Federal Court Cour fédérale

**Date: 20201208**

**Docket: T-425-20**

**Citation: 2020 FC 1133**

**Ottawa, Ontario, December 8, 2020**

**PRESENT: Madam Justice Walker**

**BETWEEN:**

**IRIS TECHNOLOGIES INC.**

**Applicant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

## ORDER AND REASONS

[1] This Order and Reasons addresses three related motions brought by the parties that centre on a motion by Iris Technologies Inc., the Applicant, for interim relief in the form of the release of approximately $21.85 million of GST/HST refunds for its January and February 2020 reporting periods, and further refunds for subsequent reporting periods (Second Relief Motion). The three motions were heard via video-conference on November 17 and 18, 2020.

[2] The Applicant brings the Second Relief Motion pending resolution of its March 27, 2020 judicial review application seeking *mandamus* to compel the Respondent, the Minister of National Revenue, to assess the Applicant's September 2019-February 2020 reporting periods and to refund the net GST/HST payable in respect of those periods. The Minister withheld the refunds claimed by the Applicant pending completion of her audit and assessment of the periods in question pursuant to the *Excise Tax Act*, RSC 1985, c E-15 (*ETA*).

[3] The Applicant first requested interim relief on March 30, 2020 (First Relief Motion). The Applicant sought an interim mandatory injunction to compel the release to it of $62.3 million in GST/HST refunds, a portion of the total refunds the Minister had withheld.

[4] The First Relief Motion was denied by my colleague, Justice Heneghan, in an Order and Reasons dated April 17, 2020 (2020 FC 532) (First FC Decision) and the Applicant appealed her decision to the Federal Court of Appeal (FCA). On July 8, 2020, the FCA dismissed the appeal and confirmed Justice Heneghan's decision (2020 FCA 117) (FCA Decision). Both Courts concluded that the First Relief Motion was premature. The Canada Revenue Agency (CRA) must be afforded a reasonable period of time within which to complete its audits and may retain refunds during the audit period. The FCA found that the reasonable period had not expired as of the date of its decision. The Applicant had no clear right to the performance by the Minister of her duty to assess the Applicant's GST/HST returns for the periods under audit as of the respective dates of the two decisions.

[5] The Applicant filed notice of the Second Relief Motion on September 14, 2020. The Applicant argued that, by that date, the reasonable period envisaged by the FCA for completion of the CRA's audit had elapsed and, further, that the Minister was withholding its GST/HST refunds for an improper purpose.

[6] On September 21, 2020, the Minister brought a motion to strike the Applicant's Second Relief Motion on the basis of issue estoppel and, in the alternative, abuse of process (Motion to Strike). The Minister argues that the Second Relief Motion raises the same question the FCA answered in a final judgment in July 2020 and that the Court should not allow the Applicant to relitigate the question mere months later.

[7] On November 3, 2020, following the date for the exchange of affidavits agreed by the parties, the Applicant brought a motion requesting leave of the Court to file a supplementary affidavit sworn by Mr. Samer Bishay, its Chief Executive Officer.

[8] For the reasons that follow, I will dismiss the Minister's Motion to Strike and the Applicant's Second Relief Motion. I granted the Applicant's request to file Mr. Bishay's supplementary affidavit during the hearing of these motions to ensure a full and fair evidentiary record. I provide brief reasons for my decision to grant the request in this Order. I also address my exclusion of certain paragraphs of Mr. Bishay's original affidavit tendered in support of the Second Relief Motion.

## I. **Context**

[9] The Applicant provides telecommunications services to residential, commercial and wholesale customers in Canada and abroad. A critical part of its domestic business is the provision of essential services in northern Canada. The Applicant expanded its business in July 2018 to begin buying and re-selling long distance minutes. Due to the nature of the re-sale business, the Applicant went from remitting net GST/HST amounts to the CRA to claiming sizeable monthly GST/HST refunds in short order.

[10] The CRA audited the Applicant's GST/HST returns for 2017 and 2018 and withheld its refunds pending completion of the audit. The Applicant requested an interim release of the refunds due to the significant impact of the withholding on its business and the Minister released approximately $63 million of the refunds claimed. The CRA completed the audit on October 28, 2019 and no adjustments were made to the Applicant's GST/HST returns for the period.

[11] On October 30, 2019, the CRA notified the Applicant that it was undertaking a second audit which was subsequently extended to cover all reporting periods from January 1, 2019 to February 29, 2020, inclusive. Again, the Minister withheld the GST/HST refunds claimed by the Applicant for the periods subject to audit.

