Federal Court  Cour fédérale

Date: 20210825

Docket: T-455-21

Citation: 2021 FC 874

Ottawa, Ontario, August 25, 2021

PRESENT: The Honourable Madam Justice Sadrehashemi

BETWEEN:

IRIS TECHNOLOGIES INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Iris Technologies Inc. [Iristel], a retail and wholesale telecommunications service provider, is asking for an interlocutory injunction to enjoin the Respondent, the Minister of National Revenue [the Minister] from taking any collection actions pending the determination of the underlying judicial review application.

[2] I am dismissing Iristel's motion for an interlocutory injunction. As set out in the reasons that follow, I do not find that Iristel has demonstrated that that it will face irreparable harm or that the balance of convenience lies in its favour.

II. Facts

A. *Background on the dispute*

[3] Iristel is a retail and wholesale telecommunications provider to individuals and companies throughout Canada and abroad. Iristel claims to provide services to approximately 10 percent of Canada's population, including in remote communities in northern Canada. In addition to this matter, Iristel and the Minister of National Revenue have a number of ongoing disputes in this Court, the Tax Court of Canada and the Federal Court of Appeal relating to the Minister's assessment of Iristel's tax liability and the Minister's conduct throughout the assessment and audit process.

[4] Iristel appealed the Minister's assessments for the 2019 tax year to the Tax Court of Canada and has now filed a motion for summary judgment to the Federal Court of Appeal requesting a determination on the disputed liabilities (A-196-21). Iristel has also filed a number of applications for judicial review in this Court relating to the Minister's conduct, including:

- T-768-20, where Iristel is seeking a declaration that the Minister assessed for an improper purpose without an evidentiary foundation and failed to afford procedural fairness in the audit of the Applicant;

- T-425-20, where Iristel is seeking mandamus and a review of the Minister's decision to withhold net tax refunds;

- T-1010-20, where Iristel is challenging the Minister's decision to deny their claim for the Canada Emergency Wage Subsidy; and

- T-860-21, where Iristel is seeking disclosure of records relating to the audit, assessment, reassessment and collections records of Iristel not produced by the CRA under the *Access to Information Act*.

[5] The Minister filed motions to strike the Notices of Application in T-768-20 (the procedural fairness/improper purpose application) and T-1010-20 (the wage subsidy denial application). In both cases, the Minister's motion to strike was dismissed by Prothonotary Aalto, decisions that were then upheld on appeal by Justice McDonald (2021 FC 597) and Justice Southcott (2021 FC 526). The Minister has appealed both of these decisions to the Federal Court of Appeal. In both matters (T-768-20 and T-1010-20) the Minister has not produced the tribunal record under rule 317 of the *Federal Court Rules*, SOR/98-106 and is appealing this Court's orders for production.

B. *Background on Minister's collection activities*

[6] The Minister certified the disputed 2019 assessments and issued writ of seizure and sale (ETA-1991-20) by certificate dated June 24, 2020. At the time this was done, all collection actions had been suspended by the CRA due to the COVID-19 pandemic.

[7] During this time that there was a general suspension on collections, Iristel, in a letter to the Minister dated June 30, 2020, requested to speak about the future conduct of the collection files while there was an ongoing dispute as to the outstanding liabilities owing. Iristel requested that the Minister exercise their discretionary power to defer collections of disputed amounts of GST/HST under section 315(3) of the *Excise Tax Act*, RSC 1985, c E-15. Specifically, Iristel asked that "all collection actions be stayed pending the determination of its entitlement to the input tax credits disallowed and the assessment of penalties." To date, the Minister has not responded to Iristel's request.

[8] The general suspension of collection activities due to the COVID-19 pandemic was lifted in February 2021.

[9] On March 1, 2021, the Minister sent Iristel notices of assessment for January to May 2020. In the notices of assessment, the Minister offset the amount owed by Iristel by the amount the Minister owed Iristel. On March 2, 2021, Iristel objected to the March 1, 2021 assessments and asked that the Minister confirm the assessments to enable the dispute to proceed in the Tax Court of Canada.

