien Rémillard's residency status is the main issue in the audit as well as the tax plan implemented for his emigration to Barbados.

[15] The plan is several pages long and provides, in addition to a list of the preliminary audit steps, the risk factors identified by the workload development team. It describes the known ties between the applicant and various companies and trusts, notes the fact that he donated his residence to one of his sons and uses the address of his financial advisor or of a short-term luxury rental residence in Barbados, and enumerates his various entries into Canada since his emigration date.

[16] Following a first contact with counsel Charles C. Gagnon, the applicant's authorized representative, in August 2016, the Agency sent a first request sheet for additional information [**request T-997-1**] under subsection 231.1(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [**ITA**]. In general, the applicant was questioned about certain assets that were disposed of when he emigrated, other assets that were transferred, bank accounts held abroad, the description of his principal residence, and his visits to Canada in 2013 and 2014. He was asked to provide an organization chart of the entities related to him for 2013 and 2014 and documentation regarding his tax plan.

[17] Mr. Gagnon responded to request T-997-1 in early October 2016 and sent a USB key with the requested documents to the auditor, Mr. Robichaud. The applicant submits that he answered all the questions except with regard to an insurance policy for works of art; Mr. Robichaud assessed the rate of satisfactory responses at 90%. It is of note that the common evidentiary record does not contain the documents that are on the USB key but only a list of these documents created by Mr. Robichaud in response to an undertaking he made when cross-examined (Vol 17, p 3221).

[18] At any rate, a second request sheet for information [**request T-997-2**] was sent to the applicant in November 2016. He was asked if the three trusts and the company mentioned therein had been dissolved and, if so, to provide a reconciliation of the distributions of the funds and of the liquidating dividend in the case of the company.

[19] Mr. Gagnon responded to request T-997-2 in a letter dated November 25, 2016. It seems that some information was missing, this information being requested again in one or more subsequent requests.

[20] In March 2017, the Agency sent its third request sheet for information [**request T-997-3**]. The applicant was asked to provide evidence regarding his status as a resident of Barbados and the fact that he was taxed on his worldwide income in that country. He was also asked to provide the cost of his investments for 2013 and 2014; the places he stayed at during his visits to Canada in 2014; the date and duration of his stays at his residence in [redacted], Florida, Barbados or other countries throughout 2014; some information about the trust that holds the residence in [redacted]; the identities of any other foreign entities related to him; and lastly, his relationship with a woman who lives in Canada and who might be his spouse.

[21] Mr. Gagnon responded to request T-997-3 in a letter dated April 13, 2017. From this letter, we learn, among other things, that the applicant is a non-domiciled resident of Barbados, that during his stays in Canada, he stays at his sons' principal or secondary residences and that he [redacted] in request T-997-3, but [redacted]. This letter was

also accompanied by a USB key, which is not available to the Court. A list of the documents on the key can be found in the common evidentiary record (Vol 17, p 3232).

[22] It was at this time that the parties' positions regarding the relevance of the requested information began to diverge. The applicant refused to provide any information about the cost of his investments, the geographic link or where they were made. In his opinion, this information had no bearing on his tax residence and would merely help the Agency to determine his net value. It was therefore only relevant if his non-resident status were being challenged.

[23] In May 2017, the Agency sent its fourth request sheet for information [**request T-997-4**]. It contained another request to provide the applicant's movements for 2013 (January to November). The Agency enquired about the company related to the applicant which had guaranteed the seller's obligations to the buyer of RCI and wanted further details on the funding of the trust owning the [redacted] residence, the relationship between the applicant's investment company and a previously identified trust, the relationship between the applicant and six other entities and the specifics of the reimbursement of a promissory note between the applicant and one of his sons. The applicant was also asked to explain what a non-domiciled resident of Barbados is and to provide details about certain reimbursements of advances made by his sons after November 2013 to companies controlled by the applicant prior to November 2013.

[24] In a June 2017 letter, Mr. Gagnon provided a complete response to the information requested in request T-997-4.

[25] Between June 2017 and June 2018, the Agency made a number of verifications with internal sources and with the Agency's Knowledge Research Centre. There is virtually no evidence about the information requested and obtained from these sources, but the following is how Mr. Robichaud explained the Agency's efforts:

> [TRANSLATION]
> We sent several requests for information to public registries, because from May…June 2017 and, let's say, the following year, so June, July 2018, we were really on a mission to gather as much information as we could from public Canadian sources to see if we could make an exchange request… well, not exchange, but a request to foreign authorities.
>
> (Common evidentiary record, Vol 12, p 2316, l 17, to p 2317, l 2)

[26] And later:

> [TRANSLATION]
> Yeah, that's it, my understanding was that we thought information held outside Canada, in a country with which we exchange information pursuant to a treaty or a TIA or I don't know the word in French, but it's an information exchange agreement or it's with a country with which we have a current tax convention.
>
> So, when there's information in those countries, we can think about getting documents or information, asking questions, if we've taken certain steps beforehand.
>
> For us, what was explained, because it is a long process, it was…if we can do as much as possible to obtain information without asking foreign authorities, we'll do it, but in this context, the… knowing that, several times, the responses were always the same, namely we would ask questions about residency, we wanted facts, we wanted explanations, and the responses we got were, "we don't want to give you the answer to your question before you say he is a resident." So we kept on realizing that we didn't think we would get the answers we were looking for and that this information, for the most part, was maybe outside Canada.
>
> (Common evidentiary record, Vol 12, p 2354, l 8, to p 2354, l 14).

[27] In August 2017, Mr. Robichaud contacted a representative of the Related Party Initiative. He was informed of an ongoing project with the OECD Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC) working group, whose goal it is to identify taxpayers who claim to have emigrated to avoid paying taxes in Canada. He was told that there were other audits in progress raising such issues and asked to be kept abreast of developments in those audits.

[28] In November 2017 the Agency began to seriously discuss foreign requests. The applicant's file was found to be particularly relevant because of his ties with three different countries. The Agency also thought it would be best to go through the JITSIC since countries are more inclined to cooperate in an information exchange than when approached unilaterally. The Agency therefore collected sufficient information to go through the JITSIC.

[29] In December 2017, Mr. Robichaud, one of his coworkers and a representative from KPMG had a discussion with Mr. Gagnon. Mr. Robichaud advised Mr. Gagnon of his intention to submit an American request, which drew criticism. Mr. Gagnon felt that things were dragging on and that the Agency had sufficient information to rule on the issue of residence; he also questioned the fact that this option was brought up more than 15 months after the audit had begun. Mr. Gagnon noted that the Agency would have to conclude that the applicant was a Canadian resident before he would disclose the requested information about the applicant's investments.

[30] In mid-March 2018, the audit team sent a first draft of the American IER to the Competent Authority. The request was considered to have been made through the JITSIC. During the discussions held in the following months between the audit team and the Competent Authority, it was concluded that the information requested in the American IER could not exceed the audit period. Thus, the period was expanded to cover 2015, 2016 and 2017.

[31] Certain questions were withdrawn from the draft IER and included in a fifth request sheet for information [**request T-997-5**] to be sent to the applicant, who was then informed of the new audit period. Mr. Robichaud gave the following explanation for the decision to send this request:

> [TRANSLATION]
> We asked several questions several times through T997, numbers 1 to 4, we obtained information that is in the public domain from Canadian sources that could help us establish the…to complete our verification of the residence status.
>
> We use third-party information sources in Canada to obtain information. We did that. Knowing that we already had negative answers to certain questions that we felt were relevant, that we weren't going to get the answers, we still felt it was appropriate to send a last request in July 2018, T997, number 5, addressed to Lucien Rémillard, which, in our opinion, established the questions that, if not answered, would be the subject of a request to foreign authorities.
>
> And that, it was their…we could call it our version of saying this was the last chance to answer the question before we initiated the procedure with…and sent requests to the foreign authorities
>
> (Common evidentiary record, Vol 12, p 2355, l 15,to p 2356, l 13).

[32] Request T-997-5, sent in July 2018, covers 27 different subjects. Some aim to obtain information already addressed in prior requests but for new audit years, others, more details about information already provided. It seems that the applicant answered these questions in a

satisfactory manner. However, for the same reasons Mr. Gagnon had expressed on various occasions, he refused to answer the questions regarding investments after 2013 (points 12, 15, 21, 22, 23, 25 and 26 of request T-997-5), namely:

> [TRANSLATION]
> 12. Transactions that seem related to the purchase of residential and/or commercial buildings ; transfers | | of a | to a | |;
>
> 15. Organizational chart of the entities related to the applicant as of December 31 for each of the additional years covered by the audit (including any trusts of which he or an entity he controls is the beneficiary);
>
> 21. Financial information regarding the company | | | for the entire period in question (the Agency noted that it already had the financial records for 2013 and 2014);
>
> 22. Financial information regarding the company | | for the entire period in question (the Agency noted that it already had the bank statements for January 2013 to April 2017);
>
> 23. Financial information regarding the company | | | for the entire period in question (the Agency noted that it already had the bank statements for January 2013 to April 2017);
>
> 25. Financial and other information regarding the trust | for January 2013 to December 2014;
>
> 26. Financial and other information regarding the trust | |.

[33] Three days after he received the applicant's response to request T-997-5, Mr. Robichaud sent the Competent Authority a new version of the American IER, which had not changed in terms of the information requested from the US partner but included a few additions regarding the information provided.

[34] On October 10, 2018, during a telephone conversation between Mr. Robichaud and Mr. Gagnon, Mr. Robichaud indicated that he was in agreement with completing the analysis of

the applicant's residence before being provided the financial information listed at paragraphs 12(c) to (g), 15, 21, 22, 23, 25 and 25 of request T-997-5. He was informed that in the meantime, the applicant would continue to compile the additional information, but that this would only be provided if the Agency concluded that he was a Canadian resident for tax purposes. While the applicant argued extensively that he had always refused to provide this information because of this agreement, the respondent, for a long time, denied that there even was an agreement. It was only during an intense cross-examination that the respondent had to face the facts and admit that this agreement existed. That said, while it is true that Mr. Robichaud accepted Mr. Gagnon's position, he did not do so until this October 10, 2018, conversation. This is therefore not the reason Mr. Gagnon refused to provide this information since April 2017 (response to request T-997-3).

[35] Moreover, the issue involving the scope of this agreement and its effect on the legality of the IERs remains intact and will be addressed further on.

[36] In December 2018, the audit team requested the assistance of the Competent Authority in preparing the Barbadian IER. The American IER was sent to the competent American authority on January 3, 2019. In April 2018, the audit team requested the assistance of the Competent authority in preparing the Swiss IER, which was sent to the competent Swiss authority on May 29, 2019. Lastly, the Barbadian IER was sent to the competent Barbadian authority on June 21, 2019.

III. Impugned decisions – the IERs

A. *The American IER*

[37] The subject of the transmittal letter for this request is *JITSIC Specific Request for Information Canada – United Stated* (sic) *Tax Convention*, and it identifies the applicant as the subject of a tax audit for 2013 to 2017. It confirms that the request complies with domestic law and that the required information could be obtained were it available in Canada. Lastly, it confirms that the Agency had exhausted all viable avenues for obtaining this information itself.

(1) Provided information

[38] The American IER is a 12-page document, enclosing some 20 exhibits that are not part of the common evidentiary record. It provides the addresses of the residence in Quebec, which he had donated to his son, and of the known residences in the United States and Barbados, and the mailing address used by the applicant [redacted]

[39] With regard to the parties related to the applicant [redacted] is mentioned first. Other than her address in Quebec, the IER states that according to Exhibit A, she also lives in the residence of [redacted].

[40] Then, the IER lists several [redacted], with brief descriptions of the known links to the applicant.

[41] The section on the entities likely to hold the sought information names the Internal Revenue Service [IRS], two financial institutions, a marine surveyor and an insurer.

[42] The "Nexus" (reason for request) section states that the *Income Tax Act* [ITA] requires Canadian residents to declare their worldwide income and all of their assets, regardless of where they are. The Agency confirms that it was advised of the applicant's decision to emigrate to Barbados in November 2013, but that it has reason to believe that he is actually a Canadian or American resident. It therefore requires this information to determine the applicant's tax residency and liability for the period in question.

[43] The "Background" section explains that the audit is being performed under the Related Party Initiative and was now part of the JITSIC Residency Project. It provides a summary description of the program, aimed at identifying related entities, analyzing transactions between related entities and taxpayers, and determining the residency of foreign trusts.

[44] The Agency then provides a list of the various ties the applicant has with Canada, the United States and Barbados, concluding that he could be a resident of any of these countries, as he split his time fairly equally between them. According to the Agency, using the JITSIC platform makes it possible to share the information needed to determine his true tax residency.

[45] With regard to the applicant's ties to Canada, the Agency states that the applicant was born in Canada and spent his entire career in Canada until retiring from his company in 2013.

His children, grandchildren, sisters, nieces and nephews live there. He is [redacted], although he denies [redacted].

[46] Prior to his departure from Canada, he donated his residence worth over [redacted] to one of his sons, and when he is in Canada, he resides in his sons' principal or secondary residences. He is the beneficiary of a Canadian trust that holds the common shares of a Canadian investment company. The applicant has allegedly received [redacted] since 2013.

[47] As for the applicant's ties with the United States, there is obviously the residence [redacted] of which he has been the beneficiary since 2012 through a Barbadian trust. According to LexisNexis, he resides there [redacted].

[48] The Agency provides the address of [redacted] located at [redacted], which the applicant allegedly acquired in 2017, and indicates that he had [redacted] inspected through a company headquartered in Florida. In 2012, he allegedly sold [redacted] of the Barbadian trust which owned the residence [redacted] and of which the applicant is the beneficiary. This loan was used as security for a loan [redacted].

[49] Lastly, the Agency informs its counterpart that since 2014, the applicant has spent close to one third of his time in the United States.

[50] Regarding the applicant's ties to Barbados, the Agency begins by mentioning the declaration the applicant made in his 2013 tax return, to the effect that he was emigrating there. The Agency mentions the Villa owned by a trust of which the applicant is a beneficiary and indicates that he had spent around one-third of his time there during the audit period. As for the financial information concerning the related entities, the Agency informs the Americans that the applicant had refused to provide any information for later than 2013.

(2) Required information

[51] The first series of questions is addressed to the IRS and asks whether the applicant is known to the IRS, whether he is considered to be a US resident and whether he reported his income during the audit period. The Agency asks the IRS to provide a credit report for the United States, to indicate whether the applicant appears as a director of any US corporations or holds any interests in any US real estate or companies (other than those identified in the request) if it does not consider him to be a resident.

[52] Regarding the real estate identified in the request, the Agency wants to know what the applicant's relationships with the companies through which this real estate was acquired are. It also requests a list of any real or personal property registered to the residential address of [redacted].

[53] Then, the Agency asks the US authorities to provide it with the information held by [redacted], identified during its audit, including the client profile, the numbers of the accounts of which the applicant is a beneficiary or authorized signatory, account statements, and the details of all $10,000-plus transactions. Lastly, it asks for copies of all the insurance policies issued by US insurers in the name of the applicant or that of a related entity.

[54] The IER concludes with a list of enclosed exhibits, A to T, and, although these exhibits are in the Agency's certified record, they are not part of the common evidentiary record.

B. *The Swiss IER*

[55] The subject of the transmittal letter for this request is *JITSIC Specific Request for Information Canada – Switzerland Income Tax Convention*, and it identifies the applicant as the subject of a tax audit for 2013 to 2017. It confirms that the request complies with domestic law and that the required information could be obtained were it available in Canada. Lastly, it confirms that the Agency has exhausted all viable avenues for obtaining this information itself.

(1) Provided information

[56] The Swiss IER is comprised of three pages and a single attachment, identified as an electronic funds transfer document. This exhibit is not part of the common evidentiary record, although it is included in the Agency's certified record.

[57] The IER identifies the applicant and provides his known addresses in Canada (contrary to the two other requests, the Canadian address is not identified as being the applicant's last known address in Canada), in the United States and Barbados, as well as his mailing address [redacted]. It lists the entities related to the applicant and identifies [redacted] as being in possession of the sought information.

[58] The "Nexus" (reason for request) section states that the request is being made in relation to a tax audit for 2013 to 2017 and aims to determine the applicant's tax liability to Canada.

[59] The "Background" section explains that the audit is being performed under the High Net Worth Individuals and Related Party Initiative, a program that aims to analyze transactions with related foreign entities and determine the tax residency of foreign trusts. It states that the Agency's data on electronic funds transfers contains certain funds transfers [redacted], via [redacted], identified in the request. The Agency indicates that the applicant refused to provide this information for the period in question on the ground that he was no longer a Canadian resident. It states, however, that considering the applicant's family ties in Canada and the number of visits and the duration of these visits since 2013, it has reason to believe that he could still be a Canadian resident. The requested bank information is required to determine the applicant's tax liability to Canada and to identify other related entities or foreign assets.

(2) Required information

[60] The Agency is asking the Swiss tax authorities to ask the identified [redacted] for documentation regarding the client profile, the numbers of the accounts of which the applicant is a beneficiary or authorized signatory, the applicant's or any other related entity's account statements and the details of all $10,000-plus transactions.

C. *The Barbadian IER*

[61] The subject of the transmittal letter for this request is *Specific Request for Information Canada – Barbados Tax Convention*, and it identifies the applicant as the subject of a tax audit for 2013 to 2017. It confirms that the request complies with domestic law and that the required information could be obtained were it available in Canada. Lastly, it confirms that the Agency has exhausted all viable avenues for obtaining this information itself.

(1) Provided information

[62] The Barbadian IER is comprised of 17 pages and a list of 27 enclosed exhibits, A to AA. The exhibits themselves are not part of the common evidentiary record although they are included in the Agency's certified record.

[63] It identifies the applicant and provides his known addresses in Canada (last known address), the United States and Barbados, as well as his mailing address [redacted]. It indicates that [redacted] which, according to the document submitted as Exhibit A, [redacted]. Lastly, it lists the known entities related to the applicant.

[64] The “Nexus” (reason for request) section states that the ITA requires Canadian residents to declare their worldwide income, any foreign assets they may have and their income from these assets. It states that the applicant declared in his 2013 income tax return that he was emigrating to Barbados on November 15, 2013, and that the Agency requires the information to determine the applicant’s tax liability to Canada for the period in question.

[65] The “Background” section explains that this audit is being performed under the High Net Worth Individuals and Related Party Initiative, and lists the various ties the applicant has with Canada, the United States and Barbados (essentially the same information as in the American request).

[66] The section mentions prior information exchanges between Canada and Barbados, regarding [redacted], and also [redacted].

(2) Required information

[67] The Agency notes that the requested information will be used to determine the applicant’s tax liability to Canada during the period in question.

[68] The first section is addressed to the Barbados Revenue Authority [BRA]. The BRA is asked whether the applicant is known to it, whether the applicant is considered to be a tax

resident of Barbados, whether he reported his income during the audit period and whether he has been the subject of a tax audit. The Agency asks the BRA to provide a credit report for the applicant in Barbados, insomuch as that information is available, if it does not consider him to be a resident.

[69] The Agency states that according to information from KPMG, the applicant is a non-domiciled resident of Barbados for 2013 to 2017. It therefore ask the BRA to (i) provide any information received from the applicant or his representatives regarding his tax residency for this same period; (ii) confirm whether the applicant had obtained a residency visa or permit; (iii) confirm the information received by the Agency to the effect that the amount of [redacted]; and (iv) confirm whether the income the applicant earns as president of a corporation deemed to be a resident in Canada is taxable in Barbados, whether the applicant reports other employment income and whether he has a work permit in Barbados.

[70] In the "Real Property and Corporate Information" section, the Agency states that this information is required to establish the applicant's ties to Barbados. It asks whether the applicant holds property other than that identified, whether he is related to entities other than those identified or whether he is the director of any such entities. Lastly, the Agency presents a series of queries about the residence the applicant uses in Barbados, including the periods it was rented to others (and any documents indicating the rental income), any property or entities registered to that address, a list of the telephone numbers billed at that residence and all the expenses related to this property.

[71] The last section of this IER is entitled "Other" and covers various requests, as follows:

> Any information regarding the applicant's entries and exits, including countries of origin, reasons for visit and duration;
>
> Any bank information from [redacted], regarding the applicant and [redacted] related to him; this includes the client profile, the numbers of accounts of which the applicant or related entity is a beneficiary or authorized signatory, statements, and the details of all $10,000-plus transactions;
>
> Any information from providers of cable and mobile telephone services registered in the applicant's name during the audit period, including monthly billing, user names, and incoming and outgoing calls and text messages;
>
> Since a trust can be considered to be a Canadian resident based on past contributions, a range of information and documents regarding [redacted] for 2009 to 2016; and
>
> Lastly, certain documents related to the applicant's tax planning for his emigration to Barbados.

IV. Issues and standard of review

[72] At issue in this application for judicial review is whether the IERs fall under the ITA and the bilateral conventions signed by Canada. First, the Court must answer the following three sub-issues:

A. *Was the Agency transparent and did it act in good faith in its IERs?*

B. *Are the information and documents required of the foreign authorities "foreseeably relevant" for the Agency's audit?*

C. *Did the respondent exhaust reasonable domestic means to obtain the information and documents required before turning to the foreign authorities?*

[73] The applicant submits that the standard of correctness applies in this case because the issue concerns the interpretation of an international convention (*Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982). In the alternative, he submits that even if the Court were to find otherwise, the IERs would not pass the standard of reasonableness test either.

[74] For the respondent, the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], teaches that the standard of reasonableness applies in the assessment of IERs. IERs are the result of an exercise of the Agency's discretionary audit power, and their purpose is to maintain the integrity of the Canadian tax system. In this context, the Court must show the greatest restraint.

[75] In a recent decision by Justice Martine St-Louis in *Levett v Canada (Attorney General)*, 2021 FC 295 [*Levett*], the judge agreed with the parties that the reasonableness standard applied to all the issues before her, except those involving the protection of solicitor-client privilege, which she was not actually required to rule on.

[76] That said, I also feel that the reasonableness standard applies, first because the question submitted does not fall within any of the exceptions the Supreme Court identified in *Vavilov*, but also because it is a matter in which this Court must show considerable deference.

[77] As will be discussed below, the issues underlying the IERs—namely the applicant's tax residency and his tax liability to Canada—are ultimately within the exclusive jurisdiction of the

Tax Court of Canada. The final analysis of the actual relevance of the requested information and documents is therefore an issue for that court.

[78] In this context, a review of the legality of the IERs, which will take into consideration the legal and factual constraints to which the Agency is subject, can only be a summary one given that this Court does not have the applicant's full audit record.

[79] The issue of the Agency's respecting the conventions and the ITA must therefore be analyzed holistically, and the Court can only intervene in the event of a central irregularity or shortcoming (*Vavilov* at para 100).

V. Analysis

A. *Was the Agency transparent and did it act in good faith in its IERs?*

[80] In his memorandum of fact and law, as in the submissions of his counsel at the hearing, the applicant relied heavily on Mr. Robichaud's [TRANSLATION] "disordered and overly ambitious" behaviour and the fact he was an uncooperative and non-credible witness, who even made false and misleading statements before the Court. The applicant adds that it was on the basis of these false statements that the Agency allegedly sent requests to foreign competent authorities that were [TRANSLATION] "riddled with false and misleading information and major omissions". The applicant submits that the IERs should be set aside for this reason alone.

[81] In addition to his memorandum of fact and law, the applicant has submitted to the Court six tables containing more than one hundred pages summarizing the evidence on the record and providing links to the common evidentiary record. The following shows how he refers to the evidence in a footnote to support his position regarding Mr. Robichaud's behaviour:

> [TRANSLATION]
> 41. See, in particular, the table presenting Mr. Robichaud's most egregious contradictions, fallacies and omissions (with references to the evidence) that emerged from the evidence: Réticences et tromperies du Vérificateur Robichaud [Auditor Mr. Robichaud's Omissions and Deceits], DAD, **Tab 4**, and the analysis of the information requested in the foreign requests, which includes a correlation with the information requested in the T-997 requests: Analysis of Requested Information, DAD, **Tab 5**. See also, Chronology, DAD, **Tab 2**, and IER-10, commented version, DAD, **Tab 3**.

[82] Table 4 (called Réticences et tromperies du Vérificateur Robichaud [Auditor Mr. Robichaud's Omissions and Deceits]), which, according to the applicant, provides the most egregious examples, is principally a list of points noted by the applicant's counsel in cross-examination. This requires, however, distinguishing between what had a negative impact on the validity of the IERs and what had no impact. The table is divided into three sections:

1. In his affidavit and in cross-examination;
2. Regarding LR and LR's representatives; and
3. In the foreign requests.

[83] Since I feel that the majority of these points have no impact on the validity of the IERs, I will only address a few examples of the criticisms made against Mr. Robichaud in each of the sections (in the order in which they appear in the table, so as not to be accused of being selective).

(1) In his affidavit and in cross-examination

[84] First, the auditor is criticized for listing in his affidavit a number of entities and trusts being audited, which, according to the applicant, have no connection with his residence. The applicant is referring to an excerpt from the transcript of Mr. Robichaud's cross-examination (Vol 10, p 1963, l 13, to Vol 11, p 1968, l 9), in which the witness confirms that the applicant actually sold the shares he held in one of the companies listed in his affidavit in 2013. However, the witness later explains the link he had made between this company and the applicant:

> [TRANSLATION]
> Q: I am not criticizing your affidavit, I just want you to explain whether there is a relevance to Lucien Rémillard's residence, because I don't see one. So that's it, that is my question.
>
> A: Ok. That's your opinion. For me, I say that here there are funds transfers or transactions [redacted], it could be relevant.
>
> (Vol 11, p 1969, l 19, to p 1970, l 3)

[85] The applicant also refers to the following excerpt from the transcript of the cross-examination:

> [TRANSLATION]
> Q: Mr. Robichaud, can we . . . let's speed things up a bit. Do we agree that Lucien Rémillard has nothing to do with [redacted]?
>
> A: Um . . . (inaudible).
>
> Q: I'm in your affidavit at paragraph 6, lowercase Roman numeral 3, under "Canadian Corporations".
>
> A: I don't think . . . I don't think I had noted anything in particular, I'm just going by memory.
>
> Q: So, to repeat, at the time we are discussing, at the time of your affidavit, in 2019, do we agree that Lucien Rémillard had nothing to do with [redacted]?

> A: Yes, but can I just clarify that the list that's there, that doesn't mean it's just entities linked to Lucien Rémillard, because there are (inaudible).
>
> Q: No, no, I don't have a problem with that.
>
> A: OK.
>
> Q: No, no, I'm not criticizing you, but I want to define the problem, and that's why I'm happy if we can agree that Lucien Rémillard has no connection with [redacted], for the... that there's no connection whatsoever, in 2013, in 2014 or even today. Agreed?
>
> A: Not to my knowledge, no.
>
> (Vol 11, p 1977, l 21, to p 1979, l 1)

[86] However, the applicant omits the witness's next statement:

> [TRANSLATION]
> A: I have... there's a series of loans with different entities. I don't remember all the entities with all the... these loans. It's difficult for me to just answer yes or no to you without having...
>
> (Vol 11, p 1979, ll 5 to 9)

[87] The witness states that, to his knowledge, the applicant has no connection with any of the entities listed in his affidavit; it appears that he cannot answer from memory about the others. However, in response to undertakings 4 to 8 that he made, he states that the companies listed in his affidavit are covered by the audit of entities related to the applicant and the applicant's sons, and he describes the applicant's involvement in a number of trusts (Vol 17, pp 3147 to 3149).

[88] Given that the audit is being conducted under the High Net Worth Individuals and Related Party Initiative, and given that the applicant himself set up a complex corporate (and trust) structure for the purposes of his business operations and tax planning, it seems to me that

the auditor's position is legitimate and that he is not misrepresenting anything when he lists the entities at issue in his affidavit. I see nothing false or misleading here.

[89] Mr. Robichaud is then criticized for stating in his affidavit that the applicant failed to provide evidence that he was no longer a Canadian resident and failed to fully cooperate with the Agency during the audit, whereas Mr. Robichaud stated in cross-examination that all T-997 requests had been answered voluntarily.

[90] In the first passage to which the applicant draws the attention of this Court (Vol 11, p 2121, l 21, to p 2124, l 15), counsel and the witness discuss the meaning of [TRANSLATION] "voluntarily", concluding that what the witness meant was that the applicant had refused to provide some of the information requested, even though he had nonetheless provided considerable information.

[91] The second passage to which the applicant draws the attention of this Court (Vol 12, p 2192, l 7, to p 2193, l 8) deals with Mr. Gagnon's response to request T-997-1. The witness confirms that he received 90% of the information requested and did not ask again for the missing 10% in request T-997-2. He explains this further on (Vol 12, p 2194, l 18, to p 2195, l 8, to which the applicant does not refer):

> [TRANSLATION]
> A: Well, sometimes it happens, when we're sure that we're not the ones missing something or that, sometimes, we have to confirm certain information before making a decision, to say "no, it hasn't been answered" or "it's been answered", and then sometimes it's left pending, and then we decide before closing the audit whether it's essential to have the answer.

> Q: Do you know, as of today and having the information that was missing in the August 2016 T997 request, whether the information is essential?
>
> A: Well, yes, I would have liked it if maybe the T1161s and then the T1135s could have been more complete.

[92] The witness confirmed that he had no record of having requested this information again or of having informed the applicant that his response to request T-997-1 was incomplete. Lastly, the witness confirmed that the response to request T-997-1 was provided voluntarily without the need to issue a requirement.

[93] The third passage to which the applicant draws the attention of this Court (Vol 12, p 2221, l 13, to p 2227, l 6) deals with the response to request T-997-2, which the witness confirmed was given voluntarily. The witness pointed out that, in audits, the Agency usually asks questions to which it is entitled to obtain answers (as set out in section 231.1 of the ITA). And the taxpayer is required to respond. This is not necessarily what he meant by [TRANSLATION] "voluntarily". He agreed, however, that the Agency did not issue a requirement or obtain an order under section 231.7 of the ITA, noting that, where the information is outside Canada, these steps may be possible but more complicated.

[94] Lastly, the fourth passage to which the applicant refers (Vol 12, p 2275, l 22, to p 2276, l 5) deals with request T-997-3, to which the applicant is said to have responded voluntarily (to understand this passage, a number of pages before it must be read).

[95] However, as stated at paragraph 22 of these reasons, it is after request T-997-3 that the parties' positions start to diverge regarding the information to which the Agency is entitled in the context of its audit. Specifically, requests T-997-4 and especially T-997-5 are problematic, and these are the ones to which the applicant apparently did not respond voluntarily.

[96] Therefore, I cannot conclude, as the applicant is asking me to do, that Mr. Robichaud misrepresented that the applicant did not fully cooperate. The issue of whether the information requested and withheld is foreseeably relevant will be discussed below, but what is important here is that Mr. Robichaud believed it was relevant and that the applicant's refusal was unfounded.

(2) Regarding LR and LR's representatives

[97] The first criticism under this category is that tax years beyond the initial period were audited before the audit period was officially extended, without the applicant being informed. And even after the period had been extended, the Swiss and Barbadian IERs exceeded the new audit period, requiring information for 2009 to 2012, and 2018. The applicant submits that this casts serious doubt on the intentions of Mr. Robichaud and the actual scope of the audit.

[98] The application refers to a series of short passages from the cross-examination of Mr. Robichaud; of course, additional reading is required to understand the context. The witness stated that, on the basis of information from Canadian banks, the Agency noted multiple transfers of large sums between 2015 and 2017 that might be related to transactions in the initial period. The witness also stated that the audit period needed to be extended because, in 2018, the Agency

had a more complete picture of the situation and found that the applicant's stays in Canada increased after 2013.

[99] With regard to the Swiss IER, the applicant refers to an annex that lists electronic funds transfers from [redacted] to [redacted] and [redacted], including one apparently occurring in 2018. I do not know who compiled the list or whether the Agency knowingly included a transfer outside the audit period. In any case, both the accompanying transmittal letter and the Swiss IER itself clearly state the period covered by this audit (2013 to 2017).

[100] As for the Barbadian IER, the applicant refers to the information requested regarding [redacted] whose residency is to be determined. The requested information covers the period from 2009 to 2016, and the request contains a note stating that past contributions to a trust may result in the trust being deemed Canadian. I am obviously not in a position to determine whether that justifies the request. However, the same comment applies: the transmittal letter and the IER itself clearly indicate the period being audited and are in no way misleading.

[101] The second criticism of the Agency in this category concerns the fact that Mr. Robichaud failed to inform the applicant and Mr. Gagnon that he was not satisfied with the responses received for requests T-997-1 to T-997-4. The applicant refers the Court to the following passages from the auditor's cross-examination:

> [TRANSLATION]
> If you're asking, "Why is it . . . why didn't I get my answers or whatever?" well, I'm trying to explain that it's tricky for us, in an audit, to put our opinion or our assessment of whether the

> taxpayer's answers are acceptable, unacceptable, lacking on certain points where we . . . we can assess whether we . . . a question needs to be asked again, or whether the question has simply not been answered and we'll leave it at that and maybe come back to it at the end or we absolutely have to do something else about it. So, it's in that context...
>
> (Vol 11, p 2056, l 22, to p 2057, l 11)
>
> ...It's a way of doing things that... at the time, if we think that they're new questions and we're not ready to ask the same question again in the same way, we'll wait...
>
> (Vol 12, p 2264, ll 6 to 10)

[102] Again, the auditor's full explanation is found in passages not cited by the applicant:

> [TRANSLATION]
> A: I'll give you an example to the best of my knowledge. OK, on that subject, we ask the question: OK, you gave us a T1161, but for two assets you did not provide another form; please provide it. OK, it's easy to see if he has or has not provided it.
>
> Now, are the contents of the form or response adequate? Today, I'm of the opinion that he didn't answer all the... he didn't indicate all the... the assets that... that had to be included on the form, but, at the time, I didn't know that the answer was false or incomplete. So if I say...
>
> I received the... the form, everything is in order and then we move on to other things, I fail to... what if I... afterwards I get another piece of information that is contradictory? That's why there's... there are... notes from the auditor to explain, "Yes, I received an answer, but I consider it incomplete". Then sometimes it can happen after, a few months, even years, if information that we find out afterwards is... proves that the response is incomplete.
>
> (Vol 11, p 2058, l 7, to p 2059, l 8)
>
> R: ... we can go point by point, and then I'll answer the... the outstanding items. I... I'm fine with that.
>
> Q: Was a requirement issued further to this form?
>
> A: No.

> Q: Did you at any time seek a court order to compel the taxpayer to answer your questions?
>
> A: On that advice, I relied on legal opinions and then, if necessary, I requested the intervention of (inaudible) counsel whether or not I could answer.
>
> (Vol 11, p 2060, ll 6 to 18)

[103] There followed a discussion between counsel, and then they moved on to another topic.

[104] I therefore cannot conclude, as the applicant does, that Mr. Robichaud left things unsaid or was misleading. Of course, the question of whether the Agency should have issued a requirement or obtained a court order will be considered below when I deal with the issue of exhaustion of means.

(3) In the foreign requests

[105] Under this heading, the Agency is first criticized for falsely stating in its IERs that it had pursued, to no avail, all its domestic means to obtain the sought information. In particular,

1. The IERs make no reference to the [TRANSLATION] "agreement" reached between Mr. Robichaud and Mr. Gagnon on October 10, 2018;
2. The Agency never issued a requirement or obtained a court order to compel the production of documents;
3. A number of pieces of information requested from foreign authorities were never requested from the applicant; and
4. Other pieces of information had been provided by the applicant and were therefore already in the Agency's possession.

[106] In my view, all of these points relate to the issue of exhaustion of means, which will be dealt with below; I do not necessarily see them as misrepresentations by the Agency but as an interpretation of the October 10, 2018, agreement and of the Applicable Conventions that is different from that of the applicant. I will discuss this further below.

[107] The second criticism of the Agency under this heading concerns the information provided to the American and Barbadian authorities about the applicant's Canadian residence—or last-known Canadian residence. It is stated that the applicant gave his luxurious residence to his son before he left Canada and that during his subsequent stays in Canada, the applicant lived at his son's secondary residence, the address of which was not provided. The applicant submits that the Agency was implying that he was in fact living at his former residence and therefore maintaining a [TRANSLATION] "permanent home" there.

[108] First, the applicant stated he had told the Agency that, during his stays in Canada, he lived in the principal and secondary residences of his two sons. Moreover, Mr. Robichaud admitted in cross-examination that he had only once asked for the address of the secondary residence of the son who had been given the applicant's residence, namely in request T-997-5, and that the answer had been provided.

[109] It is true that the primary and secondary addresses of the son in question were provided to the Agency in September 2018, in response to request T-997-5 (Vol 2, p 303). However, this was not the first time that the Agency had asked the applicant where he lived during his stays in Canada, and the previous answers provided by Mr. Gagnon were vague—at the principal and

secondary residences of his two sons (see Vol 2, p 269). Although the American and Barbadian IERs were sent after September 2018, the first draft of the American IER was sent to the Competent Authority in mid-March 2018. At that time, it was true that the address of the secondary residence of the applicant's son had not yet been provided.

[110] In my opinion, the Agency should be given the benefit of the doubt here. It is quite possible that this information was not corrected when the American IER was finalized and when the Barbadian IER, in which the section in question was copied from the American IER, was prepared.

(4) Conclusion regarding this issue

[111] In my view, the various points raised by the applicant, which make up almost his entire memorandum of fact and law, are peripheral to the real issues raised by this application for judicial review and serve only as a distraction. These points, taken in isolation or as a whole, do not allow me to conclude that Mr. Robichaud's conduct was [TRANSLATION] "disordered and overly ambitious" or that the Agency sent IERs that were [TRANSLATION] "riddled with false and misleading information and major omissions".

[112] I therefore conclude that the applicant's first argument should be rejected.

B. *Are the information and documents required of the foreign authorities "foreseeably relevant" for the Agency's audit?*

[113] The applicant correctly points out that Canada's tax treaties distinguish between the obligations of the state requesting the information (the requesting state) and those of the state receiving the request for information (the requested state). Assessing the requested information's foreseeable relevance is primarily up to the requesting state, which is presumed to be acting in good faith (*Vienna Convention on the Law of Treaties*, done on May 23, 1969, United Nations, *Treaty Series*, Vol 1155, p 331, art 31 (entered into force January 27, 1980)).

[114] This distinction is underscored in this Court's decision in *Blue Bridge Trust Company Inc v Canada (National Revenue)*, 2020 FC 893 (aff'd 2021 FCA 62, leave to appeal to SCC refused, 39682 (December 13, 2021)) [*Blue Bridge*], where Justice Roger Lafrenière was required to rule on a request made to Canada by the French competent authority. In that case, the Agency submitted that, as the requested state, it lacked in-depth knowledge of the domestic tax law of each of its partners and that it did not have access to the facts specific to each foreign taxpayer. As a result, the Agency ensures that foreign taxpayers are properly identified as residents of the requesting state, that the context of the audit, the taxpayers' tax obligations and the link to the requested information are explained to the Agency, and that the persons in Canada who may have the information sought are identified.

[115] Shortly after the Court rendered its decision in *Blue Bridge*, Justice Martine St-Louis heard *Levett*, where the Agency was the requesting state and approached the Swiss competent authority for information on Canadian residents. The applicant agrees that this decision

(currently under appeal in A-142-21) is more relevant than *Blue Bridge* but submits that Justice St-Louis erred when she applied the test of foreseeable relevance set out in *Blue Bridge* without considering that the Agency was in that case the requested state. Justice St-Louis stated the following in *Levett*:

> [93] The purpose of the "foreseeably relevant" standard is to maximise the extent of the information that can be exchanged. Our Court recently interpreted this standard in *Blue Bridge*:
>
> > [90 **[..]** [*sic*] **Consequently, the courts must merely verify that the information order is based on a sufficiently reasoned request by the requesting authority concerning information that is not — manifestly — devoid of any foreseeable relevance having regard, on the one hand, to the taxpayer concerned and to any third party who is being asked to provide the information and, on the other hand, to the tax purpose being pursued.**
> >
> > [91] Accepting Blue Bridge's interpretation would be contrary to the primary objective of Article 26 of the Convention, which, to reiterate, is to promote the exchange of information to the maximum extent possible. Article 26 specifies that the competent authorities of the contracting States shall exchange "foreseeably relevant" information in applying the provisions of the Convention.
> >
> > [92] In the circumstances, it was entirely appropriate for the Minister to focus the analysis on the foreseeable relevance of the information required by France, as set out in Article 26, paragraph 1, of the Convention and in accordance with the principles derived from the work of the OECD and the Global Forum.
> >
> > [Emphasis added]

[116] However, the passage I have emphasized does not come from Justice Lafrenière but from a passage in the decision of the Court of Justice of the European Union in *Berlioz Investment*

Fund SA v Directeur de l'administration des contributions directes, C-682/15 (May 16, 2017) [*Berlioz*] (at paras 77, 85 and 86), which Justice Lafrenière quotes. Here is the complete passage from the European decision that Justice Lafrenière cites at paragraph 90 of *Blue Bridge*:

> . . . [T]he requested authority must, in principle, trust the requesting authority and assume that the request for information it has been sent both complies with the domestic law of the requesting authority and is necessary for the purposes of its investigation. The requested authority does not generally have extensive knowledge of the factual and legal framework prevailing in the requesting State, and it cannot be expected to have such knowledge . . . . In any event, the requested authority cannot substitute its own assessment of the possible usefulness of the information sought for that of the requesting authority.
>
> . . . it must be held that the limits that apply in respect of the requested authority's review are equally applicable to reviews carried out by the courts.
>
> Consequently, the courts must merely verify that the information order is based on a sufficiently reasoned request by the requesting authority concerning information that is not — manifestly — devoid of any foreseeable relevance having regard, on the one hand, to the taxpayer concerned and to any third party who is being asked to provide the information and, on the other hand, to the tax purpose being pursued.

[117] I agree with the applicant that the above passage from *Levett* falsely suggests that the test for foreseeable relevance—or rather the burden on the Agency to demonstrate it—is the same whether the Agency is a requesting state or a requested state. However, I believe this confusion has little impact on the decision in *Levett*; the passage can be regarded as an obiter because the analysis of foreseeable relevance was not an issue before Justice St-Louis. Rather, the issue was the confidentiality of documents obtained from the Autorité des marchés financiers, attorney-client privilege, the Agency's use of false, irrelevant, incomplete information, and the Agency's

failure to exhaust its domestic means. *Levett* will therefore be relevant to the issue of exhaustion of domestic means.

[118] That said, the purpose of the foreseeable relevance test—to maximize the extent of the information that may be exchanged—applies in all cases, whether the Agency is the requesting state or the requested state.

[119] In *Crown Forest Industries Ltd v Canada*, [1995] 2 SCR 802 [*Crown Forest*], the Supreme Court stated "that, in ascertaining [the] goals and intentions [of the parties to an international agreement], a court may refer to extrinsic materials which form part of the legal context (these include accepted model conventions and official commentaries thereon) without the need first to find an ambiguity before turning to such materials" (at para 44).

[120] The OECD commentaries on the Model Convention shed some light on the standard of "foreseeably relevant" information:

> The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes of every kind and description imposed in these States even if, in the latter case, a particular Article of the Convention need not be applied. The standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer ("Commentary on Article 26: Concerning the Exchange of Information", in Model Tax Convention on Income and on Capital 2017, OECD Publishing, Paris [OECD Commentary], cited by the applicant in the common evidentiary record, Vol 4, p 693).

[121] The applicant submits that the information requested in the IERs is irrelevant to determining his residency. He points out that, since requested states are simply not equipped to check requests for validity and for compliance with Canadian law, the Court is the only bulwark protecting affected Canadian taxpayers.

[122] I agree with the applicant that the Court has jurisdiction to assess the validity of IERs. However, it is not the Court's task to rewrite them. The Court must examine the IERs as a whole and determine whether, as a whole, they meet the requirements of the Applicable Conventions. The onus is on the applicant to demonstrate that the IERs as a whole do not reasonably conform to the Conventions. The shortcomings raised must be more than superficial or peripheral; they must be sufficiently central to render the IERs invalid (*Vavilov* at para 100).

[123] The question is therefore whether the Agency has reasonably interpreted its duties under the Applicable Conventions.

[124] In *Crown Forest*, the Supreme Court determined that tax treaties, like any interstate agreement, are contracts and must therefore be interpreted in such a manner as to give effect to the purpose which animates them. However, they must be read in accordance with the modern approach to statutory interpretation endorsed in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27. The terms of the Applicable Conventions must therefore be read in their entire context and in their grammatical and ordinary sense harmoniously with their scheme, their object and the intention of the parties.

[125] Again, the standard of foreseeable relevance is intended to "provide for exchange of information in tax matters to the widest possible extent" (OECD Commentary). However, it is not without limits. The Court of Justice of the European Union recognized in *Berlioz* that there must at least be "a reasonable possibility that the requested information will be relevant" (*Berlioz* at para 67).

[126] The Applicable Conventions thus prohibit "fishing expeditions". As Justice Yvan Roy noted in *Bauer Hockey Ltd v Sport Maska Inc*, 2019 FC 1588 (at para 23), this concept was defined more than a century ago by the Master of the Rolls of England as a search by a litigant that may make it possible to "find out something of which he knows nothing now, which might enable him to make a case of which he has no knowledge at present".

[127] Of course, the foreseeable relevance of the requested information must be considered in the overall context of the Agency's tax audit. The applicant is a Canadian citizen who has spent his career in Canada, and all the members of his family [redacted] reside in Canada. Since retiring from his business in 2013, he has been spending more or less equal amounts of time in Canada, Barbados and the United States. The applicant states that he is a non-domiciled resident of Barbados, providing the mailing address [redacted] and stating that he lives in a short-term rental residence. From 2013 to 2018, he was audited to determine his tax residency and his tax liability to Canada. This audit is part of the High Net Worth Individuals and Related Party Initiative. That is the context.

[128] However, in his memorandum of fact and law, as well as in the oral submissions of his counsel, the applicant did not really explain why the information requested from the foreign authorities is not foreseeably relevant to determining his residency and tax obligations to Canada. The emphasis, again, is primarily on what he describes as errors or misrepresentations by the Agency.

[129] It is true that, in principle, the requesting state, and therefore this Court, are in a position to examine the foreseeable relevance of the information sought in the light of domestic law. However, the applicant has not (or has barely) addressed the limitations of domestic law in determining a taxpayer's tax residency. As stated above, this issue ultimately falls within the exclusive jurisdiction of the Tax Court of Canada, but it seems to me that it is nevertheless central to the assessment of foreseeable relevance. The section of the applicant's memorandum dealing with this issue contains only five paragraphs and a few trivial examples, and it focuses on a statement made by the official of the Competent Authority in cross-examination: [TRANSLATION] "When it comes to determining residency, everything is relevant". In my opinion, she is not wrong.

[130] Determining an individual's tax residency requires the Agency to examine all the facts about the individual in order to develop a comprehensive picture of the individual's situation and ties to Canada or any other country. As the Federal Court of Appeal has stated:

> [53] Generally, the residence of a person is a question of fact, the determination of which requires consideration of any number of factors that point to or away from an economic or social link between the person and a particular country. For example, in the case of an individual, the relevant factors could include nationality, physical presence, location of the family home, location of

> business and social interests, mode of family life, and social connections through birth or marriage . . . .
>
> (*Fundy Settlement v Canada*, 2010 FCA 309 at para 53)

[131] In a case such as this where a taxpayer clearly has ties to multiple countries, I am of the opinion that the auditor has no choice but to compare the strength or extent of the taxpayer's ties to the different countries.

[132] The American IER succinctly explains, under "Nexus" (reason for request), why the request is being made, stating that the applicant told the CRA he emigrated to Barbados on November 15, 2013, but the CRA has reason to believe that he may instead be a Canadian or American resident.

[133] The request then describes the evidence in the Agency's possession that leads it to conclude that the applicant has ties to Canada, the United States and Barbados. It discusses (i) the fact that the applicant splits his time almost equally between the three countries; (ii) his family ties; (iii) his real estate holdings in Barbados and the United States; and (iv) his economic ties to the three countries through companies or trusts in which he appears to have an interest.

[134] These elements are sufficient grounds for the American IER, demonstrating that the applicant has ties to each of the three countries in question. Accordingly, the Agency must examine all the applicant's family, real estate and economic ties to each of the countries in order to determine his residence and the resulting tax implications.

[135] Determining residence ultimately determines the tax obligations that apply to a given taxpayer. The Canadian tax system effectively provides that Canadian residents will be taxed on their worldwide income, while non-residents may have to pay tax in Canada on their Canadian income.

[136] The requested information concerns the applicant's tax treatment by American authorities, the applicant's real estate assets and interests in companies located in the United States, [redacted] and insurance policies issued to the applicant or to parties related to the applicant.

[137] All these questions are likely to provide the Agency with useful information about the applicant's ties to any of the states.

[138] The Swiss IER states the Agency's tax purpose, under "Nexus" and "Background", namely that the information is to be used to determine the applicant's tax liability in Canada, noting that the applicant has told Canadian authorities that he has emigrated to Barbados, but that the CRA has reason to believe that he may still be a Canadian resident, given his family ties and frequent visits to Canada.

[139] The request states that the CRA has noted transfers of funds between the applicant and certain related entities through [redacted].

[140] The information requested is limited to that relating to [redacted].

[141] Again, reasons are given for the request, and it is foreseeable that the requested information will identify assets or entities related to the applicant, providing a more complete picture of the applicant's ties to Canada or other countries.

[142] The Barbadian IER also states the tax purpose, namely, to determine the applicant's tax residency for 2013 to 2017, as well as the resulting tax liabilities, again stating that the applicant claims to be a resident of Barbados.

[143] The request discusses the applicant's ties to Canada, the United States and Barbados that were known to the Agency when the request was made.

[144] The information requested concerns the applicant's status with the Barbadian tax authorities and the tax obligations he has assumed in that country, the corporate entities located in Barbados in which he has an interest, his movable and immovable assets in Barbados, his entries to and exits from Barbados, information relating to [redacted] his subscriptions to telecommunications services, [redacted] in which he has an interest, as well as the tax planning documents relating to the applicant's emigration to Barbados.

[145] The requested information is clearly likely to shed light on the applicant's ties to Barbados and Canada.

[146] The questions regarding the applicant's investments in various companies or links to trusts, whether in Canada, the United States or Barbados, are clearly relevant because the audit has shown that a number of movable or immovable assets used by the applicant in his day-to-day life are held by companies of which he is a shareholder or trusts of which he is a beneficiary.

[147] It seems to me that it will be difficult for anyone to determine the applicant's actual residence for tax purposes, given his complex situation and the absence of complete information about him that would make it possible to qualify and quantify his family, social and economic ties to each of the countries with which he has links. In this respect, it should be kept in mind that IERs are part of the JITSIC program, which involves an exchange of information between tax authorities regarding the activities of a given taxpayer. This is, in my opinion, what the IERs (especially the one sent to the American competent authority) seek to achieve.

[148] If, at the end of the audit, the applicant is of the opinion that the auditor has reached an incorrect conclusion as to the applicant's ties to Canada, the applicant may challenge any resulting assessment in the appropriate forum, namely the Tax Court of Canada.

[149] The applicant's arguments do not allow the Court to reach the overall conclusion that the information requested in the IERs is not foreseeably relevant. In my opinion, the applicant has simply not discharged the burden of persuading this Court.

[150] In the circumstances, I am of the opinion that there is a reasonable possibility that the information requested by the Agency from foreign authorities will be relevant.

C. *Did the respondent exhaust reasonable domestic means to obtain the information and documents required before turning to the foreign authorities?*

[151] The parties agree on the principle that applies, namely the need to exhaust reasonable domestic means before turning to foreign authorities. However, they do not agree on how this principle applies to the facts of this case.

[152] The applicant submits that the IERs are unlawful because the Agency failed to exhaust the reasonable domestic means available before sending the requests to the foreign authorities. The applicant asks the Court to make this finding for two main reasons: (i) the Agency could have asked the applicant for almost all the information requested from the foreign authorities, which it failed to do; and (ii) the applicant responded to almost all the requests for information in requests T-997-1 to 4. With respect to request T-997-5, the parties agreed that the Agency would determine the issue of residency before the applicant provided the remaining information. Mr. Robichaud acknowledged in cross-examination that he had never expressed dissatisfaction with the information received in response to requests T-997-1 to 4, although, as far as he was concerned, some elements were missing.

[153] Meanwhile, the respondent submits that it pursued all reasonable domestic means of obtaining the information it was seeking:

> a. Five detailed requests for information (T-997) were sent to the applicants, some containing over one hundred questions;

> b. Three requests for information regarding transactions indirectly related to the applicant were sent to a Barbadian company that was considered a Canadian resident for tax purposes;
>
> c. Mr. Robichaud and his team sought information from third parties such as Canadian banking institutions; and
>
> d. Mr. Robichaud and his team made a number of requests to the Agency's internal research centre to search Canadian and international databases.

[154] Moreover, the respondent states that it did express its dissatisfaction to the applicant, even though it was not required to do so. In its memorandum of fact and law, it denies that there was any agreement between the Agency and the applicant regarding information not provided in response to request T-997-5. At the hearing, however, the respondent admitted that, in a telephone conversation on October 10, 2018, Mr. Robichaud had accepted the Applicant's position not to provide certain financial information until the residency issue had been decided.

[155] Regarding the need to exhaust domestic means, Justice St-Louis stated the following in *Levett*:

> [157] In regards to the Baazov and Levett Requests for Information and audits, the Applicants submit that the CRA could have (1) made a written request for the information to the Applicants; (2) used its audit powers under section 231.1 of the *Income Tax Act* to inspect, audit or examine their books or records in an attempt to locate the information; (3) used its compliance powers under section 231.2 of the *Income Tax Act* to issue a requirement for information; and (4) sought a compliance order under section 231.7 of the *Income Tax Act* to compel them to provide the information or documents sought by the Requests for Information.
>
> . . .
>
> [161] I agree that the CRA has no obligation to pursue all available domestic means. Instead, per subsection 2(a) of the Interpretative Protocol, the CRA needed to pursue "all reasonable means

> available under its internal taxation procedure to obtain the information" [emphasis added]. The Applicants' interpretation is not consistent with the wording of the Convention (see also *Update to Article 26 of the OECD Model Tax Convention and Its Commentary* (Paris: OECD, 2012); as mentioned, the Model Tax Convention and its commentaries are relevant per *Pacific Network* and *Blue Bridge* at para 20).

[156] She then lists the reasons for her conclusion. Some of the most relevant to the analysis of this case are the following (at para 162):

> a. As the information relating to the Swiss bank accounts was held by foreign corporations, the CRA could not request information from them directly pursuant to section 231.2 of the ITA;
>
> b. As the applicants claimed they had no relationship with the two corporations identified, the Agency could not request information from them pursuant to sections 231.1 and 231.2 of the ITA; and
>
> c. As the applicants had answered the T-997 requests sent pursuant to section 231.1 of the ITA, the Agency could not allege that they were in default and therefore could not seek a compliance order under section 231.7 of the ITA.

[157] In this case, the applicant failed to respond to all the requests for information in the T-997 questionnaires, despite the fact that only the Agency determines what it needs in the context of a tax audit (*Canada (National Revenue) v BP Canada Energy Company*, 2015 FC 714, rev'd on other grounds). Moreover, the Agency could have issued a requirement to provide information under section 231.2 of the ITA or sought a compliance order under section 231.7 of the ITA.

[158] The issue is whether the Agency should have pursued those means, rather than yielding to the applicant's position, before it sent the IERs. As stated above, this decision follows a legal opinion received by Mr. Robichaud, of which the Court does not have a copy.

[159] I agree with the respondent that, since T-997 requests are issued under section 231.1, they are as binding as requirements issued under section 231.2. This is why I find it difficult to understand why Mr. Robichaud did not press the matter further if he considered the requested information to be relevant to the current audit. However, although I believe he should have done so, I do not believe that it is a prerequisite for IERs. Nor do I believe that the Agency should have applied to the Court for an order because a number of the entities involved in the audit are foreign and a significant part of the assets at issue are located abroad. According to the applicant himself, he is no longer a Canadian resident.

[160] Moreover, it should be noted that the agreement to which the parties refer did not arise until October 2018, that is, after Mr. Gagnon had reiterated in his response to request T-997-5 that he did not intend to provide, at this stage of the audit, information concerning investments made by the applicant after November 2013. Mr. Gagnon expressed this position a number of times before October 2018, and there is no indication that, in the absence of a Court order requiring the applicant to provide this information, he would have changed his position.

[161] In this case, the Agency sent the applicant five T-997 questionnaires consisting of nearly 50 pages with a few hundred questions, received and reviewed hundreds of pages of documents, and consulted publicly available internal and external sources to get a complete picture of the

applicant's situation and the various factors that tie him to the three countries among which he divides his time. Apart from issuing a requirement and seeking a court order, the applicant does not state what other steps the Agency should have taken before approaching the foreign authorities. I also do not believe that he can criticize the Agency for failing to push for answers to the questions posed, since, once the Agency had posed them, the onus was on him to respond.

[162] I am therefore of the opinion that approaching the foreign authorities was subsidiary to the Agency's internal process, and rightfully so. Moreover, since the information obtained was insufficient for the Agency or required confirmation, IERs were justified (see Filip Debelva & Niels Diepvens, "Exchange of Information. An Analysis of the Scope of Article 26 OECD Model and Its Requirements: In Search for an Efficient but Balanced Procedure", [2016] 44 *Intertax* 298 at 303–04).

[163] Therefore, I am of the opinion that the IERs as a whole are in compliance with the Applicable Conventions and with the ITA, and that there are no central irregularities or shortcomings that would warrant the Court's intervention.

VI. Conclusion

[164] Since the applicant has not persuaded me that the IERs were based on misleading information or that the Agency acted in bad faith, since he has not shown that the information requested from the foreign authorities is not foreseeably relevant to the Agency's tax audit, and since I conclude that the Agency has pursued all reasonable means available under its internal

taxation procedure to obtain the information sought and available internally, the applicant's application for judicial review is dismissed.

[165] At the Court's request, the parties agreed to set their respective legal costs at $35,000, while the respondent claimed $3,592.24 in costs. The Court therefore awards the respondent $38,592.24 in costs.

JUDGMENT in T-1244-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed;

2. Costs in the amount of $38,592.24 are awarded to the respondent.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1244-19
STYLE OF CAUSE:	LUCIEN RÉMILLARD v MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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