[12] The Minister refused the Applicant's requests for release of the refunds during the audit (FCA Decision at para 6):

> [6] […] In the opinion of the CRA, although the audit was still in progress and no definitive findings had been reached, the appellant's business operations suggested participation in a

> carousel scheme, whereby a business collects net tax refunds but GST/HST is never remitted at the other end of the chain (Affidavit of Vance Smith, sworn April 6, 2020 at paras. 11-16).

[13] In March 2020, the Applicant commenced the application for judicial review that underlies the Second Relief Motion. In its affidavit filed in support of the application, the Applicant stated that it would be unable to continue its operations beyond April 15, 2020 should it not receive the GST/HST refunds withheld by the Minister.

[14] During the course of the First Relief Motion, the Minister reassessed the Applicant's January to August 2019 reporting periods and assessed the September to December 2019 reporting periods. The reassessments and assessments resulted in a large balance owing in favour of the Minister of more than $52 million, including interest and penalties for gross negligence. The Applicant has filed notices of appeal of the Minister's reassessments and assessments of the January-December 2019 reporting periods with the Tax Court of Canada (TCC).

## II. **FCA Decision**

[15] The FCA addressed the Applicant's appeal of this Court's dismissal of its First Relief Motion and a cross-appeal by the Minister of the dismissal of its motion to strike the First Relief Motion and underlying *mandamus* application for mootness. The Applicant relies on the FCA's reasons for dismissing its appeal in justifying the Second Relief Motion.

[16] The FCA confirmed that, where a mandatory injunction is sought, an applicant must satisfy the tri-partite test set out in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 31, 111 DLR (4th) 385 (*RJR-MacDonald*), as modified in *R. v Canadian Broadcasting*

*Corp.*, 2018 SCC 5 at paras 15, 17-18 (*Canadian Broadcasting Corp.*). In assessing the first element of the *RJR-MacDonald* test, the applicant must establish a strong *prima facie* case, not merely a serious issue for trial that is neither frivolous nor vexatious (*Canadian Broadcasting Corp.* at para 15).

[17] To establish a strong *prima facie* case in its application for judicial review, the Applicant is required to address the test for *mandamus* set out in *Apotex Inc. v Canada (Attorney General*), [1994] 1 FC 742, 69 FTR 152 (CA) (*Apotex*). The question before the FCA was whether the Applicant had a clear right to the performance by the Minister of her duty to assess the Applicant's GST/HST returns for the periods under audit. The same question is now before this Court in the Second Relief Motion.

[18] The FCA stated that the Minister's duty pursuant to subsection 229(1) of the *ETA* is to pay a net GST/HST refund, if one is found to be owing, with all due dispatch but the Minister must be accorded a period of time within which to conduct and complete her audit. The length of that time period or, in the language of subsection 229(1), what constitutes "all due dispatch", depends on the facts and complexity of the audit, the amounts involved, and the diligence of both the CRA and the taxpayer (FCA Decision at para 45, citing *Nautica Motors Inc. v Canada (Minister of National Revenue)*, 2002 FCT 422 (*Nautica Motors*) and *Express Gold Refining Ltd. v Canada (National Revenue)*, 2020 FC 614 (*Express Gold*).

[19] The FCA noted (1) that the appeal concerned assessments for January and February 2020; and (2) the CRA's original estimate that its audit would take 10 months. At the date of the FCA Decision, the 10 months had not elapsed. The FCA concluded (FCA Decision at para 48):

> [48] The appellant has no right, at this time, to compel the performance of the Minister's duty under subsection 229(1). The appellant has failed to show a strong *prima facie* case in its underlying application for judicial review. This Court need not consider the second and third branches of the *RJR-MacDonald* test.

## III. **Analysis**

[20] The Applicant filed the Second Relief Motion on September 14, 2020. In response, the Minister brought her Motion to Strike the Second Relief Motion on September 21, 2020. I will address the Motion to Strike first and then turn to the Second Relief Motion and evidentiary matters relevant to that Motion.

### 1. *The Minister's Motion to Strike*

[21] The Minister submits that the Second Relief Motion should be struck because the doctrine of issue estoppel prevents the Applicant from relitigating its entitlement to a mandatory injunction requiring the release of its January and February 2020 refunds. The Minister argues that the FCA addressed the question of whether the Applicant has a strong *prima facie* case in its request for *mandamus* four months ago and nothing has changed in the brief interim. In the alternative, the Minister argues that the Second Relief Motion is an abuse of process.