[10] On March 11, 2021, Iristel filed the underlying application for judicial review, asking that the Minister be enjoined from taking further collection actions in relation to the disputed tax liabilities and that the decision to offset the amounts of net tax refunds payable to the Applicant in the 2020 assessments be quashed.

[11] On July 13, 2021, a collections officer for the CRA called Iristel's CEO and requested full payment of the amounts assessed on Iristel's account. On the same day, Iristel's counsel requested permission from counsel for the Respondent to speak to the collections officer. Counsel for the Respondent indicated that the collections officer would communicate to Iristel in writing.

[12] On July 16, 2021, Iristel filed a Notice of Motion for injunctive relief seeking: i) an immediate interim injunction to be decided in writing and ii) an interlocutory injunction. On the immediate interim injunction, Iristel sought an order enjoining all collection actions until Iristel's interlocutory injunction could be heard by this Court. On the interlocutory injunction, the motion that is now before me, Iristel sought an order to stop all collection actions until there was a determination on Iristel's underlying application for judicial review.

[13] On July 29, 2021, Iristel advised that it received a letter from the CRA, post-marked July 26, 2021, indicating that the CRA had registered a certificate in Federal Court, recorded its debt on the Property Register of Ontario and the Property Register of Quebec and that it would take further collection actions after 30 days if Iristel did not pay the full amount or respond to the letter.

[14] On July 29, 2021, the Minister wrote to this Court to advise that there were no reasons to grant the immediate interim injunction because the interlocutory injunction was scheduled to be heard on August 12, 2021, before the end of the 30-day period provided for in section 321 of the *Excise Tax Act*.

[15] On August 1, 2021, Justice Little dismissed Iristel's motion for an immediate interim injunction, finding that given that the interlocutory injunction was set to be heard on August 12, 2021, prior to the date that any further collection actions were to be taken, Iristel had not met the requirement of urgency.

[16] On August 12, 2021, this Court heard Iristel's motion for an interlocutory injunction.

C. *Nature of the underlying application for judicial review*

[17] There was some dispute between the parties in oral submissions as to the nature of the underlying judicial review and therefore it requires a discussion. Similar to the review on a motion to strike, in determining the relief being sought in the underlying Notice of Application, I am reading the materials in a broad and holistic way and not engaging in an overly technical reading of the Notice of Application (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 50).

[18] Iristel brought an application for judicial review pursuant to ss. 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 seeking an "Order restraining the Minister from removing or otherwise seizing any assets or accounts of the applicant and quashing the Minister's decision to offset the amounts of the net tax refunds payable to the applicant in the Minister's assessments of periods commencing January 1, 2020 and ending December 31, 2020…" Iristel also asks that the Court "requir[es] the Minister to pay to the applicant any amounts offset against the disputed liabilities."

[19] The Minister noted in oral submissions that mixing remedies is inconsistent with Rule 302 of the *Federal Court Rules* that requires, unless the Court orders otherwise, that an application for judicial review "be limited to a single order in respect of which relief is sought." As noted above, at this stage of limited review, I am not concerned with technical deficiencies in the Notice of Application.

[20] The main thrust of the underlying application asks the Court to enjoin the Minister from taking further collection actions. Counsel for Iristel during oral submissions described the application as one that is seeking "prospective relief." In their written submissions for the interlocutory injunction, Iristel described the relief being sought on the underlying application as "a stay of collections and offset of credits payable on other programs."

[21] The issue that arose in oral submissions was whether the Minister's decision to not respond to Iristel's request for a postponement of collections, under s. 315(3) of the *Excise Tax Act*, was also under review in this application for judicial review. Iristel's counsel argued that this decision was squarely before the Court on judicial review as the Notice of Application set out that the Applicant was seeking review of the Minister's collection actions and it was noted in the grounds of review that Iristel asked the Minister, by way of a letter dated June 30, 2020, to postpone collection actions.

