

Federal Court



Cour fédérale

Date: 20210310

Docket: T-1244-19

Citation: 2021 FC 221

[ENGLISH TRANSLATION]

Montréal, Quebec, March 10, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

LUCIEN RÉMILLARD

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

I. Overview

[1] The applicant, Lucien Rémillard [Mr. Rémillard], alleges that the answers to certain undertakings given by one of the auditors [Auditor] of the Canada Revenue Agency [CRA] during his cross-examination on affidavit are incomplete, as they refer to documents that have not been disclosed.

[2] Mr. Rémillard has not satisfied me that the responses to the undertakings are incomplete or unsatisfactory. The obligation to respond to undertakings is limited to the undertaking that was freely given. The references in the documents submitted in response to the undertakings do not appear to me to be necessary to understand the documents themselves. These documents are self-contained, and it is therefore not appropriate to order the disclosure of the other documents mentioned in them that Mr. Rémillard would like to obtain.

[3] I therefore dismiss the motion.

II. Facts

[4] Mr. Rémillard is a retired businessman who claims to have established himself in Barbados and thus to have become a non-resident for the purposes of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], effective November 15, 2013.

[5] Since 2015, the Minister of National Revenue of Canada [Minister] has been auditing Mr. Rémillard's residency status, but to date still has not reached a conclusion. During this audit, the CRA made requests for administrative assistance from various countries, which were challenged by Mr. Rémillard on July 31, 2019, by an application for judicial review to have said requests for administrative assistance cancelled.

[6] According to Mr. Rémillard's latest re-amended notice of application of March 7, 2021, these requests should be cancelled as they were based on erroneous information and were made in violation of procedural fairness and outside the jurisdiction of the CRA.

[7] The facts and a more detailed procedural history of this case can be found in my judgment dated November 17, 2020, on the motion for an order of confidentiality (*Rémillard v Canada (National Revenue)*, 2020 FC 1061).

[8] Since that decision and in accordance with the timetable included in my direction dated November 20, 2020, the parties have provided each other with additional affidavits, and the parties' affiants have been cross-examined on both sides.

[9] One of the affiants of the Minister cross-examined by Mr. Rémillard was the Auditor, who was cross-examined on November 13, 2020, and on December 9 and 11, 2020.

[10] While there is no obligation to do so in cross-examination on affidavit, the Minister agreed to various undertakings, and on February 5, 2020, provided Mr. Rémillard with responses to the undertakings the Auditor gave in cross-examination.

[11] Mr. Rémillard alleged that the submitted answers to undertakings U-1, U-3, U-4, U-21, U-24 and U-28 were incomplete, but following out-of-court discussions between the parties regarding the hearing on the present motion, Mr. Rémillard is now contesting only the answers to undertakings U-1 and U-3. According to Mr. Rémillard, these answers were incomplete because they refer to documents that have not been disclosed. Mr. Rémillard is therefore asking this Court to order the Minister to provide additional answers to these undertakings.

III. Issue

[12] Should this Court order the Minister to provide additional responses to undertakings U-1 and U-3, given by the Auditor?

IV. Legal framework

[13] To put the debate in context, but without going on at length, it is clear that the basic principles applicable to cross-examination on affidavit are not the same as those applicable to examination on discovery (*Merck Frosst Canada Inc. v Canada (Minister of Health)*, [1997] FCJ no 1847 at para 4).

[14] It is also clear that an undertaking freely given on cross-examination on affidavit must be answered and that only those undertakings which the party has unequivocally agreed to give can be required (*Autodata Ltd. v Autodata Solutions Co.*, 2004 FC 1361 [*Autodata*]). However, an objection underlying a limited undertaking becomes moot when the undertaking has been fulfilled (*Ottawa Athletic Club Inc. (Ottawa Athletic Club) v Athletic Club Group Inc.* 2014 FC 672 at para 135).

[15] Furthermore, nothing in the *Federal Courts Rules*, SOR/98-106, allows Mr. Rémillard to reopen the cross-examination to seek further production or ask follow-up questions following the transmission of the undertaking (*Autodata* at paras 19–20).

V. Analysis

A. *Should this Court order the Minister to provide additional responses to undertakings U-1 and U-3 given by the Auditor?*

[16] Undertaking U-1 was for [TRANSLATION] “a copy of the initial report or referral”.

[17] Mr. Rémillard agrees that the copy of this report was indeed disclosed. There is no dispute over this issue. However, according to Mr. Rémillard, this is not enough. On several occasions throughout the report, he refers to a “OneNote” folder that would provide more details to the reader of the report. This folder allegedly contains other documents or notes concerning Mr. Rémillard that were used in drafting the report. Mr. Rémillard therefore maintains that the response to the undertaking will not be satisfactory until he receives a copy of the “OneNote” folder, since this would be essential to understanding the report.

[18] In addition, Mr. Rémillard, relying specifically on *Janssen Inc. v Apotex Inc.* 2018 FC 407 at paragraph 10 [*Janssen*], argues forcefully that the burden of proof is on the Minister to show that the “OneNote” folder is not part of the undertaking.

[19] The information claimed in *Janssen* was information that had been redacted by the party responding to the undertaking. I agree that in that context, as stated by Prothonotary Tabib, the onus of showing that the information was properly redacted rests with the producing party (*Janssen* at para 10).

[20] However, there is an important difference between requesting disclosure of redacted information and requesting disclosure of all documents referenced in the document provided in response to the undertaking. In the former case, it is difficult to demonstrate that information has been properly redacted without having access to that information. In the second case, I see no

difficulty in demonstrating that the document itself is not self-contained or comprehensible without access to the documents referred to in the document.

[21] In the latter context, therefore, the burden of proof is always on the applicant, who must show either that the party who entered into the undertaking undertook to disclose all the documents that could be cited in the disclosed documents or that the cited documents are needed to understand the disclosed documents. This has not been demonstrated in this case.

[22] Indeed, as noted above, the undertaking was for [TRANSLATION] “a copy of the initial report or referral”, and this is what was provided to Mr. Rémillard. The Auditor did not undertake to forward all documents that may be referenced in the report.

[23] Further, the report provided as undertaking U-1 is self-contained and does not require the disclosure of any further material for it to be understood. Mr. Rémillard has not satisfied me that the “OneNote” folder would be more than a mere reference tool or that its disclosure would be necessary to understand the report.

[24] A person who, in the context of an undertaking, agrees to disclose a document does not, of course, agree to disclose all of the documents referenced in it, except in cases where the disclosed document would fulfill the undertaking only by the documents appended to it and which would not have been disclosed (as in the case of an email whose sole purpose would be to provide attachments, for example). This latter situation is quite different from the one currently before me, where the disclosed document fulfills the undertaking given.

[25] Therefore, I find that the response to Undertaking U-1 is complete.

[26] Undertaking U-3 referred to the [TRANSLATION] “audit plan that was done at the time”.

[27] To fulfill this undertaking, the Auditor reconstituted the audit plan to resemble the original version since, as he had mentioned during his cross-examination, this document, being a living document, no longer existed in its original form.

[28] Mr. Rémillard does not dispute that the document disclosed does indeed correspond to the initial audit plan. However, similar to the arguments he raised for undertaking U-1, Mr. Rémillard maintains that one of the documents to which this audit plan refers should have been sent to him in addition to the plan itself.

[29] The audit plan invites the reader to look at a certain document that purportedly [TRANSLATION] “was retained in the main work plan” in a column opposite a detailed explanation of the first audit issue, namely the residence of Mr. Rémillard and that of a related entity.

[30] As mentioned above, although this undertaking was made with reservations, since a response was eventually provided, the Minister is required to provide a full response.

[31] However, I believe that the response provided is indeed complete. The same logic mentioned above applies here as well: the audit plan has been provided, and just because it refers

to other documents does not mean that those documents must be provided as well. The audit plan is clear and self-contained.

[32] In short, I am satisfied, after reviewing the responses to the undertakings, that the copy of the report and the initial audit plan that were provided to Mr. Rémillard by the Minister fully address the specific undertakings that were made during the cross-examination of the Auditor.

B. *Costs*

[33] The parties have agreed that this motion is without costs.

VI. Conclusion

[34] I dismiss the motion, without costs.

ORDER in T-1244-19

THIS COURT ORDERS as follows:

1. The motion is dismissed.
2. Without costs.

“Peter G. Pamel”

Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1244-19

STYLE OF CAUSE: LUCIEN RÉMILLARD v MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: MATTER HEARD BY VIDEOCONFERENCE AT MONTRÉAL, QUEBEC

DATE OF HEARING: MARCH 8, 2021

ORDER AND REASONS: PAMEL J.

DATED: MARCH 10, 2021

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