[22] The Applicant submits that the doctrine of issue estoppel does not apply because the 10-month estimate for the audit given by the Minister and considered by the FCA has now elapsed. The Applicant also argues that: (1) the FCA Decision was not a final decision, the

second requirement of the three conditions necessary for issue estoppel (*Eli Lilly Canada Inc. v Teva Canada Limited*, 2018 FCA 53 at para 51 (*Eli Lilly*); and (2) the Minister is acting for an improper purpose in drawing out its audit process (*McNally v Canada (National Revenue*), 2015 FC 767 at paras 40-42 (*McNally*)). I will address the Applicant's arguments regarding improper purpose as part of my analysis of the Second Relief Motion. It is sufficient to consider the Motion to Strike on the basis of the passage of time since the FCA Decision.

[23] I find that the Second Relief Motion should not be struck on the grounds of either issue estoppel or abuse of process by the Applicant and will dismiss the Motion to Strike.

[24] Issue estoppel is one aspect of the doctrine of *res judicata*, "the doctrine that precludes parties from relitigating an issue in respect of which a final determination has been made as between them" (*Eli Lilly* at para 50, citing *Régie des rentes du Québec v Canada Bread Company Ltd.*, 2013 SCC 46, [2013] 3 SCR 125 at para 24). The FCA emphasized in *Eli Lilly* the importance of *res judicata* and issue estoppel in promoting the finality of judgments and set out the three conditions for issue estoppel: (1) the same question was decided in the prior judgment; (2) the prior judgment was final; and (3) the parties to that judgment were the same as in the proceeding in which the estoppel is raised (*Eli Lilly* at para 51).

[25] In the present case, the third requirement is satisfied as the parties are unchanged. The question before me is whether the first and/or second requirements for issue estoppel are met. The Minister submits that the FCA Decision was a final decision and that the question posed is the same because "the only difference between the question answered two months ago and the

question this Court is being asked to answer today is the passage of two months". In the Minister's view, the "difference is not material". The Applicant focusses its submissions on the second *Eli Lilly* requirement and argues that the FCA Decision was not a final decision because it was not a determination of the application for judicial review. The Applicant also argues that it is permitted to return to court in light of the Minister's improper purpose in continuing her audit.

[26] The better analysis is that the FCA Decision was a final decision on the question posed to it but that the question has now changed. The FCA found that the Applicant had not established a *prima facie* case for an order of *mandamus*. The FCA concluded that the Applicant had no right "at this time", being July 2020, to compel the Minister to audit and release any resulting net refund owing pursuant to subsection 229(1) of the *ETA* (FCA Decision at para 48). The FCA relied on the fact that the assessments at issue related to January and February 2020 and, in what is a complex audit case, the CRA's estimate of 10 months to complete its audit of those months was reasonable and had not elapsed.

[27] The Minister argues that the Applicant should not be permitted to ask the Court to consider again whether it has a *prima facie* case that would support an order of *mandamus* only a few months after the FCA Decision. In most cases, I would agree with the Minister. However, the intervening four months are important not because they mark merely the passage of time but because they place the Minister and the Applicant at or near the 10-month estimate referenced by the FCA.

[28] In effect, the narrow question posed to the FCA was whether the Applicant had a strong *prima facie* case on July 8, 2020 to compel the Minister to complete its audits of January and February 2020. The question before this Court is now materially different because of the estimated audit period. I find that this is a sufficient change in circumstance to warrant a second review of the existence of a *prima facie* case.

[29] The Minister also argues that the CRA's estimate was merely that, an estimate, and that an estimate necessarily implies a degree of imperfection and flexibility. I agree but this submission is best addressed on the merits of the Second Relief Motion and not on its sufficiency as a reason to strike the Motion.

[30] Finally, the Minister submits that the Second Relief Motion is an abuse of process because it violates the principles of judicial economy, consistency and finality in the administration of justice. In my view, a second consideration by the Court of the Applicant's request for a mandatory injunction will assist the ongoing application process by establishing parameters for the parties' dispute regarding the Minister's sequential audits of the Applicant's GST/HST returns.

2. *Evidentiary matters arising in the Second Relief Motion*

[31] The parties made submissions during the November 2020 hearing regarding two evidentiary matters. I provided my oral ruling on these matters during the hearing and indicated that I would set out my reasons in this Order.