[22] The Minister argues that Iristel is not challenging the decision to not postpone collections in this application because the relief sought is not to quash this decision and send it back to the Minister to re-determine (*certiorari*), nor is there a request for an order forcing the Minister to

make a decision on the June 30, 2020 request (*mandamus*). Nor does Iristel in their Notice of Application, Notice of Motion for the interlocutory injunction, or in the submissions on the interlocutory injunction, describe the application as a review of the Minister's failure to respond to their request for a postponement.

[23] Moreover, Iristel's submissions on the serious issue arising in the underlying application for judicial review do not relate to the Minister's failure to respond to their June 2020 request to postpone collections. The serious issue is described in the Notice of Motion in this way:

> Iristel raises serious issues in this application, in its applications to the Federal Court on the Minister's conduct and in its appeal and motion to the Tax Court, which have been recognized in this Court in dismissing the Minister's motions to strike and in dismissing the Minster's appeals from dismissals of motions to strike. Iristel raises serious issues in its dispute of the assessments and seeks summary judgment vacating the assessments and all liability in the Tax Court.

[24] In Iristel's written submissions on the motion, there is similarly no argument made about the Minister's treatment of their June 2020 request for a postponement. Iristel describes the serious issue in the underlying judicial review as being akin to the issue in the *Swiftsure Taxi Co, Re*, 2004 FC 980 [*Swiftsure*] case where the Applicant argues that this Court and the Federal Court of Appeal "confirmed this Court's authority to enjoin the Minister's collection actions during a dispute of an assessment." Iristel argues that "[o]n the record, the seriousness of the issues is established, as in *Swiftsure Taxi Co*, Re. Iristel submits that the issues are even more serious as the Minister opposes production of her tribunal record for any application, any explanation for the assessments or her actions and does not comply with her disclosure obligations under the *Access to Information Act*."

[25] In oral submissions, Iristel's counsel also repeatedly framed the serious issue as being in relation to their liabilities being disputed at the Tax Court of Canada (and now before the Federal Court of Appeal on a motion for summary judgment) and that the Minister's conduct was the subject of a number of applications before this Court that have been found to raise cognizable administrative law claims.

[26] Whether the underlying application for judicial review includes a direct challenge to the Minister's decision to not respond to Iristel's request to postpone collection actions is not a matter of a technical deficiency. Rather, it is core to understanding the basis for the underlying challenge. Even reading the application broadly and holistically, I agree with the Minister that the underlying application cannot be construed as a specific challenge to a decision of the Minister to not respond to the request to postpone collections according to s. 315(3) of the *Excise Tax Act*. Rather, it is framed as an application to restrain or prohibit the Minister from taking collection actions.

[27] I find that while the June 30, 2020 request for a postponement on collections and the Minister's failure to respond to the request are relevant facts before this Court, the Minister's failure to respond to the request has not been directly challenged in the underlying judicial review application.

III. Issue

[28] The sole issue to be decided on this motion is whether the Applicant, Iristel, has met the test to obtain interlocutory injunctive relief.

IV. Test for interlocutory injunction

[29] The well-established test for an interlocutory injunction, set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*], requires those seeking injunctive relief to demonstrate that i) there is a serious issue to be tried; ii) a refusal to grant relief could irreparably harm the applicant's interests and iii) the balance of convenience favours granting the injunction. To succeed on a motion for an interlocutory injunction, an applicant needs to demonstrate all three elements of the test (*Janssen Inc v Abbvie Corp*, 2014 FCA 112 at para 14 [*Janssen*]). The three factors are not "watertight compartments" operating independently of each other; instead, motions judges are to take a flexible approach in considering the three factors, recognizing that in some cases the strength of one factor may compensate for a weakness on another (*Monsanto v Canada (Health)*, 2020 FC 1053 at para 50 [*Monsanto*]). The overall question is whether "granting the injunction would be just and equitable in all the circumstances of the case" (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 1 [*Google*]).

A. *Serious issue*

[30] The serious issue part of the test for interlocutory injunctive relief considers the merits of the underlying application for judicial review. In a case such as this, where the type of injunction being sought is prohibitive and where granting it would not be effectively granting the same relief being sought in the underlying application, only a preliminary assessment of the merits is required. It is a low standard in which the motions judge assesses the merits, not for the purpose of making a definitive determination on the likelihood of success of the underlying application, but rather to determine whether the application is frivolous or vexatious. The serious issue to be

tried factor can be satisfied even where the motions judge does not believe, on a preliminary assessment, that the applicant would be likely to succeed in the underlying application. (*RJR-MacDonald* at 337-338). In *RJR-MacDonald* at 338, the Supreme Court of Canada cautioned that "a prolonged examination of the merits is generally neither necessary nor desirable."

Concerns raised about underlying application

[31] The Minister has two principal concerns with the underlying application for judicial review. First, the Minister argues that there is no legal basis to ask this Court to stay the Minister's collection activities because of pending disputes to the assessments in the Tax Court of Canada and Federal Court of Appeal as well as applications in this Court relating to the Minister's conduct during the assessment process. Second, the Minister argues that Iristel has an adequate alternative remedy that should have been used prior to coming to this Court to seek judicial review.

a) No legal basis to stay collections

[32] Section 315(2) of the *Excise Tax Act* provides that "if the Minister sends a notice of assessment to a person, any amount assessed then remaining unpaid is payable forthwith by the person to the Receiver General." There is no provision in the *Excise Tax Act* that restricts the Minister from collecting if the assessment has been challenged in the Tax Court of Canada; similarly, there is no provision that provides for an automatic stay of collection if an applicant has challenged the Minister's conduct during the assessment process in this Court. There is,

however, a general provision that allows the Minister to exercise their discretion to postpone collections (s. 315(3)).

[33] The Minister argues that there is no basis for this Court to prohibit collections because, unlike the *Income Tax Act*, RSC 1985, c 1 (5th supp), there is no statutory basis for non-collection pending a dispute as to the liabilities owing.

[34] The Minister argues that this Court has already dealt with the same argument being advanced by Iristel in *Mason v Canada (Attorney General)*, 2015 FC 926 [*Mason*]. In *Mason*, the applicant disputed an assessment to the Tax Court of Canada and then appealed the decision to the Federal Court of Appeal. Mr. Mason sought to enjoin the Minister from collecting, pending the determination of the appeal. Mr. Mason's application for an interlocutory injunction was dismissed on the basis that there was no serious issue given that the Minister is entitled to collect while an appeal is pending. In hearing the application for judicial review, Justice Strickland also dismissed Mr. Mason's application, finding that there was no basis for the Court to prohibit the Minister from collecting solely because an appeal had been filed disputing the liabilities owing.

[35] The Applicant distinguishes *Mason*, arguing that unlike the applicant in that case, Iristel has filed a number of applications in this Court about the Minister's conduct that involve, among other things: procedural fairness concerns, abuse of process allegations, and the failure to produce a tribunal record. In contrast with *Mason*, not only have the assessments been disputed at the Tax Court of Canada and the Federal Court of Appeal, but there have also been applications in which this Court has recognized, in dismissing the Minister's applications to

strike, that there are cognizable administrative law claims being made about the Minister's conduct (see *Iris Technologies Inc v Canada (National Revenue)*, 2021 FC 526; *Iris Technologies Inc v Canada (National Revenue)*, 2021 FC 597).

[36] The Minister notes that they have appealed both decisions upholding the decision to dismiss the motions to strike and continue to argue on appeal that these issues are not properly before this Court. The Minister argues that, in any case, these are applications for judicial review that are about the Minister's conduct during the assessment process which is irrelevant in relation to the underlying application for judicial review that is about the Minister's collection actions.

[37] At this stage of a preliminary review, I am satisfied that Iristel is not making a frivolous or vexatious claim. The Applicant's case is sufficiently distinct from the situation in *Mason* that it should be left to the applications judge to determine whether the reasoning in *Mason* should apply to Iristel. The Minister also cited *Canada Revenue Agency v Tele-Mobile Company Partnership*, 2011 FCA 89 and *Prince v Canada (National Revenue)*, 2020 FCA 32. Again, I am satisfied that Iristel's circumstances are sufficiently different than the applicants in these cases and therefore do not find that these cases lend support to a finding that Iristel's application is frivolous or vexatious.

[38] The Minister also takes issue with the Applicant's heavy reliance on this Court's and the Federal Court of Appeal's decisions in *Swiftsure*. The Minister makes two points in relation to that decision. First, that the facts are distinct from Iristel's circumstances because the Court was not dealing with a general prohibition on collections as is being sought here but rather was

concerned with the sale of properties that had already been seized or that were going to be seized. Second, the Minister argued that the principle set out in *Swiftsure* – that this Court could enjoin the Minister from selling real or personal property because of a disputed liability – is not well supported in the jurisprudence. I do not find that the Minister's arguments on these points demonstrate that Iristel is making a frivolous or vexatious claim. The applications judge might decline to apply *Swiftsure* to Iristel's circumstances or might find, in reviewing the authorities relied on in *Swiftsure* and the associated line of cases, that the principle espoused in the case is not well supported. Neither of these determinations are appropriate for me to make on a preliminary review.

b) Available adequate alternative remedy

[39] The Minister argued that the Applicant's judicial review application will fail because there is an adequate alternative remedy not sought prior to coming to this Court for judicial review. Section 315(3) of the *Excise Tax Act* provides:

Minister may postpone collection	**Report des mesures de recouvrement**
(3) The Minister may, subject to such terms and conditions as the Minister may stipulate, postpone collection action against a person in respect of all or any part of any amount assessed that is the subject of a dispute between the Minister and the person.	(3) Sous réserve des modalités qu'il fixe, le ministre peut reporter les mesures de recouvrement concernant tout ou partie du montant d'une cotisation qui fait l'objet d'un litige.

[40] The Minister acknowledges that Iristel made a request to postpone collections, dated June 30, 2020. In this letter, Iristel noted that the Minister had paused all collections due to the

COVID-19 pandemic. Iristel requested to speak further about future conduct on collections and requested that "all collection actions be stayed pending the determination of its entitlement to the input tax credits disallowed and the assessment of penalties."

[41] The Minister accepts that there has been no direct response to Iristel's June 2020 request for a postponement on collections.

[42] The Minister raises two principal issues on the Applicant's failure to seek an available alternative remedy. First, the Minister argues that Iristel should have asked the Minister to postpone collections again once the general resumption of collections began in February 2021. The Minister argues that Iristel benefited from a general pause on collections due to the COVID-19 pandemic and when collections resumed, Iristel should have asked the Minister to postpone in their case, prior to coming to this Court asking that the Minister be enjoined from pursuing collections.

[43] The Minister also takes issue with the nature of Iristel's June 2020 request, arguing that it was not "a serious attempt to engage the Minister's discretion to postpone collection action." The Minister asserts that "the letter offered no security or any form of terms", nor did it set out the irreparable harm Iristel would face if the Minister did collect. On this point, the Minister also argued in oral submissions, but did not raise it in their written submissions, that Iristel could have also sought to secure the debt as provided for under s. 314 of the *Excise Tax Act*.

[44] I am satisfied that an evaluation of the Applicant's efforts at seeking an alternative remedy – whether a more fulsome request was required or whether another request was required once collections resumed – is better dealt with by the applications judge. The argument about posting a security under s. 314 of the *Excise Tax Act* was only raised cursorily in oral submissions. This is not a case in which the applicant made no attempt to seek an alternative remedy prior to coming to this Court and in this case, the Minister has yet to provide a direct response to Iristel's request that has been pending for over a year.

[45] I am satisfied that the complaints raised by the Minister do not demonstrate that Iristel has brought a frivolous or vexatious application, and therefore find there is a serious issue to tried.

B. *Irreparable Harm*

[46] Irreparable harm has been defined as harm which "either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR-MacDonald* at 341; see also *Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102 [*Oshkosh*] at para 24; *Janssen* at para 24). Irreparable harm is about the nature of the harm and not its scope or reach; as explained recently by Justice Gascon at paragraph 49 in *Letnes v Canada (Attorney General)*, 2020 FC 636: "The irreparability of the harm is not measured by the pound."

[47] The moving party must demonstrate, on a balance of probabilities, that they will suffer irreparable harm between the date of the injunction application and the determination of their

underlying judicial review application on the merits (*Evolution Technologies Inc v Human Care Canada Inc*, 2019 FCA 11 at paras 26, 29).

[48] The nature of the harm being claimed in this case is principally financial harm to Iristel. Justice Pelletier held in *Newbould v Canada (Attorney General)*, 2017 FCA 106 at para 29 that "[w]here the harm apprehended is financial, clear and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence…."

[49] A claim of irreparable harm cannot be sustained by speculations or bald assertions. As noted by Justice Mactavish in *Patry v Canada (Attorney General)*, 2011 FC 1032 at para 53 [*Patry*], "[a]llegations of harm that are merely hypothetical will not suffice." Rather, the burden is on them [the moving party] to show that irreparable harm *will result*: see *International Longshore and Warehouse Union, Canada v Canada (AG)*, 2008 FCA 3, at paras 22-25; see also *United States Steel Corporation v Canada (Attorney General)*, 2020 FCA 200 at para 7; *Centre Ice Ltd v National Hockey League* (1994), 53 CPR (3d) 34 (FCA) at p 52.

[50] Justice Stratas described the nature of the required evidence to be "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31 [*Glooscap*]). The Federal Court of Appeal has also held that it is insufficient "to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to

the Court's satisfaction – that the harm is irreparable" (*Stoney First Nation v Shotclose*, 2011 FCA 232 at para 48 [*Stoney First Nation*]).

[51] Iristel's written submissions on irreparable harm are limited to the following:

> Iristel has adduced evidence in this Court that the Minister's withholding of more than $79 000 000 in amounts due to Iristel causes irreparable harm. Taking the limited resources left in this controversy will end Iristel and endanger the more than 7 000 000 Canadians who rely on Iristel and its services.

[52] Iristel relies on affidavits from Mr. Bishay, the CEO of Iristel, to make out its claim that the Minister's collection actions will "end Iristel." The bankruptcy or shut down of a company is certainly the type of harm that would amount to irreparable harm if proven; it is the very sort of harm that could not be recovered by simply paying out of damages at a later date.

[53] The problem in this motion is that Iristel has not provided sufficient evidence to meet its burden of demonstrating that it will face this harm prior to a determination of the underlying judicial review. Overall, Iristel has failed to provide a clear picture of their current financial situation and concrete financial evidence as to what will happen if relief is not granted. A number of the claims being made in support of irreparable harm allegations relate to past harms; other claims are speculative, based on assertion or on evidence that lacks particularity; and a number of other claims relate to the impact on third parties, which is generally not considered when determining whether an applicant will suffer irreparable harm.

[54] Given the nature of the harm that Iristel claims, it is necessary that concrete evidence be presented to the Court on Iristel's current financial situation and how the failure to grant

injunctive relief will result in that harm. The financial evidence provided on this motion is incomplete, out of date and generally provides an insufficient evidentiary foundation to support a claim of irreparable harm.

[55] For example, there were no audited financial statements provided for any year, which might have provided the court with an indication from an independent third party about the financial health of the Applicant. There was also no income statement, no cash flow statement, no balance sheet and no current statement of accounts payable. A trial balance sheet was provided but the most recent one before the Court is fifteen months old from May 31, 2020. Limited historical financial information was provided, making it difficult to understand Iristel's claims in the context of how the company normally operates.

[56] Iristel also chose to only provide affidavit evidence to the Court from its CEO, Mr. Bishay. At numerous points during the cross-examination of Mr. Bishay, he could not answer questions about the financial evidence that was contained in his affidavit, answering that it was information that could be answered by the company's CFO. During the cross-examination of Mr. Bishay, counsel for Iristel repeatedly noted that the CFO was available to the Minister to be cross-examined about the financial information. The burden of proving irreparable harm rests with the moving party. There was no affidavit evidence from the CFO of the company in the record before me; nor was it explained to the Court why the evidence of the CFO was not before the Court on this motion.

[57] Irreparable harm is a forward-looking claim (*Richardson v Seventh-day Adventist Church*, 2021 FC 609 at para 47). A number of the harms cited by Iristel in support of their claim for irreparable harm are harms that they claim to have already experienced relating to the Minister's refusal to provide them with pandemic-related subsidies and the Minister's withholding of tax refunds. Iristel fails to establish a connection between these past claimed harms and the claim being made about future irreparable harm.

[58] For example, in Mr. Bishay's affidavit, he claims that Iristel was unable to close on seven significant acquisitions since August 2019. There is no information provided as to how the inability to make acquisitions in the past connects to the future irreparable harm. In the same affidavit, Mr. Bishay also claims that Iristel "has been foreclosed meaningful participation in the 3500MHz spectrum auction caused by the Minister's delay." This is a claim of retrospective harm and no connection is established on the evidence between that claim and the claim of future irreparable harm if the relief sought is not granted prior to a determination on the underlying judicial review application.

[59] Other claims advanced are speculative and based on an insufficient record that requires the Court to make a number of inferences which are not in evidence. For example, Mr. Bishay asserts in his affidavit that he has made personal advances to the company of approximately $1,587,000 and charged $908,483.19 on his credit card. In support of this he has filed two excerpts from Iristel's general ledger purporting to show a "shareholders' loan" of approximately $1,587,000 and "shareholders loan – credit card" balance of $908,483.19. The date of these general ledger excerpts is unclear. Even if this evidence were accepted despite the lack of

specificity as to the dates in question, it is not clear how this evidence assists to establish future irreparable harm. There is insufficient evidence to permit an understanding of the usual business practices of the company including Mr. Bishay's provision of loans to the company. Without more, assertions and evidence that a CEO has lent their own money to a company do not assist in establishing that there will be irreparable harm if relief is not granted.

[60] Iristel's evidence about its cashflow deficit suffers from a similar problem. Mr. Bishay's September 2020 affidavit refers to a monthly cash flow deficit of $400,000 after the applicant's layoffs, pay cuts and expenditure reductions. No more up-to-date figures on cashflow are provided, and there is no evidence as to whether that deficit is out of the ordinary for Iristel or how it relates to a claim of irreparable harm.

[61] Iristel relies on evidence of its situation with its suppliers and creditors, but this evidence does not concretely support its case that it will suffer irreparable harm if the motion is not granted. Mr. Bishay's evidence is that Iristel is in default with all of its suppliers. It is not clear on the evidence whether Iristel's level of indebtedness to its suppliers is unsustainable in its current situation, or that these debts will lead to any irreparable harm in the future if the requested relief is not granted.

[62] Mr. Bishay's June 2020 affidavit also asserts that the Applicant has exhausted its line of credit at Scotiabank and that it is "unable to borrow" further from its banker or other lenders due to the Minister's action. The Court has not been furnished with clear evidence as to the Iristel's

requirement for credit from banks or private lenders, or the connection between its status with creditors and other potential lenders and the claim of future irreparable harm.

[63] The Applicant argues that if the motion is not granted, it will "end Iristel" and "endanger the more than 7 000 000 Canadians who rely on Iristel and its services." Generally, harm to third parties is not considered in the irreparable harm analysis (*Richardson v Seventh-day Adventist Church*, 2021 FC 609 at para 40 [*Richardson*]; *Air Passengers Rights v Canada (Transportation Agency)*, 2020 FCA 92 at para 30 [*Air Passengers Rights*]). During oral submissions, this issue was put to Iristel's counsel. Iristel's counsel made reference to an exception to this general rule for registered charities. As stated by the Federal Court of Appeal, "there is a limited exception to this principle in that the interests of those individuals dependent on a registered charity may also be considered under this branch of the test (*Glooscap* at paras 33-34; *Holy Alpha and Omega Church of Toronto v Canada (Attorney General)*, 2009 FCA 265 at para 17; *Air Passengers Rights* at para 30)."

[64] Iristel did not direct the Court to any cases where this exception has expanded to include other entities that are not registered charities, nor was this issue canvassed in any way in their written submissions.

[65] I need not decide the applicability of the exception to the general rule that third party harm not be considered at the irreparable harm stage, and specifically whether it could apply to a regulated telecommunications company like Iristel. As noted above, I do not find that Iristel has provided sufficient or compelling evidence that it will face irreparable harm such that the

Minister's collection actions will force the termination or significant reduction of its services, prior to the determination of the underlying application for judicial review. Further, the potential impacts on customers if Iristel's services were reduced or terminated are speculative. The evidence provided is not sufficient to establish that these harms to third parties are anything more than hypothetical.

[66] The Minister made submissions about the nature of some of Iristel's expenditures, such as luxury cars and airport hangars, arguing that this sort of spending is incongruous with the claims that the company was in financial peril. I do not need to make a determination about the validity of this evidence or its applicability to the question before me, as I have already determined that the evidence put forward by Iristel on this motion is insufficient to meet the clear and non-speculative standard required to establish irreparable harm.

C. *Balance of convenience*

[67] The balance of convenience factor requires the Court to "identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction pending a decision on the merits" (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12). It is the moving party's onus to demonstrate that the balance of convenience lies in their favour (*Canada (Attorney General) v Bertrand*, 2021 FCA 103 at para 12).

[68] The Federal Court of Appeal at paragraph 6 of *Canada v Gilbert*, 2007 FCA 254 explains the public interest in allowing the Minister to collect lawfully due tax debts:

> In any event, the public interest militates in favour of the collection of lawfully due tax debts. While the collection measures contemplated by the Agency inconvenience and adversely affect the respondents, the tax authority also risks being left empty-handed if these measures are suspended.

[69] Other than arguing that they will face irreparable harm if the Minister is not enjoined from pursuing collections, Iristel has not advanced other concrete considerations to be assessed at this stage of the analysis. As I have explained above, Iristel has not made out that they will face irreparable harm. The underlying judicial review will decide the issue of whether the Minister can be prohibited from collecting in these particular circumstances.

[70] Overall, I find that the balance of convenience favours the Minister.

D. *Conclusion on whether relief is warranted*

[71] Taking together the factors described above (serious issue to be tried, irreparable harm and balance of convenience) and considering the overall question of whether it is just and equitable in all of the circumstances to grant injunctive relief (*Google* at para 1), I am dismissing Iristel's motion for an interlocutory injunction. Overall, I find that there is a public interest in ensuring that tax debts are collected and do not find that the evidence provided on this motion demonstrates that there is sufficient compelling and non-speculative evidence that Iristel will face irreparable harm prior to the hearing of the underlying judicial review if an injunction is not granted.

V. Costs

[72] Both parties sought the costs of this application as well as the application for immediate interim injunctive relief that was decided in writing by Justice Little on August 1, 2021. Justice Little dismissed Iristel's motion for immediate interim relief and ordered that the costs be determined by the judge considering this application. I do not see a reason to alter the usual practice of ordering the unsuccessful party to pay the costs of these motions. I award costs of both motions: the motion for an immediate interim interlocutory injunction decided in writing by Justice Little, and this motion for an interlocutory injunction, to the Respondent, the Minister of National Revenue.

ORDER IN T-455-21

THIS COURT ORDERS that:

1. The Applicant's motion for an interlocutory injunction is dismissed.

2. The Respondent shall have its costs for this motion and the motion for immediate interim interlocutory injunction that was decided in writing by Justice Little on August 1, 2021.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-455-21
STYLE OF CAUSE:	IRIS TECHNOLOGIES INC. v THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 12, 2021
ORDER AND REASONS:	SADREHASHEMI J.
DATED:	AUGUST 25, 2021

APPEARANCES:

Leigh Taylor Mireille Dahab	FOR THE APPLICANT
Michael Ezri Andrea Jackett Katie Beahen Christopher Ware	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Leigh Somerville Taylor Professional Corporation Toronto, Ontario	FOR THE APPLICANT
Dahab Law Markham, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT