

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260812

Docket: A-38-25

Citation: 2026 FCA 138

**CORAM: LEBLANC J.A.
WALKER J.A.
ROCHESTER J.A.**

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

CAE INC.

Respondent

Heard at Montréal, Quebec, on June 17, 2026.

Judgment delivered at Ottawa, Ontario, on August 12, 2026.

REASONS FOR JUDGMENT BY:

WALKER J.A.

CONCURRED IN BY:

**LEBLANC J.A.
ROCHESTER J.A.**

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REASONS FOR JUDGMENT

WALKER J.A.

I. Overview

[1] The appellant appeals an order of the Tax Court of Canada dated January 16, 2025 (2025 TCC 9, *per* Smith J.) (the Order), granting a motion by the respondent to obtain an interim confidentiality order to protect certain documents (the Confidential Documents) from public

disclosure during the discovery process. The Order is subject to any later issuance by the trial judge of a permanent confidentiality order.

[2] The respondent's motion record included a detailed affidavit from the respondent's Head of Financial Reporting regarding the nature and content of the Confidential Documents (the Stabilé Affidavit). The Confidential Documents were described in paragraph 5 of the Stabilé Affidavit (and Schedule A to the Order) in a generalized list that referred to nine "sealed" documents consisting of a series of eight bid books and a group of financial statements of certain subsidiaries and joint ventures. The motion record was served and filed in reliance on Rule 67 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a (the Rules). The Confidential Documents themselves were not included in the motion record but were made available to the Court and to the appellant at the hearing of the motion.

[3] The Order was made in respect of two Tax Court matters: Tax Court files 2023-1364(IT)(G) and 2023-1851(IT)(G). The appellant accordingly filed two appeals in this Court: Court files A-37-25 and A-38-25. The two appeals were consolidated by order of this Court and A-37-25 was designated as the lead file.

[4] Subsequently, the parties filed a notice of discontinuance of Court file A-37-25, with the result that these reasons for judgment pertain to and will be placed in Court file A-38-25.

II. Tax Court Order

[5] The Order provides that the Confidential Documents will be treated as confidential and, if filed in the court record, will be sealed. The parties are required to approach the Tax Court before filing any motion containing a transcript of the examinations for discovery, the Confidential Documents themselves or documents on the respondent's list of documents. The Order does not bind the trial judge and expires at the commencement of the hearing on the merits. The Order permits the appellant and its designated representatives full access to the Confidential Documents during discovery as the Tax Court refused the respondent's request to limit access to certain employees of the appellant.

[6] The Tax Court issued the Order despite the appellant's arguments that: the motion was premature because the Confidential Documents had not then been filed with the Court; the open court principle was not engaged at discovery; and, the implied undertaking rule would provide adequate protection to the respondent at this stage of the proceedings.

[7] The Tax Court found that the Confidential Documents contained information that had always been treated as confidential and that there was a serious risk to an important public interest to be protected. The Court also found that there were no adequate alternative solutions, such as redaction or the implied undertaking rule, that would address the respondent's concerns.

[8] The Tax Court concluded (para. 61):

[61] Ultimately, I find that the Appellant has discharged its burden of proof and satisfied the Court, on a balance of probabilities, that the implied undertaking rule is not sufficient or adequate in this case.

III. Issues and standard of review

[9] The issues raised by the appellant on appeal are as follows:

1. Did the Tax Court have jurisdiction to issue the Order?
2. Did the Tax Court err in law and/or in fact in issuing the Order in reliance on the Stabilé Affidavit and a generalized list of documents?
3. Were the appellant's rights to procedural fairness breached because the respondent did not serve and file the Confidential Documents?

[10] The Order is a discretionary decision, issued in reliance on Rules 4(1) and 4(2) and the Tax Court's necessary implied jurisdiction to govern its proceedings. When an appellant appeals a discretionary order, this Court reviews the order on the appellate standards from *Housen v. Nikolaisen*, 2002 SCC 33: see, *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 66, 79; *Canada v. Preston*, 2023 FCA 178 at para. 12. Accordingly, we will intervene only if the Tax Court made an error of law or committed a palpable and overriding error on a question of fact or mixed fact and law.

IV. Did the Tax Court have jurisdiction to issue the Order?

[11] The appellant first submits that the Tax Court did not have jurisdiction to issue the Order, stating that Rule 16.1 contemplates the issuance of a confidentiality order "at the time of filing of a document", and arguing that any exercise of the Court's implied jurisdiction must be circumscribed by recognized rules of law.

[12] The Tax Court acknowledged the appellant’s argument regarding Rule 16.1 but concluded that Rules 4(1) and 4(2) allow it to issue a confidentiality order to facilitate a proceeding before documents are filed. The Tax Court also noted its “implied jurisdiction by necessary implication” to carry out its functions (*Canada v. Dow Chemical Canada ULC*, 2022 FCA 70 at paras. 79-80, *aff’d* 2024 SCC 23; *R. v. Cunningham*, 2010 SCC 10, at para. 19).

[13] Rules 4(1) and 4(2) provide as follows:

***Tax Court of Canada Rules,
S.O.R./90-688a***

4 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

(2) Where matters are not provided for in these rules, the practice shall be determined by the Court, either on a motion for directions or after the event if no such motion has been made.

***Règles de la Cour canadienne de
l’impôt, D.O.R.S./90-688a***

4 (1) Les présentes règles doivent recevoir une interprétation large afin d’assurer la résolution équitable sur le fond de chaque instance de la façon la plus expéditive et la moins onéreuse.

(2) En cas de silence des présentes règles, la pratique applicable est déterminée par la Cour, soit sur une requête sollicitant des directives, soit après le fait en l’absence d’une telle requête.

[14] I find that the Tax Court had jurisdiction to issue the Order and committed no error of law in relying on Rules 4(1) and 4(2) and its implied jurisdiction to control its proceedings to do so.

[15] Rule 4(1) provides flexibility to the Tax Court to ensure proceedings progress efficiently to a determination of the merits and the appellant has not pointed to a specific rule of law the Court breached in issuing the Order. The Order does not suffer from overbreadth, nor is it based

on irrelevant considerations. The Order falls within the Tax Court's proper and expeditious management of this proceeding, balancing the respondent's significant confidentiality concerns that extend to third-party information, with the appellant's right to full access to the Confidential Documents to conduct its discovery process.

[16] The fact that the Tax Court appears to have rarely issued a confidentiality order prior to a hearing on the merits does not equate to a lack of jurisdiction. In *Shell Canada Limited v. The Queen*, 2022 TCC 39 at para. 32 (*Shell Canada*), for example, the Tax Court issued a confidentiality and sealing order at the discovery stage. The facts of the case differ from those of the present case as the documents at issue had been included in the appellant's list of documents and disclosed to the respondent (the Crown) but the documents had not yet been filed. In my view, the factual differences in the two proceedings do not establish that the Tax Court erred in highlighting the *Shell Canada* decision in support of its conclusion regarding jurisdiction (see also, *Silver Wheaton Corp. v. The Queen*, 2019 TCC 170).

[17] As part of its oral submissions regarding jurisdiction, the appellant stated that the Tax Court erred in law in failing to apply the three-step test for a confidentiality order set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53 (*Sierra Club*), and reinforced in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38 (*Sherman*). This submission does not relate to the Tax Court's jurisdiction. The submission relates to the exercise by the Tax Court of its jurisdiction and will be considered in the next section of these reasons.

V. Did the Tax Court err in law or in fact in exercising its jurisdiction and issuing the Order?

[18] The central questions before this Court are (1) whether the Tax Court correctly identified the legal principles applicable to the issuance of a confidentiality order at discovery; and, if so (2) whether the Tax Court made a palpable and overriding error in finding that the respondent's evidence warranted the exercise of its discretionary jurisdiction.

[19] As it did before the Tax Court, the appellant submits that the open court principle is not at issue during discovery and, therefore, the respondent's motion was premature. The appellant states that the respondent's confidentiality concerns during the discovery stage are fully addressed by the implied undertaking rule, in part because tax litigation involving the Crown does not involve the type of competitive and commercial concerns prevalent in other contexts such as intellectual property cases. The appellant also submits that the Tax Court erred in law in conflating protective orders, typically granted by the Federal Court in intellectual property actions, and confidentiality orders.

[20] On appeal, the appellant also argues that the three conditions necessary for the issuance of a confidentiality order (*Sherman* at para. 38) (the *Sherman* conditions), applied to the Tax Court's review of the motion:

- a) court openness poses a serious risk to an important public interest;
- b) the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
- c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[21] Although primarily focussed on discovery (and unfiled documents), the appellant submits that the Order engages the *Sherman* conditions because it provides that any Confidential Documents filed in the court record will be sealed.

[22] It is well-established that the open court principle is not at issue at the discovery stage of a proceeding (*Canadian National Railway v. BNSF Railway Company*, 2020 FCA 45 at para. 24 (*Canadian National*), citing *Juman v. Doucette*, 2008 SCC 8 at para. 21 (*Juman*); see also *Fibrogen, Inc. v. Akebia Therapeutics, Inc.*, 2022 FCA 135 at para. 9 (*Fibrogen*), citing *Canadian National*).

[23] The implied undertaking rule, which does apply at discovery, was described by the Supreme Court in *Juman*:

[4] Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, is subject to the implied undertaking. It is not to be used *by the other parties* except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.

[24] The Tax Court stated that the implied undertaking rule applies to disputes before it, citing *Canada v. Fio Corporation*, 2015 FCA 236 at para. 12, and canvassed the relevant jurisprudence (*Juman* at paras. 4, 25-26; *Fibrogen* at para. 53; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51). The Court reviewed the limitations of the rule (*Juman* at paras. 23, 28; *Janssen Pharmaceutica N.V. v. Apotex Inc.*, 2022 FC 1262 at paras. 4-5 (*Janssen*)) and focussed on whether the rule adequately responded to the respondent's confidentiality concerns.

[25] The Tax Court observed that the implied undertaking rule is very broad and applies to all documents produced during discovery, whether confidential or not and whether relevant or not (*Fibrogen* at para. 53). In terms of the limitations of the rule, the Tax Court explained that it does not prevent third parties from requesting a document ultimately filed in court and cited the Supreme Court’s statement in *Juman* (at para 23) that in exceptional cases, for example “in disputes about trade secrets or intellectual property”, a court may issue a confidentiality order.

[26] I find that the Tax Court correctly identified the protections and limitations of the implied undertaking rule and properly applied the conditions necessary for the issuance of an interim order to safeguard confidentiality during discovery despite the protection afforded by the rule. I do not agree with the appellant’s argument that the Tax Court erred in referring to *Janssen*, an intellectual property case. As suggested in *Juman*, the exceptional cases that may warrant a confidentiality order include but are not limited to the intellectual property arena.

[27] The Tax Court found that (i) the Confidential Documents contain information that had always been treated as confidential; (ii) there is a serious risk to the respondent’s commercial interests given the competitive industry in which it carries on business and that those interests are important public interests to be protected (*Shell Canada* at para. 32); (iii) there were no adequate alternative solutions, such as the redaction of confidential information; and (iv) the implied undertaking rule did not provide adequate protection from third party access should the Confidential Documents or a transcript be filed: Order at para. 62.

[28] The Tax Court concluded that the limitations of the rule necessitated the issuance of a confidentiality order. In substance, the Court applied the test for protective orders (*Canadian National* at para. 14, citing *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 161 F.T.R. 15, 83 C.P.R. (3d) 428 at paras. 15, 20-30, aff'd *AB Hassle v. Canada (Minister of National Health and Welfare)*, [2000] 3 F.C. 360, 5 C.P.R. (4th) 149 (Fed. C.A.)):

- i. the information in question has been treated at all relevant times as confidential;
- ii. the information is of a confidential nature; and
- iii. a party's proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information.

[29] The appellant submits that the Tax Court committed an error of law in conflating a protective order with a confidentiality order, and that a protective order was not required in this case. I agree with the appellant that there is a blurring in the Order and the Tax Court's reasons of the principles applicable to protective orders and confidentiality orders but I do not agree that this lack of clarity amounts to an error of law. The fact that the nature of the proceedings before the Tax Court does not present similar competitive issues does not preclude the Tax Court from applying the principles endorsed in *Canadian National* to the respondent's motion for a confidentiality order.

[30] Protective orders and confidentiality orders, while similar, are distinct. They serve different interests, at different stages of an action and are reviewed using different tests (*Canadian National* at para. 24, as cited in *Fibrogen* at para 9):

[24] It bears emphasis that the underlying interests in seeking protective orders and confidentiality orders are significantly different. This was acknowledged by the Motions Judge in the present instance when he observed that “a protective order has no deleterious effects on the principle of open and public courts”, unlike confidentiality orders. Yet, the Motions Judge deemed that “a request for a protective order should be considered using the same criteria as set out in paragraphs 53 and following of *Sierra Club* for a confidentiality order” (Motions Judge Reasons for Order at para. 19). This is inconsistent given that the criteria in *Sierra Club* are meant to address interests, in particular the open court principle, which are simply not in play in the context of protective orders at the pre-trial discovery stage.

[31] The central issue before a court deciding a request for a confidentiality order is the effect of the order on the open court principle. At the risk of repetition, this concern does not factor at the discovery stage.

[32] The appellant argues that the Order may affect court openness because it provides that any Confidential Documents filed will be sealed and, therefore, the Tax Court erred in failing to apply the *Sherman* conditions. I agree that the Tax Court did not address the effect of the Order on court openness but I find that the Court committed no error in this regard.

[33] Paragraph 4 of the Order provides that, before the hearing on the merits, a party who intends to bring a motion to file a transcript of the examinations for discovery, the Confidential Documents themselves or documents on the respondent’s list of documents must address the Tax Court. The Tax Court will oversee the process for serving and filing the parties’ motion records and be in a position to safeguard the sealed Confidential Documents and any confidential information contained in a transcript or the list of documents. When the motion is heard, the Tax Court will apply the *Sherman* conditions and rigorously analyze the implications for the open court principle of any request for confidential treatment of the documents or information to be

filed in the court record. As a result, the effect of the Order on the open court principle is at most immaterial.

[34] In addition, the Order expires immediately prior to the hearing on the merits and the trial judge is not bound to issue a permanent confidentiality order. If either party wishes to extend the confidential treatment of any documents filed or to file additional documents on a confidential basis, that party will be required to serve and file a motion with the trial judge who will necessarily carry out an independent analysis of the Confidential Documents in accordance with the *Sherman* conditions.

[35] In summary, I find that the Tax Court correctly identified the scope of the implied undertaking rule and its limitations, with reference to the relevant jurisprudence. I also find no palpable and overriding error in the Tax Court's application of the rule and the conditions for the issuance of a confidentiality order to the respondent's evidence. The appellant argues that any risk to an important public interest, namely the respondent's commercial interests and the possibility of disclosure, was speculative and could not satisfy the *Sherman* requirements. Again, the focus in *Sherman* on the balancing of risk of disclosure and the effect on court openness is not relevant in this case. It was open to the Tax Court to conclude that the risks identified by the respondent warranted the added protection of an interim confidentiality order during discovery.

[36] The appellant next submits that the Tax Court erred in issuing the Order without first reviewing the Confidential Documents: *Elbakhiet v. Palmer*, 2019 ONCA 333 at paras. 30-36 (*Elbakhiet*). In *Elbakhiet*, the Court of Appeal identified two errors in the motion judge's

approach. First, the motion judge concluded that there was an important public interest in the confidentiality of all the documents marked as exhibits without examining them and, in particular, without considering to what extent the documents were already in the public domain: *Elbakhiet* at para. 30. The second error identified by the Court was the motion judge’s failure to consider, as part of the *Sherman* proportionality analysis, the public interest in access to information that could facilitate cross-examination of the expert witness in other proceedings.

[37] In my view, this decision does not assist the appellant. The issue before the Court of Appeal was the propriety of a sealing order in relation to psychometric testing documents “produced and marked as exhibits during the 2012 trial” of a personal injury action: *Elbakhiet* at para. 1. The proceeding had progressed beyond discovery and the preservation of the open court principle was a clear and pressing issue. Further, there were questions as to whether some of the information was already in the public domain and whether the information was relevant to other proceedings.

[38] In contrast, in *Gaudreau v. The King*, 2023 TCC 115 (*Gaudreau*), the Tax Court issued a confidentiality order without reviewing the document sought to be protected. The Court found that (at para. 24): “[T]he record submitted to this Court in connection with this motion contains sufficient evidence as to the nature of the Memorandum [the confidential document at issue] for me to fairly decide whether it must be disclosed without it being necessary for me to review it” (citing *Canada v. Atlas Tube Canada ULC*, 2018 FC 1086 at paras. 11-13).

[39] I find no palpable and overriding error in the Tax Court's decision to issue the Order based on the Stabilé Affidavit and the list of documents served and filed by the respondent without review of the Confidential Documents. The Stabilé Affidavit details the type of information contained in the Confidential Documents, the inclusion of third-party information and confidentiality clauses in certain of the Confidential Documents, and the highly competitive and technical nature of the respondent's industry. The affiant emphasizes that the Confidential Documents had always been treated as confidential, even within the respondent itself. The respondent's evidence contained sufficiently detailed evidence to permit the Tax Court to properly gauge its importance and the necessity for heightened measures to safeguard confidentiality. In arguing that there was insufficient evidence before the Tax Court to ground the Order, in part in reliance on this Court's decision in *Desjardins v. Canada (Attorney General)*, 2020 FCA 123 (at paras. 85-88), the appellant effectively requests this Court to second guess the Tax Court's assessment of the evidence and to stray beyond its role on appeal.

VI. Were the appellant's rights to procedural fairness breached because the respondent did not serve and file the Confidential Documents?

[40] The appellant argues that the respondent's failure to serve and file the Confidential Documents in accordance with the Rules undermined its ability to cross-examine the respondent's affiant, to file evidence in support of its position in the motion and to fully prepare its submissions. The appellant states that the respondent should not have been permitted to unilaterally impose a procedure for disclosure of the Confidential Documents, whether at its counsel's office or at the hearing of the motion, and that the Tax Court's acquiescence in the non-compliant procedure resulted in an unfair process.

[41] I am not persuaded by the appellant's arguments and find no breach of its rights to a fair and equitable process.

[42] First, the appellant has not established a breach of the Rules by the respondent. Rule 67 requires a notice of motion "together with the affidavits or other documentary material to be used at the hearing of the motion", to be served on the other party. I find that the respondent did not breach Rule 67 in serving affidavit evidence only. The respondent cannot be said to have "used" the Confidential Documents by simply making them available for review to the Court and the appellant at the hearing.

[43] Second, the appellant chose not to cross-examine the respondent's affiant and, equally, chose not to file its own affidavit evidence. The appellant's concerns with the extent of the respondent's evidence does not mean it was unable to challenge the evidence as filed. In these circumstances, I find that the Tax Court committed no error in observing the lack of evidence from the respondent and in relying on the uncontested affidavit evidence served and filed by the appellant.

[44] I find that the appellant received sufficient disclosure to know the case it had to meet such that the process was fair in the circumstances (*Shull v. Canada*, 2025 FCA 25 at para. 6, citing *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 54). As the Tax Court stated, it would have been preferable for the respondent to serve and file a full list of documents. It would also have been preferable for the parties to cooperate in advance of the hearing to determine how best to safeguard the Confidential Documents while ensuring

full access to the appellant and its representatives. The process was nevertheless fair to both sides and the Tax Court has enabled the parties to carry out discovery with assurance to the respondent of confidentiality and to the appellant of full access to the Confidential Documents.

[45] In closing, I would emphasize that neither party has been prejudiced, whether procedurally or substantively, by the Order. In addition, there has been no compromise to the open court principle. Again, when and if either party seeks to file a transcript of the examinations for discovery, the Confidential Documents themselves or documents on the respondent's list of documents, that party is required to address the Tax Court and to then serve and file the motion. Both parties will have the opportunity to present their arguments regarding the motion, and to request a permanent confidentiality order which will be assessed in accordance with the *Sherman* conditions.

VII. Conclusion

[46] For the foregoing reasons, I would dismiss the appeal with costs.

"Elizabeth Walker"

J.A.

"I agree.

René LeBlanc J.A. "

"I agree.

Vanessa Rochester"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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