The Applicant's motion regarding Mr. Bishay's supplementary affidavit

[32] On November 3, 2020, the Applicant filed a motion for leave pursuant to Rule 84(2) of the *Federal Courts Rules*, SOR/98-106 (Rules), to admit the supplementary affidavit of Mr. Bishay (Supplementary Affidavit). The parties agreed that the motion would be considered at the hearing of the Second Relief Motion.

[33] The parties proposed an exchange of affidavits in the Second Relief Motion on or before October 30, 2020. The Applicant received the affidavit of Mr. Vance Smith, the Manager of the Aggressive GST/HST Planning Program in the GST Directorate of the CRA, on October 30, 2020. The Applicant submits that it could not have anticipated the breadth of the information contained in Mr. Smith's affidavit. As cross-examinations were scheduled for November 2-4, 2020, the Applicant submits that it responded quickly and served and filed the Supplementary Affidavit prior to the Minister's cross-examination of Mr. Bishay.

[34] The Minister submits that the Supplementary Affidavit should not be admitted because it allows the Applicant to split its case. She argues that the Supplementary Affidavit is a rebuttal affidavit that is not contemplated in the Rules.

[35] I will allow the Applicant's motion and grant leave to file the Supplementary Affidavit. I acknowledge the Minister's concerns regarding the importance of preventing case splitting but I am persuaded that the specific circumstances of the Second Relief Motion permit admission of the Supplementary Affidavit having regard to: (1) the scope and detail of Mr. Smith's affidavit; (2) the limited focus of the Supplementary Affidavit and the importance of ensuring a full and

fair evidentiary record is before the Court; and (3) the fact that the Supplementary Affidavit was served on the Minister prior to her cross-examination of Mr. Bishay. The Supplementary Affidavit was served on the Minister immediately before the date fixed for cross-examinations but that fact reflects the compressed timeline of these motions and the date of service of Mr. Smith's affidavit.

The Minister's objection to certain paragraphs of Mr. Bishay's September 14, 2020 affidavit

[36] In its Memorandum of Fact and Law in respect of the Second Relief Motion, the Minister objected to a number of paragraphs of Mr. Bishay's September 14, 2020 affidavit as containing impermissible opinion and speculation. The Minister also argued that two paragraphs and three Exhibits to the affidavit contain expert opinion and an expert report from Mr. Richard Ainsworth, described by Mr. Bishay and Applicant's counsel as a leading expert in VoIP VAT fraud. The Applicant did not qualify Mr. Ainsworth as an expert witness in accordance with Rule 52.2.

[37] The Applicant submits that the Minister's objections are too late and should have been raised earlier in a separate motion. The Applicant states that the Minister had full opportunity to cross-examine Mr. Bishay and that the information at issue answers the statements and allegations in Mr. Smith's affidavit.

[38] I find that the Minister is not precluded from raising her evidentiary objections to Mr. Bishay's affidavit as part of her substantive submissions in the Second Relief Motion. It is a matter for the Court to determine in each case whether an advance ruling on admissibility is

required (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 11). I note that the Minister's objections are made in the context of an interlocutory motion and the time pressures inherent in these proceedings. I have weighed the orderly advancement of the Applicant's *mandamus* application and the content of Messrs. Bishay and Smith's affidavits against the timing of the Minister's objections. I find that an advance motion and ruling would not have allowed the application to move forward in a timely manner.

[39] Leaving aside for the moment the Ainsworth material, I reviewed each of the paragraphs identified by the Minister and considered whether they should be struck from Mr. Bishay's affidavit or assessed for relevance and weight. A number of the paragraphs are factual in nature and raise no issue. The remainder contain a mix of fact, opinion and speculation. To some extent, they have little relevance to the Second Relief Motion. Therefore, I will not strike the paragraphs in question but will consider the content of each for relevance and probative value and will ignore statements that are speculative or constitute argument.

[40] The Minister objects to the Ainsworth paragraphs (paragraphs 33 and 34 of Mr. Bishay's affidavit) and Exhibits 31, 32 and 33 to the affidavit (Mr. Ainsworth's qualifications, publications and expert report). The Applicant submits that the Ainsworth report is offered as an alternative to Mr. Smith's affidavit and should be assessed by the Court for weight and not for admissibility.

[41] I agree with the Minister. Paragraphs 33 and 34 and Exhibits 31-33 inclusive of Mr. Bishay's September 14, 2020 affidavit are struck as inadmissible.

[42] Mr. Ainsworth is tendered as a leading international expert on VoIP VAT matters. The Ainsworth report is titled "Expert Witness Report for Iris Technologies Inc." and refers to this Court file number. Mr. Bishay includes with his affidavit Mr. Ainsworth's qualifications and publication history. Mr. Ainsworth gives his expert opinion on the Minister's audits and assessments and Mr. Bishay relies on Mr. Ainsworth's expertise in other jurisdictions to state that the Minister's audit does not advance the purposes of the *ETA*.

[43] The Applicant argues that the Minister has tendered Mr. Smith as an expert on Canadian VAT matters and that Mr. Ainsworth should be treated no differently. The argument is not persuasive because Mr. Smith is not put forward as an independent expert. He is tendered as a knowledgeable representative employed by the CRA and was subject to cross-examination by the Applicant.

[44] I find that Mr. Ainsworth should have been qualified as an expert witness in accordance with Rule 52.2. He was not so qualified and the Minister has been precluded from conducting any cross-examination of his expert opinions. It is evident from the content of the Bishay affidavit and the Ainsworth Report that Mr. Ainsworth's opinions are intended to provide Mr. Ainsworth's expertise regarding the Canadian GST regime and the conduct of the CRA's audits. It is not sufficient that Mr. Bishay was available for cross-examination. Mr. Ainsworth's expert evidence has been shielded from cross-examination.

3. *The Second Relief Motion*

[45] The Applicant requests that the Court issue a mandatory injunction ordering the Minister to release $21.85 million of GST/HST refunds for its January and February 2020 reporting periods, and further refunds for subsequent reporting periods. As in the First Relief Motion, the Applicant states that it will not be able to continue in business without the release of the refunds and that, should it cease operations, a significant swath of northern Canada will lose its one telecommunications service provider. The Applicant makes two submissions in support of its motion: (1) the reasonable time period for completion of the Minister's audits of the January and February reporting periods has expired; and (2) the Minister is continuing the audits for an improper purpose.

[46] The Minister submits that the CRA's 10-month estimate was given in respect of the 2019 audit and must, in any event, be treated as an estimate and not an immutable deadline. The Minister also submits that the Applicant has established no improper purpose and that the CRA continues its audit work diligently.

[47] There is no dispute between the parties regarding the conditions necessary for a mandatory injunction or the test the Applicant must meet to establish a strong *prima facie* case in its application for judicial review. The three conjunctive conditions for interim relief are: (1) a serious issue for trial; (2) irreparable harm to the applicant pending determination of the underlying application; and (3) the balance of convenience favours the applicant (*RJR-MacDonald*). Where the relief sought is in the nature of a mandatory injunction, an applicant must show that it has a strong *prima facie* case in order to satisfy the first condition

(*Canadian Broadcasting Corp*.at paras 17-18; see also FCA Decision at para 34). The question whether the Applicant has a strong *prima facie* case in its application for judicial review in turn engages the *Apotex* test for issuing an order of *mandamus*.

[48] As in the First Relief Motion, the parties agree that the first two steps of the *Apotex* test are met. Subsection 229(1) of the *ETA* creates a public legal duty to act and the Minister owes that duty to the Applicant. The focus of the inquiry before this Court, as it was for Justice Heneghan and the FCA, is whether the Applicant now has a clear right to performance of the Minister's duty.

[49] In support of the Second Relief Motion, the Applicant filed Mr. Bishay's September 14, 2020 affidavit. The relevant paragraphs of Mr. Bishay's affidavit speak to: the Applicant's business; its attempts to obtain disclosure from the Minister; Mr. Bishay's opinions regarding the ongoing audits; the essential nature of the Applicant's business and services; its significantly worsening financial condition; and the harm caused by the Minister's retention of the refunds at issue.

[50] In response, the Minister filed a lengthy affidavit from Mr. Smith, a senior CRA representative who has been involved in the CRA's audits of the Applicant and in these proceedings. Mr. Smith's affidavit sets out the Applicant's GST/HST history and details the progress of the audits of the January-February 2020 returns since April 2020. He also sets out the progress of the CRA's audits of the Applicant's subsequent GST/HST monthly returns. Mr. Smith describes the results of the CRA's investigations into the Applicant's complex supply

chain, the identities of the various entities and their principals, and their respective compliance histories. Mr. Smith provides information regarding the CRA's technical review of the Applicant's business records and reports. As stated above, Mr. Bishay's Supplementary Affidavit responds to certain parts of the commercial and technical information in Mr. Smith's affidavit.

The reasonable period of time for the January-February 2020 audits

[51] The parties accept the FCA's interpretation of subsection 229(1) of the *ETA* and the requirement that the Minister proceed "with all due dispatch". They acknowledge the FCA's conclusion that the CRA's estimate of 10 months to complete its audit was reasonable.

[52] The Applicant submits that the Minister did not appeal the FCA's factual finding that the CRA's estimate was reasonable and argues that the 10-month period in respect of the audits of the January-February 2020 reporting periods expired in August 2020. Although the FCA rejected the argument that subsection 229(1) establishes a "pay first and audit later" system, the FCA did not state that the Minister could delay an audit in perpetuity.

[53] The Minister submits that the 10-month period did not expire in August 2020 for the CRA's audits of the January-February 2020 reporting periods. The Minister also submits that the *ETA* allows the Minister some flexibility in reviewing complicated GST/HST returns and that the Minister is still well within a reasonable period of time.

[54] The FCA concluded that the CRA's 10-month estimate was reasonable but that the Applicant had no right, on July 8, 2020, to compel the Minister to complete her audit of the January-February 2020 reporting periods. However, the FCA made no finding that the CRA's

audits of those reporting periods commenced at the same time as the audit of the Applicant's 2019 reporting periods. The FCA stated (FCA Decision at para 46):

> [46] This appeal concerns assessments pertaining to January and February of this year. In what appears to be a relatively complex case, the CRA's estimate that the audit would take ten months to complete is reasonable. Those ten months have not yet elapsed.

[55] The Minister provided uncontested evidence that the Applicant's GST/HST return for January 2020 was received by the CRA on February 5, 2020 and that the February 2020 return was received on March 6, 2020. The Minister argues that the CRA could not begin its audit of those returns prior to their receipt. I agree. The CRA's audits of the two periods could not have begun in 2019. The fact that the Applicant is a monthly reporter under the *ETA* requires an interpretation of the subsection 229(1) obligation to proceed with all due dispatch that allows the CRA to conduct its audit of each reporting period. As a result, and at the very earliest, the 10-month estimate for the January 2020 period expired on December 5, 2020 and, for the February 2020 period, will expire January 6, 2021.

[56] Mr. Smith's estimate was given for the original audit that began in October 2019. On cross-examination before the First Relief Motion, Mr. Smith asked Applicant's counsel to clarify that she was referring to the October 2019 audit when he was asked to give his estimate. Counsel confirmed and Mr. Smith stated:

> So that audit was started in October of 2019. We are only now in April. Considering the complexity, that's well within the normal range of what would be expected in terms of the time it would take to complete an audit.

[57] Mr. Smith then confirmed the 10-month estimate.

[58] In addition, an estimate is just that, it does not create a fixed deadline. The fact that 10 months expired or will expire on December 5, 2020 and January 6, 2021 for the two reporting periods does not mean that the Minister's duty to complete her audits will immediately crystallize. The CRA's estimate must be taken in context and is fact dependent (FCA Decision at para 45).

[59] I make two contextual observations regarding the Minister's outstanding audits: (1) immediately after the filing of the Applicant's February 2020 GST/HST return, Canada was thrown into turmoil with the advent lockdowns due to COVID-19. The CRA was unable to continue processing the Applicant's January-February returns at that time; and (2) the Minister has provided, via Mr. Smith, a detailed accounting of the steps and investigations undertaken by the CRA since April 2020. The Applicant questions the propriety of some of the steps taken but I find that the CRA has shown continued progress in its audits. The CRA has maintained communication with the Applicant, has made requests for information and the Applicant has proposed timelines for its responses. The CRA has accommodated certain requests for extensions of time and is currently awaiting receipt of information from the Applicant. I find no evidence of unusual or improper delay on the CRA's part.

[60] I find that the Applicant does not have a clear right to performance of the Minister's duty under subsection 229(1) of the *ETA* and has not satisfied the third requirement of the *Apotex* test for *mandamus*. At the earliest, the Applicant could expect completion of the CRA's audits of its January-February 2020 reporting periods in January 2021. However, the CRA's 10-month estimate must be assessed against the exceptional circumstances of 2020 and the CRA's

diligence in pursuing the audits. The Minister and the CRA cannot delay their audit process for an unreasonable period of time or for an improper purpose. Nevertheless, it is reasonable to expect that the Minister may not be in a position to complete the audits in question in January 2021. Some limited leeway must be accorded to the CRA while maintaining the requirement that the Minister proceed with all due dispatch.

The Applicant's allegations of improper purpose

[61] The Applicant submits and I agree that the Court retains jurisdiction to review the Minister's conduct and exercise of discretion in the application of the *ETA* notwithstanding section 18.5 of the *Federal Courts Act*, RSC 1985, c F-7 (FCA Decision at para 51). Very recently, this Court stated that, should an applicant have evidence that the CRA "is acting for an ulterior purpose, or that the audit is being continuously expanded in bad faith, or otherwise not proceeding in a reasonable time-frame", the applicant may bring a motion (*Express Gold* at para 104).

[62] The Applicant submits that the Minister is continuing to investigate its business and retain refunds during the audit process for an improper purpose as her investigations to date have revealed little, if any, adverse evidence regarding its GST/HST practices and returns. The Applicant is immensely frustrated with the CRA's audits and states that the Minister's actions since March 2020 are intended to create "obfuscation and delay". The Minister's purpose and lack of demonstrable progress or result were the focus of the Applicant's oral submissions.

[63] The Minister submits she and the CRA have been diligently pursuing the 2020 audits. The Minister relies on Mr. Smith's affidavit to argue that the audits are proceeding at a

reasonable pace and that the Applicant has not provided evidence of any improper purpose in the CRA's investigations.

[64] The Applicant's arguments regarding improper purpose are twofold. The Applicant points to the length of time the CRA has been reviewing its business and the various entities in its wholesale supply structure, and compares that time period with specific deficiencies or alleged contradictions in the Minister's evidence. By way of brief summary, the Applicant argues that:

- The CRA began its audit in 2018 and has continued to investigate the business for two years, despite acknowledging that the audit could be a "wash".
- The Minister had not made any findings of fact when she issued the assessments and reassessments for the Applicant's 2019 reporting periods (referencing the FCA Decision at para 6). The Applicant also refers to the cross-examination of Mr. Smith and his answer to whether, in his affidavit, he had indicated there was evidence of Iris' complicity in its supplier's activities. He responded that he had not so indicated.
- The CRA has repeatedly refused the Applicant's multiple requests for disclosure during the audit process and during these proceedings. There has been no transparency on the Minister's part. The Minister is shielding the CRA's actions and does not want their investigations reviewed by the Court.
- A CRA representative indicated during the audit process that legislative changes regarding VoIP taxation may be forthcoming.
- The CRA is auditing the Applicant to protect the government's revenues and not to assess its tax payable as required, despite having assessed various entities in the supply chain. The Minister must be limited to fixing the Applicant's tax liabilities and cannot continue its audit because it fears being unable to collect the GST/HST owed by the Applicant's various suppliers.
- Mr. Smith's October 2020 affidavit reveals no evidence that the Applicant's supply chain is suspect or that the suppliers did not carry out the impugned sales of long distance minutes. The investigations have been superficial and are fully answered by Mr. Bishay's evidence in the Supplementary Affidavit.

[65] I do not find the Applicant's submissions persuasive. It is important to bear in mind that the facts before me are very different from those in the *McNally* case cited by the Applicant. In that case, the Minister admitted that the taxpayer's return had not been assessed in order to discourage others from participating in tax shelters. The Court concluded that the Minister's delay was capricious and could not stand. In the present case, the Applicant's allegations of improper purpose are based on its interpretations of the CRA's actions with reference to portions of Mr. Smith's cross-examination and evidence and its own technical expertise.

[66] The Minister relies on Mr. Smith's detailed list of actions undertaken by the CRA since April 2020. Mr. Smith sets out each action taken, its date and the Applicant's involvement (where applicable). I find that the Smith affidavit establishes reasonable progress by the CRA. The Applicant's submissions that information should have been requested earlier and that the investigations are superficial are not sufficient to establish improper purpose.

[67] The Applicant emphasizes the fact that no definitive findings had been made by the Minister in April 2020 and that she issued assessments and reassessments in a bid to insulate the CRA's conduct from review by this Court. The Applicant relies on the FCA Decision and the answers given by Mr. Smith on cross-examination.

[68] First, the FCA cited the CRA's statement that "although the audit was still in progress and no definitive findings had been reached, the appellant's business operations suggested participation in a carousel scheme, […]" (FCA Decision at para 6). The FCA made no independent finding.

[69] Second, on cross-examination, Mr. Smith confirmed that he had not stated in his affidavit that the Applicant was complicit with its suppliers because the CRA's work was ongoing. Mr. Smith stated that, in his view, the use of the word "complicit" suggested criminal activity and he was not prepared to cast the Applicant as criminal. The Applicant also questioned Mr. Smith's technical capability to interpret its Call Data Records (CDRs), which Mr. Smith admitted. However, the CRA's technical assessment of the CDRs was undertaken by one of Mr. Smith's colleagues. In my view, neither admission by Mr. Smith leads to the conclusion that the CRA is engaged in a fishing expedition. The January-December 2019 audit is complete and the reassessments and assessments of the various 2019 reporting periods are under appeal to the TCC where they will be scrutinized. The Applicant will have disclosure rights in respect of that litigation. If the CRA's decision to issue the reassessments and assessments was not based on sound factual findings, it will not withstand the appeal.

[70] The Applicant relies on a number of other aspects of the Minister's evidence to draw an inference of improper purpose in the CRA's audit of its post-2019 GST/HST reporting periods but I find the inference is not substantiated by the record. Neither the fact that the CRA's inquiries bleed into actions and contracts from 2019, nor the fact that another CRA official was expecting legislative change (which has not occurred), contradicts the evidence of progress in the CRA's audits. Finally, the Applicant has not established that the CRA is delaying its audits to safeguard its ability to recoup the GST/HST owing by third parties. The Minister's focus on the Applicant's supply chain is warranted in light of the rapid evolution of its business model and the status of certain suppliers (see, FCA Decision at para 47).

[71] In conclusion, I find that the Applicant has not established that the Minister is acting for an improper purpose or is unreasonably extending its audits and retaining the refunds claimed for the January-February 2020 reporting periods, and further refunds for subsequent reporting periods. The Applicant has not satisfied the first condition for a mandatory injunction and the Second Relief Motion must fail. It is not necessary to address the conditions of irreparable harm and balance of convenience.

## IV. **Costs**

[72] At the hearing of these motions, the parties agreed to discuss the quantum of costs to be awarded. I have since received and reviewed correspondence dated December 3, 2020, in which the parties jointly propose that the successful party in the Second Relief Motion be awarded a lump sum of costs in the amount of $10,000.00 in respect of all three motions, payable when costs are determined in the Applicant's underlying *mandamus* application. I see no reason not to adopt the proposal negotiated by the parties. Given my decision to dismiss the Second Relief Motion, the Minister is entitled to costs from the Applicant in the amount of $10,000.00, inclusive of disbursements and tax.

**ORDER IN T-425-20**

**THIS COURT ORDERS that:**

1. The motion by the Minister of National Revenue, the Respondent, to strike the Second Relief Motion (as defined in the following paragraph of this Order) is dismissed.

2. The motion by Iris Technologies Inc., the Applicant, for a mandatory injunction (Second Relief Motion) ordering the Respondent to release $21,857,515 representing GST/HST refunds claimed by the Applicant in respect of its January and February 2020 reporting periods, and refunds for periods filed subsequent to the date of its notice of motion, is dismissed.

3. The Applicant's motion for leave to admit the supplementary affidavit of Mr. Samer Bishay is granted.

4. The Applicant shall pay the Respondent costs of the three motions addressed in this Order in the lump sum amount of $10,000.00, inclusive of disbursements and tax, payable when costs are determined in the Applicant's underlying *mandamus* application in this Court file.

"Elizabeth Walker"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-425-20 |
| **STYLE OF CAUSE:** | IRIS TECHNOLOGY INC. v THE MINISTER OF NATIONAL REVENUE |
| **PLACE OF HEARING:** | HEARD BY VIDEOCONFERENCE FROM TORONTO, ONTARIO AND OTTAWA, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 17, 2020 AND NOVEMBER 18, 2020 |
| **ORDER AND REASONS:** | WALKER J. |
| **DATED:** | DECEMBER 8, 2020 |

**APPEARANCES:**

| | |
|---|---|
| Leigh Somerville Taylor<br>Mireille Dahab | FOR THE APPLICANT |
| Andrea Jackett, Darren Prevost,<br>Sandra Tsui and Katie Beahen | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |